# ADVISORY COMMITTEE
# ON
# APPELLATE RULES

**October 9, 2024**

# TAB 1

ADVISORY COMMITTEE ON APPELLATE RULES
Meeting of October 9, 2024
Washington, DC
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Next meeting: April 2, 2025

# TAB 1A

# RULES COMMITTEES — CHAIRS AND REPORTERS

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

**Chair**

Honorable John D. Bates
United States District Court
Washington, DC

**Reporter**

Professor Catherine T. Struve
University of Pennsylvania Law School
Philadelphia, PA

### Secretary to the Standing Committee

H. Thomas Byron III, Esq.
Administrative Office of the U.S. Courts
Office of the General Counsel – Rules Committee Staff
Washington, DC

## Advisory Committee on Appellate Rules

**Chair**

Honorable Allison H. Eid
United States Court of Appeals
Denver, CO

**Reporter**

Professor Edward Hartnett
Seton Hall University School of Law
Newark, NJ

## Advisory Committee on Bankruptcy Rules

**Chair**

Honorable Rebecca B. Connelly
United States Bankruptcy Court
Harrisonburg, VA

**Reporter**

Professor S. Elizabeth Gibson
University of North Carolina at Chapel Hill
Chapel Hill, NC

**Associate Reporter**

Professor Laura B. Bartell
Wayne State University Law School
Detroit, MI

## RULES COMMITTEES — CHAIRS AND REPORTERS

### Advisory Committee on Civil Rules

**Chair**

Honorable Robin L. Rosenberg
United States District Court
West Palm Beach, FL

**Reporter**

Professor Richard L. Marcus
University of California
Hastings College of the Law
San Francisco, CA

**Associate Reporter**

Professor Andrew Bradt
University of California, Berkeley
Berkeley, CA

### Advisory Committee on Criminal Rules

**Chair**

Honorable James C. Dever III
United States District Court
Raleigh, NC

**Reporter**

Professor Sara Sun Beale
Duke University School of Law
Durham, NC

**Associate Reporter**

Professor Nancy J. King
Vanderbilt University Law School
Nashville, TN

### Advisory Committee on Evidence Rules

**Chair**

Honorable Jesse M. Furman
United States District Court
New York, NY

**Reporter**

Professor Daniel J. Capra
Fordham University School of Law
New York, NY

# ADVISORY COMMITTEE ON APPELLATE RULES

| Chair | Reporter |
|---|---|
| Honorable Allison H. Eid<br>United States Court of Appeals<br>Denver, CO | Professor Edward Hartnett<br>Seton Hall University School of Law<br>Newark, NJ |

## Members

| | |
|---|---|
| Linda Coberly, Esq.<br>Winston & Strawn LLP<br>Chicago, IL | George W. Hicks, Jr., Esq.<br>Kirkland & Ellis LLP<br>Dallas, TX |
| Professor Bert Huang<br>Columbia Law School<br>New York, NY | Honorable Leondra R. Kruger<br>Supreme Court of California<br>San Francisco, CA |
| Honorable Carl J. Nichols<br>United States District Court<br>Washington, DC | Honorable Elizabeth B. Prelogar<br>Solicitor General (ex officio)<br>United States Department of Justice<br>Washington, DC |
| Honorable Sidney R. Thomas<br>United States Court of Appeals<br>Billings, MT | Honorable Richard C. Wesley<br>United States Court of Appeals<br>Geneseo, NY |
| Lisa B. Wright, Esq.<br>Office of the Federal Public Defender<br>Washington, DC | |

## Liaisons

| | |
|---|---|
| Honorable Daniel A. Bress<br>(*Bankruptcy*)<br>United States Court of Appeals<br>San Francisco, CA | Andrew J. Pincus, Esq.<br>(*Standing*)<br>Mayer Brown LLP<br>Washington, DC |

## Clerk of Court Representative

Christopher Wolpert, Esq.
Clerk
United States Court of Appeals
Denver, CO

## ADVISORY COMMITTEE ON APPELLATE RULES

| Members | Position | District/Circuit | Start Date | End Date |
|---|---|---|---|---|
| Allison H. Eid<br>Chair | C | Tenth Circuit | Chair: 2024 | 2027 |
| Linda Coberly | ESQ | Illinois | 2023 | 2026 |
| George W. Hicks, Jr. | ESQ | Washington, DC | 2022 | 2025 |
| Bert Huang | ACAD | New York | 2022 | 2025 |
| Leondra R. Kruger | JUST | California | 2021 | 2027 |
| Carl J. Nichols | D | District of Columbia | 2021 | 2027 |
| Elizabeth Prelogar* | DOJ | Washington, DC | ---- | Open |
| Sidney R. Thomas | C | Ninth Circuit | 2023 | 2025 |
| Richard C. Wesley | C | Second Circuit | 2020 | 2026 |
| Lisa B. Wright | ESQ | Assistant Federal Public Defender (Appellate) (DC) | 2019 | 2025 |
| Edward Hartnett<br>Reporter | ACAD | New Jersey | 2018 | 2025 |

Principal Staff: Bridget Healy

* Ex-officio - Solicitor General

**ADVISORY COMMITTEE ON APPELLATE RULES**
**SUBCOMMITTEES**
**(2024–2025)**

| **Amicus Subcommittee**<br>Linda Coberly, Esq.<br>Prof. Bert Huang<br>Lisa Wright, Esq. | **Bankruptcy Appeals Subcommittee***<br>George Hicks, Esq.<br>Prof. Bert Huang<br>Hon. Leondra Kruger |
|---|---|
| **Costs on Appeal Subcommittee***<br>Hon. Carl Nichols, Chair<br>Mark Freeman, Esq.<br>Hon. Richard Wesley | **IFP Form 4 Subcommittee**<br>Lisa Wright, Esq., Chair<br>Prof. Bert Huang<br>Hon. Leondra Kruger |
| **Intervention on Appeal Subcommittee**<br>Mark Freeman, Esq.<br>Prof. Bert Huang<br>Hon. Leondra Kruger<br>Tim Reagan, Esq. (Federal Judicial Center) | **Rule 15 Subcommittee**<br>Prof. Bert Huang, Chair<br>Mark Freeman, Esq.<br>Andrew Pincus, Esq. (Liaison from Standing Committee) |

* Subcommittee inactive and likely to be disbanded.

## RULES COMMITTEE LIAISON MEMBERS

| | |
|---|---|
| Liaisons for the Advisory Committee on Appellate Rules | Andrew J. Pincus, Esq.<br>*(Standing)*<br><br>Hon. Daniel A. Bress<br>*(Bankruptcy)* |
| Liaison for the Advisory Committee on Bankruptcy Rules | TBD<br>*(Standing)* |
| Liaisons for the Advisory Committee on Civil Rules | Hon. D. Brooks Smith<br>(*Standing*)<br><br>Hon. Catherine P. McEwen<br>*(Bankruptcy)* |
| Liaison for the Advisory Committee on Criminal Rules | Hon. Paul J. Barbadoro<br>(*Standing*) |
| Liaisons for the Advisory Committee on Evidence Rules | Hon. Michael W. Mosman<br>(*Criminal*)<br><br>Hon. Edward M. Mansfield<br>*(Standing)*<br><br>Hon. M. Hannah Lauck<br>(*Civil*) |

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Senior Research Associate
***(Civil)***

**Tim Reagan, Esq.**
Senior Research Associate
***(Standing)***

# TAB 1B

|  | FRAP Item | Proposal | Source | Current Status |
|---|---|---|---|---|
|  | 16-AP-D | Rule 3(c)(1)(B) and the Merger Rule | Neal Katyal | Effective 12/2021 |
|  |  |  |  |  |
|  | 17-AP-G | Rule 42(b)–discretionary "may" dismissal of appeal on consent of all parties | Christopher Landau | Effective 12/2022 |
|  | 18-AP-E | Privacy in Railroad Retirement Act cases | Railroad Retirement Board | Effective 12/2022 |
|  |  |  |  |  |
|  | None assigned | Rules for Future Emergencies Rules 2 and 4 | Congress (CARES Act) | Effective 12/2023 |
|  | None assigned | Add Juneteenth to Rule 26 | Congress | Effective 12/2023 |
|  |  |  |  |  |
| 7 | 18-AP-A | Rules 35 and 40 – Comprehensive review | Department of Justice | Discussed at S18 meeting and subcommittee formed<br>Discussed at F18 meeting<br>Discussed at S19 meeting<br>Discussed at F19 meeting<br>Discussed at S20 meeting<br>Discussed at F20 meeting<br>Draft approved for submission to Standing Committee S21<br>Remanded by Standing Committee June 21<br>Draft approved for resubmission to Standing Committee F21<br>Draft approved for publication by Standing Committee January 22<br>Correction approved for submission to Standing Committee S22<br>Correction approved for publication by Standing Committee June 21<br>Discussed at F22 meeting<br>Final approval for submission to Standing Committee S23<br>Approved by Standing Committee June 23<br>Approved by Judicial Conference Sept 23<br>Approved by Supreme Court April 24 |
|  |  |  |  |  |
| 6 | 21-AP-D | Costs on Appeal; Rule 39 | Alan Morrison | Initial consideration of suggestion and subcommittee formed F21<br>Discussed at S22 meeting<br>Discussed at F22 meeting<br>Discussed at S23 meeting |

|  | FRAP Item | Proposal | Source | Current Status |
|---|---|---|---|---|
|  |  |  |  | Draft approved for submission to Standing Committee S23<br>Draft approved for publication by Standing Committee June 23<br>Final approval for submission to Standing Committee S24<br>Approved by Standing Committee June 24 |
| 4 | None assigned | Appeals in Bankruptcy Cases; Rule 6 | Bankruptcy Committee | Discussed at F22 meeting and subcommittee formed<br>Discussed at S23 meeting<br>Draft approved for submission to Standing Committee S23<br>Draft approved for publication by Standing Committee June 23<br>Final approval for submission to Standing Committee S24<br>Approved by Standing Committee June 24 |
|  |  |  |  |  |
| 3 | 19-AP-C | IFP Standards | Sai | Initial consideration F19<br>Discussed at S20 meeting and subcommittee formed<br>Discussed at F20 meeting<br>Discussed at S21 meeting<br>Discussed at F21 meeting<br>Discussed at S22 meeting<br>Discussed at F22 meeting and held<br>See 20-AP-D |
| 3 | 20-AP-D | IFP Forms | Sai | Initial consideration F20 and referred to IFP subcommittee<br>Discussed at S21 meeting<br>Discussed at F21 meeting<br>Discussed at S22 meeting<br>Discussed at F22 meeting and held<br>Draft approved for submission to Standing Committee S24<br>Draft approved for publication by Standing Committee June 24 |
| 3 | 21-AP-B | IFP Forms | Sai | Initial consideration and referred to IFP subcommittee S21<br>Discussed at F21 meeting<br>Discussed at S22 meeting<br>Discussed at F22 meeting and held<br>See 20-AP-D |
| 3 | 21-AP-C | Amicus Disclosures | Senator Whitehouse & Representative Johnson | Issue noted and subcommittee formed F19<br>Initial consideration of suggestion S21<br>Discussed at F21 meeting<br>Discussed at S22 meeting<br>Discussed at F22 meeting<br>Discussed at S23 meeting |

|  | FRAP Item | Proposal | Source | Current Status |
|---|---|---|---|---|
|  |  |  |  | Discussed at F23 meeting<br>Draft approved for submission to Standing Committee S24<br>Draft approved for publication by Standing Committee June 24 |
| 3 | 21-AP-G | Comment on 21-AP-C | Chamber of Commerce | Initial consideration S22<br>See 21-AP-C |
| 3 | 21-AP-H | Comment on 21-AP-C | Senator Whitehouse & Representative Johnson | Initial consideration S22<br>See 21-AP-C |
| 3 | 22-AP-A | Comment on 21-AP-C | Senator Whitehouse & Representative Johnson | Initial consideration S22<br>See 21-AP-C |
| 3 | 23-AP-A | Rule 29; Amicus Briefs | DRI Center | Initial consideration and referred to amicus subcommittee S23 |
| 3 | 23-AP-B | Rule 29; Amicus Briefs | Atlantic Legal Foundation | Initial consideration and referred to amicus subcommittee S23 |
| 3 | 23-AP-I | Comment on 21-AP-C | Senator Whitehouse & Representative Johnson | Initial consideration and referred to amicus subcommittee S24 |
| 3 | 23-AP-K | Comment on 21-AP-C | Senator Whitehouse & Representative Johnson | Initial consideration and referred to amicus subcommittee S24 |
| 3 | 24-AP-A | Regulate expert information in amicus briefs | David DeMatteo | Initial consideration and referred to amicus subcommittee S24 |
|  |  |  |  |  |
| 1 | 21-AP-E | Electronic Filing by Pro Se Litigants | Sai | Initial consideration of suggestion and referred to reporters F21<br>Discussed at S22 meeting<br>Discussed at F22 meeting<br>Discussed at S23 meeting<br>Discussed at F23 meeting<br>Discussed at S24 meeting |

|  | FRAP Item | Proposal | Source | Current Status |
|---|---|---|---|---|
| 1 | 20-AP-C | Pro Se Electronic Filing | Usha Jain | Initial consideration F20 and tabled pending consideration by Civil Rules Committee<br>Referred to reporters F21<br>See 21-AP-E |
| 1 | 22-AP-E | Social Security Numbers in Court Filings | Senator Widen | Initial consideration S23<br>Discussed at S23 meeting<br>Discussed at F23 meeting<br>Discussed at S24 meeting |
| 1 | 22-AP-G | Intervention on Appeal | Stephen Sachs | Initial consideration and subcommittee formed S23<br>Discussed at F23 meeting<br>Discussed at S24 meeting |
| 1 | 23-AP-C | Intervention on Appeal | Judith Resnik | Initial consideration and subcommittee formed S23<br>See 22-AP-G |
| 1 | 24-AP-B | Use of pseudonym for minors | DOJ | Initial consideration S24 |
| 1 | 24-AP-G | Rule 15; premature petitions | Judge Randolph | Initial consideration and subcommittee formed S24 |
|  | 24-AP-C | Comment on 24-AP-B | American Association for Justice | Initial consideration F24 |
| 1 | 24-AP-D | Comment on 21-AP-C | Chamber of Commerce | Initial consideration F24 |
| 1 | 24-AP-E | Rule 28; standards of review | Jonathan Cohen | Initial consideration F24 |
| 1 | 24-AP-F | Comment on costs on appeal | Sai | Initial consideration F24 |
| 1 | 24-AP-H | Name styling | Sai | Initial consideration F24 |
| 1 | 24-AP-I | Common local rules as Federal Rules | Sai | Initial consideration F24 |
| 1 | 24-AP-J | New federal common rules | Sai | Initial consideration F24 |
| 1 | 24-AP-K | Standardize word and page equivalents | Sai | Initial consideration F24 |
| 1 |  | Rule 4; Reopening time to appeal | Judge Sutton<br>Judge Gregory | Initial consideration F24 |
| 1 |  | Administrative stays | Will Havemann | Initial consideration F24 |
|  |  |  |  |  |
| 0 | None assigned | Review of rules regarding appendices | Committee | Discussed at F17 meeting and a subcommittee formed to review<br>Discussed at S18 meeting and removed from agenda<br>Will reconsider in S21<br>Discussed at S21 meeting and postponed until S24<br>Discussed at S24 meeting and retained on agenda |

| | FRAP Item | Proposal | Source | Current Status |
|---|---|---|---|---|
| 0 | 22-AP-C | Third-Party Litigation Funding Disclosure | Lawyers for Civil Justice | Initial consideration F22<br>Discussed and held pending Civil Committee S23 |
| 0 | 22-AP-D | Comment on 22-AP-C | International Legal Finance Association | Initial consideration S23<br>See 22-AP-C |
| 0 | 23-AP-J | PACER Access | Andrew Straw | Initial consideration and removed from agenda S24 |

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

# TAB 1C

## PROPOSED AMENDMENTS TO THE FEDERAL RULES

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

Current Step in REA Process:

- Transmitted to Congress (Apr 2024)

REA History:

- Transmitted to Supreme Court (Oct 2023)
- Approved by Standing Committee (June 2023 unless otherwise noted)
- Published for public comment (Aug 2022 – Feb 2023 unless otherwise noted)

| Rule | Summary of Proposal | Related or Coordinated Amendments |
|---|---|---|
| AP 32 | Conforming proposed amendment to subdivision (g) to reflect the proposed consolidation of Rules 35 and 40. | AP 35, 40 |
| AP 35 | The proposed amendment would transfer the contents of the rule to Rule 40 to consolidate the rules for panel rehearings and rehearings en banc together in a single rule. | AP 40 |
| AP 40 | The proposed amendments address panel rehearings and rehearings en banc together in a single rule, consolidating what had been separate provisions in Rule 35 (hearing and rehearing en banc) and Rule 40 (panel rehearing). The contents of Rule 35 would be transferred to Rule 40, which is expanded to address both panel rehearing and en banc determination. | AP 35 |
| Appendix: Length Limits | Conforming proposed amendments would reflect the proposed consolidation of Rules 35 and 40 and specify that the limits apply to a petition for initial hearing en banc and any response, if requested by the court. | AP 35, 40 |
| BK 1007(b)(7) and related amendments | The proposed amendment to Rule 1007(b)(7) would require a debtor to submit the course certificate from the debtor education requirement in the Bankruptcy Code. Conforming amendments would be made to the following rules by replacing the word "statement" with "certificate": Rules 1007(c)(4), 4004(c)(1)(H), 4004(c)(4), 5009(b), 9006(b)(3) and 9006(c)(2). | |
| BK 7001 | The proposed amendment would exempt from the list of adversary proceedings in Rule 7001, "a proceeding by an individual debtor to recover tangible personal property under § 542(a)." | |
| BK 8023.1 (new) | This would be a new rule on the substitution of parties modeled on FRAP 43. Neither FRAP 43 nor Fed. R. Civ. P. 25 is applicable to parties in bankruptcy appeals to the district court or bankruptcy appellate panel, and this new rule is intended to fill that gap. | AP 43 |
| BK Restyled Rules | The third and final set of current Bankruptcy Rules, consisting of Parts VII-IX, are restyled to provide greater clarity, consistency, and conciseness without changing practice and procedure. The first set of restyled rules (Parts I & II) were published in 2020, and the second set (Parts III-VI) were published in 2021. The full set of restyled rules is expected to go into effect no earlier than December 1, 2024. | |
| CV 12 | The proposed amendment would clarify that a federal statute setting a different time should govern as to the entire rule, not just to subdivision (a). | |
| EV 107 | The proposed amendment was published for public comment as new Rule 611(d), but is now new Rule 107. | EV 1006 |

**PROPOSED AMENDMENTS TO THE FEDERAL RULES**

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

Current Step in REA Process:
- Transmitted to Congress (Apr 2024)

REA History:
- Transmitted to Supreme Court (Oct 2023)
- Approved by Standing Committee (June 2023 unless otherwise noted)
- Published for public comment (Aug 2022 – Feb 2023 unless otherwise noted)

| Rule | Summary of Proposal | Related or Coordinated Amendments |
| --- | --- | --- |
| EV 613 | The proposed amendment would require that, prior to the introduction of extrinsic evidence of a witness's prior inconsistent statement, the witness receive an opportunity to explain or deny the statement. | |
| EV 801 | The proposed amendment to paragraph (d)(2) would provide that when a party stands in the shoes of a declarant or declarant's principal, hearsay statements made by the declarant or declarant's principal are admissible against the party. | |
| EV 804 | The proposed amendment to subparagraph (b)(3)(B) would provide that when assessing whether a statement is supported by corroborating circumstances that clearly indicate its trustworthiness, the court must consider the totality of the circumstances and evidence, if any, corroborating the statement. | |
| EV 1006 | The proposed changes would permit a properly supported summary to be admitted into evidence whether or not the underlying voluminous materials have been admitted. The proposed changes would also clarify that illustrative aids not admitted under Rule 1006 are governed by proposed new Rule 107. | EV 107 |

**PROPOSED AMENDMENTS TO THE FEDERAL RULES**

**Effective (no earlier than) December 1, 2025**

Current Step in REA Process:
- Approved by Standing Committee (June 2024 unless otherwise noted)

REA History:
- Published for public comment (Aug 2023 – Feb 2024 unless otherwise noted)
- Approved for publication by Standing Committee (Jan and June 2023 unless otherwise noted)

| Rule | Summary of Proposal | Related or Coordinated Amendments |
|---|---|---|
| AP 6 | The proposed amendments would address resetting the time to appeal in cases where a district court is exercising original jurisdiction in a bankruptcy case by adding a sentence to Appellate Rule 6(a) to provide that 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. In addition, the proposed amendments would make Rule 6(c) largely self-contained rather than relying on Rule 5 and would provide more detail on how parties should handle procedural steps in the court of appeals. | BK 8006 |
| AP 39 | The proposed amendments would provide 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. In addition, the proposed amendments would provide a clearer procedure that a party should follow if it wants to request that the court of appeals to reconsider the allocation of costs. | |
| BK 3002.1 and Official Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R | Previously published in 2001. Like the prior publication, the 2023 republished amendments to the rule are intended to encourage a greater degree of compliance with the rule's provisions. A proposed midcase assessment of the mortgage status would no longer be mandatory notice process brought by the trustee but can instead be initiated by motion at any time, and more than once, by the debtor or the trustee. A proposed provision for giving only annual notices HELOC changes was also made optional. Also, the proposed end-of-case review procedures were changed in response to comments from a motion to notice procedure. Finally, proposed changes to 3002.1(i), redesignated as 3002.1(i) are meant to clarify the scope of relief that a court may grant if a claimholder fails to provide any of the information required under the rule. Six new Official Forms would implement aspect of the rule. | |
| BK 8006 | The proposed amendment to Rule 8006(g) would clarify that any party to an appeal from a bankruptcy court (not merely the appellant) may request that a court of appeals authorize a direct appeal (if the requirements for such an appeal have otherwise been met). There is no obligation to file such a request if no party wants the court of appeals to authorize a direct appeal. | AP 6 |
| Official Form 410 | The proposed amendment would change the last line of Part 1, Box 3 to permit use of the uniform claim identifier for all payments in cases filed under all chapters of the Code, not merely electronic payments in chapter 13 cases. If approved, the amended form would go into effect December 1, 2024. | |

**PROPOSED AMENDMENTS TO THE FEDERAL RULES**

**Effective (no earlier than) December 1, 2025**

Current Step in REA Process:
- Approved by Standing Committee (June 2024 unless otherwise noted)

REA History:
- Published for public comment (Aug 2023 – Feb 2024 unless otherwise noted)
- Approved for publication by Standing Committee (Jan and June 2023 unless otherwise noted)

| Rule | Summary of Proposal | Related or Coordinated Amendments |
|---|---|---|
| CV 16 | The proposed amendments to Civil Rule 16(b) and 26(f) would address the "privilege log" problem. The proposed amendments would call for development early in the litigation of a method for complying with Civil Rule 26(b)(5)(A)'s requirement that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials. | CV 26 |
| CV 16.1 (new) | The proposed new rule would provide the framework for the initial management of an MDL proceeding by the transferee judge. Proposed new Rule 16.1 would provide a process for an initial MDL management conference, submission of an initial MDL conference report, and entry of an initial MDL management order. | |
| CV 26 | The proposed amendments to Civil Rule 16(b) and 26(f) would address the "privilege log" problem. The proposed amendments would call for development early in the litigation of a method for complying with Civil Rule 26(b)(5)(A)'s requirement that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials. | CV 16 |

**PROPOSED AMENDMENTS TO THE FEDERAL RULES**

**Effective (no earlier than) December 1, 2026**

Current Step in REA Process:

- Published for public comment (Aug 2024 – Feb 2025 unless otherwise noted)

REA History:

- Approved for publication by Standing Committee (Jan and June 2024 unless otherwise noted)

| Rule | Summary of Proposal | Related or Coordinated Amendments |
|---|---|---|
| AP 29 | The proposed amendments to Rule 29 relate to amicus curiae briefs. The proposed amendments, among other things, would require all amicus briefs to include 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 help the court. In addition, they would require an amicus that has existed for less than 12 months to state the date the amicus was created. With regard to the relationship between a party and an amicus, two new disclosure requirements would be added. Also, the proposed amendments would retain the member exception in the current rule, but limit the exception to those who have been members for the prior 12 months. Finally, the proposed amendments would require leave of court for all amicus briefs, not just those at the rehearing stage. | Rule 32; Appendix |
| AP 32 | The proposed amendments to Rule 32 would conform to the proposed amendments to Rule 29. | Rule 29 |
| AP Appendix | The proposed amendments to the Appendix would conform to the proposed amendments to Rule 29. | Rule 29 |
| AP Form 4 | The proposed amendments to Form 4 would simplify Form 4, with the goal of reducing the burden on individuals seeking in forma pauperis status (IFP) while providing the information that courts of appeals need and find useful when deciding whether to grant IFP status. | |
| BK 1007 | The proposed amendments to Rule 1007(c)(4) eliminate the deadlines for filing certificates of completion of a course in personal financial management. The proposed amendments to Rule 1007(h) clarify that a court may require a debtor to file a supplemental schedule to report postpetition property or income that comes into the estate under § 115, 1207, or 1306 of the Bankruptcy Code. | |
| BK 3018 | The proposed amendment to subdivision (c) would allow for more flexibility in how a creditor or equity security holder may indicate acceptance of a plan in a chapter 9 or chapter 11 case. | |
| BK 5009 | The proposed amendments to Rule 5009(b) would provide an additional reminder notice to the debtors that the case may be closed without a discharge if the debtor's certificate of completion of a personal financial management course has not been filed. | |
| BK 9006 | The proposed amendments conform to the proposed amendments to Rule 1007. | |
| BK 9014 | The proposed amendment to Rule 9014(d) relaxes the standard for allowing remote testimony in contested matters to "cause and with appropriate safeguards." The current standard, imported from the trial standard in Civil Rule | |

**Effective (no earlier than) December 1, 2026**

Current Step in REA Process:

- Published for public comment (Aug 2024 – Feb 2025 unless otherwise noted)

REA History:

- Approved for publication by Standing Committee (Jan and June 2024 unless otherwise noted)

| Rule | Summary of Proposal | Related or Coordinated Amendments |
|---|---|---|
| | 43(a), which is applicable across bankruptcy (in both contested matters and adversary proceedings) is cause "in compelling circumstances and with appropriate safeguards." | |
| BK 9017 | The proposed amendment to Rule 9017 removes the reference to Civil Rule 43 leaving the proposed amendment to Rule 9014(d) to govern the standard for allowing remote testimony in contested matters, and Rule 7043 to govern the standard for allowing remote testimony in adversary proceedings. | |
| BK 7043 | Rule 7043 is new and works with proposed amendments to Rules 9014 and 9017. It would make Civil Rule 43 applicable to adversary proceedings (though not to contested matters | |
| BK Official Form 410S1 | The proposed changes would conform the form the pending amendments to Rule 3002.1 that are on track to go into effect on **December 1, 2025,** and would go into effect on the same date as the rule change. | |
| EV 801 | The proposed amendment to Rule 801(d)(1)(A) would provide that all prior inconsistent statements admissible for impeachment are also admissible as substantive evidence, subject to Rule 403. | |

# TAB 1D

# Legislation That Directly or Effectively Amends the Federal Rules
# 118th Congress
# (January 3, 2023–January 3, 2025)

Ordered by most recent legislative action; most recent first

| Name | Sponsors & Cosponsors | Affected Rules | Text and Summary | Legislative Actions Taken |
|---|---|---|---|---|
| **Marijuana Misdemeanor Expungement Act** | **H.R. 8917**<br>*Sponsor:*<br>Carter (D-LA)<br><br>*Cosponsor:*<br>Armstrong (R-ND) | CR; CV | **Most Recent Bill Text:**<br>https://www.congress.gov/118/bills/hr8917/BILLS-118hr8917ih.pdf<br><br>**Summary:**<br>Would require the Supreme Court to prescribe rules, within one year of enactment, for the review, expungement, sealing, sequester, and redaction of official records related to certain marijuana misdemeanors and civil infractions. | • 07/02/2024: H.R. 8917 introduced in House; referred to Judiciary Committee |
| **Closing Bankruptcy Loopholes for Child Predators Act of 2024** | **H.R. 8077**<br>*Sponsor:*<br>Ross (D-NC)<br><br>*Cosponsor:*<br>Tenney (R-NY) | BK 2004, 9018 | **Most Recent Bill Text:**<br>https://www.congress.gov/118/bills/hr8077/BILLS-118hr8077ih.pdf<br><br>**Summary:**<br>Would directly amend BK 2004 and 9018 to provide additional procedures in cases related to the alleged sexual abuse of a child. | • 04/18/2024: H.R. 8077 introduced in House; referred to Judiciary Committee |
| **Bankruptcy Threshold Adjustment Extension Act** | **S. 4150**<br>*Sponsor:*<br>Durbin (D-IL)<br><br>*Cosponsors:*<br>5 bipartisan cosponsors | BK 1020; BK Forms 101 & 201 | **Most Recent Bill Text:**<br>https://www.congress.gov/118/bills/s4150/BILLS-118s4150is.pdf<br><br>**Summary:**<br>Would extend the CARES Act definition of debtor in Section 1182(1) with its $7.5m subchapter V debt limit for a further two years. | • 04/17/2024: S. 4150 introduced in Senate; referred to Judiciary Committee |
| **Bankruptcy Venue Reform Act**<br><br><br><br><br><br><br><br>**SHOP Act** | **H.R. 1017**<br>*Sponsor:*<br>Lofgren (D-CA)<br><br>*Cosponsors:*<br>7 Democratic & 2 Republican cosponsors<br><br>**S. 4095**<br>*Sponsor:*<br>McConnell (R-KY)<br><br>*Cosponsors:*<br>Cotton (R-AR)<br>Tillis (R-NC) | BK | **Most Recent Bill Text:**<br>https://www.congress.gov/118/bills/hr1017/BILLS-118hr1017ih.pdf<br>https://www.congress.gov/118/bills/s4095/BILLS-118s4095is.pdf<br><br>**Summary:**<br>Would require the Supreme Court to prescribe rules through the Rules Enabling Act process to allow government attorneys to appear and intervene in Title 11 proceedings without charge, and without meeting any requirement under any local court rule relating to attorney appearances or the use of local counsel, before any bankruptcy court, district court, or bankruptcy appellate panel. | • 04/10/2024: S. 4095 introduced in Senate; referred to Judiciary Committee<br>• 02/14/2023: H.R. 1017 introduced in House; referred to Judiciary Committee |

| Name | Sponsors & Cosponsors | Affected Rules | Text and Summary | Legislative Actions Taken |
|---|---|---|---|---|
| **Supreme Court Ethics, Recusal, and Transparency Act of 2023** | **H.R. 926**<br>*Sponsor:*<br>Johnson (D-GA)<br><br>*Cosponsors:*<br>136 Democratic cosponsors<br><br>**S. 359**<br>*Sponsor:*<br>Whitehouse (D-RI)<br><br>*Cosponsors:*<br>43 Democratic or Democratic-caucusing cosponsors | AP, BK, CV, CR | **Most Recent Bill Text:**<br>https://www.congress.gov/118/bills/hr926/BILLS-118hr926ih.pdf<br>https://www.congress.gov/118/bills/s359/BILLS-118s359rs.pdf<br><br>**Summary:**<br>Would require the Supreme Court and JCUS to issue and prescribe—through an expedited Rules Enabling Act process—<br>(a) codes of conduct for justices and judges;<br>(b) rules of procedure requiring certain disclosures by parties and amici; and<br>(c) rules of procedure for prohibiting or striking an amicus brief that would result in disqualification of a justice, judge, or magistrate judge. | • 09/05/2023: S. 359 placed on Senate Legislative Calendar under General Orders<br>• 07/20/2023: S. 359 reported with an amendment from Senate Judiciary Committee<br>• 02/09/2023: S. 359 introduced in Senate; referred to Judiciary Committee<br>• 02/09/2023: H.R. 926 introduced in House; referred to Judiciary Committee |
| **Government Surveillance Transparency Act of 2023** | **H.R. 5331**<br>*Sponsor:*<br>Lieu (D-CA)<br><br>*Cosponsor:*<br>Davidson (R-OH) | CR 41 | **Most Recent Bill Text:**<br>https://www.congress.gov/118/bills/hr5331/BILLS-118hr5331ih.pdf<br><br>**Summary:**<br>Would amend CR 41(f)(1)(B) by adding that an inventory shall disclose whether the provider disclosed to the government any electronic data not authorized by the court and whether the government searched persons or property without court authorization.<br><br>Would provide for public access to docket records for certain criminal surveillance orders in accordance with rules promulgated by JCUS. | • 09/01/2023: H.R. 5331 introduced in House; referred to Judiciary Committee |
| **Protecting Our Democracy Act** | **H.R. 5048**<br>*Sponsor:*<br>Schiff (D-CA)<br><br>*Cosponsors:*<br>160 Democratic cosponsors | CR 6; CV | **Most Recent Bill Text:**<br>https://www.congress.gov/118/bills/hr5048/BILLS-118hr5048ih.pdf<br><br>**Summary:**<br>Would require the Supreme Court and JCUS to prescribe rules—through an expedited Rules Enabling Act process—to ensure the expeditious treatment of a civil action brought to enforce a congressional subpoena.<br><br>Would preclude any interpretation of CR 6(e) to prohibit disclosure to Congress of certain grand-jury materials related to individuals pardoned by the President. | • 07/28/2023: H.R. 5048 referred to the subcommittee on Economic Development, Public Buildings, and Emergency Management<br>• 07/27/2023: H.R. 5048 introduced in House; referred to Oversight & Accountability, Judiciary, Administration; Budget, Transportation & Infrastructure, Rules, Foreign Affairs, Ways & Means, and Intelligence Committees |

| Name | Sponsors & Cosponsors | Affected Rules | Text and Summary | Legislative Actions Taken |
|---|---|---|---|---|
| **Back the Blue Act of 2023** | **H.R. 355**<br>*Sponsor:*<br>Bacon (R-NE)<br><br>*Cosponsors:*<br>19 Republican cosponsors<br><br>**H.R. 3079**<br>*Sponsor:*<br>Bacon (R-NE)<br><br>*Cosponsors:*<br>21 Republican cosponsors<br><br>**S. 1569**<br>*Sponsor:*<br>Cornyn (R-TX)<br><br>*Cosponsors:*<br>41 Republican cosponsors | § 2254<br>Rule 11 | **Most Recent Bill Text:**<br>https://www.congress.gov/118/bills/hr355/BILLS-118hr355ih.pdf<br>https://www.congress.gov/118/bills/hr3079/BILLS-118hr3079ih.pdf<br>https://www.congress.gov/118/bills/s1569/BILLS-118s1569is.pdf<br><br>**Summary:**<br>Would amend Rule 11 of the Rules Governing Section 2254 Cases by adding: "Rule 60(b)(6) of the Federal Rules of Civil Procedure shall not apply to a proceeding under these rules in a case that is described in section 2254(j) of title 28, United States Code." | • 05/11/2023: S. 1569 introduced in Senate; referred to Judiciary Committee<br>• 05/05/2023: H.R. 3079 introduced in House; referred to Judiciary Committee<br>• 01/13/2023: H.R. 355 introduced in House; referred to Judiciary Committee |
| **Restoring Artistic Protection (RAP) Act of 2023** | **H.R. 2952**<br>*Sponsor:*<br>Johnson (D-GA)<br><br>*Cosponsors:*<br>33 Democratic cosponsors | EV | **Most Recent Bill Text:**<br>https://www.congress.gov/118/bills/hr2952/BILLS-118hr2952ih.pdf<br><br>**Summary:**<br>Would amend the Federal Rules of Evidence by adding a new Rule 416 to limit the admissibility of evidence of a defendant's creative or artistic expression against such defendant. | • 04/27/2023: Introduced in House; referred to Judiciary Committee |
| **Sunshine in the Courtroom Act of 2023** | **S. 833**<br>*Sponsor:*<br>Grassley (R-IA)<br><br>*Cosponsors:*<br>Klobuchar (D-MN)<br>Durbin (D-IL)<br>Blumenthal (D-CT)<br>Markey (D-MA)<br>Cornyn (R-TX) | CR 53 | **Most Recent Bill Text:**<br>https://www.congress.gov/118/bills/s833/BILLS-118s833is.pdf<br><br>**Summary:**<br>Would permit district court cases to be photographed, electronically recorded, broadcast, or televised, notwithstanding any other provision of law, after JCUS promulgates guidelines. | • 03/16/2023: Introduced in Senate; referred to Judiciary Committee |

**Legislation Requiring Only Technical or Conforming Changes**
**118th Congress**
**(January 3, 2023–January 3, 2025)**

| Name | Sponsors & Cosponsors | Affected Rules | Text and Summary | Legislative Actions Taken |
|---|---|---|---|---|
| **Election Day Holiday Act of 2024**<br><br>**Election Day Act**<br><br>**Freedom to Vote Act** | **H.R. 7329**<br>*Sponsor:*<br>Eshoo (D-CA)<br><br>**H.R. 6267**<br>*Sponsor:*<br>Fitzpatrick (R-PA)<br><br>**H.R. 11**<br>*Sponsor:*<br>Sarbanes (D-MD)<br><br>**S.1; S. 2344**<br>*Sponsor:*<br>Klobuchar (D-MN)<br><br>Each bill has several Democratic or Democratic-caucusing cosponsors. | AP 26, 45; BK 9006; CV 6; CR 45, 56 | **Most Recent Bill Text:**<br>https://www.congress.gov/118/bills/hr7329/BILLS-118hr7329ih.pdf<br>https://www.congress.gov/118/bills/hr6267/BILLS-118hr6267ih.pdf<br>https://www.congress.gov/118/bills/hr11/BILLS-118hr11ih.pdf<br>https://www.congress.gov/118/bills/s1/BILLS-118s1is.pdf<br>https://www.congress.gov/118/bills/s2344/BILLS-118s2344is.pdf<br><br>**Summary:**<br>Would make Election Day a federal holiday. | • 02/13/2024: H.R. 7329 introduced in House<br>• 11/07/2023: H.R. 6267 introduced in House<br>• 07/25/2023: S. 1 introduced in Senate<br>• 07/18/2023: S. 2344 introduced in Senate<br>• 07/18/2023: H.R. 11 introduced in House<br>• Among others, house bills referred to Oversight & Accountability Committee; senate bills referred to Committee on Rules & Administration |
| **Indigenous Peoples' Day Act** | **H.R. 5822**<br>*Sponsor:*<br>Torres (D-AL)<br><br>*Cosponsors:*<br>86 Democratic cosponsors<br><br>**S. 2970**<br>*Sponsor:*<br>Heinrich (D-NM)<br><br>*Cosponsors:*<br>13 Democratic or Democratic-caucusing cosponsors | AP 26, 45; BK 9006; CV 6; CR 45, 56 | **Most Recent Bill Text:**<br>https://www.congress.gov/118/bills/hr5822/BILLS-118hr5822ih.pdf<br>https://www.congress.gov/118/bills/s2970/BILLS-118s2970is.pdf<br><br>**Summary:**<br>Would replace the term "Columbus Day" with the term "Indigenous Peoples' Day" as a legal public holiday. | • 09/28/2023: H.R. 5822 introduced in House; referred to Oversight & Accountability Committee<br>• 09/28/2023: S. 2970 introduced in Senate; referred to Judiciary Committee |
| **Patriot Day Act** | **H.R. 5366**<br>*Sponsor:*<br>Fitzpatrick (R-PA)<br><br>*Cosponsors:*<br>Gottheimer (D-NJ)<br>Malliotakis (R-NY) | AP 26, 45; BK 9006; CV 6; CR 45, 56 | **Most Recent Bill Text:**<br>https://www.congress.gov/118/bills/hr5366/BILLS-118hr5366ih.pdf<br><br>**Summary:**<br>Would make Patriot Day a federal holiday. | • 09/08/2023: Introduced in House; referred to Oversight & Accountability Committee |

| Name | Sponsors & Cosponsors | Affected Rules | Text and Summary | Legislative Actions Taken |
|---|---|---|---|---|
| **Diwali Day Act** | **H.R. 3336**<br>*Sponsor:*<br>Meng (D-NY)<br><br>*Cosponsors:*<br>15 Democratic & 1 Republican cosponsors | AP 26, 45; BK 9006; CV 6; CR 45, 56 | **Most Recent Bill Text:**<br>https://www.congress.gov/118/bills/hr3336/BILLS-118hr3336ih.pdf<br><br>**Summary:**<br>Would make Diwali (a/k/a Deepavali) a federal holiday. | • 05/15/2023: Introduced in House; referred to Oversight & Accountability Committee |
| **September 11 Day of Remembrance Act** | **H.R. 2382**<br>*Sponsor:*<br>Lawler (R-NY)<br><br>*Cosponsors:*<br>4 Democratic & 2 Republican cosponsors<br><br>**S. 1472**<br>*Sponsor:*<br>Blackburn (R-TN)<br><br>*Cosponsor:*<br>Wicker (R-MS) | AP 26, 45; BK 9006; CV 6; CR 45, 56 | **Most Recent Bill Text:**<br>https://www.congress.gov/118/bills/hr2382/BILLS-118hr2382ih.pdf<br>https://www.congress.gov/118/bills/s1472/BILLS-118s1472is.pdf<br><br>**Summary:**<br>Would make September 11 Day of Remembrance a federal holiday. | • 05/04/2023: S. 1472 introduced in Senate; referred to Judiciary Committee<br>• 03/29/2023: H.R. 2382 introduced in House; referred to Oversight & Accountability Committee |
| **Workers' Memorial Day** | **H.R. 3022**<br>*Sponsor:*<br>Norcross (D-NJ)<br><br>*Cosponsors:*<br>11 Democratic cosponsors | AP 26, 45; BK 9006; CV 6; CR 45, 56 | **Most Recent Bill Text:**<br>https://www.congress.gov/118/bills/hr2382/BILLS-118hr2382ih.pdf<br><br>**Summary:**<br>Would make Workers' Memorial Day a federal holiday. | • 04/28/2023: Introduced in House; referred to Oversight & Accountability Committee |
| **St. Patrick's Day Act** | **H.R. 1625**<br>*Sponsor:*<br>Fitzpatrick (R-PA)<br><br>*Cosponsor:*<br>Lawler (R-NY) | AP 26, 45; BK 9006; CV 6; CR 45, 56 | **Most Recent Bill Text:**<br>https://www.congress.gov/118/bills/hr1625/BILLS-118hr1625ih.pdf<br><br>**Summary:**<br>Would make St. Patrick's Day a federal holiday. | • 03/17/2023: Introduced in House; referred to Oversight & Accountability Committee |
| **Lunar New Year Day Act** | **H.R. 430**<br>*Sponsor:*<br>Meng (D-NY)<br><br>*Cosponsors:*<br>58 Democratic cosponsors | AP 26, 45; BK 9006; CV 6; CR 45, 56 | **Most Recent Bill Text:**<br>https://www.congress.gov/118/bills/hr430/BILLS-118hr430ih.pdf<br><br>**Summary:**<br>Would make Lunar New Year Day a federal holiday. | • 01/20/2023: Introduced in House; referred to Oversight & Accountability Committee |
| **Rosa Parks Day Act** | **H.R. 308**<br>*Sponsor:*<br>Sewell (D-AL)<br><br>*Cosponsors:*<br>115 Democratic cosponsors | AP 26, 45; BK 9006; CV 6; CR 45, 56 | **Most Recent Bill Text:**<br>https://www.congress.gov/118/bills/hr308/BILLS-118hr308ih.pdf<br><br>**Summary:**<br>Would make Rosa Parks Day a federal holiday. | • 01/12/2023: Introduced in House; referred to Oversight & Accountability Committee |

# TAB 1E

Date: August 12, 2024

To: Advisory Committees on Rules of Practice and Procedure

From: Tim Reagan (Research)
Maureen Kieffer (Education)
Christine Lamberson (History)
Federal Judicial Center

Re: Federal Judicial Center Research and Education

This memorandum summarizes efforts by the Federal Judicial Center relevant to federal-court practice and procedure. Center researchers attend rules committee, subcommittee, and working-group meetings and provide empirical research as requested. The Center also conducts research to develop manuals and guides; produces education programs for judges, court attorneys, and court staff; and provides public resources on federal judicial history.

## RESEARCH

### Completed Research for Rules Committees

*Local-Counsel Requirements for Practice in Federal District Courts*

Prepared for the Standing Rules Committee's subcommittee on admissions to the district courts' bars, this report summarizes when and where federal district courts require local counsel to participate in litigation and attorney admissions (www.fjc.gov/content/385779/local-counsel-requirements-practice-federal-district-courts).

*Fees for Admission to Federal Court Bars*

Prepared for the Standing Rules Committee's subcommittee on admissions to the district courts' bars, this report summarizes fees charged for admission to federal court bars, including admission fees, pro hac vice fees, and fees charged by state and territory bars for certificates of good standing (www.fjc.gov/content/385023/fees-admission-federal-court-bars).

### Current Research for Rules Committees

*Broadcasting Criminal Proceedings*

The Center is providing the Criminal Rules Committee with research support as it studies whether the proscription on remote public access to criminal proceedings should be amended.

*Remote Participation in Bankruptcy Contested Matters*

The Center is providing the Bankruptcy Rules Committee with research support as it studies remote participation in contested matters.

*Prior Convictions as Impeachment Evidence for Criminal Defendants*

At the request of the Evidence Rules Committee, the Center is conducting research on prior felony convictions as impeachment evidence against testifying criminal defendants.

*Intervention on Appeal*

At the request of the Appellate Rules Committee, the Center is conducting research on interventions on appeal.

*The Need for Redacted Social Security Numbers in Bankruptcy Cases*

In light of proposals to fully redact Social Security numbers in public filings, rather than all but the last four digits, the Bankruptcy Rules Committee asked the Center to survey bankruptcy trustees and others on the need for partial Social Security numbers in public filings.

*Bankruptcy Judges' Use of "Special Masters"*

At the request of the Bankruptcy Rules Committee, the Center will be gathering information from bankruptcy judges on how and whether they would use "special masters" if they had the authority to do that. It is acknowledged that there are concurrent proposals to discontinue use of the word "master" because of the word's historical association with involuntary servitude.

*Default and Default-Judgment Practices in the District Courts*

At the request of the Civil Rules Committee, the Center studied district-court practices with respect to the entry of defaults and default judgments under Civil Rule 55. Of particular interest was under what circumstances they are entered by clerks rather than judges. A completed report will be presented to the committee at its October 2024 meeting.

*Complex Criminal Litigation Website*

As suggested by the Criminal Rules Committee, the Center is developing a collection of resources on complex criminal litigation as one of its curated websites.

**Completed Research for Other Judicial Conference Committees**

*Unredacted Social Security Numbers in Federal Court PACER Documents*

At the request of the Committee on Court Administration and Case Management, as part of the Center's ongoing privacy study, the Center identified unredacted Social Security numbers in public filings apparently out of compliance with Federal Rules of Practice and Procedure: Appellate

Rule 25(a)(5), Bankruptcy Rule 9037, Civil Rule 5.2, and Criminal Rule 49.1. The Center found 22,391 unredacted Social Security numbers in a sample of 4.7 million filed documents (www.fjc.gov/content/387587/unredacted-social-security-numbers-federal-court-pacer-documents). Of those, 22% were exempt from the redaction requirement, and 6% belonged to pro se filers who waived the rules' privacy protection by disclosing their own Social Security numbers.

**Current Research for Other Judicial Conference Committees**

*The Privacy Study: Unredacted Sensitive Personal Information in Court Filings*

At the request of the Committee on Court Administration and Case Management, the Center is conducting research on unredacted personal information in public filings, an update to research prepared for the Committee on Rules of Practice and Procedure in 2010 and 2015 (Unredacted Social Security Numbers in Federal Court PACER Documents, www.fjc.gov/content/313365/unredacted-social-security-numbers-federal-court-pacer-documents).

*Remote Public Access to Court Proceedings*

At the request of the Committee on Court Administration and Case Management, the Center conducted focus groups with district judges, magistrate judges, and bankruptcy judges to learn about their experiences providing remote public access to proceedings with witness testimony during the pandemic.

*Case Weights for Bankruptcy Courts*

The Center is collecting data for updated research on bankruptcy-court case weights. Case weights are used in the computation of weighted caseloads, which in turn are used when assessing the need for judgeships. The research was requested by the Committee on Administration of the Bankruptcy System.

**Other Completed Research**

*Enhancing Efforts to Coordinate Best Workplace Practices Across the Federal Judiciary*

This report, and the study of federal-judiciary workplace practices on which it is based, were undertaken by the Center and the National Academy of Public Administration pursuant to a House Committee recommendation under the Consolidated Appropriations Act of 2023 (www.fjc.gov/content/388247/enhancing-efforts-coordinate-best-workplace-practices-across-federal-judiciary).

## JUDICIAL GUIDES

### Completed

*Mutual Legal Assistance Treaties and Letters Rogatory: Obtaining Evidence and Assistance from Foreign Jurisdictions*

This guide, now in its second edition, provides an overview of the statutory schemes and procedural matters that distinguish mutual legal assistance treaties and letters rogatory (www.fjc.gov/content/386124/mutual-legal-assistance-treaties-letters-rogatory). It also discusses legal issues that arise when the prosecution, the defense, or a civil litigant seek to obtain evidence from abroad as part of a criminal or civil proceeding.

### In Preparation

*Manual for Complex Litigation*

The Center is preparing a fifth edition of its *Manual for Complex Litigation* (fourth edition, www.fjc.gov/content/manual-complex-litigation-fourth).

*Reference Manual on Scientific Evidence*

The Center is collaborating with the National Academies of Science, Engineering, and Medicine to prepare a fourth edition of the *Reference Manual on Scientific Evidence* (third edition, www.fjc.gov/content/reference-manual-scientific-evidence-third-edition-1).

*Manual on Recurring Issues in Criminal Trials*

The Center is preparing a seventh edition of what previously was called *Manual on Recurring Problems in Criminal Trials* (sixth edition, www.fjc.gov/content/manual-recurring-problems-criminal-trials-sixth-edition-0).

*Benchbook for U.S. District Court Judges*

The Center is preparing a seventh edition of its *Benchbook for U.S. District Court Judges* (sixth edition, www.fjc.gov/content/benchbook-us-district-court-judges-sixth-edition).

## HISTORY

*Summer Institute for Teachers*

In June 2024, the Center collaborated with the ABA to present a week-long professional-development conference for teachers focusing on three famous historical trials: The *Amistad* trial, *United States v. Guiteau*, and *United States v. Rosenberg*. The Center presents information about these and other famous federal trials on its website (www.fjc.gov/history/cases/famous-federal-trials).

*Spotlight on Judicial History*

Since 2020, the Center has posted twenty-two short essays about judicial history on a variety of topics (www.fjc.gov/history/spotlight-judicial-history).

Recent posts include "*Chy Lung v. Freeman*: Anti-Chinese Sentiment and the Supremacy of Federal Immigration Law" (www.fjc.gov/history/spotlight-judicial-history/chinese-immigration-restriction), "Eighth Amendment Prison Litigation" (www.fjc.gov/history/spotlight-judicial-history/eighth-amendment-prison-litigation), "The Certificate of Division" (www.fjc.gov/history/spotlight-judicial-history/certificate-division), and "NFL Television Broadcasting" (www.fjc.gov/history/spotlight-judicial-history/nfl-television-broadcasting).

*A User Guide to the History of the Federal Judiciary Website*

The Center recently added to its History website a user guide that provides brief descriptions of resources of interest to specific audiences, including the general public, judges and court staff, educators, students, and researchers (www.fjc.gov/history/user-guide).

*Snapshots of Federal Judicial History, 1790–1990*

The Center recently added to its History website extensive exhibits presenting data about the federal judiciary at various points in its evolution (www.fjc.gov/history/exhibits/snapshots-federal-judicial-history-1790-1990).

## EDUCATION

### Specialized Workshops

*FJC–Center for Law, Brain & Behavior Workshop on Science-Informed Decision-Making*

Participants at this three-day, in-person workshop on the incorporation of behavioral science into decisions made in criminal cases were judges and probation and pretrial services officers.

*Judicial Seminar on Emerging Issues in Neuroscience*

A two-day, in-person judicial seminar explored developments in neuroscience and the role that neuroscience can play in legal determinations, such as decisions about criminal culpability and the admissibility of evidence. The seminar was cosponsored by the American Association for the Advancement of Science and funded by a grant from the Dana Foundation.

*Electronic Discovery Seminar*

A two-day, in-person judicial workshop explored technologies, rules, and legal requirements related to the retrieval of electronically stored information. It was cosponsored by the Electronic Discovery Institute.

*Employment Law Workshop*

A two-day, in-person judicial workshop explored issues arising in employment-law litigation, including the use of experts, electronic discovery, case management, retaliation, implicit bias, big data, and the role of the whistleblower. The New York University School of Law's Institute of Judicial

Administration and Center for Labor and Employment Law cosponsored the program.

*Ronald M. Whyte Intellectual Property Seminar*

A four-day, in-person judicial workshop addressed the basics of patent, copyright, and trademark law; patent case management; and emerging issues in intellectual property law. It was cosponsored by the Berkeley Center for Law and Technology.

*Antitrust Judicial Law and Economics Institute for Federal Judges*

A three-day, in-person judicial workshop focused on antitrust law and economics fundamentals in the context of various procedural issues, including pleading an antitrust case after the Supreme Court's decision in *Bell Atlantic Corporation v. Twombly*; antitrust injury; class certification; and the use of experts at class certification, during damages analysis, and throughout trial. The program was a collaboration of the Center, the American Bar Association's Antitrust Section, the University of Chicago, and the University of California at Berkeley.

**Distance Education**

*Court Web*

A monthly webcast included as recent episodes "Generative AI and the Future of Legal Practice" (featuring Middle District of Florida Magistrate Judge Anthony Porcelli and Southern District of California Magistrate Judge Allison Goddard), "Election Litigation Update" (featuring Professors Richard Hasen and Derek Muller), "Hot Topics in Federal Sentencing" (featuring Northern District of Ohio Judge Benita Pearson and Alan Dorhoffer, director of the U.S. Sentencing Commission's Office of Education and Sentencing Practice), "Finding the Ripcords: Top Ten 'Safe Landing' Federal Practice Cases" (featuring attorney Jim Wagstaffe and discussing recent appellate cases addressing jurisdictional issues), "Best Practices for Serving Unrepresented Litigants in the Federal Courts" (featuring Northern District of California Judge Jacqueline Scott Corley and Western District of Missouri Judge Willie Epps), and "Below the Radar: Vital Civil Procedure Developments You Might Not Know" (featuring attorney Jim Wagstaffe and highlighting the most recent developments in federal jurisdiction and civil procedure).

*Term Talk*

The Center has presented periodic webcasts with the nation's top legal scholars discussing what federal judges need to know about the U.S. Supreme Court's most impactful decisions. Recent episodes include "*Turkiye Halk Bankasi v. United States*; *Pugin v. Garland*" (discussing subject-matter jurisdiction over criminal prosecutions against foreign sovereigns) and "*Biden v. Nebraska*; *United States v. Texas*" (discussing state standing to sue

for losses suffered by a third party and standing to seek vacation of immigration guidelines).

*Consumer Case-Law Update for Bankruptcy Judges*

This quarterly webcast features retired Western District of Tennessee Bankruptcy Judge William H. Brown discussing the latest consumer-bankruptcy case-law updates.

*Business Case-Law Update for Bankruptcy Judges*

This quarterly webcast features Professor Bruce Markell (a retired bankruptcy judge).

*Interactive Orientation for Federal Judicial Law Clerks*

The Center provides term law clerks with online interactive training resources.

*Customer Service in the Courts*

Launched in 2023, this e-learning course discusses working with self-represented litigants, among other topics. The course objectives are to provide information and address concerns without crossing into legal advice.

**General Workshops**

*National Leadership Conference for Chief Judges of United States District and Bankruptcy Courts*

This is an annual conference. In addition to updates from various Judicial Conference committees, the 2024 workshop included a session on the evaluation of the interim recommendations of the Cardone Report.

*National Workshop for U.S. District Court Judges*

These three-day workshops are held in even-numbered years. Among the topics examined at the 2024 workshop were scientific evidence, artificial intelligence, employment-discrimination litigation, deferred sentencing, restorative justice, and managing mass litigation.

*National Workshop for U.S. Magistrate Judges*

These three-day workshops are held annually. Among the topics examined at the 2024 workshop were the impact of ChatGPT on court filings, including those by self-represented litigants, and the impact of “deepfakes” on evidence and procedure.

*National Workshop for U.S. Bankruptcy Judges*

These three-day workshops are held annually. Among the topics discussed in 2024 were sealing court records and healthcare bankruptcies.

*Circuit Workshops for U.S. Appellate and District Judges*

In 2023, the Center put on two- or three-day workshops for Article III judges in the Second, Ninth, and Eleventh Circuits.

*National Conference for Appellate Staff Attorneys*

The Center puts on biennial three-day educational conferences for appellate staff attorneys, now in odd-numbered years.

*Wm. Matthew Byrne, Jr., Judicial Clerkship Institute for Career Law Clerks*

Held in collaboration with Pepperdine University Caruso School of Law, this annual two-day program offers sessions on managing pro se litigation, bankruptcy appeals, and jurisdictional issues.

*Federal Defender Capital Habeas Unit National Conference*

This annual three-day conference is designed for attorneys, paralegals, investigators, and mitigation specialists.

*National Seminar for Federal Defenders*

This annual three-day seminar is designed for assistant federal defenders who have been practicing criminal law for a minimum of three years.

**Orientation Programs**

*Orientation Programs for Judges*

The Center invites newly appointed judges to attend two one-week conferences focusing on skills unique to judging. The first phase includes sessions on trial practice, case management, judicial ethics, and opinion writing. In addition, district judges learn about the sentencing process, magistrate judges learn about search warrants, and bankruptcy judges learn about the bankruptcy code. The second phase includes sessions on such topics as civil-rights litigation, employment discrimination, case management, security, self-represented litigants, relations with the media, and ethics. Recent orientation programs for district judges have included updates on the Cardone Committee's recommendations and evaluation. Orientation programs for circuit judges include a program at New York University School of Law for both state and federal appellate judges.

*Orientation Seminar for Assistant Federal Defenders*

This week-long seminar is held every year.

# TAB 2

# TAB 2A

# MINUTES
# COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

June 4, 2024

The Judicial Conference Committee on Rules of Practice and Procedure (the Standing Committee) met in a hybrid in-person and virtual session in Washington, D.C., on June 4, 2024. The following members attended:

Judge John D. Bates, Chair
Judge Paul J. Barbadoro
Elizabeth J. Cabraser, Esq.
Louis A. Chaiten, Esq.
Judge William J. Kayatta, Jr.
Justice Edward M. Mansfield
Dean Troy A. McKenzie
Judge Patricia A. Millett
Hon. Lisa O. Monaco, Esq.[*]
Andrew J. Pincus, Esq.
Judge D. Brooks Smith
Kosta Stojilkovic, Esq.
Judge Jennifer G. Zipps

The following attended on behalf of the Advisory Committees:

Advisory Committee on Appellate Rules –
Judge Jay S. Bybee, Chair
Professor Edward Hartnett, Reporter

Advisory Committee on Bankruptcy Rules –
Judge Rebecca B. Connelly, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Laura B. Bartell, Associate Reporter

Advisory Committee on Civil Rules –
Judge Robin L. Rosenberg, Chair
Professor Richard L. Marcus, Reporter
Professor Andrew Bradt, Associate Reporter
Professor Edward H. Cooper, Consultant

Advisory Committee on Criminal Rules –
Judge James C. Dever III, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter

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

Others who provided support to the Standing Committee, in person or remotely, included Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; H. Thomas Byron III, Esq., Secretary to the Standing Committee; Allison A. Bruff, Esq., Bridget M. Healy, Esq., and S. Scott Myers, Esq., Rules Committee Staff Counsel; Shelly Cox and Rakita Johnson, Rules Committee Staff; Zachary Hawari, Law Clerk to the Standing Committee; Dr. Elizabeth C. Wiggins, Director, Research Division, Federal Judicial Center (FJC); and Dr. Tim Reagan, Senior Research Associate, FJC.

[*] Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, represented the Department of Justice (DOJ) on behalf of Deputy Attorney General Lisa O. Monaco.

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## OPENING BUSINESS

Judge John Bates, Chair of the Standing Committee, called the meeting to order and welcomed everyone, including the committee members and reporters who were attending remotely. Judge Bates also welcomed members of the public and press who joined as observers.

Judge Bates expressed sorrow at the loss of Judge Gene E.K. Pratter the prior month. She completed a full term on the Civil Rules Committee before joining the Standing Committee and she will be missed.

Professor Catherine Struve honored Judge Pratter's legacy as the quintessential Philadelphia lawyer and judge—incredibly skilled in lawyering and rhetoric—and a role model in the Philadelphia legal community. She began her career in 1975 at Duane Morris LLP where she became the firm's first general counsel and expert on legal ethics. She came to teach ethics and trial advocacy at the University of Pennsylvania Law School and served on its board of overseers. Professor Struve also recalled Judge Pratter's generosity and sense of humor.

Judge D. Brooks Smith noted how shocked he had been to learn of Judge Pratter's untimely passing. He came to know her as a friend and colleague when she became a judge, and he quickly learned of her abilities as a district judge. She also contributed greatly when she sat by designation on the court of appeals. He also remarked on Judge Pratter's wonderful sense of style and humor.

Judge Bates thanked Professor Struve and Judge Brooks and added that Judge Pratter will be remembered as an excellent judge who made countless contributions to justice, the federal judiciary, and the rules process in particular.

As this was Judge Kayatta's last meeting, Judge Bates thanked him for his work and recognized that he had been a wonderful contributor to the efforts of the Standing Committee and the rules process.

Judge Bates welcomed the incoming chairs for the Advisory Committees on Appellate Rules and Evidence Rules. Judge Allison Eid, who is from the Tenth Circuit and a former member of the Appellate Rules Committee, will be succeeding Judge Jay Bybee as chair of the Appellate Rules Committee. Judge Jesse Furman from the Southern District of New York, a former member of the Standing Committee, will be succeeding Judge Patrick Schiltz as chair of the Evidence Rules Committee. Judge Bates recognized the great work that Judge Bybee and Judge Schiltz had performed as chairs of their committees, which have been amazingly productive and done excellent work throughout their tenure.

Judge Bates noted that his term as Chair of the Standing Committee had been extended for another year.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the minutes of the January 4, 2024, meeting.**

Mr. Thomas Byron, Secretary to the Standing Committee, reported that the latest set of proposed rule amendments had been approved by the Supreme Court and transmitted to Congress. Those amendments will take effect on December 1, 2024, in the absence of congressional action.

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Judge Bates noted that the Standing Committee's March 2024 report to the Judicial Conference begins on page 54 of the agenda book and the FJC's report on research projects begins on page 64. Dr. Tim Reagan explained that the FJC in January restarted its reports to the rules committees about work the FJC does. Because he has heard during meetings that education can be a useful alternative to rule amendments, these periodic reports now include information about the FJC's Education Division.

## JOINT COMMITTEE BUSINESS

### *Electronic Filing by Self-Represented Litigants*

Professor Struve reported that the working group hopes to bring proposals to the advisory committees in the fall.

### *Redaction of Social Security Numbers*

Mr. Byron provided the report on several privacy issues, including redaction of social-security numbers. A memorandum from the Reporters' Privacy Rules Working Group begins on page 74 of the agenda book and outlines what the working group and Rules Committee Staff have done over the last several months. The advisory committees and their chairs were asked to provide feedback on this memorandum at their spring meetings.

As previously reported, the rules currently require filers to redact all but the last four digits of a social-security number in court filings, and Senator Ron Wyden suggested that the rules committees revisit whether to require complete redaction. A tentative draft of such an amendment appears on page 75 of the agenda book.

That draft is not being proposed as a rule amendment at this time because it makes sense to consider it in conjunction with other privacy rule proposals that have been received in the last year. As described in the memorandum, there are also other potential ambiguities and areas for clarification in the exemption and waiver provisions that may be worth addressing. The working group, with the help of the advisory committee chairs, will continue considering whether to address any of those issues—in addition to the suggestions from Senator Wyden and others—through the fall, and likely spring, meetings.

### *Joint Subcommittee on Attorney Admission*

Professor Struve reported that there was robust discussion of the various options under consideration by the Joint Subcommittee on Attorney Admission at some of the advisory committees' spring meetings. The subcommittee will continue to consider that input as well as the feedback gathered during the Standing Committee's January meeting. The Subcommittee's consideration is also aided by the excellent research from the FJC regarding fees for admission to federal court bars as well as local counsel requirements for practice in federal district courts. Those FJC reports begin on page 78 of the agenda book. The subcommittee will next meet in July.

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## REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Bybee and Professor Hartnett presented the report of the Advisory Committee on Appellate Rules, which last met on April 10, 2024, in Denver, Colorado. The Advisory Committee presented four action items – two for final approval and two for publication and public comment – and one information item. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 126.

*Action Items*

***Final Approval of Proposed Amendment to Rule 39 (Costs on Appeal).*** Judge Bybee reported on this item. The text of the proposed amendment appears on page 184 of the agenda book, and the written report begins on page 127.

The proposed amendment to Rule 39 would address allocating and taxing costs in the courts of appeals and the district courts. "Allocate" refers to which party bears the costs, and "tax" refers to the calculation of the costs. The Advisory Committee received two favorable comments, one comment that was not relevant, and one late-filed comment. Aside from some stylistic changes, the Advisory Committee did not believe changes were needed to the published version.

A practitioner member commented that he liked the terminology, which was in response to prior feedback from the Standing Committee, that is, "allocate" when describing who is being asked to pay and "tax" when describing what should be paid. He offered a tweak to Rule 39(a) on page 184, line 3, to say, "The following rules apply to allocating taxable costs…" Adding "taxable" would introduce both concepts. Judge Bybee agreed that the addition would signal exactly what the rule was doing, and, without objection, the addition was made.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendment to Rule 39.**

***Final Approval of Proposed Amendment to Rule 6 (Appeal in a Bankruptcy Case).*** Judge Bybee reported on this item. The text of the proposed amendment begins on page 163 of the agenda book, and the written report begins on page 129.

This extensive revision of Rule 6 concerns appeals in bankruptcy cases. First, it addresses resetting the time to appeal as a result of a tolling motion in the district court, making clear that the shorter time period used in the Bankruptcy Rules for such motions applies. Second, it addresses direct appeals to the courts of appeals that bypass review by the district court or bankruptcy appellate panel. The amendments overhaul and clarify the provisions for direct appeal, making the rule largely self-contained. Judge Bybee thanked the Bankruptcy Rules Committee for its substantial assistance. There was only one comment during the comment period, and it supported the amendment.

Judge Bates commented that on page 173, line 184, the rule says that Bankruptcy Rule 8007 "applies" to any stay pending appeal, but elsewhere the rule uses "governs." He asked if there is a reason to say "applies" rather than "governs."

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Professor Hartnett could not think of one but asked if the style consultants or bankruptcy representatives had a preference. Professor Garner commented that consistency is preferable and that "governs" seems to work. Judge Bybee noted that "applies" was used in the stricken language on line 203 and that the committee note on page 182, line 433, uses "governs." The rule and the note should be made consistent regardless of which word is used.

A judge member agreed with using "governs" if Rule 8007 is all-inclusive as to what controls the appeal. If another rule contains requirements for the appeal, however, Rule 8007 would not "govern," only "apply." Judge Connelly and Professor Gibson indicated that Rule 8007 is the only rule relevant to stays pending appeal.

Professor Struve noted that she had suggested the language change to "applies to" at the spring 2023 Advisory Committee meeting but that she did not object to reverting to "governs." Judge Bates called for a vote on the proposal with the minor change from "applies to" to "governs."

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendment to Rule 6.**

***Publication of Proposed Amendment to Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis (IFP)).*** Judge Bybee reported on this item. The text of the proposed form appears on page 213 of the agenda book, and the written report begins on page 132.

This proposal is a change to streamline the way in which Appellate Form 4 collects information for purposes of seeking leave to appeal IFP. It does not affect the standard for whether to grant IFP status. The Advisory Committee has been considering this matter since 2019 and gave the courts of appeals, which have adopted various local versions of Form 4, an opportunity to weigh in on the changes.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendment to Form 4 for public comment.**

***Publication of Proposed Amendment to Rule 29 (Brief of an Amicus Curiae).*** Judge Bybee reported on this item. The text of the proposed amendment appears on page 192 of the agenda book, and the written report begins on page 135.

The Advisory Committee has been considering the proposal to amend Rule 29, regarding disclosures in amicus briefs, since 2019. In 2020, the Supreme Court received inquiries from Senator Whitehouse and Representative Johnson, which were referred to the Advisory Committee.

Judge Bybee expressed the Advisory Committee's appreciation for the substantial feedback from the Standing Committee. The Advisory Committee anticipates receiving a lot of public input, which will inform whether the rule strikes the right balance. It has already received some anticipatory comments that have been docketed as additional rules suggestions.

As explained in the written report, the Advisory Committee considered three difficult issues: (1) disclosure requirements concerning the relationship between a party and the amicus,

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including contributions to an amicus that were not earmarked for the preparation of a brief; (2) disclosure requirements concerning the relationship between a nonparty and the amicus; and (3) an exception in the existing rule concerning earmarked contributions by members of an amicus organization.

Judge Bates thanked Judge Bybee and Professor Hartnett for providing an extensive discussion of the rule from various perspectives, including First Amendment considerations.

Much of the Standing Committee's discussion related to concerns about a change that would require leave of the court for non-governmental entities to file an amicus brief during the initial consideration of a case on the merits.

A practitioner member questioned the decision to move away from the Supreme Court's recent rule revision permitting amicus briefs to be filed without leave of the court or the consent of the parties. The Supreme Court's rule presumably reflects the view that the value of helpful amicus briefs outweighs the burden of unhelpful briefs. He wondered if there is actually an overabundance of amicus briefs in the courts of appeals. Even if this rule reduces the number of amicus briefs, there would be more motions for leave to file. He also struggled to see why recusal is an issue for courts of appeals considering that they can strike amicus briefs. If recusal is an issue, rather than limiting the circumstances in which a party can file an amicus brief, perhaps recusal should be addressed directly in the rule (for example, by providing that any amicus brief that would cause recusal of a judge would automatically be stricken) or addressed by the Code of Conduct for United States Judges.

Judge Bates recalled that these concerns were discussed at the Advisory Committee and some unique considerations came up with respect to some appellate courts.

Professor Hartnett remarked that the Supreme Court's rule removes even the very modest filter of consent, so adopting the approach taken in the current Supreme Court rule would require a change from the current Rule 29. One concern expressed at the Advisory Committee was that this completely open rule might result in what are effectively letters to the editor being filed as amicus briefs. However, the recusal issue was a far greater concern to the Advisory Committee. A judge member on the Advisory Committee had explained that the problem is particularly acute during a court's consideration of whether to grant rehearing en banc. When an amicus brief is filed at the en banc stage, no judge is in a position to strike an amicus brief that would require automatic recusal. There is also a recusal problem at the initial panel stage to the extent that the clerk may effectively recuse a judge on the basis of an amicus brief without any judge actually deciding whether the contribution of the amicus brief outweighs the fact that the brief will cause the recusal.

Judge Bybee added that the Advisory Committee's clerk representative was satisfied that this modest change in the rule would not dramatically increase the burden on the clerk's office. He also noted that a prior draft of this proposal followed the Supreme Court's rule and that the requirement of a motion for leave was a recent addition to the proposed amendment.

Multiple members expressed concerns about the increased burden on judges, amici, and parties resulting from a rule that requires a motion for leave to accompany every amicus brief. One judge member noted that motions tend to spawn additional filings—responses, motions for

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extensions of time, and replies. She also pointed out that the motion for leave to file may come before a panel is assigned or publicly disclosed. And she was not sure on what basis, other than recusal, leave to file might be denied. Amicus briefs are a way for people to express their views to the court, which is an important part of the openness of the appellate process. If the parties consented to the amicus brief being filed, she did not know why the court would need to police it.

A practitioner member commented that there was a powerful case made at the Advisory Committee meeting about automatic recusal at the en banc petition stage—at least with respect to the Ninth Circuit—because no panel was assigned to decide whether to permit the amicus brief before the en banc petition vote. His reaction as to the panel stage, however, was similar to the judge member's reaction in that recusal prior to a panel assignment was uncertain, and there would be added costs for motions. Nevertheless, he was persuaded that allowing the public to comment on this proposal would reveal whether there is a problem, and a distinction might be drawn after publication between the panel and en banc stages.

Another practitioner member had a mild negative reaction to the added cost but recognized that the reaction from appellate practitioners—and those who pay for their services—during the public comment process will inform whether this procedure is worth the cost. In practice, she always consents to the filing of an amicus brief, even if it is unfavorable to her position. A judge member agreed that she had advised clients to consent to amicus briefs when she was in private practice.

A judge member remarked that, in her circuit, amicus briefs are often circulated before the vote on the petition for rehearing en banc, and an amicus brief is rejected if it would cause a judge to be recused. That said, her circuit does not have en banc proceedings as often as the Ninth Circuit.

Judge Bates invited Judge Bybee and Professor Hartnett to respond to the concerns expressed by some members of the Standing Committee about eliminating consent at the panel stage.

Professor Hartnett suggested that the proposal be published as-is. The proposal may be changed after the comment period to treat the panel and en banc stages differently, but the current structure of the rule was not amenable to making that change during this meeting. From a process perspective, he also explained that, if there is a substantial concern about the burden that a motion requirement will impose, that will come out during the comment period with the proposal in its current form. But, if the proposal were revised (for example, to retain the option of filings on consent), the Advisory Committee could miss out on that feedback. Judge Bybee added that he does not expect judges to comment on this proposal, and that, by publishing the version of the proposal that accommodates some judges' concerns about the en banc process, the rulemakers can elicit comments from the bar.

A judge member expressed skepticism about publishing the proposal with the motion requirement, considering that the appellate judges on the Standing Committee had expressed opposition. But, if the motion requirement were to remain, it would be practically useful for the judge who is considering the motion to have those disclosures in the motion itself, not only the brief.

Judge Bybee's initial reaction was to suspect that recusal issues would be identified by the parties in the motion and that the disclosures would inform the judge about how to weigh the brief. It was also noted that this proposal does not change the current rule with respect to disclosures being contained in the briefs, not motions. The judge member responded that who was contributing money could be relevant on whether to grant leave to file. Also, it has not been an issue because there is not currently a mandatory motion process.

To address disclosures in motions, a practitioner member suggested inserting "motion and" on page 198, line 113, so that the opening of new Rule 29(b) would read "An amicus motion and brief must disclose." Another practitioner member did not think that would capture everything and suggested adding a new Rule 29(a)(3)(C), on the bottom of page 193, to add the disclosures required by Rule 29(b), (c), and (e) to the information accompanying a motion for leave to file. Professor Struve added that Rule 29(a)(4)(A) also requires corporate amici to include a disclosure statement like that required of parties by Rule 26.1. With Judge Bybee's consent, the new subparagraph was added to require those disclosures in a motion for leave.

Regarding the motion requirement issue, a judge member asked about bracketing parts of the proposed rule. A practitioner member suggested bracketing "~~the consent of the parties or~~" on page 193, lines 15–16 and "~~or if the brief states that all parties have consented to its filing~~" on lines 18–19. Judge Bybee agreed with the concept of bracketing that language to call attention to the issue, although he and Professor Hartnett noted that, if that language were restored, it would require some changes later in the rule.

Following further discussion among chairs and reporters during a break, rather than bracketing the language, Professor Hartnett proposed adding language to the report included with the Preliminary Draft, specifically inviting public comment on whether motions should always be required for amicus briefs at the panel stage and whether rehearing should be treated differently. A judge member pointed out that there is language in the proposed committee note, defending the elimination of the consent provision, that would be inconsistent with this solicitation, and Judge Bates suggested that the new report language could refer to the committee note as well as at the rule text. The Standing Committee accepted this proposal.

A few minor changes were made to the proposed rule text and committee note.

First, a judge member questioned why the amicus brief was referred to as being of "considerable help" to the court, on page 192, line 10, whereas it was simply of "help" elsewhere. A practitioner member agreed with omitting "considerable," commenting that no one would want to argue in motions about whether something is of "considerable help" and that it could be an unintentional burden. Professor Hartnett indicated that the phrase was borrowed from the Supreme Court rule, and Judge Bybee indicated no objection to removing "considerable."

Second, Judge Bates asked what is being captured in the phrase "a party, its counsel, or any combination of parties or their counsel" and whether the "or" should be "and." Professor Hartnett indicated they were trying to capture a group of parties, a group of counsel, or a group that includes some counsel and some parties. Professor Struve offered "a party, its counsel, or any combination of parties, their counsel, or both." A practitioner member observed that this provision will cause anxiety, and it is better to be specific even if a little clunky. After further discussion and

with the style consultants' and Judge Bybee's acquiescence, the Standing Committee approved Professor Struve's suggested language.

Judge Bates also asked whether it was necessary to include the clause "but must disclose the date when the amicus was created" in Rule 29(e) when it is also required in Rule 29(a)(4)(E). Judge Bybee indicated the Advisory Committee felt that the repetition was warranted because it is closing a loophole. However, for consistency, the word "when" was removed from the clause in Rule 29(e).

Conforming changes and minor corrections to citations were also made to the proposed committee note. In addition, on page 206, the parentheses around "(or pledged to contribute)" and "(or pledges)" were removed because, as a judge member noted, pledges to contribute are as relevant as actual contributions.

Several issues were also discussed that did not result in changes to the proposal.

Judge Bates asked about the scope of the term "counsel" regarding the obligations placed on parties or their counsel. Professor Hartnett noted that it was not discussed because it is in the current rule, and no one has raised any concerns about it. Judge Bates asked the practitioner members if they had any concerns, and none were offered.

With respect to the disclosure period in Rule 29(b)(4) for "the prior fiscal year," a judge member asked why the period is not the prior or current fiscal year. Professor Hartnett responded that this provision was a compromise when the Advisory Committee was considering whether to use the calendar year or the 12 months prior to filing the brief. This compromise might leave open some strange situations in which there is a dramatic change in an amicus's revenue, but the provision was designed to make administration of the disclosure requirement as simple as possible. Professor Struve added that the contribution or pledge is captured in the numerator, that is the 12 months before the brief is filed, and that the denominator is set by the prior fiscal year. Plus, the total revenue of the current fiscal year may not be knowable.

A judge member commented that some amicus briefs are filed, not to bring anything new to the court's attention, but to notify the court of their support for a position on a policy issue. He added that it was not apparent to him what additional, useful information will be uncovered by this proposal that is not disclosed under the current rule or that is not obvious from the brief. Judge Bybee responded that the Advisory Committee has been weighing that foundational question, and there were some judges who felt very strongly about having this information. Professor Hartnett added that this is a disclosure requirement, not a filing requirement, and that disclosure also serves to inform the public about who is trying to influence the judiciary.

Finally, a judge member asked if there is urgency to publishing this rule now, given the changes made during the meeting. Professor Hartnett responded that the majority of the changes were stylistic and that the most significant change was to require information provided in the brief to also be provided in the motion. No changes were made to address the most serious concerns about the proposed requirement for a motion for leave. Instead, they will flag that issue in the report. Moreover, the Advisory Committee has already started receiving preemptive comments that have been docketed as rules suggestions, and there is a strong sense from the Advisory

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Committee that it is time to get formal feedback after a very long time considering this issue. Judge Bates agreed that a substantial delay in publication is not warranted given the thoroughness of the examination that has taken place.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendment to Rule 29 for public comment.**

***Publication of Proposed Amendments to Rule 32 (Form of Briefs, Appendices, and Other Papers); Appendix of Length Limits.*** Judge Bybee reported that the proposed amendment to Rule 29 required conforming changes to Rule 32 and the appendix on length limits. The text of the proposed amendments appears on page 210 of the agenda book.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendments to Rule 32 and the appendix of length limits for public comment.**

*Information Item*

***Intervention on appeal.*** Judge Bybee reported that the Advisory Committee continues to consider intervention on appeal, but nothing new is being proposed right now.

Judge Bates thanked Judge Bybee and Professor Hartnett for their report and thanked Judge Bybee, in particular, for his fantastic and concerted work over the years.

## REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Connelly and Professors Gibson and Bartell presented the report of the Advisory Committee on Bankruptcy Rules, which last met on April 11, 2024, in Denver, Colorado. The Advisory Committee presented action items for final approval of two rules and seven official forms, as well as publication of several proposed rule amendments. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 237.

*Action Items*

***Final Approval of Proposed Amendments to Rule 3002.1 (Notice Relating to Claims Secured by a Security Interest in the Debtor's Principal Residence in a Chapter 13 Case) and Proposed New Official Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R.*** Judge Connelly reported on this item. The text of the proposed amendments begins on page 253 of the agenda book, and the written report begins on page 239.

Rule 3002.1 applies in Chapter 13 cases and addresses notices from mortgage companies concerning postpetition mortgage payments. The proposed amendment to Rule 3002.1 provides for status updates during the case and enhances the notice at the end of the case. The six accompanying forms—which consist of two motions, one notice, and responses to them—provide a uniform mechanism to do this.

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The Standing Committee approved the proposal for publication last year, and the Advisory Committee received a number of helpful, constructive comments. The comments guided the Advisory Committee in making clarifying changes in the proposed rule. The Advisory Committee unanimously approved Rule 3002.1 and the accompanying forms at its spring meeting.

Following a brief style discussion, Judge Bates called for a motion on a vote for final approval for the proposed amendment to Rule 3002.1 and the adoption of the six new official forms as presented in the agenda book. Mr. Byron and Professor Gibson clarified that the effective date for the official forms related to Rule 3002.1, if approved, would be the same as the proposed changes to the rule, December 1, 2025.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendments to Rule 3002.1 and new Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R.**

***Final Approval of Proposed Amendment to Rule 8006(g) (Certifying a Direct Appeal to a Court of Appeals).*** Judge Connelly reported on this item. The text of the proposed amendment begins on page 291 of the agenda book, and the written report begins on page 241.

The proposed amendment to Rule 8006(g) clarifies that any party to the appeal may request that the court of appeals authorize a direct appeal. The Advisory Committee received only one comment during publication, and it was supportive. This change is related to, and consistent with, Appellate Rule 6(c)(2)(A), which was given final approval during the Appellate Rules Committee's report.

Professor Hartnett noted that this small amendment to Rule 8006 drove virtually all of the revisions to Appellate Rule 6, and he thanked the Bankruptcy Rules Committee for working closely with the Appellate Rules Committee.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendment to Rule 8006(g).**

***Final Approval of Proposed Amendment to Official Form 410 (Proof of Claim).*** Judge Connelly reported on this item. The text of the proposed amendment begins on page 327 of the agenda book, and the written report begins on page 245.

The uniform claim identifier (UCI) is a bankruptcy identifier that was developed to facilitate electronic disbursements in Chapter 13 cases to certain large creditors. Official Form 410, which is the proof of claim form used by any creditor making a claim for payment in a bankruptcy case, currently provides for the creditor's disclosure of the UCI "for electronic payments in Chapter 13 (if you use one)." The proposed amendment would eliminate that restriction, thereby expanding the disclosure of the UCI to any chapter and for nonelectronic disbursements, as well as electronic disbursements. Following publication, the Advisory Committee received one favorable comment.

Mr. Byron and Professor Gibson clarified that, unlike the official forms related to Rule 3002.1, the amendment to Official Form 410, if approved, would take effect in the normal course on December 1, 2024.

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Professor Coquillette asked if this identifier could cause any privacy issues. Judge Connelly responded that use of a UCI may enhance debtor privacy, as it does not require a full account number or Social Security number. It is a unique bankruptcy identifier for creditors that use it to identify the creditor, court, and debtor's claim.

An academic member asked what would happen if someone wanted to use Official Form 410 to file a proof of claim on behalf of someone else, such as a would-be class representative filing on behalf of members of a proposed class under Rule 7023. Judge Connelly commented that this form cannot address all circumstances but that this change would not be affected by who is filing the claim. She added that only parties who represent large institutions would be likely to use an accounting system that would involve a UCI. There are also safeguards in place to address false or duplicative claims.

One additional technical change was made to Official Form 410 to conform it to the restyled Bankruptcy Rules scheduled to go into effect on December 1, 2024: The reference to Bankruptcy Rule 5005(a)(2) in Part 3 of the form was changed to Rule 5005(a)(3).

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendment to Official Form 410.**

***Publication of Proposed Amendment to Rule 3018 (Chapter 9 or 11 – Accepting or Rejecting a Plan).*** Judge Connelly reported on this item. The text of the proposed amendment begins on page 334 of the agenda book, and the written report begins on page 245.

The Standing Committee approved this proposal for publication at its January 2024 meeting. After that meeting, Professor Struve and the Standing Committee's liaison to the Bankruptcy Rules Committee, among others, raised some concerns about the language that had been approved. The Advisory Committee considered those comments and approved some clarifying revisions at its spring meeting. It now seeks approval to publish this revised version for public comment.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendment to Rule 3018 for public comment.**

***Publication of Proposed Amendments to Rules 9014 (Contested Matters), 9017 (Evidence), and new Bankruptcy Rule 7043 (Taking Testimony).*** Judge Connelly reported on this item. The text of the proposed amendments begins on page 341 of the agenda book, and the written report begins on page 247.

This proposal relates to the means of taking testimony in bankruptcy cases, and, if approved, would establish different standards for allowing remote testimony in bankruptcy adversary proceedings (separate lawsuits within the bankruptcy case analogous to a civil action in district court) and contested matters (a motion-based procedure that can usually be resolved

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expeditiously by means of a hearing).[1] Under current Rule 9017, Civil Rule 43 applies to "cases under the Code." Civil Rule 43(a), in turn, provides that, at trial, a court may permit testimony by remote means if three criteria are present: (1) good cause, (2) appropriate safeguards, and (3) compelling circumstances. Many bankruptcy courts read Bankruptcy Rules 9014(d) and 9017 together to require that the three-part standard set forth in Civil Rule 43(a) must be met before allowing any remote testimony in a bankruptcy case, whether it is in a contested matter or an adversary proceeding.

This proposal would remove the reference to Civil Rule 43 in Rule 9017, but it would retain Rule 43(a)'s three-part standard for allowing remote testimony in adversary proceedings via a new Rule 7043. A separate amendment would be made to Rule 9014(d) that would incorporate most of the language in Civil Rule 43, but without the requirement to show "compelling circumstances" before a court could allow remote testimony in a contested matter. Good cause—now shortened by restyling to "cause"—and appropriate safeguards would continue to be required for a witness to testify remotely in contested matters.

When this proposal came before Advisory Committee during its fall 2023 meeting, it was pointed out that the Judicial Conference was considering amendments to the broadcast policy based on a recommendation—which has since been adopted—from the Committee on Court Administration and Case Management (CACM). The proposal was delayed so that the Advisory Committee could confer with the CACM Committee. A CACM subcommittee, with input from the Committee on the Administration of the Bankruptcy System, considered this bankruptcy rules proposal and indicated that the proposed amendments and their publication would not violate the new policy or interfere with the CACM Committee's ongoing work.

At the Advisory Committee's spring meeting, there was consensus to seek public comment on the proposal. There was also a question raised about whether this proposal represented a first step with the goal of allowing remote testimony more broadly in bankruptcy cases. Judge Connelly explained that it was not—and is not—the intent of the proposal to herald a broader change, although the Advisory Committee recognizes that adoption of this proposal might lead to future suggestions to adopt the less stringent standard for remote testimony beyond contested matters.

Judge Bates stated that remote proceedings and remote testimony are important issues across the judiciary, not only in the bankruptcy courts. He asked three questions. First, what is the current practice, and is remote testimony being taken already? Second, what are the expected effects of the proposed amendments? Third, what does the standard "for cause and with appropriate safeguards" mean?

As to the first question, Judge Connelly explained that she did not have hard data. Based on conversations with colleagues, she said that remote testimony has been occurring on an ad hoc

[1] Contested matters do not require the procedural formalities used in adversary proceedings, including a complaint, answer, counterclaim, crossclaim, and third-party practice or a discovery plan. They occur frequently over the course of a bankruptcy case and are often resolved on the basis of uncontested testimony. Testimony might concern, for example, the simple proffer by a debtor about the ability to make ongoing installment payments for an automobile that is the subject of a motion to lift the automatic stay. Or, as another example, testimony might be given in a commercial chapter 11 case by a corporate officer about ongoing operational costs in support of a motion to use estate assets to maintain business operations.

basis following the pandemic. Her impression was that, although not unheard-of pre-pandemic, it has become more common to allow remote testimony in contested matters in Chapter 11 cases because these cases involve parties across the country or the world and the hearings tend to be more administrative and for the purpose of gathering information. She thought that permitting remote testimony for background information in consumer cases was rare pre-pandemic but that the practice has become more common post-pandemic—although some judges have told her that they feel they can no longer take remote testimony now that the pandemic has subsided.

As to expectations concerning the proposed amendments, Judge Connelly anticipates that remote testimony will become more common in contested matters, particularly consumer matters. She noted, however, that some bankruptcy judges have expressed concern about taking remote testimony and giving increased discretion to those judges is not likely to change their practice.

Judge Connelly said that "cause and appropriate safeguards" under proposed Rule 9014(d) means what "good cause" and "appropriate safeguards" mean under Civil Rule 43, adding that under the restyled Bankruptcy Rules "good cause" is restyled to "cause." Part of the reason for the proposed change, however, was that under most of the published opinions on Civil Rule 43 courts have held that the "compelling circumstances" element in Rule 43 is almost impossible to meet. Many courts have found that distance to the courthouse and financial concerns—two big issues in bankruptcy—are not compelling circumstances that would allow for remote testimony, though they might be enough to find cause to allow remote testimony.

Judge Bates expressed some concern about the prospect that the amendments would make remote testimony more common than it is under the existing rules, and wondered if it might be expected to overtake the general rule requiring in-person testimony. Judge Connelly stated that live testimony would, of course, remain the default under the rules. A party would need to request permission to testify remotely, and a judge would need to find cause.

Professor Marcus mentioned, for context, the Civil Rule 43(a) proposal on page 527 of the agenda book. The Civil Rules Committee has referred that proposal to a subcommittee, in which Judge Kahn is participating on behalf of the Bankruptcy Rules Committee. The practitioners who have proposed the amendment to Civil Rule 43 wish to significantly expand the availability of remote testimony in proceedings under the Civil Rules. While the bankruptcy proposal does not change the standard for adversary proceedings, the Civil Rules Committee would be very interested in seeing any comments on the bankruptcy proposal.

Professor Hartnett asked how often subpoenas are required in contested matters and whether bankruptcy has the same issues as civil with respect to Civil Rule 45 distance requirements. Judge Connelly responded that subpoenas are common in adversary proceedings but less so in contested matters.

A judge member inquired if the Advisory Committee contemplated a judge making a blanket order setting remote testimony as the default for certain categories of matters. He explained that there is a new courthouse that is not yet accessible to the public for security reasons, but the bankruptcy judges were able to move in because most things are done remotely. Judge Connelly responded that the Advisory Committee did not anticipate such blanket orders. If anything, she had heard from colleagues the opposite, that is, that they would generally not approve requests to

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testify remotely. There might, however, be circumstances that prevent people from being able to access the courthouse—like security, the pandemic, or weather—and being able to conduct hearings in those circumstances is valuable to the system.

Ms. Shapiro asked why the CACM Committee did not think this would interfere with its work. Mr. Byron and others explained that the CACM Committee separates the ideas of using technology for broadcasting—making the courtroom more accessible to the public—from remote participation, such as allowing witnesses to testify remotely. Because the CACM Committee is focused on broadcasting, this proposal on remote testimony in contested matters is different in kind from, and does not impede, its work. Ms. Shapiro commented that, whether intended or not, some might conflate remote testimony and remote public access because proponents of cameras in the courtroom use a similar good cause and substantial safeguards standard.

Another judge member pointed out that the committee note for Civil Rule 43 has extensive discussion of what constitutes "good cause" and says that "good cause and compelling circumstances" may be established with relative ease if all parties agree that testimony should be presented by remote transmission. She asked if there should be more detail in the bankruptcy rule's note about it. Judge Bates wondered if that supports a cross-reference in the committee note to the explanation in the committee note to Civil Rule 43 about good cause. Judge Connelly responded that a cross-reference to the Rule 43 committee note might make sense, but she explained that unlike in a two-party dispute, it would be difficult in a contested bankruptcy matter to get the consent of every affected party, which technically could include all creditors in the bankruptcy case. So, while there may be consent of all hearing participants, that might not mean the same thing as consent of all parties in a civil case in district court.

Judge Bates later observed that Civil Rule 43 has been viewed as limiting remote proceedings whereas the proposed bankruptcy rule is intended to expand access to remote proceedings. Yet, they share most of the same language, including a reference in the note to Civil Rule 43, and the only change is the removal of the language requiring compelling circumstances.

Professor Bartell responded that both rules permit remote proceedings but only under very limited circumstances. The proposed bankruptcy rule will simply permit it in slightly broader circumstances. Judge Connelly added that, under both rules, the judge still has discretion and there must be cause. Professor Bartell also noted that, in jurisdictions with a large geographic scope, in-person attendance can be a significant burden on parties, whether on the debtor or creditor side. Presumably, jurisdictions with small geographic areas will have fewer situations calling for remote testimony. Judge Bates noted that the vast area explanation also comes up in other contexts like non-random case assignment.

A judge member commented that there will always be some basis for cause—convenience or lesser expense—so, as a practical matter, dropping compelling circumstances means that this decision will be left to the judge's discretion in contested matters. Judge Connelly noted that this could be another reason to cross-reference Civil Rule 43 for the cause standard.

A practitioner member remarked that the big question is whether this is the beginning of a larger creep toward allowing remote participation in proceedings more generally, and another practitioner member wondered if this proposal should be on the same timeline as the recent

suggestion concerning Civil Rule 43. An academic member pointed out that, while coordination is generally a good idea, the Bankruptcy Rules often adapt to new technology first, and that experience in that arena can inform the other rule sets.

Judge Connelly reiterated that this proposal does not affect Civil Rule 43's application in adversary proceedings; it only affects contested matters and only by removing the need to show compelling circumstances. That is a much more limited change than what is proposed to Civil Rule 43. Delaying the bankruptcy proposal might make things more complicated.

Several committee members felt it would be helpful to add language to the committee note giving a principled reason for why contested matters are being treated differently than adversary proceedings. For example, contested matters occur with routine frequency, often require the attendance of pro se litigants, are shorter, involve more affected parties which makes consent harder to obtain, and often involve testimony where credibility is less of an issue.

Judge Bates remarked that his sense of the Standing Committee's discussion was that it is not necessary to tie the timing of this proposal to that of the proposal concerning Civil Rule 43 but that some additional explanation in the committee note would be useful.

The committee briefly discussed how to incorporate this feedback without delaying publication for another year. A practitioner member asked if this could be handled via email in the coming days, and Judge Bates commented that an email vote is only used if there is some need to resolve the matter promptly. A judge member asked if remote testimony is being permitted around the country. Judge Connelly noted that remote testimony is taking place, although it was hard to tell how often, and there is some urgency in the need to provide clarity. She offered to provide the amendment to the note very promptly. Another judge member remarked that it would be enough for him if the note captured the explanation given during the meeting and that he would like to give the Advisory Committee leadership an opportunity to provide that without derailing the process entirely. Judge Bates emphasized that this would not create a precedent, but, with no opposition from the Standing Committee, he was comfortable with handling this matter by email.

Following the meeting, Judge Connelly and Professors Gibson and Bartell prepared a revised committee note for Rule 9014 that addresses the concerns raised during the Standing Committee meeting, explaining why contested matters are different from adversary proceedings. The Advisory Committee unanimously approved the revised committee note for publication. The revised committee note was circulated to the Standing Committee, which unanimously approved it, and the revised language was included in the agenda book posted on the judiciary's public website.

By email ballot and without opposition: **The Standing Committee gave approval to publish the proposed amendments to Rules 9014 and 9017 and proposed new Rule 7043 for public comment.**

***Publication of Proposed Amendments to Rules 1007 (Lists, Schedules, Statements, and Other Documents; Time to File), 5009 (Closing a Chapter 7, 12, 13, or 15 Case; Declaring Liens Satisfied), and 9006 (Computing and Extending Time; Motions).*** The text of the proposed amendments begins on page 331 of the agenda book, and the written report begins on page 248.

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By statute, most individual debtors must complete a course on personal financial management to receive a discharge. Rule 1007 provides the deadline for filing a certificate of course completion, and Rule 9006 provides for altering timelines. The proposal is to eliminate the deadline in Rule 1007 and the cross-reference in Rule 9006. The education requirement is a prerequisite for the discharge, but there is not a particular statutory deadline. But because there is a specific deadline in Rule 1007, some courts have denied a discharge even if the debtor completed the education after the deadline. The Advisory Committee seeks to publish this proposal to address the concern that the rule is making it unnecessarily difficult for debtors to obtain a discharge.

Relatedly, Rule 5009 directs the clerk to perform certain tasks, including sending a reminder notice to debtors who have not filed a certification of completion. This proposal would add a second reminder notice creating a two-tiered system with one notice early in the case when engagement is higher, and a second notice, if the certification of course completion has not been filed, before the case is closed.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendments to Rules 1007, 5009, and 9006 for public comment.**

*Information Items*

In the interest of time, Judge Connelly and the reporters referred the Standing Committee to the written materials, beginning on page 250 of the agenda book, for a report on four information items. The information items pertain to suggestions to remove partially redacted social-security numbers from certain filings, suggestions to allow the use of masters in bankruptcy cases, a description of technical amendments made to certain bankruptcy forms and form instructions to reflect the restyling of the Bankruptcy Rules, and a decision not to go forward with proposed amendments to two forms.

Judge Bates thanked Judge Connelly and the Advisory Committee.

## REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Rosenberg and Professors Marcus and Bradt presented the report of the Advisory Committee on Civil Rules, which last met on April 9, 2024, in Denver, Colorado. The Advisory Committee presented two action items and several information items. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 375.

Judge Rosenberg reported that, in August 2023, proposed amendments to Rules 16 and 26, dealing with privilege log issues, and a new Rule 16.1 on multidistrict litigation (MDL) proceedings were published for public comment. Three public hearings were held on these changes in October 2023, January 2024, and February 2024, presenting the views of over 80 witnesses. The public comment period ended on February 16, 2024. On April 9, the Advisory Committee voted unanimously to seek final approval from the Standing Committee for both proposals.

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*Action Items*

***Final Approval of Proposed Amendments to Rules 16(b)(3) (Pretrial Conferences; Scheduling; Management) and 26(f)(3) (Duty to Disclose; General Provisions Governing Discovery).*** Judge Rosenberg reported on this item. The text of the proposed rule amendments begins, respectively, on page 530 and page 550 of the agenda book, and the written report begins on page 379.

In August 2023, amendments to Rules 26(f)(3)(D) and 16(b)(3)(B)(iv), the "privilege log" rule amendments, were published for public comment, and there was a lot of feedback from the viewpoints of both discovery "producers" and "requesters." Summaries of the testimony and written comments begin on page 391 of the agenda book. The Discovery Subcommittee recommended no change to the rule text, but it shortened the committee note considerably. The shortened committee note omitted observations about burdens, avoided language favoring either side, and took no position on controversial issues raised during the public comment process. As described in the Advisory Committee's written report, the subcommittee considered several other issues but ultimately did not recommend other changes to the proposal.

Professor Marcus emphasized that the Advisory Committee preferred an adaptable approach. Shortening the committee note was intended to allow judges to consider arguments from both sides without the note giving support to either.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendments to Rules 26(f)(3)(D) and 16(b)(3)(B)(iv).**

***Final Approval of Proposed New Rule 16.1 (Multidistrict Litigation).*** Judge Rosenberg reported on this item. The text of the proposed new rule begins on page 533 of the agenda book, and the written report begins on page 414.

Judge Rosenberg acknowledged the long, hard work of many people on Rule 16.1, including contributions from Judge Proctor, the current chair of the MDL Subcommittee, and Judge Dow, the prior Chair of the MDL Subcommittee and the Advisory Committee. She also recognized the work of Judge Bates, the Advisory Committee members and reporters, the stylists, and the many organizations and individuals who have offered their feedback during this seven-year process.

The Advisory Committee heard from over 80 witnesses and received over 100 written comments, representing a diverse set of views and perspectives. The MDL transferee judges expressed strong, unanimous support for the proposed Rule 16.1 at the transferee judges conferences in October 2022 and 2023. In addition, the two judges who have been assigned perhaps the most MDLs and the largest MDL wrote letters in support of the version approved for public comment. The MDL Subcommittee and the full Advisory Committee weighed this feedback carefully.

As detailed in the written report, since publication, the proposed rule has been restructured to address both style and substantive feedback. The revised rule now has two lists of prompts to consider, differentiating topics calling for the parties' "initial" views, those topics where court action may be premature before leadership counsel is appointed, if that is to occur, from those

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topics that frequently call for early action by the court. Additionally, the revised proposal omits a provision concerning the appointment of coordinating counsel, which generated negative feedback. Nothing in the revised rule precludes a judge from appointing coordinating or liaison counsel, but the negative public reaction to that provision resulted in its removal from the rule. The rule also highlights the need to decide early whether, and if so how, to appoint leadership counsel. The revised rule also reverses the default such that parties must address the matters listed in the rule unless the court directs otherwise.

The Advisory Committee concluded that republication was not required in light of these changes. Under the rules committees' governing procedures, republication is appropriate when an advisory committee makes substantial changes to a rule after publication unless it determines that republication would not be necessary to achieve adequate public comment and would not assist the work of the rules committees. The Advisory Committee concluded that the post-publication changes to proposed Rule 16.1 did not rise to the level of substantial changes. Moreover, the changes were discussed regularly throughout the hearings and rulemaking process, and the changes were made in light of the comments the Advisory Committee received.

Professor Marcus emphasized that the public comment period really works and that the rule proposal today is quite similar to the published version albeit rearranged after careful reconsideration. The support of the transferee judges is significant, and the alternative to something like this rule is to leave transferee judges with no indication of the parties' views going into the initial management conference. The Advisory Committee worked for seven years on this proposal, and the original MDL Subcommittee was appointed by Judge Bates when he was chair of the Advisory Committee.

Professor Bradt remarked that the process and outreach to practitioners, academics, and judges had been extraordinary. Although this rule may not include everything that any particular group would have wanted, it achieved consensus.

Professor Cooper added that this rule is discretionary, not a mandate, and is a terrific guide.

Judge Bates congratulated the Advisory Committee's current leadership, members, and predecessors for an outstanding effort in preparing this rule. It is a modest rule considering the initial proposals.

Judge Rosenberg explained that, shortly before the meeting, a judge member of the Standing Committee had suggested clarifying the term "judicial assistance" in the committee note regarding Rule 16.1(b)(3)(E). In response, Judge Rosenberg proposed the following change to the paragraph beginning on page 547, line 386:

> **Rule 16.1(b)(3)(E).** Whether or not the court has appointed leadership counsel, the court may consider measures to facilitate the resolution of some or all actions before the court ~~it may be that judicial assistance could facilitate the resolution of some or all actions before the transferee court~~. ~~Ultimately, the question of whether parties reach a settlement is just that – a decision to be made by the parties. But the court may assist the parties in efforts at resolution.~~ In MDL proceedings, in addition to mediation and other dispute resolution alternatives, focused discovery orders, timely adjudication of principal legal issues,

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> selection of representative bellwether trials, and coordination with state courts may facilitate resolution. Ultimately, the question of whether parties reach a settlement is just that – a decision to be made by the parties. But the court may assist the parties in efforts at resolution.

Judge Bates pointed out that the paragraph begins with "[w]hether or not the court has appointed leadership counsel" yet this provision is contained in a list that must wait for appointment of leadership counsel. Professor Marcus stated that Judge Bates identified a drafting challenge in that the question of leadership counsel informs a variety of other issues. A judge member suggested striking that introductory phrase, which Judge Rosenberg accepted. This change to the committee note—including the omission of "Whether or not the court has appointed leadership counsel"—was incorporated into the Rule 16.1 proposal.

With respect to proposed Rule 16.1(b)(2)(A)(iv), Judge Bates suggested adding "facilitating" before "resolution." That term reflects the language in proposed Rule 16.1(b)(3)(E) and the language in the committee note explaining that one purpose of item (iv) "is to facilitate resolution of claims." Judge Bates also suggested deleting "some of" in the committee note on page 539, line 140, because this is the only reason given for all of the items. With Judge Rosenberg's agreement and the input from the style consultants, "facilitating" was added to Rule 16.1(b)(2)(A)(iv), and the language in the committee note for Rule 16.1(b)(2) was changed to "court action on a matter ~~some of the matters~~ identified in Rule 16.1(b)(3)."

Judge Bates also commented that whether direct filings will be permitted is a threshold question for the transferee court, but the language in proposed Rule 16.1(b)(2)(D) ("how to manage the direct filing of new actions in the MDL proceedings") seems to presume that there would be direct filings. Judge Rosenberg explained that the current language served to notify the court that there will likely be actions filed directly in the transferee court in addition to those transferred as tagalongs by the Judicial Panel on Multidistrict Litigation (JPML). The use of "manage" in the rule is also intended to encourage parties to think about issues like choice of law and where a directly filed case would be remanded if less than the entire case is resolved in the MDL. Professor Bradt added that there will inevitably be actions filed directly in the transferee court even if there is no direct filing stipulation to waive venue and personal jurisdiction objections. It is the plaintiff's decision where to file in the first instance and the defendant's decision whether to challenge that decision by a Rule 12(b) motion. The current language avoids weighing in on whether a direct filing order pursuant to a defendant's stipulation is necessary, and he worried that it would create confusion if the rule were changed to suggest that the plaintiff could not file first in the MDL forum. Judge Bates said that he would defer to the Advisory Committee's judgment on the direct filing language.

A practitioner member pointed out that the transferee court may be a natural jurisdiction for trial purposes, so there will be direct filings. There could even be direct filings in MDLs involving class actions; she recalled one MDL in which over 400 class actions were filed. MDLs are inherently trans-substantive, and she was impressed by the balance that the Advisory Committee struck to give flexibility. She suggested removing "(g)" from "Rule 23(g)" on page 543, line 256, in response to a concern that she heard from antitrust and securities practitioners. They were concerned that the case management provisions in Rule 16 and 23 might be abrogated by Rule 16.1. Without objection, that change was made to the committee note.

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Another practitioner member asked about the interplay of proposed Rule 16.1(b)(2)(D) and (E) and how to manage plaintiffs who file lawsuits outside the transferee court. Professor Marcus noted that such a case when filed in another federal district court is a tag-along, and it will be transferred to the transferee court unless the JPML chooses not to do so. Professor Bradt remarked that how to deal with tag-along actions is fairly regularized. The rule deals with direct filings because there is a lot of confusion that does not apply to tag-alongs. Another practitioner member added that the JPML has a set of detailed rules regarding tag-alongs, which is likely why it has not been brought up in this rule. Whether to transfer the tag-along case to the transferee district is up to the JPML, not the transferee court; so the issues that would actually come before the transferee court (rather than the JPML) are those in the categories described by (D) and (E).

Another practitioner member worried about the term "authority" in proposed Rule 16.1(b)(2)(A)(iv), referring to leadership counsel's "responsibilities and authority in conducting pretrial activities," and what it might suggest about leadership counsel's ability to bind other attorneys. Striking "and authority" would make it more consistent with the committee note, which speaks of duties and responsibilities, not authority. Professor Marcus responded that to say only "responsibilities" would leave out an important part of the appointment of leadership counsel; as proposed Rule 16.1(b)(2)(A)(vi) recognizes, a corollary to appointing leadership counsel often involves setting limits on activity by nonleadership counsel. Judge Rosenberg noted that one of her prior orders of appointment, which was based on a survey of other judges' orders, defined the "authority, duties, and responsibility" of plaintiffs' leadership.

After a review of all of the changes, Judge Bates called for a motion to approve proposed new Rule 16.1.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed new Rule 16.1.**

*Information Items*

Judge Rosenberg reported on the work of the Advisory Committee's subcommittees as well as a few other information items. These items are described in the written report beginning on page 523 of the agenda book.

***Rule 41 Subcommittee.*** The Rule 41 Subcommittee was formed in October 2022 in response to submissions identifying a circuit split on whether Rule 41 permits a unilateral, voluntary dismissal of something less than an entire action. The subcommittee has concluded that the rule should be revised to explicitly increase its flexibility so that parties can dismiss one or more claims from the case. That is consistent with the prevailing district court practice and the policy goal of narrowing the issues in the case. The subcommittee plans to put forth proposed text at the fall Advisory Committee meeting, changing "an action" to "a claim."

***Discovery Subcommittee.*** The Discovery Subcommittee continues to work on two items—the manner of service for subpoenas, and filing under seal—that were reported on at the January Standing Committee meeting.

***Rule 7.1 Subcommittee.*** The Rule 7.1 Subcommittee also hopes to put forward a proposal at the fall Advisory Committee meeting. The subcommittee has been considering whether to

expand the disclosures required of non-governmental organizations. Rule 7.1 disclosures inform judges when making recusal decisions under 28 U.S.C. § 455(b)(4). The Committee on Codes of Conduct recently issued guidance providing that judges should recuse themselves when they have a financial interest in a parent company that controls a party to a case before them. Professor Bradt added that the subcommittee is working on a rule that makes it as easy as possible for judges to implement this guidance.

***Cross-Border Discovery Subcommittee.*** Cross-border discovery is a big issue, and the subcommittee is in an early, information-gathering stage. The subcommittee decided to focus first on handling discovery for use in litigation in the United States and the application of the Hague Convention.

***Rule 43/45 Subcommittee.*** A number of plaintiff-side attorneys have suggested resolving a split in courts about the interaction of (i) Rule 45(c)'s limitations on where a witness must appear under subpoena and (ii) the possibility of remote testimony under Rule 43(a) from an unwilling witness whose presence at a distant place of testimony can be obtained only by subpoena. A new subcommittee has been created to look at this issue.

Professor Marcus noted that there are two subcommittees looking at Rule 45. The Rule 45 aspect of this remote testimony question appears easier to solve compared to the Rule 43 part. It is possible that the Advisory Committee will consider the Rule 45 issues together in a single proposal separate from the Rule 43 remote testimony question.

***Random Case Assignment.*** The reporters continue to research this issue and monitor the effects of new Judicial Conference guidance that encourages random assignment of cases seeking nationwide or statewide injunctive relief. Professor Bradt added that he is researching Rules Enabling Act authority for a rule and what a rule might look like. The subcommittee will focus on monitoring the uptake of the new guidance over the summer.

***Use of the Word "Master" in the Rules.*** The American Bar Association proposed removing the word "master" from the rules, particularly Rule 53, and substituting "court-appointed neutral." The Academy of Court-Appointed Neutrals (formerly the Academy of Court-Appointed Masters) supports the proposal. The Advisory Committee would appreciate the views of the Standing Committee on whether the word "master" should be discarded in the rules and, if so, what term should replace it. The term "master" appears in at least six other rules, the Supreme Court's rules, and at least one statute. Judges also use the term in making appointments to assist in the conduct of litigation even without relying on Rule 53.

Professor Marcus sought guidance, particularly from judges. The term "master" has been used in Anglo-American jurisprudence for a very long time, but it has also been used in a very harmful way in contexts mostly unrelated to judicial proceedings. Anecdotally, from the two judges he asked, he heard opposite views about whether a change is needed.

Hearing nothing, Judge Bates noted that the Standing Committee members could reach out to Professor Marcus after the meeting and commented that the Standing Committee would look forward to the Advisory Committee's views.

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***Demands for Jury Trials in Removed Actions.*** The Advisory Committee has not yet decided how to address the verb-tense change made during the restyling of Rule 81(c)(3)(A) and the potential issues that it may be causing in removed actions.

Judge Bates thanked Judge Rosenberg and the reporters for their report.

## REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Dever presented the report of the Advisory Committee on Criminal Rules, which last met on April 18, 2024, in Washington, D.C. The Advisory Committee presented four information items and no action items. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 573.

*Information Items*

***Rule 17 and pretrial subpoena authority.*** The Rule 17 Subcommittee, chaired by Judge Nguyen, has been considering how information is gathered from third parties in criminal cases and has determined that there is a need to clarify the rule. The subcommittee has conducted a survey and gathered information showing that there is great disparity in actual practice regarding how Rule 17 has been interpreted by courts. The subcommittee has been working to draft language for the Advisory Committee to review and possibly to road test.

***Rule 53 and broadcasting criminal proceedings.*** The Rule 53 Subcommittee is considering a suggestion from a consortium of media groups proposing to amend Rule 53 to give courts discretion to televise trials. The Rules Law Clerk has prepared a memorandum on the history of Rule 53, and the subcommittee is now in the process of gathering information about actual practice. Judge Michael Mosman, who joined the Advisory Committee to replace Judge Conrad after he was appointed Director of the Administrative Office of the U.S. Courts, will serve as a member of the Rule 53 Subcommittee.

The subcommittee is also coordinating with the CACM Committee. As Judge Dever commented during the discussion on remote testimony in contested bankruptcy matters, the CACM Committee draws a distinction between using technology to bring witnesses into court and using technology to expand the courtroom.

***Rule 49.1 and references to minors by pseudonyms.*** The Advisory Committee recently received a suggestion from the Department of Justice to amend Rule 49.1 to protect the privacy of minors by using pseudonyms, instead of initials as is currently required. Judge Dever announced a new Privacy Subcommittee, headed by Judge Harvey, to consider this proposal as well as other issues under Rule 49.1, including the redaction of social-security numbers.

***Ambiguities and gaps in Rule 40.*** Magistrate Judge Bolitho submitted a proposal to clarify Rule 40 as it applies when a defendant from outside the district is arrested for violating conditions of release. The Magistrate Judges Advisory Group recently submitted a comprehensive request concerning additional amendments to Rule 40 that would address several issues of concern, including the situation raised by Judge Bolitho. Judge Dever anticipates creating a new subcommittee.

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## REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Schiltz and Professor Capra presented the report of the Advisory Committee on Evidence Rules, which last met on April 19, 2024, in Washington, D.C. The Advisory Committee presented one action item and three information items. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 96.

*Action Item*

***Publication of Proposed Amendment to Rule 801 (Definitions That Apply to This Article; Exclusions from Hearsay).*** Judge Schiltz reported on this item. The text of the proposed amendment appears on page 102 of the agenda book, and the written report begins on page 97.

This proposal is related to a witness's prior inconsistent statements, which are introduced early and often at trials. In theory, under the current Rule, prior inconsistent statements can be used only to assess the credibility of a witness—not for the substance of the statement—unless the statement was made under oath at a formal proceeding. As a practical matter, prior inconsistent statements are likely being used by jurors for substantive purposes, and the proposed amendment would allow admissible prior inconsistent statements to be used for both credibility and substance.

Aside from prosecutors using grand jury testimony, prior inconsistent statements are rarely made under oath at a formal proceeding. Judges give instructions like the following: "You heard Joe testify that the light was red. You also heard that, a few months ago, Joe told his sister that the light was green. You may use Joe's statement to his sister in deciding whether Joe was being truthful in saying the light was red, but you may not use Joe's statement to his sister in deciding whether the light was red." But many trial judges believe jurors do not understand or follow such instructions, and attorneys often do not ask for these instructions.

As a matter of hearsay law, a prior inconsistent statement cannot be admitted unless the person who made it is on the stand, under oath, and subject to cross-examination; this proposal would not change that standard and would not result in jurors hearing anything new. Rather, the proposal would bring the rule into alignment with practice and spare judges from giving jury instructions that are likely not being followed. It would further bring the treatment of prior *inconsistent* statements into alignment with prior *consistent* statements, which may be considered for both purposes (substance and credibility). This would restore the rule to the version proposed by the original Advisory Committee before Congress, in enacting the Evidence Rules, changed Rule 801's approach to prior inconsistent statements. Additionally, about half of the states have more lenient treatment than the federal rules, and around 15 states allow the use of prior inconsistent statements for any purpose.

One of the practitioner members commented that the proposal was elegant, but the deletion of the limiting language in Rule 801(d)(1)(A) would raise questions about new types of evidence coming in as substantive evidence. For example, in a criminal case, witnesses are commonly confronted with prior statements memorialized in federal agent notes such as the FBI form FD-302. But those federal agent notes are not a transcript and would not themselves be admissible. He wondered whether the rule would encompass prior statements that cannot be easily verified; what if the witness states that they cannot recall what they previously told the agent? He suggested

adding "is otherwise admissible under these rules" in the rule or clarifying it in the committee note. Another practitioner member suggested that the committee note could provide a more fulsome cross-reference to the other rules to expressly clarify that the statement would need to be otherwise admissible.

Professor Capra explained that proving a prior inconsistent statement is done with extrinsic evidence under Rule 613(b), and the statement will be admitted as substantive proof only if there is admissible evidence. Judge Schiltz noted that this is not an affirmative rule of admissibility. The proposal simply lifts the hearsay bar as is already done with prior consistent statements. Judge Schiltz and Professor Capra pointed out that judges could still monitor the use of statements through Rule 403, and authenticity rules also still apply. Nevertheless, they agreed that a new paragraph could be added to the committee note to clarify this issue, and there was some discussion about whether to make that change now or after publication.

A judge member asked why we would only make this clarification (referring to otherwise admissible evidence) as to inconsistent statements and not to consistent statements. Professor Capra agreed that was a good point. The rules do not say that the evidence must be admissible every time there is an exception to the hearsay rule. The judge member asked if there had been issues with the change to consistent statements, and Professor Capra indicated there had not. The judge member stated that she would not limit any change to inconsistent statements, and Professor Capra worried about negative inferences for every other hearsay exception. Another judge member echoed this concern.

The first practitioner member commented that it would be sufficient to address this in the committee note. He reiterated that the note's statement that "[t]he rule is one of admissibility, not sufficiency" implies something that the Advisory Committee did not mean to imply. Professor Capra proposed removing that sentence from the note. The previous judge member indicated that would be acceptable, and that sentence in the note was deleted without opposition.

The practitioner member also suggested deleting the word "timing" on line 79 because Rule 613(b) is not just a matter of timing, and Professor Capra agreed. A conforming change was made in line 79 to make "requirement" plural. For consistency, Judge Bates also suggested adding "prior" before "inconsistent statement" in line 31, which Judge Schiltz agreed was a good idea.

Another judge member thought there was a convincing argument that this proposal will not make a practical difference in most cases. However, this change would make a substantive difference in cases where the out-of-court statement is the only piece of evidence to fill a hole in the sufficiency of the evidence.

Judge Schiltz agreed that it is theoretically possible for a case to be decided on only a prior inconsistent statement, but he found it difficult to produce real-life examples of that happening. Professor Capra added that, as state practice shows, this rule change will make a difference in some cases. He also noted that, when Congress was initially considering Rule 801, a senator objected to the third subparagraph of Rule 801(d)(1) on the ground that a prior identification, not made under oath, should not serve as the sole basis of conviction. Congress, however, revised its thinking because, like an excited utterance, this is a form of hearsay exception, and hearsay exceptions can

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be sufficient evidence. The Evidence Rules address admissibility, not sufficiency, of evidence; concerns about sufficiency of evidence are beyond the purview of those rules.

Another judge member offered a hypothetical where five witnesses said that the light was green, and one witness gave an out-of-court hearsay statement that the light was red but recanted at trial, saying he was mistaken and could not recall. That case would now go to a jury. Judge Schiltz agreed that the case would go to the jury, but it is unlikely that jurors would credit the inconsistent statement over the five people who testified. There are already convictions based on out-of-court statements made by people who do not testify in court, such as excited utterances by victims in domestic violence cases. Under this proposal, the person who made the prior inconsistent statement would need to be in court, under oath, and subject to cross-examination.

Ms. Shapiro commented that Judge Schiltz made a compelling argument. As she had expressed to the Advisory Committee, the prosecutor community generally opposed this proposal. First, prior inconsistent statements are definitionally hearsay and unreliable. Such statements contradict what is being said on the stand. Second, prosecutors are concerned about collateral litigation around proving statements that the witness denies ever making. Finally, limiting instructions are common, and we presume juries understand and apply these instructions. Amending this rule because jurors do not understand limiting instructions could lead to many other rule changes. On the other hand, there were some prosecutors who came from states where this proposal was the rule, and they did not have issues. The Department's civil litigators were agnostic.

Professor Capra responded that the prior inconsistent statement may or may not be credible, but the reliability is guaranteed by the person being on the stand and subject to cross-examination. With respect to collateral litigation about extrinsic evidence, that already happens when a party seeks to admit the statement for impeachment purposes, and this is no different from proving any other fact. Finally, this proposal is not an attack on all limiting instructions. This limiting instruction is particularly hard to understand, which was also true in 2014 with respect to amendments addressing prior consistent statements.

Judge Bates asked Ms. Shapiro if prosecutors had a position on the agent notes issue that was raised earlier. Ms. Shapiro explained that federal agent interview notes, such as FBI FD-302 forms, are turned over during discovery as statements of the witness, but the notes are actually the work product of the agent. When an agent is testifying and there is something potentially inconsistent in the interview notes, there can be fights over whether the statement belongs to the witness or the agent. Judge Schiltz commented that these issues exist today, and this proposal does not create new problems in this respect.

Judge Schiltz and Professor Capra also noted that prosecutors coming from state courts that allow the use of prior inconsistent statements as substantive evidence say that the rule is very valuable in certain kinds of cases, like domestic violence and gang cases, where witnesses can be intimidated before the trial. And a panel of state prosecutors in California indicated several years ago that they could not bring many cases without this rule. There is also value to the defense side, and the Advisory Committee's public defender member voted in favor of publishing this rule.

Judge Bates noted that this proposal is only for publication and that further changes can be made later. He asked Judge Schiltz to clarify what the committee was voting on. Judge Schiltz

explained that the rule text is as proposed on pages 102–03 of the agenda book. The changes to the committee note are as follows: on page 103, line 31, "prior" was inserted before "inconsistent;" on page 105, line 77, the last sentence was deleted; on line 79, "timing" was deleted, and "requirement" became "requirements."

Upon motion by a member, seconded by another, and by show of hands: **The Standing Committee, with one abstention,[2] gave approval to publish the proposed amendment to Rule 801 for public comment.**

*Information Items*

Professor Capra reported on three topics being considered by the Advisory Committee. The written report begins on page 98 of the agenda book.

***Artificial intelligence and machine-generated information.*** The Advisory Committee has convened two panels of experts to educate the committee about artificial intelligence and how it affects admissibility. The Advisory Committee is focusing on two issues: (1) reliability issues concerning machine learning and algorithms and (2) authenticity issues related to deepfake audio and visual presentations.

Regarding machine learning, the Advisory Committee is looking at Article VII of the Evidence Rules. Although the issue is still in its early stages: one possibility is a new Rule 707 treating machine outputs that are used like human experts the same as human expert testimony by applying *Daubert* and Rule 702 standards.

Regarding deepfakes, the problem is how to authenticate alleged fakes. The Advisory Committee is considering proposals to create a structure for resolving these disputes but is also considering waiting and monitoring the caselaw. A New York State Bar Association commission decided to wait to see what courts are doing. In 2010, with respect to social media and allegations of hacking, the Advisory Committee determined that the authenticity rules were sufficiently flexible, and courts handled it well. The question is whether deepfakes are a difference in kind as opposed to degree. Timing also presents a dilemma. If the rule is too specific, it may no longer be relevant in three years. But a rule that is too general may not be helpful.

***Rule 609 (Impeachment by Evidence of a Criminal Conviction).*** Under Rule 609(a)(2), convictions that involve dishonesty or false statement are automatically admissible for impeachment. Rule 609(a)(1) allows a party to impeach with prior convictions that do not involve dishonesty or false statement. For non-falsity convictions, there are two balancing tests. In deference to a defendant's right to testify, Congress provided a more protective rule for defendants: the conviction is admissible only if the probative value outweighs its prejudicial effect. For all other witnesses, the admissibility is governed by Rule 403.

One professor urged the Advisory Committee to abrogate the entire rule because, as many academics argue, the rule does not make sense and is unfair. Many problematic convictions under

[2] Ms. Shapiro indicated that the DOJ would abstain for now and await publication.

Rule 609(a)(1) are being admitted against criminal defendants, particularly those similar to the crime being charged. Professor Capra explained that some Advisory Committee members felt that the problem was not with the rule but its application. On the other hand, if courts are misapplying the rule, then it may be a rule problem.

The Advisory Committee first considered eliminating Rule 609(a)(1) entirely and leaving only Rule 609(a)(2) for convictions that involve dishonesty or false statement. Some members felt that went too far so the Advisory Committee is focusing on a proposal to make the balancing test more protective for criminal defendants under Rule 609(a)(1)—the probative value must *substantially* outweigh the prejudice.

Some Advisory Committee members were also skeptical about whether this proposal would make a difference in how likely criminal defendants are to testify. Trying to determine whether, or to what extent, this rule impacts a defendant's decision to testify is difficult, and the FJC and Sentencing Commission will hopefully be able to help with data.

***Evidence of prior false accusations made by complainants in criminal cases.*** The final information item related to false complaints, most often in sexual assault cases. This proposal came from a law professor who explained that courts are not using a consistent set of rules to handle the admissibility of false complaints of sexual assault. They might use Rule 404(b), Rule 608, or Rule 412. She proposed a new Rule 416 specifically addressing false complaints.

The proposal is in a nascent stage. Reducing confusion would be good. But states have much more experience handling false complaints of sexual assault, and the Advisory Committee resolved to first look at what states are doing. Professor Liesa Richter, Consultant to the Advisory Committee, is conducting a 50-state survey on this issue.

Judge Bates thanked Judge Schiltz and Professor Capra for the report and for Judge Schlitz's many years of excellent service.

## OTHER COMMITTEE BUSINESS

The legislation tracking chart begins on page 606 of the agenda book. The Rules Law Clerk provided a legislative update, noting that the current legislative session will end shortly before the Standing Committee's next meeting.

*Action Item*

***Judiciary Strategic Planning.*** As at prior meetings, Judge Bates asked the Standing Committee to authorize him to work with Rules Committee Staff to respond to the Judicial Conference of the United States regarding strategic planning. Without objection, the Standing Committee authorized Judge Bates to work with Rules Committee Staff to submit a response regarding Strategic Planning on behalf of the Standing Committee.

**2024 Report on the Adequacy of Privacy Rules Prescribed Under the E-Government Act of 2002 (2024 Privacy Report).** This was the last item on the meeting's agenda, and the draft 2024 Privacy Report is included in the agenda book starting on page 616. Mr. Byron asked for the

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Standing Committee's approval of this draft with authorization for the Chair and Secretary to make minor changes based on feedback leading up to the Judicial Conference.

Judge Bates noted that the CACM Committee played a substantial role in preparing the 2024 Privacy Report. Mr. Byron added that the FJC also meaningfully contributed. The report describes the first phase of a study that the FJC conducted, which will assist both the CACM Committee and the Rules Committees in evaluating the adequacy of the privacy rules.

Without objection, the Standing Committee recommended that the Judicial Conference approve the 2024 Privacy Report, subject to any minor revisions approved by the Chair, and ask the AO Director to transmit it to Congress in accordance with law.

## CONCLUDING REMARKS

Judge Bates thanked the Standing Committee members and other attendees. The Standing Committee will next convene on January 7, 2025, in a location to be announced.

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# TAB 2B

**Agenda E-19 (Summary)**
**Rules**
**September 2024**

## SUMMARY OF THE

## REPORT OF THE JUDICIAL CONFERENCE

## COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

The Committee on Rules of Practice and Procedure recommends that the Judicial Conference:

1. Approve the proposed amendments to Appellate Rules 6 and 39, as set forth in Appendix A, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law........................................................................................ pp. 2-4

2. a. Approve the proposed amendments to Bankruptcy Rules 3002.1 and 8006, as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law;

   b. Approve, effective December 1, 2025 and contingent on the approval of the above-noted amendments to Bankruptcy Rule 3002.1, the proposed amendments to Bankruptcy Official Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R, as set forth in Appendix B, for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date; and

   c. Approve, effective December 1, 2024, the proposed amendments to Official Form 410, as set forth in Appendix B, for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date ............................ pp. 7-9

3. Approve the proposed amendments to Civil Rules 16 and 26, and new Rule 16.1, as set forth in Appendix C, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law............................................. pp. 11-13

**NOTICE**
**NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE CONFERENCE ITSELF.**

4. Approve the proposed 2024 Report of the Judicial Conference of the United States on the Adequacy of Privacy Rules Prescribed Under the E-Government Act of 2002, as set forth in Appendix D, and ask the Administrative Office Director to transmit it to Congress in accordance with the law ..... pp. 16-18

The remainder of the report is submitted for the record and includes the following items for the information of the Judicial Conference:


- Federal Rules of Appellate Procedure ..... pp. 2-6
  - Rules and Form Approved for Publication and Comment ..... pp. 4-6
  - Information Items ..... p. 6
- Federal Rules of Bankruptcy Procedure ..... pp. 7-11
  - Rules Approved for Publication and Comment ..... pp. 9-10
  - Information Items ..... p. 11
- Federal Rules of Civil Procedure ..... pp. 11-14
  - Information Items ..... pp. 13-14
- Federal Rules of Criminal Procedure
  - Information Items ..... pp. 14-15
- Federal Rules of Evidence
  - Rule Approved for Publication and Comment ..... p. 16
  - Information Items ..... p. 16
- Judiciary Strategic Planning ..... pp. 18-19

**Agenda E-19**
**Rules**
**September 2024**

# REPORT OF THE JUDICIAL CONFERENCE

## COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

**TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:**

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on June 4, 2024. All members participated.

Representing the advisory committees were Judge Jay S. Bybee, Chair, and Professor Edward Hartnett, Reporter, Advisory Committee on Appellate Rules; Judge Rebecca Buehler Connelly, Chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura B. Bartell, Associate Reporter, Advisory Committee on Bankruptcy Rules; Judge Robin L. Rosenberg, Chair, Professor Richard L. Marcus, Reporter, Professor Andrew Bradt, Associate Reporter, and Professor Edward Cooper, consultant, Advisory Committee on Civil Rules; Judge James C. Dever III, Chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, Advisory Committee on Criminal Rules; and Chief Judge Patrick J. Schiltz, Chair, and Professor Daniel J. Capra, Reporter, Advisory Committee on Evidence Rules.

Also participating in the meeting were Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, Consultants to the Standing Committee; H. Thomas Byron III, the Standing Committee's Secretary; Allison A. Bruff, Bridget M. Healy, and Scott Myers, Rules Committee Staff Counsel; Zachary T. Hawari, Law Clerk to the Standing Committee; John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, Federal Judicial Center (FJC);

**NOTICE**
**NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE CONFERENCE ITSELF.**

and Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, U.S. Department of Justice, on behalf of Deputy Attorney General Lisa O. Monaco.

In addition to its general business, including a review of the status of pending rule amendments in different stages of the Rules Enabling Act[1] process and pending legislation affecting the rules, the Standing Committee received and responded to reports from the five advisory committees. The Committee also received an update on the coordinated work among the Bankruptcy, Civil, and Criminal Rules Committees on attorney admission rules, and by those committees and the Appellate Rules Committee on electronic filing by pro se litigants and on the redaction of Social Security numbers (SSNs).

## FEDERAL RULES OF APPELLATE PROCEDURE

### *Rules Recommended for Approval and Transmission*

The Advisory Committee on Appellate Rules recommended for final approval proposed amendments to Appellate Rules 6 and 39. The Standing Committee unanimously approved the Advisory Committee's recommendations, with minor stylistic changes to each rule.

Rule 6 (Appeal in a Bankruptcy Case)

The proposed amendments to Rule 6 make changes to Rule 6(a) (dealing with appeals from judgments of a district court exercising original jurisdiction in a bankruptcy case) to clarify the time limits for post-judgment motions in bankruptcy cases and Rule 6(c) (dealing with direct appeals from bankruptcy court to the court of appeals) to clarify the procedures for direct appeals. The amendments also make stylistic changes to those provisions and to Rule 6(b) (dealing with appeals from a district court or bankruptcy appellate panel exercising appellate jurisdiction in a bankruptcy case). The proposed amendments to Rule 6(a) clarify the time for

[1]Please refer to Laws and Procedures Governing Work of the Rules Committees for more information.

filing certain motions that reset the time to appeal in cases where a district court is exercising original jurisdiction in a bankruptcy case. The proposed amendments provide that the reference in Appellate Rule 4(a)(4)(A) to the time allowed for motions under certain Federal Rules of Civil Procedure must be read in such cases as a reference to the time allowed for the equivalent motions under the applicable Federal Rules of Bankruptcy Procedure. The proposed amendments to Rule 6(c) clarify the procedure for handling direct appeals from a bankruptcy court to a court of appeals under 28 U.S.C. § 158(d)(2), providing more detail about how parties should handle initial procedural steps in the court of appeals once authorization for a direct appeal is granted. The Rule 6(c) amendments dovetail with the proposed amendment to Bankruptcy Rule 8006(g) described later in this report.

Rule 39 (Costs on Appeal)

The proposed amendments are in response to the Supreme Court's holding in *City of San Antonio v. Hotels.com*, 141 S. Ct. 1628 (2021). In that case, the Court held that Rule 39, which governs costs on appeal, 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 proposed amendments clarify 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 court calculating and taxing the dollar amount of costs upon the proper party or parties. In addition, the proposed amendments codify 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, and establish a clearer procedure that a party should follow if it wants to ask the court of appeals to reconsider the allocation of costs. Finally, the proposed amendments clarify and improve Rule 39's parallel structure.

**Recommendation:** That the Judicial Conference approve the proposed amendments to Appellate Rules 6 and 39, as set forth in Appendix A, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

***Rules and Form Approved for Publication and Comment***

The Advisory Committee on Appellate Rules submitted proposed amendments to Rules 29 and 32, and the Appendix of Length Limits, as well as Form 4, with a recommendation that they be published for public comment in August 2024. The Standing Committee unanimously approved the Advisory Committee's recommendation, with minor changes to the proposed amendments to Rule 29.

Rule 29 (Brief of an Amicus Curiae)

After much consideration, the Advisory Committee recommended publication for public comment of proposed amendments to Rule 29, dealing with amicus curiae briefs, along with conforming amendments to Rule 32(g) and the Appendix of Length Limits. In considering the proposed amendments, the Advisory Committee was mindful of First Amendment concerns and proposed legislation regarding amicus filings.

The proposed amendments require all amicus briefs to include, as applicable, a description of the identity, history, experience, and interests of the amicus curiae along with an explanation of how the brief will help the court. Also, the proposed amendments require an amicus entity that has existed for less than 12 months to state the date the entity was created.

The proposed amendments add two new disclosure requirements regarding the relationship between a party and an amicus curiae. Those disclosure requirements focus, respectively, on ownership or control of the amicus (if it is a legal entity), and contributions to the amicus curiae; in each instance the focus is on ownership, control, or contributions by (1) a party, (2) its counsel, or (3) any combination of parties, counsel, or both. The first provision would require the disclosure of a majority ownership interest in or majority control of

a legal entity submitting the brief. The second provision would require disclosure of contributions to an amicus curiae, with a threshold amount of 25 percent of annual revenue, with the reasoning that an amicus that is dependent on a party for one quarter of its revenue may be sufficiently susceptible to that party's influence to warrant disclosure.

In addition, the proposed amendments revise the disclosure obligation with respect to a relationship between a nonparty and an amicus curiae. The current rule requires disclosure of contributions intended to fund preparing or submitting the brief by persons "other than the amicus curiae, its members, or its counsel." The proposed amended rule would retain the member exception, but would limit that exception to persons who have been members of the amicus for at least the prior 12 months or who are contributing to an amicus that has existed for less than 12 months. (As noted above, an amicus that has existed for less than 12 months must state the date it was created.) These proposed amendments would require a new member making contributions earmarked for a particular brief to be effectively treated as a non-member for these purposes and would require disclosure.

The proposed amendments would also eliminate the option for a non-governmental entity to file an amicus brief based on the parties' consent during a court's initial consideration of a case on the merits, and would therefore require a motion for leave to file the brief.

Finally, the proposed amendments set the length limit for amicus briefs at 6,500 words (rather than one-half the maximum length authorized for a party's principal brief) to simplify the calculation for filers.

At its meeting, the Standing Committee made minor changes to the rule. The phrase "may be of considerable help to the court" was changed to "may help the court" both to improve the style and readability and because the Committee determined that including the word "considerable" could create an unintentional burden. The disclosures required by the rule were

added to the required contents of the motion for leave. And to promote clarity, the phrase "a party, its counsel, or any combination of parties or their counsel" was changed to "a party, its counsel, or any combination of parties, their counsel, or both." Other changes to improve style and consistency were made to the rule and the committee note.

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

The proposed amendments to Rule 32 conform Rule 32(g)'s cross-references to the proposed amendments to Rule 29.

Appendix of Length Limits

The proposed amendments to the Appendix of Length Limits conform the Appendix's list of length limits for amicus briefs to the proposed amendments to Rule 29.

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

The proposed amendments, in response to several suggestions, simplify Form 4 to reduce the burden on individuals seeking in forma pauperis (IFP) status (including the amount of personal financial detail required), while providing the information that courts of appeals need and find useful when deciding whether to grant IFP status.

***Information Items***

The Advisory Committee met on April 10, 2024. In addition to the recommendations discussed above, the Advisory Committee discussed a possible new rule regarding intervention on appeal, considered the possibility of improving the length and content of appendices, and discussed possible amendments to Rule 15 (Review or Enforcement of an Agency Order—How Obtained; Intervention). Also, the Advisory Committee removed from consideration a suggestion to eliminate PACER fees, because it is not a subject governed by the rules.

## FEDERAL RULES OF BANKRUPTCY PROCEDURE

***Rules and Forms Recommended for Approval and Transmission***

The Advisory Committee on Bankruptcy Rules recommended for final approval: (1) amendments to Bankruptcy Rule 3002.1 and six new Official Forms related to those amendments; (2) amendments to Rule 8006; and (3) amendments to Official Form 410. The Standing Committee unanimously approved the Advisory Committee's recommendations.

Rule 3002.1 (Notice Relating to Claims Secured by a Security Interest in the Debtor's Principal Residence in a Chapter 13 Case) and Related Official Forms

Rule 3002.1 is amended to encourage a greater degree of compliance with its provisions by adding an optional motion process the debtor or case trustee can initiate to determine a mortgage claim's status while a chapter 13 case is pending to give the debtor an opportunity to cure any postpetition defaults that may have occurred. The changes also add more detailed provisions about notice of payment changes for home-equity lines of credit.

Accompanying the proposed amendments to Rule 3002.1 is a proposal for adoption of six new Official Forms:

- Official Form 410C13-M1 (Motion Under Rule 3002.1(f)(1) to Determine the Status of the Mortgage Claim)
- Official Form 410C13-M1R (Response to [Trustee's/Debtor's] Motion Under Rule 3002.1(f)(1) to Determine the Status of the Mortgage Claim)
- Official Form 410C13-N (Trustee's Notice of Payments Made)
- Official Form 410C13-NR (Response to Trustee's Notice of Payments Made)
- Official Form 410C13-M2 (Motion Under Rule 3002.1(g)(4) to Determine Final Cure and Payment of Mortgage Claim)
- Official Form 410C13-M2R (Response to [Trustee's/Debtor's] Motion Under Rule 3002.1(g)(4) to Determine Final Cure and Payment of the Mortgage Claim)

Under Rule 3002.1(f), an official form motion (410C13-M1) can be used by the debtor or trustee over the course of the plan to determine the status of the mortgage. An official form response (410C13-M1R) is used by the claim holder if it disagrees with facts stated in the motion. If there is a disagreement, the court will determine the status of the mortgage claim. If

the claim holder fails to respond or does not dispute the facts set forth in the motion, the court may enter an order favorable to the moving party based on those facts.

Under Rule 3002.1(g), after all plan payments have been made to the trustee, the trustee must file the new official form notice (410C13-N) concerning disbursements made, amounts paid to cure any default, and whether the default has been cured. The claim holder must respond to the notice using the official form response (410C13-NR) to provide the required information. Rule 3002.1(g) also provides that either the trustee or the debtor may file a motion, again using an official form (410C13-M2), for a determination of final cure and payment. If the claim holder disagrees with the facts set out in the motion, it must respond using Official Form 410C13-M2R.

Stylistic changes are made throughout the rule, and its title and subdivision headings have been changed to reflect the amended content.

Rule 8006 (Certifying a Direct Appeal to a Court of Appeals)

Rule 8006 addresses the process for requesting that an appeal go directly from the bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2). The proposed amendment to Rule 8006(g) clarifies that any party to the appeal may file a request that a court of appeals authorize a direct appeal. There is no obligation to do so if no party wishes the court of appeals to authorize a direct appeal. This amendment dovetails with the proposed amendments to Appellate Rule 6 discussed earlier in this report.

Official Form 410 (Proof of Claim)

The form is amended to permit use of the uniform claim identifier for all payments in cases filed under all chapters of the Bankruptcy Code, not merely electronic payments in chapter 13 cases. In addition, an amendment is made to the margin note in "Part 3: Sign Below" to conform to the restyled rules approved by the Judicial Conference in September 2023 (JCUS-SEP 2023, p. 24): the reference to Rule 5005(a)(2) is changed to Rule 5005(a)(3).

**Recommendation:** That the Judicial Conference approve the following:

a. Proposed amendments to Bankruptcy Rules 3002.1 and 8006, as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law;

b. Effective December 1, 2025 and contingent on the approval of the above-noted amendments to Bankruptcy Rule 3002.1, the proposed amendments to Bankruptcy Official Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R, as set forth in Appendix B, for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date; and

c. Effective December 1, 2024, the proposed amendments to Official Form 410, as set forth in Appendix B, for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date.

***Rules Approved for Publication and Comment***

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to (1) Rule 3018; (2) Rules 9014, 9017, and new Rule 7043; and (3) Rules 1007, 5009, and 9006, with a recommendation that they be published for public comment in August 2024. The Standing Committee unanimously approved the Advisory Committee's recommendation, with changes to the language in the committee note to Rule 9014 addressing the different treatment of adversary proceedings and contested matters with respect to allowing remote testimony.

Rule 3018 (Chapter 9 or 11—Accepting or Rejecting a Plan)

The proposed amendments would authorize a court in a chapter 9 or 11 case to treat as an acceptance of a plan a statement on the record by a creditor's attorney or authorized agent.

Rules 9014 (Contested Matters), 9017 (Evidence), and new Rule 7043 (Taking Testimony)

The proposed amendments would (1) amend Rule 9017 to eliminate the applicability of Fed. R. Civ. P. 43 (Taking Testimony) to bankruptcy cases generally; (2) create a new Rule 7043 (Taking Testimony) that would retain the applicability of Fed. R. Civ. P. 43 in

adversary proceedings—thereby authorizing remote witness testimony in adversary proceedings "for good cause in compelling circumstances and with appropriate safeguards"; and (3) amend Rule 9014 to allow a court in a contested matter to permit remote witness testimony "for cause and with appropriate safeguards" (i.e., eliminating the requirement of "compelling circumstances"). The effect of this proposal would be to provide bankruptcy courts greater flexibility to authorize remote testimony in contested matters. This proposed change rests on the difference between adversary proceedings and contested matters: whereas adversary proceedings resemble civil actions, contested matters proceed by motion and can usually be resolved less formally and more expeditiously by means of a hearing, often on the basis of uncontested testimony.[2]

Rules 1007 (Lists, Schedules, Statements, and Other Documents; Time to File), 5009 (Closing a Chapter 7, 12, 13, or 15 Case; Declaring Liens Satisfied), and 9006 (Computing and Extending Time; Motions)

Proposed changes to Rules 1007, 5009, and 9006 are made to reduce the number of individual debtors who go through bankruptcy but whose cases are closed without a discharge because they either failed to take the required course on personal financial management or merely failed to file the needed documentation upon completion of the course. The proposed amendments to Rule 1007, along with conforming amendments to Rule 9006, would eliminate the deadlines for filing the certificate of course completion. The proposed amendment to Rule 5009 would provide for two notices instead of just one, reminding the debtor of the need to take the course and to file the certificate of completion.

[2]The Advisory Committee on Bankruptcy Rules previously requested input on these proposed amendments from the Committees on Court Administration and Case Management (CACM Committee) and the Administration of the Bankruptcy System, which advised that the proposals would not appear to create any conflict with existing Judicial Conference policy regarding remote access or remote proceedings, nor impact the CACM Committee's ongoing consideration of potential revisions to the remote public access policy.

### *Information Items*

The Advisory Committee on Bankruptcy Rules met on April 11, 2024. In addition to the recommendations discussed above, the Advisory Committee discussed a proposal to require redaction of the entire SSN in court filings; two suggestions to eliminate the requirement that all notices given under Rule 2002 include in the caption, among other things, the last four digits of the debtor's SSN; and a suggestion to allow the appointment of masters in bankruptcy cases and proceedings.

## FEDERAL RULES OF CIVIL PROCEDURE

### *Rules Recommended for Approval and Transmission*

The Advisory Committee on Civil Rules recommended for final approval proposed amendments to Civil Rules 16 and 26, and new Rule 16.1. The Standing Committee unanimously approved the Advisory Committee's recommendations, with minor changes to the proposed amendments to new Rule 16.1.

<u>Rule 16 (Pretrial Conferences; Scheduling; Management) and Rule 26 (Duty to Disclose; General Provisions Governing Discovery)</u>

The proposed amendments would call for early identification of a method to comply with Rule 26(b)(5)(A)'s requirement that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials. Specifically, the proposed amendment to Rule 26(f)(3)(D) would require the parties to address in their discovery plan the timing and method for complying with Rule 26(b)(5)(A). The proposed amendment to Rule 16(b) would provide that the court may address the timing and method of such compliance in its scheduling order.

After public comment, the Advisory Committee recommended final approval of the proposed amendments as published with minor changes to the committee notes.

New Rule 16.1 (Multidistrict Litigation)

Proposed new Rule 16.1 is designed to provide a framework for the initial management of multidistrict litigation (MDL) proceedings. After several years of work by its MDL subcommittee, extensive discussions with interested bar groups, consideration of multiple drafts, three public hearings on the published draft, and subsequent revisions based on public comment, the Advisory Committee unanimously recommended final approval of new Rule 16.1.

Rule 16.1(a) encourages the transferee court to schedule an initial MDL management conference soon after transfer, recognizing that this is currently regular practice among transferee judges. An initial management conference allows for early attention to matters identified in Rule 16.1(b), which may be of great value to the transferee judge and the parties. Because it is important to maintain flexibility in managing MDL proceedings, proposed new Rule 16.1(a) says that the transferee court "should" (not "must") schedule such a conference.

Rule 16.1(b)—a revised version of what was published as subdivision (c)—encourages the court to order the parties to submit a report prior to the initial management conference. The report must address any topic the court designates—including any matter under Rule 16—and unless the court orders otherwise, the report must also address the topics listed in Rules 16.1(b)(2)-(3). Rule 16.1(b)(2) directs the parties to provide their views on appointment of leadership counsel; previously entered scheduling or other orders; additional management conferences; new actions in the MDL proceeding; and related actions in other courts. Rule 16.1(b)(3) calls for the parties' "initial views" on consolidated pleadings; principal factual and legal issues; exchange of information about factual bases for claims and defenses; a discovery plan; pretrial motions; measures to facilitate resolving some or all actions before the court; and referral of matters to a magistrate judge or master. Because court action on some matters identified in paragraph (b)(3) may be premature before leadership counsel is appointed,

those topics are categorized separately from those in paragraph (b)(2). Rule 16.1(b)(4) permits the parties to address other matters that they wish to bring to the court's attention.

Rule 16.1(c) prompts courts to enter an initial MDL management order after the initial MDL management conference. The order should address the matters listed in Rule 16.1(b) and may address other matters in the court's discretion. This order controls the MDL proceedings unless and until modified.

Following public comment, the Advisory Committee made some minor changes to the proposed new rule as published. In response to extensive public input, it removed a provision inviting courts to consider appointing "coordinating counsel." For the reasons noted above, it restructured the list of matters to be included in the parties' report into the "views" called for by Rule 16.1(b)(2) and the "initial views" called for by Rule 16.1(b)(3), and it revised those provisions to direct parties to address the listed topics unless the court orders otherwise (rather than obligating the court to affirmatively set out minimum topics to be addressed). It also made stylistic changes based on input from the Standing Committee's style consultants.

At its meeting, the Standing Committee made minor changes to the rule and committee note to improve style and promote consistency. In the committee note, language was refined to clarify measures to facilitate resolution of MDL proceedings.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Civil Rules 16 and 26, and new Rule 16.1, as set forth in Appendix C, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

***Information Items***

The Advisory Committee on Civil Rules met on April 9, 2024. In addition to the matters discussed above, the Advisory Committee discussed various information items, including potential amendments to Rule 7.1 (Disclosure Requirement) regarding disclosure of possible

grounds for recusal, Rule 28 (Persons Before Whom Depositions May Be Taken) regarding cross-border discovery, Rule 41(a) (Dismissal of Actions) regarding the dismissal of some but not all claims or parties, Rule 45(b)(1) (Subpoena) regarding methods for serving a subpoena, and Rule 81(c)(3)(A) (Applicability of the Rules in General; Removed Actions) regarding demands for a jury trial in removed cases. The Advisory Committee also discussed issues related to sealed filings and use of the word "master" in the rules, and was briefed on the random case assignment policy adopted by the Judicial Conference in March 2024 (*see* JCUS-MAR 2024, p. 8) and the importance of monitoring its implementation, as well as ongoing research related to rulemaking authority in this area. Finally, the Advisory Committee discussed a new proposal to amend Rule 43(a) (Taking Testimony) and Rule 45(c) (Subpoena) concerning the use of remote testimony in certain circumstances, and a new subcommittee was formed to consider this proposal.

## FEDERAL RULES OF CRIMINAL PROCEDURE

### *Information Items*

The Advisory Committee on Criminal Rules met on April 18, 2024, and discussed several information items, including two new suggestions.

The Advisory Committee continues to consider a possible amendment to Rule 17 (Subpoena), prompted by a suggestion from the White Collar Crime Committee of the New York City Bar Association. The Advisory Committee's Rule 17 subcommittee is working to develop a draft of a proposed amendment to clarify the rule and expand the scope of parties' authority to subpoena material from third parties before trial. The subcommittee has tentatively concluded that any proposed amendment should provide for case-by-case judicial oversight of each subpoena application, express authorization of ex parte subpoenas, and different standards or levels of protection for personal or confidential information and other information.

Last year, the Advisory Committee received two suggestions regarding Rule 53 (Courtroom Photographing and Broadcasting Prohibited) and proceedings in the cases of *United States v. Donald J. Trump*. The Advisory Committee concluded that it did not have the authority to exempt specific cases or parties from the rule's prohibition on broadcasting, and it acknowledged that any amendment under the Rules Enabling Act process would likely take three or more years. The Advisory Committee determined, however, that further examination of the proposal to amend Rule 53 was warranted, and, as previously reported to the Judicial Conference, a subcommittee was formed. The subcommittee is in early stages of its consideration of potential amendments and will coordinate with other committees evaluating issues of remote public access to federal judicial proceedings.

The Advisory Committee also discussed two new suggestions. The Department of Justice has submitted a suggestion to amend Rule 49.1 (Privacy Protection For Filings Made with the Court) to require the use of pseudonyms—instead of initials—to mask the identity of minors in court filings. A new subcommittee was formed to consider this proposal as well as other privacy issues under Rule 49.1. The Advisory Committee received another suggestion to clarify Rule 40 (Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District) as it applies when a defendant from outside the district is arrested for violating conditions of release. The Advisory Committee recently received a related submission (from the Administrative Office's Magistrate Judges Advisory Group) which includes a comprehensive proposal for additional amendments to Rule 40. Consideration of these proposals will continue.

## FEDERAL RULES OF EVIDENCE

### *Rule Approved for Publication and Comment*

The Advisory Committee on Evidence Rules submitted a proposed amendment to Rule 801(d)(1)(A) with a recommendation that it be published for public comment in August 2024. The Standing Committee (with the Department of Justice representative abstaining) approved the Advisory Committee's recommendation, with minor amendments to the committee note.

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

The proposed amendment provides that all prior inconsistent statements admissible for impeachment are also admissible as substantive evidence, subject to Rule 403. The current Rule 801(d)(1)(A) includes a very limited exemption from the hearsay rule for prior inconsistent statements of a testifying witness, providing that a prior statement is substantively admissible only when it was made under oath at a formal proceeding.

### *Information Items*

The Advisory Committee met on April 19, 2024. In addition to the recommendation discussed above, the Advisory Committee held a panel discussion on artificial intelligence and machine-generated information, and the possible impact of artificial intelligence on the Federal Rules of Evidence. The Advisory Committee also discussed a possible amendment to Rule 609(a) (Impeachment by Evidence of a Criminal Conviction) and a possible new rule to address evidence of prior false accusations made by alleged victims in criminal cases.

## PROPOSED 2024 REPORT OF THE JUDICIAL CONFERENCE ON THE ADEQUACY OF PRIVACY RULES PRESCRIBED UNDER THE E-GOVERNMENT ACT OF 2002

The E-Government Act of 2002 directed the judiciary to promulgate rules, under the Rules Enabling Act, "to protect privacy and security concerns relating to electronic filing of documents and the public availability … of documents filed electronically." Pub. L.

No. 107-347, § 205(c)(3)(A)(i). Pursuant to this mandate, the "privacy rules"—Appellate Rule 25(a)(5), Bankruptcy Rule 9037, Civil Rule 5.2, and Criminal Rule 49.1—took effect on December 1, 2007. Section 205(c)(3)(C) of the E-Government Act directs that, every two years, "the Judicial Conference shall submit to Congress a report on the adequacy of [the privacy rules] to protect privacy and security." The most recent prior report was completed in June 2022. This report covers the period from June 2022 to June 2024. The Committee considered and approved the proposed draft 2024 report of the Judicial Conference on the Adequacy of the Privacy Rules Prescribed under the E-Government Act of 2002, subject to revisions approved by the chair in consultation with the Rules Committee Staff.

Part I of the 2024 report describes the consideration of several proposed rule changes that include privacy-related issues. The Bankruptcy, Civil, and Criminal Rules Committees are reconsidering the need for the last four digits of SSNs in court filings, and they are also considering whether the privacy rules need to remain uniform with respect to the level of redactions applied to SSNs. One suggestion noted in the 2022 report resulted in the proposed amendments to Appellate Form 4 (discussed earlier in this report) that will be published for comment in August 2024. Several more recent privacy-related suggestions are in the beginning stages of consideration. Part II of the 2024 report describes ongoing judiciary implementation efforts to protect privacy in court filings and opinions. Among other things, the CACM Committee sent a memorandum to the courts in May 2023 sharing suggested practices to protect personal information in court filings and opinions and encouraging continued outreach and educational efforts. The memorandum also reminded courts about the possible inclusion of sensitive information in Social Security and immigration opinions and reminded courts of a software fix implemented in 2020 that can mask certain information in extracts of Social Security and immigration opinions. Part II also reports that the CACM Committee asked

the Administrative Office and the FJC to explore other ways to increase awareness of the need to protect privacy in court filings and opinions. This has led the Administrative Office to update the judiciary's internal and external websites, and the FJC to consider increased ways to address privacy issues in educational materials for new judges and other judiciary officials. Part III of the 2024 report, in turn, discusses the FJC's 2024 update of its studies in 2010 and 2015 concerning the rate of compliance with existing privacy rules regarding unredacted SSNs in court filings, conducted at the request of the CACM Committee. The FJC's 2024 study reveals that instances of non-compliance remain very low. Upcoming FJC studies addressing other aspects of the privacy rules will be considered by the rules committees and the CACM Committee in the coming years and will be addressed in future privacy reports.

The CACM Committee considered the draft report at its May 2024 meeting and endorsed a recommendation that the Judicial Conference approve the 2024 report and ask the AO Director to transmit it to Congress in accordance with the law.

> **Recommendation:** That the Judicial Conference approve the proposed 2024 Report of the Judicial Conference of the United States on the Adequacy of Privacy Rules Prescribed Under the E-Government Act of 2002, as set forth in Appendix D, and ask the Administrative Office Director to transmit it to Congress in accordance with the law.

## JUDICIARY STRATEGIC PLANNING

The Committee was asked to provide input on the proposed process for the 2025 review and update of the *Strategic Plan for the Federal Judiciary*. The Committee's views were

communicated to Judge Scott Coogler (N.D. Ala.), the judiciary planning coordinator, by letter dated June 17, 2024.

Respectfully submitted,

John D. Bates, Chair

Paul Barbadoro
Elizabeth J. Cabraser
Louis A. Chaiten
William J. Kayatta, Jr.
Edward M. Mansfield
Troy A. McKenzie
Patricia Ann Millett
Lisa O. Monaco
Andrew J. Pincus
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Kosta Stojilkovic
Jennifer G. Zipps

* * * * *

# TAB 3

Minutes of the Fall Meeting of the

Advisory Committee on the Appellate Rules

April 10, 2024

Denver, CO

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Judge Jay Bybee, Chair, Advisory Committee on the Appellate Rules, called the meeting of the Advisory Committee on the Appellate Rules to order on Wednesday, April 10, 2024, at approximately 9:00 a.m. MDT.

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

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

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

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

## I. Introduction and Preliminary Matters

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

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

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

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

## II. Approval of the Minutes

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

## III. Discussion of Joint Committee Matters

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

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

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

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



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

## IV. Discussion of Matters Published for Public Comment

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

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

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

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

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

### B. Bankruptcy Appeals

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

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



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work of Danielle Spinelli, an experienced bankruptcy appeals lawyer who was on the subcommittee but whose term has now expired. They were also worked out with the close cooperation of the reporters for the Bankruptcy Rules Committee.

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

The subcommittee recommends final approval as published.

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

## V. Discussion of Matters Before Subcommittees

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

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

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

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

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



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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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



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

The Committee voted, without dissent, to change:

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

to read:

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

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

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

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

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

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

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



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

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

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

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

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

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

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

The resulting text then read:

**Committee Note**

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

There are three other concerns to highlight.

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

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

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


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

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

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

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

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

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

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

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

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



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

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

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

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

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

## VI. Discussion of Recent Suggestions



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

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

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

### B. PACER Access (23-AP-J)

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

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

### C. Rule 15

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

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

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

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

## VII. Review of Impact and Effectiveness of Recent Rule Changes

The Reporter directed the Committee's attention to a table of recent amendments to the Appellate Rules. (Agenda book page 244). This matter is placed on the agenda to provide an opportunity to discuss whether anybody has noticed



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things that have gone well or gone poorly with our amendments. No one raised any concerns.

## VIII. Old Business

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

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

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

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

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

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

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

## IX. New Business

No member of the Committee raised new business.

## X. Adjournment

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

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

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

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

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# TAB 4

# TAB 4A

## MEMORANDUM

**DATE:** August 21, 2024

**TO:** Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules

**FROM:** Catherine T. Struve

**RE:** Sketch of potential rule amendments concerning self-represented litigants' filing and service

As you know, a working group has recently been discussing possible rule amendments on the topic of self-represented litigants' filing and service. The working group has focused on two broad topics: (1) increases to electronic access to court by self-represented litigants (whether via the court's electronic-filing system[1] or alternative means) and (2) service (of papers subsequent to the complaint) by self-represented litigants on litigants who will receive an electronic notice of filing (Notice of Filing)[2] through the court's electronic-filing system or through a court-based

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1 In prior memos, this project had referred specifically to CM/ECF. This memo refers generically to the "court's electronic-filing system" in order to take account of other terms that courts may use for their electronic-filing system (such as the Appellate Case Management System, or "ACMS," that is in use in the Second and Ninth Circuits).

2 This memo uses "Notice of Filing" to denote an electronic notice provided to case participants by the court's electronic-filing system to inform them of a filing or other activity on the docket. The term "Notice of Filing" encompasses the current terms "Notice of Docket Activity" and "Notice of Electronic Filing" or "NEF."

One Clerk representative questions the choice of "Notice of Filing" as the defined term, and suggests "Notice of Entry" or "Notice of Docket Activity" as possible alternatives: "Because electronic notices are sent whenever anything happens on the docket, we tend to think the term 'NDA' is more appropriate. There are many instances where nothing was 'Filed' and only a docket entry has been entered. Many courts issue docket text-only orders. It's not implausible to consider attorneys eventually doing this too. If so, would 'entry' be more accurate than 'document?'"

This is a good question. If one were thinking only of items that might be served by a party, then "Notice of Filing" seems like a logical choice, because the items that a party might typically need to serve under Rule 5 – usually, post-complaint pleadings, motions, and other papers – would also be filed. But Civil Rule 77(d)(1) incorporates Rule 5(b) when discussing the

electronic-noticing program.

The working group has collaborated on a very tentative sketch of a possible amendment to Civil Rule 5. This memo sets out the current version of that sketch for discussion at the fall Advisory Committee meetings. After providing a brief introduction (in Part I of this memo), I set out the sketch in Part II.

## I. Overview of the project

**General policy choices.** The sketch in Part II implements two policy choices – one regarding service, and the other regarding filing.

As to service, the sketch eliminates the requirement of separate (paper) service (of documents after the complaint) on a litigant who receives a Notice of Filing through the court's electronic-filing system or a court-based electronic-noticing program. (See Part I of my September 2023 memo[3] for discussion of some courts that have already implemented such an exemption.)

The sketch also permits service by email to the address that the court uses to email Notices of Filing, so long as the sender has designated in advance the email address from which such service will be made.[4] This provision could be useful beyond the context of self-

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clerk's service of notice of the entry of an order or judgment: "Immediately after entering an order or judgment, the clerk must serve notice of the entry, as provided in Rule 5(b), on each party who is not in default for failing to appear. The clerk must record the service on the docket. A party also may serve notice of the entry as provided in Rule 5(b)." So it's worthwhile to consider whether the choice of term should reflect the reality that many of the court-provided notices served electronically under Rule 77(d)(1) and Rule 5(b) concern docket entries that don't involve a separately *filed* court order. (See also Rule 79(a)(2), including among the things the clerk must enter in the docket "papers filed with the clerk" and "orders, verdicts, and judgments.")

On the other hand, I think that terminological issue is also baked into the current Rule as well, given that existing Rule 5(b)(2)'s description of service through CM/ECF reads in relevant part "A paper is served under this rule by: … (E) sending it to a registered user by filing it with the court's electronic-filing system." If that provision is sufficiently clear as it applies currently to Rule 5(b) as incorporated by Rule 77(d)(1), then perhaps "Notice of Filing" would be sufficiently clear in the amended rule as applied to the same thing.

3 That memo is available starting at page 184 of the agenda book that is available here: https://www.uscourts.gov/sites/default/files/2024-01_agenda_book_for_standing_committee_meeting_final_0.pdf

4 The proviso about designating the email address from which the service will be made is designed to address the possibility that this sort of email service otherwise might end up in the

represented litigants; for example, discovery material that is served but not filed could also be served this way.

As to filing, the sketch makes two changes compared with current practice: (1) it presumptively permits self-represented litigants to file electronically (unless a court order or local rule bars them from doing so) and (2) it provides that a local rule or general court order that bars self-represented litigants from using the court's electronic-filing system must include reasonable exceptions or must permit the use of another electronic method for filing documents and receiving electronic notice of activity in the case.

A court could comply with this amended filing rule by doing either of the following:

- Allowing reasonable access for self-represented litigants to the court's electronic-filing system. That access could (and I expect typically would) be limited to non-incarcerated litigants and could be restricted to those persons who satisfactorily complete required training. (See Part II of my September 2023 memo for discussion of some courts that already provide such access.)

- Not allowing self-represented litigants to access CM/ECF, but providing them with an alternative electronic means for filing (such as by email or upload) and an alternative electronic means for receiving notice of court filings and orders (such as an electronic noticing program). (See Part III of my September 2023 memo for discussion of some courts that already have such alternative programs.)

Note that, under the amended filing rule, a court would need to adopt a local rule or court order *dis*allowing CM/ECF access for self-represented litigants if it wanted to foreclose such access; the default would be access. Note also that the rule would always permit a court to enter an order barring a particular litigant from using CM/ECF.

These policy choices, at present, are the product of discussions in the working group.

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recipient's "junk mail" folder. This concern might arise with respect to service by a party in a way that it wouldn't arise with respect to notices from the court, because it's reasonable to expect those participating in the court's electronic-filing or electronic-noticing systems to take steps to ensure that emails from the court's email address won't be snared in a junk folder. In order for the participant to take similar steps with respect to service by another litigant, it may be necessary to require that a litigant making service by email has designated their email address in advance before using it to make email service.

It should be noted, though, that there is not full consensus on the inclusion of this proviso. One of the Clerk representatives argues that this proviso is unnecessary and "serves only to complicate the rule. A recipient's junk filters aren't really of concern to the courts. This potentially exists in the paper world too. (We mailed it, but it never arrived for any myriad of reasons.)"

After roughing out a sketch of the proposed rule changes based on those policy choices, we circulated the sketch to the Clerk representatives on the Appellate, Bankruptcy, Civil, and Criminal Rules Committees for their comments. Their input has produced significant improvements in the draft shown here.

In addition, the Clerk liaisons' feedback made clear that – as the committees have already heard – the proposed changes regarding filing by self-represented litigants will be controversial at the level of the trial courts (though likely not at the level of the courts of appeals). Although the proposed rule and Note would make clear that e-filing need not be provided to incarcerated filers and that litigants who abuse the system can be barred from it, concerns persist that technological limitations or cybersecurity fears may nonetheless make it difficult for some trial courts to comply with either of the dual options noted above (providing self-represented litigants with either CM/ECF access or some alternative means of electronic filing and noticing).

In the event that the advisory committees decide to publish these proposed amendments for comment, we would expect to receive robust public input on the filing aspects of the proposal. A question for the Advisory Committees is whether to proceed with publication and comment of the filing portion of the project despite the concerns that have been expressed about it. On one hand, these concerns may ultimately lead the Advisory Committees to hold back from approving the filing aspects of the proposal sketched below (at least in the rule sets that apply to the trial courts). But on the other hand, publication and comment may usefully serve to generate new knowledge and awareness about practices in federal courts around the country, which may be salutary even if the changes concerning filing are not adopted in this rulemaking cycle.

In any event, whether or not the Advisory Committees decide to publish for public comment the aspects of the proposed rule concerning filing, the working group supports the publication (and adoption, assuming no unanticipated grounds for hesitation emerge from the comment period) of the proposed rule changes concerning service. The service-related changes sketched below have not generated substantive concerns to date (though, as noted in this memo, consensus is still emerging on the best language choices for the service provisions).

**Implementation across the rule sets.** As noted, we are using Civil Rule 5 for illustrative purposes. Once we arrive at a working draft of Civil Rule 5, we would then turn to working on parallel sketches for amendments to the other sets of rules.[5]

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5 Here is my working list of the rules that would require consideration: Appellate Rule 25 (filing and service); Bankruptcy Rules 5005 (filing), 7005 (applying Civil Rule 5 in adversary proceedings), 8011 (filing & service in appeals to a district court or BAP), and 9036(c) (electronic service); and Criminal Rule 49.

In those other rules, there might be additional particularities to consider as drafting proceeds. For example, as noted in the text, our goal here is to address filing and service issues of documents subsequent to the initial complaint – hence the focus on Civil Rule 5 rather than

**Application in the criminal, habeas, and Section 2255 contexts.** We are contemplating possible amendments that would be generally parallel across the Appellate, Bankruptcy, Civil, and Criminal rule sets. It is also necessary to consider how the amendments would work in the context of state-prisoner habeas (i.e., Section 2254) and Section 2255 proceedings.

Criminal Rule 49's treatment of issues regarding self-represented litigants may at first appear beside the point, given that nearly all criminal defendants are represented. But Criminal Rule 49's potential applicability to Section 2255 proceedings means that there is a significant population of self-represented litigants that could be affected by the proposed changes to Criminal Rule 49. Admittedly, nearly all those self-represented litigants will be incarcerated, and the proposed amendments would not require courts to provide CM/ECF access for self-represented litigants who are incarcerated. So the on-the-ground effect of the proposed filing-related changes to Criminal Rule 49 would be minimal. However, the proposed service-related changes to Criminal Rule 49 (and Civil Rule 5) would be important for incarcerated self-represented litigants (in Section 2254 and Section 2255 proceedings), because those changes would relieve such litigants of a service requirement that is likely to be onerous for incarcerated litigants (who may have greater difficulty than non-incarcerated litigants in paying for postage).

There is a further reason to amend Criminal Rule 49 in tandem with Civil Rule 5. As you know, Rule 12 of the Rules Governing § 2254 Cases provides that "[t]he Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules." Meanwhile, Rule 12 of the Rules Governing § 2255 Proceedings provides that "[t]he Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules." To the extent that Civil Rule 5 and Criminal Rule 49 are amended so as to take the same approach to the service and filing questions discussed here, that would allow courts to avoid choosing which rule governs.

As drafting proceeds, the Appellate and Criminal Rules Committees might also wish to give attention to whether the proposed changes would require adjustment to the 'prison mailbox' provisions in Appellate Rules 4(c) and 25(a)(2)(A)(iii) and in Rules 3 of the habeas and Section

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Civil Rule 4. In the bankruptcy context, the petition that initiates the bankruptcy may not be the only case-initiating document, because complaints in adversary proceedings might also be filed in the context of an ongoing bankruptcy. Thus, the Bankruptcy Rules Committee might wish to consider adjusting the language of the sketch's Committee Note, when transposing it into the context of Bankruptcy Rule 5005, to make clear that the amended rule does not displace any local requirement that a complaint initiating an adversary proceeding be filed in paper. The adjustment might be accomplished by this tweak to the Committee Note: "Also, a court could adopt a local provision stating that certain types of filings – for example, **complaints in adversary proceedings, and/or** notices of appeal – cannot be made by means of the court's electronic-filing system."

2255 rules.[6]

## II. The tentative rule sketch

Below is the current sketch. A particular focus, in drafting, has been on terminology. We are trying to use language that maps onto the way in which court technology programs currently work and are likely to work in the future.

Currently, the court electronic-filing programs that we are aware of are the Case Management / Electronic Case Filing (CM/ECF) system and the Appellate Case Management (ACMS) system; both of those are encompassed in the term "the court's electronic-filing system." We are also aware of alternative electronic-filing options that some courts provide to self-represented litigants (such as the Electronic Document Submission System (EDSS)) and court-based electronic-noticing programs. Notice from a court-based electronic-noticing system is encompassed in proposed Rule 5(b)(2)'s reference to persons "registered to receive [a Notice of Filing] from the court's electronic-filing system" and in proposed Rule 5(d)(3)(B)(ii)'s reference to "another electronic method for … receiving electronic notice of activity in the case." Alternative electronic-filing options (such as EDSS) are encompassed in proposed Rule 5(d)(3)(B)(ii)'s reference to "another electronic method for filing documents … in the case."

**Rule 5. Serving and Filing Pleadings and Other Papers**

**(a) Service: When Required.**

**(1) In General.** Unless these rules provide otherwise, each of the following papers must be served on every party:

(A) an order stating that service is required;

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6 I highlighted this question in a prior sketch of this project that was circulated to the Clerk representatives on the Advisory Committees and to selected additional court personnel. The feedback that we received included this suggestion: "This would be a good opportunity to amend [Appellate Rule] 4(c) to make explicit that the electronic service programs qualify as 'a system designed for legal mail' and to define 'deposited in the institution's mail system' for purposes of filing - what kind of document, statement, or evidence does the inmate need to provide when filing electronically, to get the benefit of the mailbox rule?"

The possibility of revising the prisoner-mailbox provisions to take account of prison e-filing programs may have been briefly considered the last time that the Appellate Rules' prison-mailbox rules were amended (effective 2016). At that time, no attempt was made to address institutional e-filing programs. But it may well be that the prevalence of prison e-filing programs has expanded in the 8+ years since the 2016 amendments were under consideration, so perhaps the time may be ripe for re-considering this question. In any event, that question seems potentially separable from the proposed rule changes addressed in the text of this memo.

(B) a pleading filed after the original complaint, unless the court orders otherwise under Rule 5(c) because there are numerous defendants;

(C) a discovery paper required to be served on a party, unless the court orders otherwise;

(D) a written motion, except one that may be heard ex parte; and

(E) a written notice, appearance, demand, or offer of judgment, or any similar paper.

* * *

**(b) Service: How Made.**

**(1) Serving an Attorney.** If a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party.

**(2) Service by Means of the Court's Electronic-Filing System.** The [court's sending of the][7] Notice of Filing [is] [constitutes][8] service under this rule [of the filed paper][9] on the Notice's[10] date on any person registered to receive the Notice from the court's electronic-filing system. The court may provide by local rule that [filings] [papers filed] under seal are not served under this Rule 5(b)(2).

**(3) Service by Other Means ~~in General~~.** A paper ~~is~~ can also be served under this rule by:

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7 Some participants have suggested eliminating the phrase "court's sending of the" and saying, simply, "The Notice of Filing is" service. That shorter formulation may also work, but one benefit of the slightly longer formulation is that it might be clearer to users (such as self-represented litigants) who aren't generally familiar with the system.
8 Which of these verbs is better? Cf. Civil Rule 5(d)(3)(C) ("A filing made through a person's electronic-filing account . . . constitutes the person's signature.").
9 Is this bracketed language helpful or unnecessary? A participant suggested "of the filed document," but I would lean toward "of the filed paper" if we are adding this phrase, because Civil Rule 5 uses "paper" instead of "document."
10 Should we capitalize "Notice"? I believe that the CM/ECF authorities use capitals in the phrase "Notice of Electronic Filing," see, e.g., https://www.uscourts.gov/court-records/electronic-filing-cmecf/faqs-case-management-electronic-case-files-cmecf. Presumably whether to capitalize the short form ("Notice") is a question for the style consultants.

(A) handing it to the person;

(B) leaving it:

(i) at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or

(ii) if the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there;

(C) mailing it to the person's last known address – in which event service is complete upon mailing;

(D) leaving it with the court clerk if the person has no known address;

(E) ~~sending it to a registered user by filing it with the court's electronic-filing system or~~ sending it by email to the address that the court uses to email Notices of Filing – so long as the sender has designated in advance the email address from which such service will be made – or by other electronic means that the person consented to in writing—in either of which events service is complete upon ~~filing or~~ sending, but is not effective if the ~~filer or~~ sender learns that it did not reach the person to be served; or

(F) delivering it by any other means that the person consented to in writing – in which event service is complete when the person making service delivers it to the agency designated to make delivery.

~~**(3) Using Court Facilities.** [Abrogated (Apr. 26, 2018, eff. Dec. 1, 2018.]~~
**(4) Papers not filed.** Rule 5(b)(3) governs service of a paper that is not filed.

**(5) Definition of "Notice of Filing."** The term "Notice of Filing" in this rule includes a Notice of Docket Activity, a Notice of Electronic Filing, and any other similar electronic notice provided to case participants by the court's electronic-filing system to inform them of a filing or other activity on the docket.

* * *

**(d) Filing.**

**(1) Required Filings; Certificate of Service.**

**(A) Papers after the Complaint.** Any paper after the complaint that is required to be served must be filed no later than a reasonable time after service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: depositions, interrogatories, requests for documents or tangible things or to permit entry onto land, and requests for admission.

**(B) Certificate of Service.** No certificate of service is required when a paper is served under Rule 5(b)(2)~~by filing it with the court's electronic-filing system~~. When a paper that is required to be served is served by other means:

(i) if the paper is filed, a certificate of service must be filed with it or within a reasonable time after service; and

(ii) if the paper is not filed, a certificate of service need not be filed unless filing is required by court order or by local rule.

**(2) Nonelectronic Filing.** A paper not filed electronically is filed by delivering it:

(A) to the clerk; or

(B) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.

**(3) Electronic Filing and Signing.**

**(A) By a Represented Person—Generally Required; Exceptions.** A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

**(B) By an Unrepresented Person—When Allowed or Required.**

(i) A person not represented by an attorney~~: (i)~~ may file electronically ~~only if allowed by~~ unless a court order or ~~by~~ local rule bars the person from doing so; ~~and~~but ~~(ii)~~ may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

(ii) A local rule or general court order that bars persons not represented by an attorney from using the court's electronic-filing system must include reasonable exceptions or must permit the use of another electronic method for filing documents and receiving electronic notice of activity in the case.

(iii) A court may set reasonable conditions and restrictions on access to the court's electronic-filing system for persons not represented by an attorney.

(iv) A court may deny a particular person access to the court's electronic-filing system, and may revoke a person's prior access to the court's electronic-filing system for noncompliance with the conditions stated in (iii).

* * *

**Committee Note**

Rule 5 is amended to address two topics concerning self-represented litigants. Rule 5(b) is amended to address service of documents (subsequent to the complaint) filed by a self-represented litigant in paper form. Because all such paper filings are uploaded by court staff into the court's electronic-filing system, there is no need to require separate paper service by the filer on case participants who receive an electronic notice of the filing from the court's electronic-filing system. Rule 5(b)'s treatment of service is also reorganized to reflect the primacy of service by means of the electronic notice. Rule 5(d) is amended to expand the availability of electronic modes by which self-represented litigants can file documents with the court and receive notice of filings that others make in the case.

**Subdivision (b).** Rule 5(b) is restructured so that the primary means of service – that is, service by means of the court's electronic-filing system – is addressed first, in subdivision 5(b)(2). Existing Rule 5(b)(2) becomes new Rule 5(b)(3), which continues to address alternative means of service. New Rule 5(b)(4) addresses service of papers not filed with the court, and new Rule 5(b)(5) defines the term "Notice of Filing" as any electronic notice provided to case participants by the court's electronic-filing system to inform them of a filing or other activity on the docket.

**Subdivision (b)(2).** Amended Rule 5(b)(2) eliminates the requirement of separate (paper) service (of documents after the complaint) on a litigant who is registered to receive a Notice of Filing from the court's electronic-filing system. Litigants who are registered to receive a Notice of Filing include those litigants who are participating in the court's electronic-filing system with respect to the case in question and also include those litigants who receive the

Notice because they have registered for a court-based electronic-noticing program.[11] (Current Rule 5(b)(2)(E)'s provision for service by "sending [a paper] to a registered user by filing it with the court's electronic-filing system" had already eliminated the requirement of paper service on registered users of the court's electronic-filing system by other registered users of the system; the amendment extends this exemption from paper service to those who file by a means other than through the court's electronic-filing system.)

The last sentence of amended Rule 5(b)(2) states that the court may provide by local rule that papers filed under seal are not served under Rule 5(b)(2). This sentence is designed to account for districts in which parties in the case cannot access other participants' sealed filings via the court's electronic-filing system.

**Subdivision (b)(3).** Subdivision (b)(3) carries forward the contents of current Rule 5(b)(2), with two changes.

The subdivision's introductory phrase ("A paper is served under this rule by") is amended to read "A paper can also be served under this rule by." This locution ensures that what will become Rule 5(b)(3) remains an option for serving any litigant, even one who receives Notices of Filing. This option might be useful for a litigant who will be filing non-electronically but who wishes to effect service on their opponent before the time when the court will have uploaded the filing into the court's system (thus generating the Notice of Filing).

Subdivision (b)(3)(E). Subdivision (b)(3)(E) is amended in two ways. First, the prior reference to "sending [a paper] to a registered user by filing it with the court's electronic-filing system" is deleted, because this is now covered by new Rule 5(b)(2). Second, a new option is added: "sending [the paper] by email to the address that the court uses to email Notices of Filing – so long as the sender has designated in advance the email address from which such service will be made." This provision enables a litigant to serve another case participant by email to the email address that the court uses to email Notices of Filing, but only if the sending litigant has already designated in advance the email address from which such service will be made. The latter proviso addresses the possible concern that otherwise an email from another litigant in the case might end up in the recipient's junk email folder.

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11 N.B.: An initial sketch of Rule 5(b) included a proposed Rule 5(b)(3) that separately treated "service by means of the court's electronic-noticing system," but we have removed that provision because it appears that such service appears to be already covered in proposed Rule 5(b)(2). The reason is that – as far as we are aware – the way that electronic-noticing programs work, in the courts that have them, is that email addresses for those self-represented litigants who opt in to electronic noticing are simply added to the list of email recipients that will receive Notices of Filing from the court's electronic-filing system. (There seems to be no reason that any court would use a different method for their e-noticing program. However, if we are incorrect about this, public comment should bring that fact to light.)

**Subdivision (b)(4).** New Rule 5(b)(4) addresses service of papers not filed with the court. It makes explicit what is arguably implicit in new Rule 5(b)(2): If a paper is not filed with the court, then the court's electronic system will never generate a Notice of Filing, so the sender cannot use Rule 5(b)(2) for service and thus must use Rule 5(b)(3).

**Subdivision (b)(5).** New Rule 5(b)(5) defines the term "Notice of Filing" as any electronic notice provided to case participants by the court's electronic-filing system to inform them of a filing or other activity on the docket. There are two equivalent terms currently in use: Notice of Electronic Filing and Notice of Docket Activity. "Notice of Filing" is intended to encompass both of those terms, as well as any equivalent terms that may come into use in future. The word "Electronic" is deleted as superfluous now that electronic filing is the default method.

**Subdivision (d)(3)(B).** Under new Rule 5(d)(3)(B)(i), the presumption is the opposite of the presumption set by the prior Rule 5(d)(3)(B). That is, under new Rule 5(d)(3)(B)(i), self-represented litigants are presumptively authorized to use the court's electronic-filing system to file documents in their case subsequent to the case's commencement. If a district wishes to restrict self-represented litigants' access to the court's electronic-filing system, it must adopt an order or local rule to impose that restriction.

Under Rule 5(d)(3)(B)(ii), a local rule or general court order that bars persons not represented by an attorney from using the court's electronic-filing system must include reasonable exceptions, unless that court permits the use of another electronic method for filing documents and receiving electronic notice of activity in the case. But Rule 5(d)(3)(B)(iii) makes clear that the court may set reasonable conditions on access to the court's electronic-filing system.

A court can comply with Rules 5(d)(3)(B)(ii) and (iii) by doing either of the following: (1) Allowing reasonable access for self-represented litigants to the court's electronic-filing system, or (2) providing self-represented litigants with an alternative electronic means for filing (such as by email or by upload through an electronic document submission system) and an alternative electronic means for receiving notice of court filings and orders (such as an electronic noticing program).

For a court that adopts the option of allowing reasonable access to the court's electronic-filing system, the concept of "reasonable access" encompasses the idea of reasonable conditions and restrictions. Thus, for example, access to electronic filing could be restricted to non-incarcerated litigants and could be restricted to those persons who satisfactorily complete required training and/or certifications and comply with reasonable conditions on access. Also, a court could adopt a local provision stating that certain types of filings – for example, notices of appeal – cannot be filed by means of the court's electronic-filing system. Rule 5(d)(3)(B)(ii) uses the term "general court order" to make clear that Rule 5(d)(3)(B)(ii) does not restrict a court from entering an order barring a specific self-represented litigant from accessing the court's electronic-filing system.

Rule 5(d)(3)(B)(iv) provides that the court may deny a specific self-represented litigant access to the court's electronic-filing system, and that the court may revoke a self-represented litigant's access to the court's electronic-filing system.

* * *

A conforming amendment to Civil Rule 6(d) would be needed to adjust for the change in numbering of current Civil Rule 5(b)(2):

**Rule 6. Computing and Extending Time; Time for Motion Papers**

* * *

**(d) Additional Time After Certain Kinds of Service.** When a party may or must act within a specified time after being served and service is made under Rule 5(b)(~~2~~3)(C) (mail), (D) (leaving with the clerk), or (F) (other means consented to), 3 days are added after the period would otherwise expire under Rule 6(a).

**Committee Note**

Subdivision (d) is amended to conform to the renumbering of Civil Rule 5(b)(2) as Rule 5(b)(3).

# TAB 4B

# MEMORANDUM

**To:** Advisory Committee Chairs

**From:** Reporters' Privacy Rules Working Group
H. Thomas Byron III, Rules Committee Chief Counsel

**Re:** Potential issues related to the privacy rules

**Date:** August 21, 2024

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The Rules Committees have received several suggestions that address particular issues related to the privacy rules (Appellate Rule 25, Bankruptcy Rule 9037, Civil Rule 5.2, and Criminal Rule 49.1): (1) a suggestion to reconsider whether to require complete redaction of social-security numbers (SSNs) in federal-court filings (22-AP-E, 22-BK-I, 22-CV-S, 22-CR-B); (2) suggestions to streamline the caption on many bankruptcy notices by limiting or eliminating detailed information about a debtor, including the debtor's SSN, from subsequent notices after the meeting of creditors notice (23-BK-D, 23-BK-J); and (3) a suggestion to amend Criminal Rule 49.1(a)(3) and corresponding provisions of the other privacy rules, which currently require including in a filing only the initials of a known minor, to require instead the use of a pseudonym in order to better protect the privacy interests of minors who are victims or witnesses (suggestions 24-CR-A, 24-AP-B, 24-BK-D, 24-CV-C). The appropriate Advisory Committees will continue to consider those pending suggestions. This memo addresses whether those deliberations should expand to encompass other privacy-related issues, and recommends against such an expansion.

## I. Background and Overview

At the spring 2024 meetings, the Advisory Committees discussed a suggestion from Senator Wyden (22-AP-E, 22-BK-I, 22-CV-S, 22-CR-B) that would require complete redaction of social-security numbers. The agenda books included a sketch of a draft rule amendment but did not recommend that the amendment be considered at that time. (Our March 19, 2024, memorandum is attached for reference.) Based on the recommendation of the reporters' working group, the committees decided to defer consideration of a draft rule amendment until after discussion of pending suggestions and possibly other potential issues concerning the privacy rules.

In addition to the pending suggestions that are under consideration by the Bankruptcy and Criminal Rules Committees, we have identified several potential

issues common to all three rule sets (Bankruptcy, Civil, and Criminal).[1] This memorandum explains the tentative conclusion of the working group that those issues, outlined below, do not warrant further study by the advisory committees. We seek input from each committee about that recommendation and about whether any other issues related to the privacy rules deserve consideration at this time.

Each of the issues described below represents an area where some clarifying changes could be made to the privacy rules or where they could be expanded to cover additional information. But our consensus view is that there is no demonstrated need for the Rules Committees to take up any of these issues. Put simply, there is no real-world problem that we need to solve right now. That initial question—whether there is an actual problem in the application of the rules that could be solved by an amendment—has long driven the focus of the rules committees, and it properly reflects the limited time and other resources available to the committees, as well as the presumption that rule amendments should be limited to avoid disruption of settled practices.

That view could change if we receive a specific suggestion for a rule amendment that identifies a practical problem in the privacy rules or if case law or other information reflects real uncertainty or divergence in how the rules are being interpreted or applied. In that event, we will ask the committees to consider how to address the particular concern. Similarly, if another Judicial Conference committee, such as CACM or IT, were to identify a privacy-related concern that could be addressed by a rule amendment, the rules committees could consider the issues raised in that context.

In the meantime, the Bankruptcy and Criminal Rules Committees will continue to consider the pending proposals for amendments to the privacy rules. The suggestion for an amendment requiring complete redaction of social-security numbers can be considered along with any proposed amendments that result from that ongoing work on pending suggestions.

The following summaries describe the issues considered by the working group:

## II. Potential Privacy-Rule Issues

### A. Ambiguity and overlap in the exemptions

The exemptions from the redaction requirements, set forth in subdivision (b) of each of the privacy rules, include language that appears ambiguous or possibly

[1] Appellate Rule 25(a)(5) generally provides that that the appropriate privacy rule in the Bankruptcy, Civil, or Criminal Rules will govern in particular categories of cases in the appellate courts. Unless otherwise noted, privacy rule citations in this memo are to the common provisions of the Bankruptcy, Civil, and Criminal Rules.

overbroad, although we are not aware of any particular problems or concerns related to the application of these provisions. Here are two examples:

Subdivision (b)(3) refers to the "official record from a state-court proceeding"; rules committee records indicate that this exemption was originally intended to refer to the records of state cases removed to federal court. But that focus is not apparent in the text of the rules. And state-court records can be included in filings in other types of cases as well.

Subdivision (b)(4), which exempts "the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed," was initially aimed at pre-2007 federal court records, although the rule text appears to apply much more broadly to the record of any court or tribunal. It appears to overlap, and perhaps make redundant, some more specific exemptions for: (1) the record of administrative or agency proceedings, in subdivision (b)(2); (2) the official record of a state-court proceeding, in subdivision (b)(3); and (3) state-court records in a pro se action brought under 28 U.S.C. § 2254, in subdivision (b)(6) of Civil Rule 5.2 and Criminal Rule 49.1.

**B. Scope of the waiver**

The waiver provision in subdivision (h) of Civil Rule 5.2 and Criminal Rule 49.1, and subdivision (g) of Bankruptcy Rule 9037, can be read narrowly to provide only that an individual does not violate the rule by failing to comply with the redaction requirements with respect to the person's own personally identifiable information (PII). That is, inclusion of a person's own unredacted PII waives the redaction requirement for that party with respect to that specific PII in that particular filing only. However, the records of the rules committees' original consideration of the privacy rules support a broader reading of the waiver provision: Under that view, once a person waives the protection of subdivision (a)'s redaction requirements in a filing as to the person's own information, other filers no longer need to redact the disclosed PII in subsequent filings in the case (or perhaps even in other cases).

The broader view is not apparent from the rule text or committee note. But the ambiguity inherent in the term "waives," as well as the rules committees' public records on the subject, leaves open the possibility that the waiver provision could be read by some litigants to permit inclusion of unredacted PII in a broad range of court filings. Here too, however, we have not received any indication of a problem in practice related to the waiver provision.

**C. Expansion of protected information subject to redaction**

Since their adoption in 2007, the privacy rules have required redaction of "an individual's social-security number, taxpayer-identification number, or birth date," as well as "the name of an individual known to be a minor" and "a financial-account

number." Civil Rule 5.2(a). Other categories or identifiers might equally warrant protection in court filings as PII. For example, an individual's passport or driver's license number could potentially cause harm if disclosed, and there seems little or no reason why an unsealed filing would need to disclose those kinds of details. Similarly, online login information such as account identifiers and passwords could cause harm if disclosed.

Other information, such as an individual's birthplace, could—in conjunction with other data—facilitate identity theft or similar malicious activity. Telephone numbers and physical or email addresses could pose different considerations, as they are generally required for attorneys and pro se filers to ensure that courts and parties can reach litigants. But there might be little reason to allow routine disclosure of third parties' information.

At this point, we have not received any indication that disclosure of these categories of information in court filings is widespread or has led to specific problems. And the absence of such a suggestion seems sufficient reason not to devote resources to these questions now.

## D. Protection of other sensitive information

Beyond redaction of specific PII, there might also be additional categories of information that warrant protection from public disclosure. For example, medical records and related information about an individual's health conditions are protected from disclosure in certain circumstances, although the privacy rules do not address that type of information. And geolocation information (such as from cellphone records, smartwatches, GPS devices, or Bluetooth trackers) can also include sensitive personal information that might be considered private in some circumstances. The privacy rules specifically mention filings made under seal in subdivision (d), and these categories of information raise the question whether the rules should protect specific categories of privacy-related information that might need to be known to parties in litigation but should not be subject to wider public disclosure.

A 2023 submission from Lawyers for Civil Justice (23-CV-W) questions whether the rules as a whole do enough to ensure the protection of sensitive personal information from disclosure. The Civil Rules Committee has not yet discussed that suggestion, and its consideration of the issues could provide additional relevant guidance to the other Advisory Committees. At this time, however, there is no indication that the privacy rules need to be amended to address these broader concerns.

# MEMORANDUM

**To:** Advisory Committee Chairs

**From:** Reporters' Privacy Rules Working Group
H. Thomas Byron III, Chief Counsel, Rules Committee Staff
Zachary Hawari, Rules Law Clerk

**Re:** Update on Review of Privacy Rules

**Date:** March 19, 2024

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## I. Background and Overview

In 2022, Senator Ron Wyden suggested that the Rules Committees reconsider whether to require complete redaction of social-security numbers (SSNs) in federal-court filings (suggestions 22-AP-E, 22-BK-I, 22-CV-S, 22-CR-B). The redaction requirements—including the requirement that filers redact all but the last 4 digits of SSNs—are generally consistent across the privacy rules (Appellate Rule 25(a)(5), Bankruptcy Rule 9037, Civil Rule 5.2(a), and Criminal Rule 49.1(a)). See E-Government Act of 2002, Pub. L. No. 107-347, § 205(c)(3)(A)(ii), 116 Stat. 2914 ("Such rules shall provide to the extent practicable for uniform treatment of privacy and security issues throughout the Federal courts.").

The partial SSN redaction requirement in the privacy rules was adopted and retained in large part due to concerns that participants in bankruptcy cases needed the last 4 digits of a debtor's SSN. In light of that history, the Advisory Committees concluded in 2022 that the Bankruptcy Rules Committee should first determine the extent to which that need remains paramount before the Appellate, Civil, and Criminal Rules Committees consider whether any different approach would be warranted in non-bankruptcy cases. The Bankruptcy Rules Committee has tentatively determined that it would not be feasible to require complete redaction of SSNs in all bankruptcy filings, but that committee is considering a range of options that could include eliminating SSNs from some filings. Those issues remain under review and are unlikely to result in a recommendation to publish any proposed amendments to the Bankruptcy Rules before 2025.

The reporters and Rules Committee Staff have been discussing Senator Wyden's suggestion and related issues concerning the privacy rules. We have tentatively concluded that any amendments to the Civil and Criminal Rules concerning the redaction of SSNs should not be considered in isolation but should be part of a more considered review of the privacy rules. The following sections outline possible areas of inquiry that the Rules Committees might consider.

## II. Sketch of Rules Amendments Requiring Complete Redaction of SSNs

The Rules Committees could consider amendments that would require complete SSN redaction by amending Civil Rule 5.2(a) and Criminal Rule 49.1(a) along these lines:

> (a) REDACTED FILINGS. Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number, a party or nonparty making the filing must [fully] redact the social-security number or taxpayer-identification number and may include only:
>
> (1) ~~the last four digits of the social-security number and taxpayer-identification number;~~
>
> ~~(2)~~ the year of the individual's birth;
>
> (~~3~~2) the minor's initials; and
>
> (~~4~~3) the last four digits of the financial-account number.

The Bankruptcy Rules Committee is considering this suggestion, among other possible approaches to amending the rules governing SSNs in bankruptcy filings.[1]

Several considerations warrant a broader review of the privacy rules before moving forward to consider this or a similar proposal in isolation. First, the Federal Judicial Center is conducting a study of unredacted privacy information—including SSNs—in court filings. That study could help inform the Rules Committees' understanding of whether the privacy rules warrant further review and possible amendment. Second, the Rules Committees have received additional suggestions concerning possible amendments to the privacy rules. While the proposal outlined above could move forward while the committees consider other suggestions, the Rules Committees generally seek to avoid multiple proposed amendments to any individual rule, preferring instead to present a single set of consolidated changes after comprehensive consideration. This approach helps educate courts, litigants, and the public about rules changes, avoiding confusion and the risk of amendment fatigue.

Because the committees will be considering other privacy rule suggestions, as well as the conclusions of the ongoing FJC study, it seems prudent to consider any proposed amendment requiring full redaction of social-security numbers along with any other proposed amendments to the privacy rules that the committees conclude may be warranted after careful review of the issues.

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[1] There would likely be no need for an amendment of Appellate Rule 25(a)(5), which specifies that the other privacy rules apply to appellate filings in particular categories of cases.

## III. Other Privacy Rule Issues

**A.** The Bankruptcy Rules Committee is considering suggestions to streamline the caption on many notices by limiting or eliminating detailed information about a debtor, including the debtor's SSN, from subsequent notices after the meeting of creditors notice (23-BK-D, 23-BK-J). That committee is considering the suggestions in conjunction with its ongoing consideration of the continuing need and utility of including the last 4 digits of an individual's SSN in bankruptcy filings.

**B.** The Department of Justice has recently submitted a suggestion to amend Criminal Rule 49.1(a)(3), which currently requires including in a filing only the initials of a known minor, to require instead the use of a pseudonym in order to better protect the privacy interests of minors who are victims or witnesses (suggestion 24-CR-A). Because similar requirements appear in the Bankruptcy and Civil Rules, and are incorporated in the Appellate Rules, the suggestion has been forwarded to those advisory committees as well (suggestions 24-AP-B, 24-BK-D, 24-CV-C).

**C.** Nearly 20 years have passed since the Rules Committees initially considered the privacy rules, and this could present a timely opportunity to review the rules and consider whether any amendments might be warranted in light of the passage of time, or whether practice under the rules has identified other areas of concern. For example, the committees could consider whether any other personal information, not included in the redaction requirements, might warrant protection today.

Some issues could concern provisions that are common to the privacy rules. For example, the exemptions from the redaction requirements in subdivision (b) of each of the privacy rules include language that could be ambiguous or overlapping; additional inquiry could identify whether any of these provisions pose a practical problem to litigants or courts. And the waiver provision in subdivision (h) might warrant clarification. Those inquiries should proceed on a coordinated basis, either by continuing the work of the reporters' working group, by designating one advisory committee to take the lead, or by asking the Standing Committee Chair to appoint a joint subcommittee.

Moreover, an Advisory Committee might seek to consider issues solely related to filings in appellate, bankruptcy, civil, or criminal proceedings. For example, the Bankruptcy Rules Committee is already considering such questions. And the Criminal Rules Committee might review several provisions in Criminal Rule 49.1 that address unique concerns, such as arrest or search warrants and charging documents (Rule 49.1(b)(8)-(9)).

*** * * ***

The Rules Committee Staff will continue to work with the relevant Advisory Committee Chairs and reporters to identify any areas of common concern and to

assist in any necessary coordination. We anticipate that the reporters' advisory group will continue its discussions over the next several months. Each Advisory Committee can also consider whether it wishes to appoint a subcommittee to consider these issues or instead to await further information.

# TAB 4C

**MEMORANDUM**

**DATE:** August 21, 2024

**TO:** Advisory Committees on the Bankruptcy, Civil, and Criminal Rules

**FROM:** Judge J. Paul Oetken
Andrew Bradt
Catherine T. Struve

**RE:** Joint Subcommittee on Attorney Admission Report

We write on behalf of the Joint Subcommittee on Attorney Admission to report on the Subcommittee's ongoing deliberations. As you know, the Subcommittee includes members of the Criminal, Civil, and Bankruptcy Rules Committees[1] and has been tasked with considering the proposal by Alan Morrison and others for adoption of national rules concerning admission to the bars of the federal district courts.[2]

We are grateful for the feedback provided by the Advisory Committees at their spring 2024 meetings. This memo summarizes our inquiries since then. Part I of this memo provides a brief summary of the project to date, including the 2024 discussions in the Standing Committee and Advisory Committee meetings. Part II turns briefly to the question of statutory authority for rulemaking on the topic of attorney admission. Part III considers the admission of attorneys to practice in the federal appellate courts. Part IV discusses local-counsel requirements and how those might affect the efficacy of any national rule that might be adopted concerning attorney admission. Part V summarizes what we have learned to date concerning attorney admission fees. Part VI explores the question of how a rule concerning admission to practice in federal district courts might intersect with state law concerning the unauthorized practice of law. And Part VII

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1 The Subcommittee members are: Judge J. Paul Oetken (Chair; member, Bankruptcy Rules Committee), Judge André Birotte Jr. (member, Criminal Rules Committee), Thomas G. Bruton (Clerk of Court representative on the Civil Rules Committee), David J. Burman, Esq. (member, Civil Rules Committee); Judge Michelle M. Harner (member, Bankruptcy Rules Committee), Judge M. Hannah Lauck (member, Civil Rules Committee), and Catherine M. Recker, Esq. (member, Criminal Rules Committee).

2 See Suggestions 23-BK-G, 23-CR-A, and 23-CV-E, available at https://www.uscourts.gov/rules-policies/archives/suggestions/alan-morrison-23-bk-g .

notes that concerns about challenges facing attorneys who are military spouses may be partially addressed through other mechanisms.

## I. The project to date

In this Part, we briefly sketch some of the major developments since the project's inception.

### A. October 2023 Subcommittee discussion

The Subcommittee held its initial discussion in October 2023, and considered the three possible options sketched by Dean Morrison: (1) creating a national "Bar of the District Court for the United States," (2) adopting a rule providing that admission to any federal district court entitles a lawyer to practice before any federal district court, or (3) adopting a rule barring the district courts from requiring (as a condition of admission to the district court's bar) that the applicant reside in, or be a member of the bar of, the state in which the district court is located.

Subcommittee members expressed no interest in Dean Morrison's Option (1), and a number of members questioned its feasibility and/or predicted that it would generate much opposition. Some participants did express interest in considering Option (3). Participants also discussed the possibility of modeling a national rule for the district courts on Appellate Rule 46.

The Subcommittee members considered various policy concerns regarding any change from the current system. It was noted that requiring in-state bar admission is particularly burdensome in states that require applicants to take the bar examination. But participants also noted the need to allow districts to pursue their goal of protecting the quality of practice within the district – a goal that implicates both a lawyer's experience level and also the capacity of the admitting court to know of discipline imposed on the lawyer in other jurisdictions. The Subcommittee recognized that changing the rules on attorney admission might pose a revenue concern and observed that fee revenues currently fund a range of important court functions.

We also noted that any proposal would need to address questions of whether the rulemakers have statutory authority to address the topic of attorney admission.

The Subcommittee summarized its progress in a December 2023 report that was published in the agenda book for the Standing Committee's January 2024 meeting.[3]

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3 That report starts on page 101 of the agenda book that is available here: https://www.uscourts.gov/sites/default/files/2024-01_agenda_book_for_standing_committee_meeting_final_0.pdf .

### B. Morrison / Alvord December 2023 comment

On December 21, 2023, after publication of the Subcommittee's December 2023 report to the Standing Committee, Dean Morrison and Thomas Alvord responded to the report:

> … Our primary goal in making this proposal was to eliminate the many barriers that prevented lawyers who are admitted to practice in one district court from practicing in other districts. It was our view that centralizing admission in the Administrative Office of the U.S. Courts would be the easiest way to accomplish that goal, but we are by no means wedded to that alternative.
>
> In particular, we have no interest in removing the authority from individual districts to discipline attorneys, and our suggestion to centralize discipline was based on our view about centralizing admission.
>
> As for the issues of costs of implementation and loss of revenue, we also recognize that the AO has much better access to the data than we do. In that connection, we note that different districts have different rules on how often attorneys must renew their licenses and how much the court charges for renewal. The lack of uniformity might be another issue the Subcommittee might consider if it is not inclined to support a centralized system of admission….

### C. January 2024 Standing Committee discussion

At the Standing Committee's January 2024 meeting, the Subcommittee Chair and reporters summarized the Subcommittee's initial discussion (as well as the new Morrison / Alvord comments) and sought the Standing Committee's reactions.[4]

Multiple members of the Standing Committee expressed support for pursuing the project. A number of members expressed support for dropping Option (1), and no one expressed interest in pursuing that option. A couple of members expressed support for considering Option (3). It was noted that in-state bar admission is not a close proxy for quality of lawyering and that fees to local counsel can be costly for litigants. A committee member encouraged us to consider whether and how to assist military spouses who must practice law while moving multiple times.

Participants did express some reservations, as well. One member wondered whether lawyers admitted only to federal court would forum-shop into federal court; and other participants expressed concern that permitting out-of-state lawyers to handle state-law claims in diversity or supplemental jurisdiction could offend federalism values. It was noted that

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4 The relevant portion of the draft minutes of the meeting is available starting on page 22 of the agenda book available here: https://www.uscourts.gov/sites/default/files/2024-06_agenda_book_for_standing_committee_meeting_final_6-21-24.pdf .

admission to practice in the courts of appeal is not a close model for admission to practice in the trial court, where more can go wrong (e.g., with discovery).

Ethics and client-protection concerns were also highlighted. There was concern about national practitioners soliciting clients whom they can only represent in federal court. The importance of collaboration between district courts and state disciplinary authorities was noted. A member asked whether broadening admission standards for lawyers who are not members of the encompassing state's bar could raise questions of unauthorized practice of law.

The question of fees was also discussed, with one member asking how fees and revenues vary across districts.

### D. February 2024 Subcommittee discussion

The Subcommittee held its second meeting on February 12, 2024. We first reported on the Standing Committee's January discussion.

The issue of local-counsel requirements emerged as a key theme during our February discussion. It was noted that some judges would oppose a rule amendment that would prevent the court from requiring the involvement of local counsel in every case. That requirement, for instance, could be viewed as important in a district that maintains a practice of moving cases quickly. Would broadening attorney admission requirements do much to increase access if the broadening rule change were offset by a broadened local-counsel requirement? Members suggested that it would be helpful to learn more about why the courts that require local counsel do so.

Attorney discipline also emerged as a matter of concern. While courts each have their own disciplinary systems, and can also coordinate with the disciplinary authorities of other jurisdictions, we questioned how any particular district court could stay abreast of disciplinary activity in far-flung jurisdictions. One idea was to require the admitted attorney to update the court concerning subsequent disciplinary actions in other jurisdictions.

Tim Reagan had already been researching the various district courts' attorney-admission fees, and he undertook to prepare an additional report on local-counsel requirements. (His findings on these topics are discussed in Parts IV and V, below.)

### E. Spring Advisory Committee discussions

We provided a report to each of the relevant Advisory Committees (Bankruptcy, Civil, and Criminal) during their spring 2024 meetings. The most extensive discussion took place at the

Civil Rules Committee meeting.[5]

At the Civil Rules Committee's April 9, 2024 meeting, two judge members voiced strong opposition to the project, and a third judge member's comments were also somewhat skeptical. The first judge questioned why this is a rules issue; to him, this is a matter for state bars. He can see why a court would want lawyers practicing before it to be part of the state bar, as that increases the chances of repeat players and a sense of community. He also questioned the analogy to practice in the courts of appeals; coming in to argue an appeal differs from establishing a law practice in the state. The second judge agreed, noting that districts have distinct cultures and important traditions. This judge felt that admission pro hac vice suffices to accommodate the legitimate needs of out-of-state lawyers. The third judge noted that a district's bar-admission practices reflect the culture of the local bar as well as that of the local bench. During the Civil Rules discussion, Dan Coquillette also underscored the need to look at the unauthorized-practice issue.

Our report on the project did not generate feedback during the Bankruptcy Rules Committee's April 11, 2024 meeting, but a member shared a suggestion for a potential contact with state bar authorities. At the Criminal Rules Committee's April 18, 2024 meeting,[6] Jonathan Wroblewski (the DOJ representative) noted that the U.S. Supreme Court has very permissive practices about admitting attorneys to its bar, and he asked how the Court handles situations in which an attorney it has admitted is disbarred in another jurisdiction.

**F. Summer 2024 Subcommittee discussion**

The Subcommittee met virtually in July 2024. It reviewed Tim Reagan's research (detailed in Parts IV and V below) concerning local-counsel requirements and admission fees. Participants continued discussing the potential significance of local-counsel requirements, which might offset the effects of any new rule requiring the district courts to loosen their attorney-admission practices. The Subcommittee also discussed issues relating to the unauthorized practice of law (noted in Part VI of this memo). Participants noted that it would be useful to make inquiries among state bar authorities to learn whether they would have concerns about a national rule loosening district-court admission requirements for out-of-state lawyers. It was also noted that learning more about circuits' practices under Appellate Rule 46 (see Part III.A below) would be useful.

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5 The Civil Rules discussion is also described in the Civil Rules Committee's draft minutes starting at page 566 of the agenda book available here: https://www.uscourts.gov/sites/default/files/2024-06_agenda_book_for_standing_committee_meeting_final_6-21-24.pdf .

6 The Criminal Rules discussion is also described in the Criminal Rules Committee's draft minutes starting at page 600 of the agenda book available here: https://www.uscourts.gov/sites/default/files/2024-06_agenda_book_for_standing_committee_meeting_final_6-21-24.pdf .

## II. Questions of rulemaking authority

One threshold question, as always, is whether the Rules Enabling Act provides rulemaking authority on this issue. In the language of the statute, would rulemaking regarding district court bar membership fit the category of "general rules of practice and procedure . . . for cases in the United States district courts" and not "not abridge, enlarge or modify any substantive right." The Reporters are continuing research on this question, though the existence of Appellate Rule 46, detailed further below, for a half century provides strong precedent on the general issue.

Questions were also raised about the relevance of 28 U.S.C. § 1654. We enclose a helpful memo from the then-Rules Law Clerk, Zachary Hawari, on that topic.

## III. Federal appellate courts as a model?

As the Subcommittee has already discussed, the federal appellate courts might provide a model for attorney admission at the district-court level. Part III.A summarizes what we know of the courts of appeals' approaches under Appellate Rule 46, and Part III.B discusses the approach taken by the U.S. Supreme Court under its rules. Part III.C notes reasons why the appellate court experience may not generalize to the district court.

### A. The federal courts of appeals

This subpart recapitulates Rule 46's features and summarizes what we have learned about admission fees and attorney discipline in the courts of appeals.

Appellate Rule 46 reads:

(a) Admission to the Bar.

> (1) Eligibility. An attorney is eligible for admission to the bar of a court of appeals if that attorney is of good moral and professional character and is admitted to practice before the Supreme Court of the United States, the highest court of a state, another United States court of appeals, or a United States district court (including the district courts for Guam, the Northern Mariana Islands, and the Virgin Islands).
>
> (2) Application. An applicant must file an application for admission, on a form approved by the court that contains the applicant's personal statement showing eligibility for membership. The applicant must subscribe to the following oath or affirmation:
> "I, ________________, do solemnly swear [or affirm] that I will

conduct myself as an attorney and counselor of this court, uprightly and according to law; and that I will support the Constitution of the United States."

(3) Admission Procedures. On written or oral motion of a member of the court's bar, the court will act on the application. An applicant may be admitted by oral motion in open court. But, unless the court orders otherwise, an applicant need not appear before the court to be admitted. Upon admission, an applicant must pay the clerk the fee prescribed by local rule or court order.

(b) Suspension or Disbarment.

(1) Standard. A member of the court's bar is subject to suspension or disbarment by the court if the member:

(A) has been suspended or disbarred from practice in any other court; or

(B) is guilty of conduct unbecoming a member of the court's bar.

(2) Procedure. The member must be given an opportunity to show good cause, within the time prescribed by the court, why the member should not be suspended or disbarred.

(3) Order. The court must enter an appropriate order after the member responds and a hearing is held, if requested, or after the time prescribed for a response expires, if no response is made.

(c) Discipline. A court of appeals may discipline an attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with any court rule. First, however, the court must afford the attorney reasonable notice, an opportunity to show cause to the contrary, and, if requested, a hearing.

A few features of Rule 46 are worth noting. Rule 46(a)(1) mandates that an attorney is eligible for admission to the bar of a court of appeals if the attorney is "of good moral and professional character" and admitted to the bar of the U.S. Supreme Court, a state high court, another federal court of appeals, or a federal district court. Rules 46(a)(2) and (3) accord the court of appeals the authority to set the form of the application and to prescribe the fee. Rule 46(b) recognizes the court of appeals' authority to suspend or disbar the attorney, subject to a loose substantive test (suspension or disbarment by another court, or "conduct unbecoming") and some basic procedural protections. And Rule 46(c) recognizes a court of appeals' authority to

impose discipline short of suspension or disbarment upon lawyers practicing before the court, so long as it provides notice and an opportunity to be heard.

Thanks to helpful research by Tim Reagan, we know that the fee for admission to the bar of a court of appeals varies across the circuits.[7] It is "$199 plus any additional fee that the local court charges."[8] "The median [total] bar admission fee is $239, and the range is from $214 to $300."[9] Tim notes that because Appellate Rule 46 requires that the attorney seeking admission be admitted to another bar, the attorney will also have to pay for a certificate of good standing from that other bar.[10] Three circuits charge a renewal fee (of from $20 to $50) every five years.[11] Some circuits exempt stated categories of lawyers from paying the admission fee (or, in some instances, permit the lawyer to appear pro hac vice without paying a fee). The most common exemptions are those for federal government lawyers and lawyers representing IFP litigants.

As noted, Rule 46(b)(1)(A) provides for discipline based upon suspension or disbarment in another jurisdiction. In the Subcommittee's discussions, the question has arisen how a court of appeals would become aware of discipline imposed by another jurisdiction. Anecdotally, a court of appeals is more likely to be contacted about attorney discipline by authorities from states within the circuit than by authorities from states outside the circuit. But on at least some occasions, a court of appeals may become aware of discipline imposed by an out-of-circuit state. In at least one circuit, a local rule appears to require that members of the court's bar update the court if they are suspended or disbarred in another jurisdiction.[12] Self-reporting is of course an imperfect system; one can find examples where lawyers who should have self-reported failed to do so.

There is reason to think that not all attorney-discipline opinions can be found on electronic case-reporting systems such as WestlawNext or Lexis. It is thus perhaps unsurprising that an initial very rough search found not many opinions available on WestlawNext concerning reciprocal discipline.

The Subcommittee is currently making inquiries with the Circuit Clerks to ascertain how

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7 See Tim Reagan, Fees for Admission to Federal Court Bars 2 (FJC 2024) ("Reagan Fee Report"). Tim's report was distributed to the Subcommittee previously; you can also download it at https://www.fjc.gov/content/385023/fees-admission-federal-court-bars (last visited August 12, 2024).
8 Id. at 1.
9 Id. at 2.
10 Id. at 1 (noting that the fee for a certificate of good standing "in the states and territories range from no fee to $50").
11 Id. at 2.
12 Ninth Circuit Rule 46-2(c) provides in part: "An attorney who practices before this Court shall provide the Clerk of this Court with a copy of any order or other official notification that the attorney has been subjected to suspension or disbarment in another jurisdiction."

Rule 46 is functioning and whether the Rule's relatively open approach to attorney admission causes any problems with attorney conduct in the circuits.

### B. The U.S. Supreme Court

Like the federal courts of appeals, the U.S. Supreme Court has a relatively permissive admission standard. Supreme Court Rule 5.1 provides:

> To qualify for admission to the Bar of this Court, an applicant must have been admitted to practice in the highest court of a State, Commonwealth, Territory or Possession, or the District of Columbia for a period of at least three years immediately before the date of application; must not have been the subject of any adverse disciplinary action pronounced or in effect during that 3-year period; and must appear to the Court to be of good moral and professional character.

Supreme Court Rule 8 governs disbarment and disciplinary action. It provides:

> 1. Whenever a member of the Bar of this Court has been disbarred or suspended from practice in any court of record, or has engaged in conduct unbecoming a member of the Bar of this Court, the Court will enter an order suspending that member from practice before this Court and affording the member an opportunity to show cause, within 40 days, why a disbarment order should not be entered. Upon response, or if no response is timely fled, the Court will enter an appropriate order.
>
> 2. After reasonable notice and an opportunity to show cause why disciplinary action should not be taken, and after a hearing if material facts are in dispute, the Court may take any appropriate disciplinary action against any attorney who is admitted to practice before it for conduct unbecoming a member of the Bar or for failure to comply with these Rules or any Rule or order of the Court.

The Supreme Court Practice treatise offers this description of the Supreme Court's approach:

> The issuance of an order to show cause is usually premised, as Rule 8 indicates, on a report by federal or state bar authorities that some form of serious discipline has been imposed upon the attorney in question…. The Supreme Court also learns of disbarment or disciplinary actions affecting members of its Bar from the periodic reports of the American Bar Association Center for Professional Responsibility, which maintains a computerized information system referred to as the National Discipline Data Bank. That data bank records disciplinary actions of all state, federal, and appellate courts and bar authorities. The Supreme Court

> Clerk's Office carefully reviews the reports of the Center for Professional Responsibility to determine whether any members of the Supreme Court Bar have been subjected to disbarment or other discipline, and it provides the Center with information concerning disbarment or discipline imposed by the Court….
>
> If reports of state disciplinary actions are made and it appears that any member of the Supreme Court Bar has been the subject of such discipline, the Clerk then makes an evaluation of the disciplinary sanction. A mere reprimand or other minor sanction is not likely to result in the issuance of a show cause order by the Court, although the fact that the state imposed such a sanction is duly noted. But if the state has imposed some significant disciplinary sanction falling short of permanent disbarment, a show cause order may well issue from the Court. In such situations, the Court has been known to impose a more severe sanction than that imposed by the state authorities, the sanction of permanent disbarment.[13]

The National Lawyer Regulatory Data Bank (as it is now called) warrants a bit of explanation. The ABA's website states:

> The ABA National Lawyer Regulatory Data Bank is the only national repository of information concerning public regulatory actions relating to lawyers throughout the United States. It was established in 1968 and is operated under the aegis of the ABA Standing Committee on Professional Discipline. ... The Data Bank is particularly useful for disciplinary authorities and bar admissions agencies in providing a central repository of information to facilitate reciprocal discipline and to help prevent the admission of lawyers who have been disbarred or suspended elsewhere. All states and the District of Columbia, as well as many federal courts and some agencies, provide regulatory information to the Data Bank.[14]

An important limitation of the Data Bank is that submission of data is voluntary, and thus may not be complete.[15] Moreover, one commentator stated in 2012 that disciplinary authorities "are not informed automatically when lawyers they license are reported to the Data Bank."[16] And

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13 Stephen M. Shapiro et al., Supreme Court Practice ch. 20, § 20.8 (11th ed. 2019) (ebook).
14 American Bar Association, National Lawyer Regulatory Data Bank, available at https://www.americanbar.org/groups/professional_responsibility/services/databank/ (last visited August 12, 2024).
15 See Jennifer Carpenter & Thomas Cluderay, Implications of Online Disciplinary Records: Balancing the Public's Interest in Openness with Attorneys' Concerns for Maintaining Flexible Self-Regulation, 22 Geo. J. Legal Ethics 733, 746 (2009).
16 Arthur F. Greenbaum, The Automatic Reporting of Lawyer Misconduct to Disciplinary Authorities: Filling the Reporting Gap, 73 Ohio St. L.J. 437, 506 n.277 (2012).

even when the authorities are told about the imposition of discipline in another jurisdiction, there may be mix-ups concerning who was disciplined: "because [the Data Bank] does not employ a universal identification number system, it is sometimes hard to identify whether a given lawyer, particularly one with a common name, has been reported."[17] Note, as well, that the "Data Bank only includes those who have actually been disciplined, thus, excluding lawyers who have been sanctioned by courts, but not disciplined."[18]

### C. Whether the appellate experience generalizes to the district court

Initial anecdotal data suggest that, at least in one circuit, the current system has not led to problems with the quality of practice before the court of appeals. This is so even though it is possible that the court does not learn about disciplinary problems encountered by all the lawyers that practice before it. Similarly, the U.S. Supreme Court maintains a very large bar and a very permissive admission standard.

However, a number of participants in discussions of this project have questioned whether the experience of the federal courts of appeals with attorney admission can generalize to the context of admission to practice at the trial level. They note that the typical appellate proceeding involves a very confined set of activities and comparatively few deadlines (briefing and perhaps argument), whereas at the trial level – where the record is made and where the participants conduct discovery, hearings, and trials – much more can go awry if an unskilled or unscrupulous practitioner is involved.

## IV. Local-counsel requirements

Many districts currently require that an attorney admitted pro hac vice associate local counsel. Dean Morrison and his fellow rule-change proponents appear to assume that admission to a district court's bar would exempt an out-of-state lawyer from the requirement of associating local counsel in a case.[19] But in the Subcommittee's most recent discussions, participants asked whether expanding access to district court bars would be a Pyrrhic victory for the rule change's

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17 Greenbaum, supra note 16, at 506 n. 277.

18 Lonnie T. Brown, Jr., Ending Illegitimate Advocacy: Reinvigorating Rule 11 Through Enhancement of the Ethical Duty to Report, 62 Ohio St. L.J. 1555, 1607–08 (2001).

19 Dean Morrison's proposal for a national rules change does not discuss local-counsel requirements. But the appended materials (which he and others previously submitted to the Northern District of California in support of a proposal for a local rule amendment) explain that not being admitted to practice in the district subjects litigants to onerous local-counsel requirements. See Petition of Public Citizen Litigation Group & 12 Others Pursuant to Local Rule 83-2 To Amend Local Rule 11-1(b) (Feb. 6, 2018), at 11 ("[U]nder the current Rule, if a client prefers to have as lead counsel a lawyer who is not eligible to become a member of the Bar of this Court, that will generally require retaining and paying for local counsel, not just to sign papers, but, for at least some judges, to appear in court.").

proponents if districts responded by also expanding their local-counsel requirement so that it encompasses attorneys who are admitted in the district but not in the encompassing state.

Currently, more than half of federal districts require participation by local counsel in litigation conducted by an attorney who is admitted pro hac vice. Tim found that "[f]ifty-six districts (60%) require local-counsel participation for pro hac vice appearances. In addition to being a member of the district court's bar, local counsel may be required to live or work in the district or be a member of the local state's bar."[20]

Some districts even require local counsel for some cases litigated by members of the district court's bar;[21] these districts do so in (variously) three types of circumstances: (1) if the attorney is not an in-state bar member, (2) if the attorney neither resides nor has an office in the district, and (3) if the attorney either doesn't reside in the district or lacks a full-time office there.

Courts vary in the degree of involvement that they require of local counsel. Many courts require that local counsel make the motion for non-local counsel's admission pro hac vice; it's possible that this might be one way that a district assures itself that someone has checked that the non-local counsel is in good standing with their home-state bar. The court may also require that local counsel:

- sign the first pleading,[22]
- review and sign all filings,[23]
- be available for service of litigation papers,[24]
- be prepared to try the case,[25]

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20 Tim Reagan, Local-Counsel Requirements for Practice in Federal District Courts (FJC 2024), at 10. Tim's report and its appendices are available here: https://www.fjc.gov/content/385779/local-counsel-requirements-practice-federal-district-courts (last visited August 12, 2024).

21 See Reagan, Local-Counsel Report, at 6 ("Thirteen districts (14%) require association with local counsel even for some members of the district court's bar."). In six of those districts, though, as Tim notes, the rules don't themselves require local counsel in this situation, but accord the judge discretion to require it.

22 See, e.g., E.D. Okla. Local Civil Rule 83.3(b) ("The local attorney shall sign the first pleading filed and shall continue in the case unless other local counsel is substituted.").

23 See W.D. Wash. Local Civil Rule 83.1(d)(2) ("Unless waived by the court … , local counsel must review and sign all motions and other filings [and] ensure that all filings comply with all local rules of this court ….").

24 See, e.g., E.D. Okla. Local Civil Rule 83.3(b) ("Any notice, pleading or other paper may be served upon the local counsel with the same effect as if personally served on the non-resident attorney.").

25 M.D. Tenn. Local Rule 83.01(e)(4) ("Entry of an appearance or otherwise participating as

- be prepared to step in for the lead counsel whenever necessary,[26]
- attend all court appearances,[27] and/or
- be "equally responsible with *pro hac vice* counsel for all aspects of the case."[28]

We might try to infer from the nature of these requirements the reasons why courts require local counsel. To take an obvious example, the requirements that local counsel be available to accept service seem addressed to a simple logistical point – and one that may be largely obsolete now that service of papers subsequent to the commencement of the case is ordinarily accomplished via CM/ECF. A requirement that local counsel review and sign all filings suggests that the court wishes to have a local (and thus more accountable?) lawyer review the filings' compliance with Civil Rule 11. Requirements that local counsel be available to step in at any time suggest that the court is concerned that out-of-district lawyers not cause delay. (A related example might be the Eastern District of Virginia, where local counsel are viewed as important to fulfilling the demands of the court's "rocket docket.") An additional possibility is that, by requiring local counsel, some courts are trying to address behavior by lawyers that doesn't rise to the level of a discipline issue but that implicates questions of quality of lawyering, civility, and professionalism.

Another theme that has emerged is the potential significance of the court's discretion to excuse compliance with the local-counsel requirement. Some local rules explicitly provide for such discretion. Additionally, some local rules expressly exempt some categories of attorney from the local co-counsel requirement.[29]

Dean Morrison and the other rule-change proponents are not taking direct aim at the local counsel requirements themselves (perhaps because they are not focusing on the relatively small number of districts that require local counsel even for some admitted attorneys). Rather, they appear to assume that admission would release an out-of-district lawyer from any obligation to associate local counsel. To test the plausibility of that assumption, it may make sense to focus on districts that currently require in-state bar membership for admission and ask whether those

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counsel of record is a representation that the attorney will be prepared to conduct the trial of the case, from which the attorney may only be relieved by approval of the Court.").

26 See W.D. Wash. Local Civil Rule 83.1(d)(2) ("By agreeing to serve as local counsel and by signing the pro hac vice application, local counsel attests that he or she is authorized and will be prepared to handle the matter in the event the applicant is unable to be present on any date scheduled by the court.").

27 See E.D. Mich. Local Rule 83.20(f)(2) ("Local counsel must attend each scheduled appearance on the case unless the Court, on its own motion or on motion or request of a party, dispenses with the requirement.").

28 M.D. Tenn. Local Rule 83.01(d)(6).

29 See, e.g., N.D. Okla. Loc. Gen. Rule 4-3(c) (exempting lawyers for the federal government, federal defenders, and CJA lawyers); M.D. Tenn. Local Rule 83.01(d)(2) (exempting lawyers for the federal government and federal defenders).

districts also impose a local-counsel requirement for attorneys who are only admitted pro hac vice.

We have not yet compiled that full list, but as a starting point, one can look at the nine districts in California, Delaware, Florida, and Hawaii that currently require in-state bar membership for admission (it is in those districts, of course, that in-state bar membership is the most onerous barrier because it requires taking the state bar exam). Here is a chart of those districts:

| District | Local counsel required where lead attorney is admitted pro hac vice? |
|---|---|
| Central District of California | Yes. See C.D. Cal. Local Civil Rule 83-2.1.3.4. |
| Eastern District of California | Not exactly? E.D. Cal. Local Rule 180(b)(2)(ii) requires that an attorney admitted pro hac vice "shall … designate … a member of the Bar of this Court with whom the Court and opposing counsel may readily communicate regarding that attorney's conduct of the action and upon whom service shall be made." |
| Northern District of California | Yes. See N.D. Cal. Local Civil Rule 11-3(a)(3) (requiring "[t]hat an attorney, identified by name and office address, who is a member of the bar of this Court in good standing and who maintains an office within the State of California, is designated as co-counsel"). |
| Southern District of California | Not exactly? S.D. Cal. Civil Rule 83.3(c)(4) requires that an attorney admitted pro hac vice must "designate … a member of the bar of this court with whom the Court and opposing counsel may readily communicate regarding the conduct of the case and upon whom papers will be served." |
| District of Delaware | Yes. See D. Del. Local Rule 83.5(d): "Unless otherwise ordered, an attorney not admitted to practice by the Supreme Court of the State of Delaware may not be admitted pro hac vice in this Court unless associated with an attorney who is a member of the Bar of this Court and who maintains an office in the District of Delaware for the regular transaction of business ("Delaware counsel"). … Delaware counsel shall be the registered users of CM/ECF and shall be required to file all papers. Unless otherwise ordered, Delaware counsel shall attend proceedings before the Court." |
| Middle District of Florida | Apparently not. (N.B.: This district's version of pro hac vice admission is called "special admission," see M.D. Fla. Local Rule 2.01(c).). |
| Northern District of Florida | Apparently not. |
| Southern District of Florida | Yes. See Rules 1(b)(1) (local counsel to move admission pro hac vice) and 1(b)(3) (requiring designation of "at least one member of the bar of this Court who is authorized to file through the Court's electronic filing system, with whom the Court and opposing counsel may readily communicate regarding the conduct of the case, upon whom filings shall be served, and who shall be |

| | |
|---|---|
| | required to electronically file and serve all documents and things that may be filed and served electronically, and who shall be responsible for filing and serving documents in compliance with the CM/ECF Administrative Procedures”). |
| District of Hawaii | Yes. See D. Haw. Local Rule 83.1(c)(2)(B)(vi) (requiring “designation of a current member in good standing of the bar of this court who maintains an office within the district to serve as associate counsel” and also “the associated attorney’s commitment to at all times meaningfully participate in the preparation and trial of the case with the authority and responsibility to act as attorney of record for all purposes; to participate in all court proceedings (not including depositions and other discovery) unless otherwise ordered by the court; and to accept service of any document”). |

We can see that more than half of these districts (five of nine) require attorneys admitted pro hac vice to associate local counsel. It’s not implausible to surmise that at least some of these districts – if required by national rule to admit to their bar attorneys not admitted to the bar of the encompassing state – might consider whether to extend the local-counsel requirement to such attorneys.

These reflections prompt the following questions:

- Is this sampling of districts representative of the districts that currently take a restrictive approach to bar admissions?

- In districts with rules that require local counsel, how often are those requirements waived in practice?

- Would a national rule change on bar admission simply prompt widespread enlargement of local-counsel requirements?

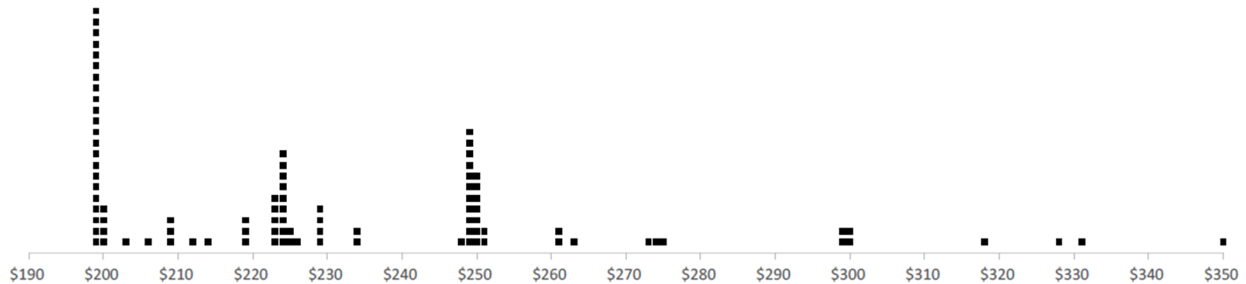
If the answer to the last of these questions is yes, then unless the rulemakers are willing to enlarge this project to encompass districts’ ability to require local counsel, one might question the prospects for effectively addressing the access and expense concerns that underpin the proposals we are currently considering.

## V. Attorney admission fees

Our discussions have also focused on the fiscal implications of potential changes to the district courts’ attorney-admission framework. This Part briefly summarizes what we have learned about the revenue coming in and the uses to which it is put.

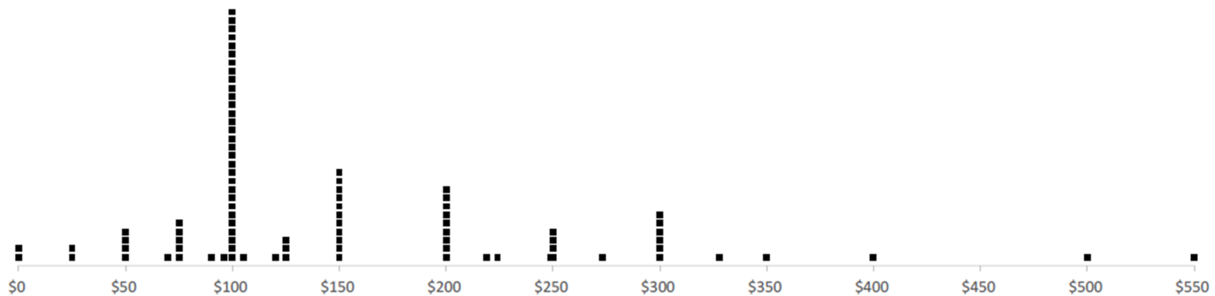
### A. Revenue coming in

Tim Reagan has provided us with an overview of the fees charged by districts around the country. He reports that "admission fees range from the national minimum of $199 to $350."[30] His helpful graph[31] suggests that most districts set the fee in the $199 - $250 range:




In addition, roughly a quarter of districts charge periodic dues or renewal fees. "Twenty-five districts (27%) charge dues, often referred to as renewal fees. Renewal periods range from one to six years, and annualized dues range from $3 to $75."[32] From the detailed discussion in the accompanying footnote, it looks as though five districts have annualized 'dues' of more than $25.[33]

Separate from admission fees are the fees charged for pro hac vice admission. Tim reports that "[p]ro hac vice fees range from no fee to $550."[34] His accompanying graph[35] suggests that most districts charge $150 or less, with additional clusters at $200, $250, and $300:




30 Reagan Fee Report, supra note 7, at 3.
31 See id.
32 Id.
33 See id. at 3 n.6.
34 See id. at 3.
35 See id. at 4.

### B. Uses to which revenue is put

The district courts do not keep the "national" portion of the admission fee, which is $199;[36] they remit that portion to the Administrative Office of the U.S. Courts. By contrast, there is no "national" portion of any fee for renewing a bar admission or for admission pro hac vice, and so the districts keep the entirety of those fees.

As we have previously noted, districts put their portion of the fees to various uses, including funding a clinic for self-represented litigants; guardians ad litem for defendants who are minors; bench/bar activities; reimbursement of pro bono expenses; and support for a court historical society.

## VI. Unauthorized practice of law

During our discussions, a number of participants have stressed the importance of examining the relevance of state law concerning the unauthorized practice of law. An initial look at this field confirms that this topic is well worth the Subcommittee's consideration.

To some, the idea of federal-court attorney-admission barriers intersecting with unauthorized-practice-of-law issues might seem somewhat counterintuitive. After all, if a federal district court *authorizes* someone to practice as a member of the court's bar, how could practice in that court be *unauthorized*? An answer to this question becomes easier to discern if one distinguishes between different types of situations in which the question might be posed.

Some might intuitively imagine a scenario that a big-firm lawyer usually encounters: Big Corp. gets sued in federal court in State A, looks around for a high-powered lawyer, finds Lawyer B in State C, and hires B to handle the federal-court lawsuit in State A. It seems (and likely is) straightforward that B can handle the suit, without being admitted to practice in State A, so long as B is admitted to practice, or gets permission to appear pro hac vice, in the relevant federal district court in State A.

But a look at the caselaw indicates that unauthorized-practice issues usually come up in quite a different type of scenario. Lawyer D, say, is admitted to practice in State E but not in State F. Lawyer D moves to State F and doesn't get admitted in State F, but gets admitted in the federal district court for the District of F. Lawyer D hangs out a shingle in State F, sees clients, triages them, and only takes cases Lawyer D can bring in federal court. In at least some states, it seems, there is a potential risk that the state bar authorities would consider D to be engaging in the unauthorized practice of law in State F by so doing. The strictest caselaw on this topic is in some instances decades old, and there has been some movement toward making the rules on

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36 See District Court Miscellaneous Fee Schedule (setting fee "[f]or original admission of attorneys to practice" at $199), available at https://www.uscourts.gov/services-forms/fees/district-court-miscellaneous-fee-schedule (last visited June 28, 2024).

unauthorized practice of law more forgiving, but nonetheless it appears from an initial look at the caselaw that Lawyer D could run a substantial risk in a number of states by behaving as described.

We will not review here the details of the caselaw that we have gathered thus far. By definition, a field of law (like professional responsibility) that is governed state-by-state is challenging to summarize comprehensively. Moreover, some of the notable caselaw is relatively dated. Instead, we note a few key lines of authority and sketch some relevant concepts. A better sense of the scope and nature of likely problems might emerge from an inquiry with state bar authorities as the project moves forward.

It's useful to start with two sources of authority that might be influential to those shaping state law on unauthorized practice: the Model Rules of Professional Conduct and the Restatement of the Law Governing Lawyers.

Model Rule of Professional Conduct 5.5[37] currently provides in relevant part:

Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) **A lawyer who is not admitted to practice in this jurisdiction shall not:**

**(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law**; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) **A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that**:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

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37 See American Bar Association, Model Rules of Professional Conduct Rule 5.5, available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_5_unauthorized_practice_of_law_multijurisdictional_practice_of_law/ (last visited August 12, 2024).

(2) **are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized**;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) **A lawyer admitted in another United States jurisdiction** or in a foreign jurisdiction, **and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof**, or a person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction, **may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:**

(1) are provided to the lawyer's employer or its organizational affiliates, are not services for which the forum requires pro hac vice admission; and when performed by a foreign lawyer and requires advice on the law of this or another U.S. jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or

(2) **are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction…**.

Model Rule 5.5 (emphases added).

Much of the contents of the current version of Model Rule 5.5 – including most of the bolded language above – was contained in the version of Model Rule 5.5 adopted by the ABA House of Delegates in August 2002.[38] Of particular interest in the current context is Rule

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38 See American Bar Ass’n Center for Professional Responsibility, Client Representation in the

5.5(d)(2), which authorizes the provision, by a lawyer not admitted in the state, "through an office or other systematic and continuous presence in this jurisdiction," of "services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction."

A key question is what the drafters meant by "authorized by federal … law or rule." Neither the Commentary nor the 2002 Report of the Commission on Multijurisdictional Practice addresses whether a federal court's admission of a lawyer to practice would count as authorization for this purpose, or what the scope of that authorization would be.[39]

The Restatement of the Law Governing Lawyers also provides relevant, but somewhat equivocal, authority on this point. Section 3 of the Restatement provides:

> § 3 Jurisdictional Scope of the Practice of Law by a Lawyer
>
> A lawyer currently admitted to practice in a jurisdiction may provide legal services to a client:
>
> (1) at any place within the admitting jurisdiction;
>
> (2) before a tribunal or administrative agency of another jurisdiction or the federal government in compliance with requirements for temporary or regular admission to practice before that tribunal or agency; and
>
> (3) at a place within a jurisdiction in which the lawyer is not admitted to the extent that the lawyer's activities arise out of or are otherwise reasonably related to the lawyer's practice under Subsection (1) or (2).

Comment g to Section 3 states in part:

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21st Century: Report of the Commission on Multijurisdictional Practice title page & 19-20 (2002) ("MJP Commission Report"). An ABA commission is currently considering possible changes to Model Rule 5.5, including a proposal to authorize practice in all states based on admission in any single state. See Memorandum dated January 16, 2024 from David Machrzak, Chair, Center for Professional Responsibility Working Group on ABA Model Rule of Professional Conduct 5.5 to ABA Entities, Courts, Bar Associations (state, local, specialty, and international), Individuals, and Entities, available at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/issues-paper-for-comment-mr5-5.pdf (last visited August 19, 2024) ("ABA Issues Paper"). That proposal, if adopted, would significantly change the assumptions on which restrictive federal-court admission rules are based. The ABA project does not address more specifically the federal-court-practice issues of interest here.

39 MJP Commission Report, supra note 38, at 34.

> g. Authorized practice in a federal agency or court. A lawyer properly admitted to practice before a federal agency or in a federal court (see § 2, Comment b) may practice federal law for a client either at the physical location of the agency or court or in an office in any state, so long as the lawyer's practice arises out of or is reasonably related to the agency's or court's business. Such a basis for authorized practice is recognized in Subsection (2). Thus, a lawyer registered with the United States Patent and Trademark Office could counsel a client from an office anywhere about filing a patent or about assigning the ensuing patent right, matters reasonably related to the lawyer's admission to the agency. (The permissible scope of practice of a nonlawyer patent agent may be less, since admission to the agency does not suggest competence to deal with matters, such as the assignment of patents, beyond the jurisdiction of the agency.)
>
> A lawyer admitted in one state who is admitted to practice in a United States district court located in another state, but who is not otherwise admitted in the second state, can practice law in the state so long as the practice is limited to cases filed in that federal court. Local rules in some few federal district courts additionally require admission to the bar of the sitting state as a condition of admission to the federal court. The requirement is inconsistent with the federal nature of the court's business….

Reading this commentary, one might be tempted to impute to the Restatement a broad view about the preemptive force of federal-court rules governing attorney admission to practice in federal court. Before reaching that conclusion, though, it is useful also to consider this observation in the Reporter's Note to comment e: "There are few decisions dealing with the question of permissible out-of-state practice. Several involve clear instances of impermissible practice, through setting up an office in a state in which the lawyer is not admitted." Admittedly, the Reporter's Note expresses only the views of the Reporter, and not necessarily those of the ALI. But together, the commentary and the Reporter's Note suggest a view that admission to practice in a federal district protects the lawyer from unauthorized-practice accusations so long as the lawyer limits that practice to the cases actually filed in federal court – but that the lawyer courts trouble by actually opening an office in a state in which the lawyer isn't admitted.

It's also useful to consider the U.S. Supreme Court's decision in *Sperry v. State of Florida*, 373 U.S. 379 (1963). *Sperry* provides some support for the idea that a lawyer who only maintains an in-state office for purposes of a solely federal-tribunal practice does not violate state unauthorized-practice prohibitions. However, *Sperry* can be read narrowly to apply only to the context in which it arose – federal patent office practice – in which the topic area is well-defined and the jurisdiction is exclusively federal.

Sperry was "a practitioner registered to practice before the United States Patent Office"

who had “not been admitted to practice law before the Florida or any other bar.”[40] He had an office in Tampa and held “himself out to the public as a Patent Attorney.”[41] The Florida Supreme Court found that he was engaging in unauthorized practice and enjoined him from, inter alia, from calling himself a patent attorney, giving legal opinions (even on patentability), preparing legal documents (including patent applications), “holding himself out, in [Florida], as qualified to prepare … patent applications,” or otherwise practicing law.[42] The U.S. Supreme Court vacated and remanded, holding that 35 U.S.C. § 31[43] and regulations promulgated thereunder authorized the admission of persons, including nonlawyers, to practice before the Patent Office.[44] The Court did not define exactly what the state was foreclosed from prohibiting, but offered this guidance:

> Because of the breadth of the injunction issued in this case, we are not called upon to determine what functions are reasonably within the scope of the practice authorized by the Patent Office. The Commissioner has issued no regulations touching upon this point. We note, however, that a practitioner authorized to prepare patent applications must of course render opinions as to the patentability of the inventions brought to him, and that it is entirely reasonable for a practitioner to hold himself out as qualified to perform his specialized work, so long as he does not misrepresent the scope of his license.[45]

One might read *Sperry* to stand for the proposition that any valid federal-law provision authorizing a person to practice before a federal tribunal preempts the application of state unauthorized-practice provisions to a lawyer’s work in connection with such authorized practice before a federal tribunal. Note, however, that federal patent applications differ from ordinary federal-court litigation because the subject-matter is discrete and exclusively federal, and might well be ordinarily separable from matters that might be covered by state law.

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40 Sperry, 373 U.S. at 381.

41 Id.

42 Id. at 382.

43 At the time, 35 U.S.C. § 31 provided:

> § 31. Regulations for agents and attorneys
> The Commissioner, subject to the approval of the Secretary of Commerce, may prescribe regulations governing the recognition and conduct of agents, attorneys, or other persons representing applicants or other parties before the Patent Office, and may require them, before being recognized as representatives of applicants or other persons, to show that they are of good moral character and reputation and are possessed of the necessary qualifications to render to applicants or other persons valuable service, advice, and assistance in the presentation or prosecution of their applications or other business before the Office.

44 Id. at 384-85.

45 Id. at 402 n.47.

As noted previously, it is challenging to offer confident appraisals of state unauthorized-practice law as it might apply to practice by lawyers admitted in federal court but not to the bar of the encompassing state. Much of the relevant caselaw is somewhat dated – raising the possibility that subsequent changes in applicable state statutes or rules might have undermined earlier and more restrictive approaches. Also, the Rules of Professional Conduct may provide incomplete guidance in some states, because unauthorized-practice principles are also contained in statutes that might not have been updated at the same time as the state's Rules of Professional Conduct.

Initial research has uncovered some authority in a couple of states that suggests that admission to practice in an in-state federal court may not always immunize a lawyer (who is not admitted to the state bar) from charges of unauthorized practice. The picture emerging is that the clearest case for protection from unauthorized-practice allegations is where the client relationship arose in a state where the lawyer is admitted to practice and the client then decides to sue (or is sued) in a federal court (in a different state) where the lawyer is admitted. The clearest case of danger of unauthorized practice would be where the lawyer opens a permanent office only in the encompassing state without being admitted there, and brings in new clients by interviewing them in that in-state office. Even if the lawyer appears only in federal court, the lawyer might be regarded (at least by authorities in some states) as engaging in unauthorized practice.

Due to this complexity, it may be difficult to draft a national rule without giving attention to the unauthorized-practice question in some way. While the picture of unauthorized-practice-of-law doctrine is still emerging, this topic merits attention as the Subcommittee seeks the views of state bar authorities concerning the issues raised by this project.

## VII. Addressing concerns about attorneys who are military spouses

In the discussions to date, participants have sometimes mentioned that particular types of attorneys face particular hardship from restrictive bar admission rules. Lawyers who are military spouses are an example, as their spouse's work might require the family to relocate multiple times.

That particular concern might be partly addressed at the state bar level. An effort is underway to persuade state bar authorities to adopt special provisions to accommodate military spouses. The Military Spouse J.D. Network Foundation provides this description of its ongoing efforts:

> In February 2012, with the support of the ABA Commission on Women in the Profession, the ABA House of Delegates adopted a ABA Resolution 108 (2012) supporting changes in state licensing rules for military spouses with law degrees.

> In April 2012, Idaho became the first state to approve a military spouse licensing accommodation.
>
> Then in July 2012, the Conference of Chief Justices voted to support a resolution for admission of military spouse attorneys without examination. ….
>
> December 2012 saw the second state, Arizona, adopt a licensing rule specifically addressed the challenges faced by military spouse attorneys. Since then, other states have joined in the efforts to reduce barriers to employment for military spouses in the legal profession.
>
> In the years since, MSJDN has seen more than 40 states and the U.S. Virgin Islands pass common sense license reciprocity rules for military spouse attorneys. Our efforts continue as we work to reach all 50 states. MSJDN has also begun to petition the nine states which passed license reciprocity for military spouses but included harmful supervision requirements which have rendered the rules unduly burdensome and ineffective in practice.[46]

## VIII. Conclusion

This report provides a snapshot of the Subcommittee's efforts as of summer and fall 2024. The Subcommittee will provide further updates as it continues its inquiries, and welcomes any additional Advisory Committee feedback in the meantime.

Encl.

46 See Military Spouse J.D. Network Foundation, State Licensing Efforts, available at https://msjdn.org/rule-change/ (last visited August 12, 2024).

**MEMORANDUM**

**To:** Catherine T. Struve
Andrew Bradt

**From:** Zachary Hawari, Rules Law Clerk

**Re:** History of 28 U.S.C. § 1654

**Date:** December 28, 2023

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**History**

*Why and when was this statute first adopted, and what was its subsequent history?*

The statutory right to plead and conduct one's own case personally or by counsel goes back at least to the founding of the United States courts, and its language remains largely unchanged. Section 35 of the Judiciary Act of 1789 provided "[t]hat in all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct their cases therein." 1 Stat. 73, 92 (1789).

The Judiciary Act of 1789 was introduced as Senate Bill No. 1 in the first legislative session of the first Congress, and its authorship is often credited to Oliver Ellsworth and the other two members of the drafting committee–William Paterson and Caleb Strong.[1] Section 35 contains the provision that became 28 U.S.C. § 1654, but it also included a more controversial provision providing for the appointment of United States Attorneys and the Attorney General.[2] I have not had much success in identifying the purpose or history of the relevant part of Section 35.

Some courts and commentators have since observed that the Sixth Amendment's right to counsel was being debated at the same time as the Judiciary Act.[3] The history of the common law right to self-representation, the Founders'

[1] *See* New Light on the History of the Federal Judiciary Act of 1789 (jstor.org); The Judiciary Act of 1789: Charter for U.S. Marshals and Deputies (usmarshals.gov); First Federal Congress: Creation of the Judiciary (gwu.edu)

[2] New Light on the History of the Federal Judiciary Act of 1789 (jstor.org).

[3] Historical Background on Right to Counsel | Constitution Annotated | Congress.gov | Library of Congress

skepticism toward lawyers, the Sixth Amendment's right to counsel, and the Judiciary Act was discussed extensively by the Supreme Court in *Faretta v. California*, 422 U.S. 806, 812-32 (1975). More research would be required to understand how views during the 17th and 18th century led to Section 35, especially considering that views on the right to counsel in civil and criminal cases appears to have essentially reversed.[4]

In any event, Section 35 was codified in [Section 747 of the Revised Statutes]() in the 1870s. The Judicial Code of 1911 then included a slightly modified version. [36 Stat. 1087, 1164 (1911)](). Section 272 of Chapter 11, which provided for provisions common to more than one court, stated: "In all courts of the United States the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys at law as, by the rules of the said courts, respectively, <u>are permitted</u> to manage and conduct <u>causes</u> therein" (changes emphasized). When Title 28 was reorganized, that provision was moved from 28 U.S.C. § 394 to § 1654.

In 1948, § 1654 was briefly shortened to: "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel." [62 Stat. 869, 944 (1948).]() According to the reviser's notes for the 1948 amendment, the phrase "as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein" was "omitted as surplusage," and "[c]hanges were made in phraseology."[5] For example, "by the assistance of such counsel or attorneys at law" was apparently shortened to "by counsel."[6]

But in 1949, Congress "restore[d]" the "language of the original law." [63 Stat. 89, 103 (1949).]() Oddly, this restoration only included the "as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein" phrase.

[4] Several colonies in the 17th century prohibited pleading for hire. *Faretta*, 422 U.S. at 827. Interestingly, the Massachusetts Body of Liberties included a proto-attorney-admission element or, at least, a provision giving the court power to reject a representative:

Every man that findeth himselfe unfit to plead his owne cause in any Court shall have Libertie to imploy any man *against whom the Court doth not except*, to helpe him, provided he give him noe fee or reward for his paines….

*Id.* at n.32 (quoting Art. 26 (1641)) (emphasis added).

[5] [United States Code: General Provisions, 28 U.S.C. §§ 1651-1656 (1952) (loc.gov)]().

[6] It is not entirely clear whether shortening to "by counsel" was done in the 1948 amendment. The advisory committee notes to the 1944 amendment of Criminal Rule 44 quotes § 1654 with the assistance-of-counsel-or-attorney-at-law language. So, either there was another amendment between 1944 and 1948 or the 1949 amendment did not fully restore § 1654 to the 1911 version. Unfortunately, year-by-year versions of this statute have proven difficult to track down.

The change to “by counsel” survived the 1949 rollback. The allusion to the last phrase being “surplusage” in 1948 and its subsequent restoration in 1949 is intriguing, but I have not been able to find much legislative history on these changes. For example, the reviser’s notes and several cases refer to 80th Congress House Report No. 308, but I cannot find it online.

The current § 1654 has not changed since 1949. To summarize, these are the differences between 1789 and today:

> “[I]n all ~~the~~ courts of the United States~~,~~ the parties may plead and ~~manage~~ conduct their own ~~causes~~ cases personally or by ~~the assistance of such~~ counsel ~~or attorneys at law~~ as, by the rules of ~~the said~~ such courts, respectively, ~~shall be~~ are permitted to manage and conduct ~~their cases~~ causes therein.

**Rule-Making Authority and Appellate Rule 46**

*Does the statute’s reference to counsel who are “permitted to … conduct causes” in the federal courts “by the rules of such courts” indicate that this statute accords the local courts authority over attorney admissions?*

Courts were regulating attorney admissions and conduct prior to the REA, but it is not clear under what authority they did so—possibly inherent authority, some natural law theory, or statutory authorization like Section 35. *See generally Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1867) (discussing attorney admission and discipline in the context of a Civil War era statute requiring attorneys to swear oaths).

More recently, the Supreme Court has “recogniz[ed] that a district court has discretion to adopt local rules that are necessary to carry out the conduct of its business. See 28 U.S.C. §§ 1654, 2071; Fed. Rule Civ. Proc. 83.” *Frazier v. Heebe*, 482 U.S. 641, 645 (1987). “This authority includes the regulation of admissions to its own bar.” *Id.* This is a point on which the dissent agreed. *Id.* at 652 (Rehnquist, J., dissenting) (“It is clear from 28 U.S.C. § 1654 that the authority provided in § 2071 includes the authority of a district court to regulate the membership of its bar.”).[7]

Nor was *Frazier* the first time the Supreme Court mentioned these provisions together as a basis for authority. The Court had previously noted that two district

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[7] The Court held that the district court “was not empowered to adopt its local Rules to require members of the Louisiana Bar who apply for admission to its bar to live in, or maintain an office in, Louisiana where that court sits.” *Frazier*, 482 U.S. at 645. The dissent, however, believed that the Supreme Court lacked authority to set aside a rule promulgated by a district court governing admission to its own bar merely because it found the rules “unnecessary and irrational.” *Id.* at 652-55.

courts were "[a]cting under 28 U.S.C. §§ 1654, 2071, and Rule 83" when they promulgated local rules governing practice in their courts." *United States v. Hvass*, 355 U.S. 570, 571 (1958).[8]

Circuit courts have made similar statements. The Seventh Circuit stated that "[t]he authority to adopt rules relating to admission to practice before the federal courts was delegated by Congress to the federal courts in Section 35 of the Judiciary Act of 1789, … *now codified as* 28 U.S.C. § 1654." *Brown v. McGarr*, 774 F.2d 777, 781 (7th Cir. 1985); *see also Pappas v. Philip Morris, Inc.*, 915 F.3d 889, 895 (2d Cir. 2019) (quoting *Brown*). The Seventh Circuit also relied on § 2071 and inherent power to support the district court's authority to regulate attorney conduct.

It appears that courts have the necessary authority to regulate admission to the bar of that court under § 1654 and the REA, but it is not entirely clear whether § 1654, alone, would provide sufficient authority.[9]

*If so, was this statute analyzed during prior rulemaking discussion on attorney admissions, for example in the lead-up to the adoption of Appellate Rule 46?*

I have not found a direct reference to § 1654 in the discussion leading up to the addition of Appellate Rule 46 in the 1960s—at least not in the materials on the uscourts.gov website, namely the Committee Reports and Meeting Minutes. There is another archive of historical records that I have not yet searched, so there might still be something to be found.

Interestingly, however, in the minutes for the Appellate Rules Committee's August 1963 meeting, Dean O'Meara felt that attorney admission issues should be left for each appellate court to deal with by local rule while other members felt that this was an area where uniformity would be particularly helpful to the bar.[10]

[8] The issue in *Hvass* was not, however, about the validity of a local rule, but rather whether a willfully false statement made by an attorney under oath during the district court's examination, under its local rule, into his fitness to practice before it, constitutes perjury.

[9] The reviser's note to the 1940s amendments to § 1654 also mentions these sections together, stating that "the revised section [1654] and section 2071 of this title effect no change in the procedure of the Tax Court before which certain accountants may be admitted as counsel for litigants under Rule 2 of the Tax Court." That said, the reviser's note was getting at separate discussion about who can appear before the Tax Court and whether it should be limited to attorneys.

[10] Circuit courts as they existed in the 18th century looked very different from modern courts of appeal, which were created in the Evarts Act in 1891. Another potential avenue for follow-up research is determining when courts of appeals created local rules governing attorney admission (presumably in the late 19th and early 20th centuries but possibly earlier) and seeing what authority they cited.

# TAB 5

# TAB 5A

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Amicus Subcommittee

Re: FRAP 29

Date: September 6, 2024

Proposed amendments to FRAP 29, dealing with amicus briefs, were published in August for public comment. The public comment period ends on February 17, 2025. To date, we have received only two public comments. The amendments as published, along with the two comments, follow this memo.

Andrew Straw contends that amicus briefs should be allowed without restriction as an aspect of the First Amendment right to petition.

The Washington Legal Foundation opposes the proposed amendments. It sees no reason to require a motion in all cases for nongovernmental parties to file amicus briefs. The slight burden of preparing a motion in the infrequent cases where the parties do not consent, or consent at the last minute, is much less than the burden of having to file a motion in every case. It is not persuaded that the existing provision that allows for the striking of a brief that would cause disqualification is inadequate to deal with any disqualification concern. It also contends that the proposed disclosure rule regarding parties is unnecessary and that the current rule's prohibition on party funding of a brief is adequate. It objects to the proposed disclosure rule regarding nonparties, contending that all earmarked contributions by members of an amicus should be protected from disclosure, without exception for recent members.

The subcommittee anticipates that we will receive more comments before the comment period closes and will meet to consider those comments. The subcommittee also expects that, unlike any other proposal in recent years, this proposal may draw witnesses who want to testify at a hearing.

The subcommittee is aware that there was substantial concern expressed at the meeting of the Standing Committee this past June about the proposal to require that all nongovernmental entities file a motion seeking permission to file an amicus brief. The current rule allows for the filing of an amicus brief during a court's initial consideration of a case, but not during a court's consideration whether to grant rehearing, based on the consent of the parties. *Compare* FRAP 29(a)2) (initial consideration) *with* FRAP 29(b)(2) (whether to grant rehearing). Members of the Standing Committee are concerned that requiring motions, rather than relying on the consent of the parties, will produce unnecessary work for both litigants and courts.

The Advisory Committee may want to explore in more detail the nature and seriousness of the disqualification problem during a court's initial consideration of a case. Pending, of course, additional public comment, the Advisory Committee might also consider abandoning this part of the proposed amendment and focusing where it began this project: on disclosure requirements.

# TAB 5B

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

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

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

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

7 (2) **Purpose; When Permitted.** An amicus
8 curiae brief that brings to the court's attention
9 relevant matter not already mentioned by the
10 parties may help the court. An amicus brief
11 that does not serve this purpose—or that is
12 redundant with another amicus brief—is
13 disfavored. The United States ~~or~~, its officer
14 or agency, or a state may file an amicus brief

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

15 without ~~the consent of the parties or~~ leave of
16 court. Any other amicus curiae may file a
17 brief only with ~~by~~ leave of court ~~or if the brief~~
18 ~~states that all parties have consented to its~~
19 ~~filing, but a court of appeals~~. The court may
20 prohibit the filing of or may strike an amicus
21 brief that would result in a judge's
22 disqualification.

23 (3) **Motion for Leave to File.** A ~~The~~ motion for
24 leave to file must be accompanied by the
25 proposed brief and state:

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

27 (B) the reason ~~why an amicus~~ the brief is
28 helpful ~~desirable~~ and why it serves
29 the purpose set forth in Rule 29(a)(2);
30 and ~~the matters asserted are relevant~~
31 ~~to the disposition of the case.~~

32 (C) the information required by Rules
33 29(a)(4)(A), (b), (c), and (e).
34 (4) **Contents and Form**. An amicus brief must
35 comply with Rule 32. In addition to the
36 requirements of Rule 32, The the cover must
37 identify name the party or parties supported
38 and indicate whether the brief supports
39 affirmance or reversal. An amicus The brief
40 need not comply with Rule 28, but it must
41 include the following:
42 (A) if the amicus curiae is a corporation,
43 a disclosure statement like that
44 required of parties by Rule 26.1;
45 (B) a table of contents, with page
46 references;
47 (C) a table of authorities — cases
48 (alphabetically arranged), statutes,
49 and other authorities, — with

50 ~~references to~~ together with the pages
51 ~~of the brief~~ where they are cited;
52 (D) a concise ~~statement~~ description of the
53 identity, history, experience, and
54 interests of the amicus curiae, ~~its~~
55 ~~interest in the case, and the source of~~
56 ~~its authority to file~~ together with an
57 explanation of how the brief and the
58 perspective of the amicus will help
59 the court;
60 (E) if an amicus has existed for less than
61 12 months, the date the amicus was
62 created;
63 ~~(E)~~(F) unless the amicus is the United States,
64 its officer or agency, or a state, the
65 disclosures required by Rules 29(b),
66 (c), and (e); ~~curiae is one listed in the~~

67 ~~first sentence of Rule 29(a)(2), a~~

68 ~~statement that indicates whether:~~

69 ~~(i) a party's counsel authored the~~

70 ~~brief in whole or in part;~~

71 ~~(ii) a party or a party's counsel~~

72 ~~contributed money that was~~

73 ~~intended to fund preparing or~~

74 ~~submitting the brief; and~~

75 ~~(iii) a person other than the~~

76 ~~amicus curiae, its members, or~~

77 ~~its counsel contributed~~

78 ~~money that was intended to~~

79 ~~fund preparing or submitting~~

80 ~~the brief and, if so, identifies~~

81 ~~each such person;~~

82 ~~(F)~~(G) an argument, which may be preceded

83 by a summary ~~and which~~ but need not

84 include a statement of the applicable
85 standard of review; and
86 ~~(G)~~(H) a certificate of compliance under
87 Rule 32(g)(1)~~, if length is computed~~
88 ~~using a word or line limit~~.
89 (5) **Length**. Except ~~by~~ with the court's
90 permission, an amicus brief must not exceed
91 6,500 words ~~may be no more than one-half~~
92 ~~the maximum length authorized by these~~
93 ~~rules for a party's principal brief. If the court~~
94 ~~grants a party permission to file a longer~~
95 ~~brief, that extension does not affect the length~~
96 ~~of an amicus brief~~.
97 (6) **Time for Filing**. An amicus curiae must file
98 its brief~~, accompanied by a motion to filing~~
99 ~~when necessary,~~ no later than 7 days after the
100 principal brief of the party being supported is
101 filed. An amicus curiae that does not support

102 either party must file its brief no later than 7
103 days after the appellant's or petitioner's
104 principal brief is filed. The ~~A~~ court may grant
105 leave for later filing, specifying the time
106 within which an opposing party may answer.
107 (7) **Reply Brief**. An amicus curiae may file a
108 reply brief only with the court's permission.
109 ~~Except by the court's permission, an amicus~~
110 ~~curiae may not file a reply brief.~~
111 (8) **Oral Argument**. An amicus curiae may
112 participate in oral argument only with the
113 court's permission.
114 **(b) Disclosing a Relationship Between an Amicus and**
115 **a Party**. An amicus brief must disclose whether:
116 (1) a party or its counsel authored the brief in
117 whole or in part;

118 (2) a party or its counsel contributed or pledged
119 to contribute money intended to pay for
120 preparing, drafting, or submitting the brief;
121 (3) a party, its counsel, or any combination of
122 parties, their counsel, or both has a majority
123 ownership interest in or majority control of a
124 legal entity submitting the brief; and
125 (4) a party, its counsel, or any combination of
126 parties, their counsel, or both has, during the
127 12 months before the brief was filed,
128 contributed or pledged to contribute an
129 amount equal to 25% or more of the total
130 revenue of the amicus curiae for its prior
131 fiscal year.
132 **(c) Naming the Party or Counsel.** Any disclosure
133 required by Rule 29(b) must name the party or
134 counsel.

135 **(d) Disclosure by the Party or Counsel.** If the party or
136 counsel knows that an amicus has failed to make the
137 disclosure required by Rule 29(b) or (c), the party or
138 counsel must do so.
139 **(e) Disclosing a Relationship Between an Amicus and**
140 **a Nonparty**. An amicus brief must name any
141 person—other than the amicus or its counsel—who
142 contributed or pledged to contribute more than $100
143 intended to pay for preparing, drafting, or submitting
144 the brief, unless the person has been a member of the
145 amicus for the prior 12 months. If an amicus has
146 existed for less than 12 months, an amicus brief need
147 not disclose contributing members, but must disclose
148 the date the amicus was created.
149 **~~(b)~~(f) During Consideration of Whether to Grant**
150 **Rehearing.**
151 (1) **Applicability**. ~~This Rule 29(b)~~ Rules 29(a)-
152 (e) govern~~s~~ amicus ~~filings~~ briefs filed during

153 a court's consideration of whether to grant
154 panel rehearing or rehearing en banc, except
155 as provided in Rules 29(f)(2) and (3), and
156 unless a local rule or order in a case provides
157 otherwise.
158 (2) **When Permitted.** The United States or its
159 officer or agency or a state may file an amicus
160 brief without the consent of the parties or
161 leave of court. Any other amicus curiae may
162 file a brief only by leave of court.
163 (3) **Motion for Leave to File.** Rule 29(a)(3)
164 applies to a motion for leave.
165 (4)(2) Contents, Form, and **Length**. Rule 29(a)(4)
166 applies to the amicus brief. An amicus The
167 brief must not exceed 2,600 words.
168 (5)(3) **Time for Filing**. An amicus curiae supporting
169 the a petition for rehearing or supporting
170 neither party must file its brief, accompanied

171 ~~by a motion for filing when necessary,~~ no
172 later than 7 days after the petition is filed. An
173 amicus curiae opposing the petition must file
174 its brief~~, accompanied by a motion for filing~~
175 ~~when necessary,~~ no later than the date set by
176 the court for ~~the~~ a response.

177 **Committee Note**

178 The amendments to Rule 29 make changes to the
179 procedure for filing amicus briefs, including to the
180 disclosure requirements.

181 The amendments seek primarily to provide the courts
182 and the public with more information about an amicus
183 curiae. Throughout its consideration of possible
184 amendments, the Advisory Committee has carefully
185 considered the relevant First Amendment interests.

186 Some have suggested that information about an
187 amicus is unnecessary because the only thing that matters
188 about an amicus brief is the merits of the legal arguments in
189 that brief. At times, however, courts do consider the identity
190 and perspective of an amicus to be relevant. For that reason,
191 the Committee thinks that some disclosures about an amicus
192 are important to promote the integrity of court processes and
193 rules.

194 Careful attention to the various interests and the need
195 to avoid unjustified burdens is reflected throughout these
196 amendments. For example, the amendment treats disclosures

197 about the relationship between a party and an amicus
198 differently than disclosures about the relationship between a
199 nonparty and an amicus. While the public interest in
200 knowing about an amicus—in order to evaluate its
201 arguments and a court's consideration of those arguments—
202 is relevant in both situations, there is an additional interest in
203 disclosing the relationship between a party and an amicus:
204 the court's interest in evaluating whether an amicus is
205 serving as a mouthpiece for a party, thereby evading limits
206 imposed on parties in our adversary system and misleading
207 the court about the independence of an amicus. Moreover,
208 the burden on an amicus of disclosing a relationship with a
209 party is much lower than having to disclose a relationship
210 with nonparties. Disclosing a relationship with a party
211 requires an amicus to check its records (and perhaps make a
212 disclosure) regarding only the limited number of persons
213 who are parties to the case. Disclosing a relationship with a
214 nonparty would, by contrast, require an amicus to check its
215 records (and perhaps make a disclosure) regarding the much
216 larger universe of all persons who are not parties to the case.

217 To take another example, the amendment treats
218 contributions by a nonparty that are earmarked for a
219 particular brief differently than general contributions by a
220 nonparty to an amicus. People may make contributions to
221 organizations for a host of reasons, including reasons that
222 have nothing to do with filing amicus briefs. Requiring the
223 disclosure of non-earmarked contributions provides less
224 useful information for those who seek to evaluate a brief and
225 imposes far greater burdens on contributors.

226 **Subdivision (a).** The amendment to Rule 29(a)(2)
227 adds a statement of the purpose of an amicus brief: to bring
228 to the court's attention relevant matter not already mentioned
229 by the parties that may help the court. By contrast, if an
230 amicus curiae brief is redundant with the parties' briefs or

231 other amicus curiae briefs, it is a burden rather than a help.
232 The amendment also eliminates the ability of a
233 nongovernmental amicus to file a brief based solely on the
234 consent of the parties. Most parties follow a norm of granting
235 consent to anyone who asks. As a result, the consent
236 requirement fails to serve as a useful filter. Some parties
237 might not respond to a request to consent, leaving a potential
238 amicus needing to wait until the last minute to know whether
239 to file a motion. Under the amendment, all nongovernmental
240 parties must file a motion, eliminating uncertainty and
241 providing a filter on the filing of unhelpful briefs.
242 Rule 29(a)(3) is amended to require the motion to state why
243 the brief is helpful and serves the purpose of an amicus brief;
244 the motion must also include the disclosures required by
245 Rules 29(a)(4)(A), (b), (c). and (e).

246 The amendment to Rule 29(a)(4)(D) expands the
247 required statement regarding the identity of an amicus and
248 its interest in the case and requires “a concise description of
249 the identity, history, experience, and interests of the amicus
250 curiae, together with an explanation of how the brief and the
251 perspective of the amicus will help the court.” The
252 amendment calls for this broader disclosure to help the court
253 and the public evaluate the likely reliability and helpfulness
254 of an amicus, particularly those with anodyne or potentially
255 misleading names. It also requires that the amicus explain
256 how the brief and the perspective of the amicus will further
257 the goal of helping the court. Rule 29(a)(4)(E) is new. It
258 requires an amicus that has existed for less than 12 months
259 to state the date of its creation, helping identify amici that
260 may have been created for the purpose of this litigation.
261 Subsequent provisions are re-lettered.

262 Existing disclosure requirements about the
263 relationship between the amicus and both parties and
264 nonparties are removed from subdivision (a) and placed in

265 separate subdivisions, one dealing with parties (subdivision
266 (b)) and one dealing with nonparties (subdivision (e)).

267 Rule 29(a)(5) is amended to directly impose a word
268 limit on amicus briefs, replacing the provision that
269 establishes length limits for amicus briefs as a fraction of the
270 length limits for parties. This results in removing the option
271 to rely on a page count rather than a word count. This change
272 enables Rule 29(a)(4)(H) (formerly 29(a)(4)(G)) to be
273 simplified and require a certification of compliance under
274 Rule 32(g)(1) in all amicus briefs.

275 **Subdivision (b).** Subdivision (b) dealing with
276 disclosure of the relationship between the amicus and a party
277 is new, but it draws on existing Rule 29(a)(4)(E). Because of
278 the important interest in knowing whether a party has
279 significant influence or control of an amicus, these
280 disclosures are more far reaching than those involving
281 nonparties, which are addressed in (e).

282 Rule 29(b)(1) carries forward the existing
283 requirement that authorship of an amicus brief by a party or
284 its counsel must be disclosed.

285 Rule 29(b)(2) carries forward the existing
286 requirement that money contributed by a party or party's
287 counsel that was intended to fund the preparation or
288 submission of the brief must be disclosed. But in an effort to
289 counteract the possibility of an amicus interpreting the
290 existing rule narrowly, the amendment explicitly refers to
291 "preparing, drafting, or submitting the brief," thereby
292 making clear that it applies to every stage of the process.

293 Subdivision (b)(3) is new. It requires disclosure of
294 whether a party, its counsel, or any combination of parties or
295 counsel either has a majority ownership interest in or
296 majority control of an amicus. If a party has such control

297 over an amicus, it is in a position to control the content of an
298 amicus brief. If undisclosed, the court and the public may be
299 misled about the independence of an amicus from a party,
300 and a party may be able to effectively exceed the limitations
301 otherwise imposed on parties.

302 Subdivision (b)(4) is new. It requires disclosure of
303 whether a party, its counsel, or any combination of parties or
304 counsel has either contributed or pledged to contribute 25%
305 or more of the revenue of an amicus. The 25% figure is
306 chosen because the Committee believes that someone who
307 provides that high a percentage of the revenue of an amicus
308 is likely to have substantial power to influence that amicus.
309 Because the concern is about contributions or pledges made
310 sufficiently near in time to the filing of the brief to influence
311 the brief, contributions or pledges made within 12 months
312 before the filing of the brief must be disclosed. To minimize
313 the burden of disclosure on the amicus, the 25% calculation
314 is based on the total revenue of the amicus for its prior fiscal
315 year. This means that such a calculation of the disclosure
316 threshold needs to be done only once a year rather than each
317 time an amicus brief is filed. And by using the prior fiscal
318 year, an amicus can rely on its ordinary accounting process.
319 The term "total revenue" is used because that is the term used
320 by a tax-exempt organization on its IRS Form 990. A non-
321 tax-exempt entity is likely to prepare an income statement
322 which includes its total revenue. Individual amici can rely on
323 their total income from the prior fiscal year reported on IRS
324 Form 1040.

325 **Subdivision (c)**. Subdivision (c) requires that any
326 disclosure required by paragraph (b) name the party or
327 counsel. This builds upon the requirement in current Rule
328 29(a)(4)(D)(iii) that certain persons who make earmarked
329 contributions be identified.

330 **Subdivision (d)**. Subdivision (d) is new. It operates
331 as a backstop to the disclosure requirements of (b) and (c):
332 If the amicus fails to make a required disclosure, and the
333 party or counsel knows it, the party or counsel must make
334 the disclosure.

335 **Subdivision (e)**. Subdivision (e) focuses on the
336 relationship between the amicus and a nonparty. It makes
337 several changes to the existing Rule 29(a)(4)(E)(iii), which
338 currently requires the disclosure of any contribution
339 earmarked for a brief, no matter how small, by anyone other
340 than the amicus itself, its members, or its counsel.
341 Earmarked contributions run the risk that the amicus is being
342 used as a paid mouthpiece by the contributor. Knowing
343 about earmarked contributions helps courts and the public
344 evaluate the arguments and information in the amicus brief
345 by providing information about possible reasons for the
346 filing other than those explained by the amicus itself.

347 The Committee considered requiring the disclosure
348 of nonparties who make any significant contributions to an
349 amicus, whether earmarked or not. But it decided against
350 doing so because of the burdens it could impose on amici
351 and their contributors, even when the reason for the
352 contribution had nothing to do with the brief. Instead, it
353 retained the focus of the existing rule on earmarked
354 contributions.

355 The Committee considered eliminating the member
356 exception because that exception allows for easy evasion:
357 simply become a member at the time of making an
358 earmarked contribution. But it decided against doing so
359 because members speak through an amicus and an amicus
360 generally speaks for its members. In addition, eliminating
361 the member exception threatened to place an unfair burden
362 on amici who do not budget in advance for amicus briefs

363 (and therefore have to "pass the hat" when the need to file
364 an amicus brief arises) compared to other amici who may file
365 amicus briefs more frequently (and therefore can budget in
366 advance and fund them from general revenue). Without a
367 member exception, the latter (generally larger) amici would
368 not have to disclose, but the former (generally smaller) amici
369 would have to disclose.

370 Instead, the amendment retains the member
371 exception, but limits it to those who have been members of
372 the amicus for the prior 12 months. In effect, the amendment
373 is an anti-evasion rule that treats new members of an amicus
374 as non-members.

375 This then raises the question of what to do with a
376 newly-formed amicus organization. Rather than eliminate
377 the member exception for such organizations, the
378 amendment protects members from disclosure. But
379 Rule 29(a)(4)(E) requires an amicus that has existed for less
380 than 12 months to disclose the date of its creation. This
381 requirement works in conjunction with the expanded
382 disclosure requirement of Rule 29(a)(4)(D) to reveal an
383 amicus that may have been created for purposes of particular
384 litigation or is less established and broadly-based than its
385 name might suggest. Unless adequately explained, a court
386 and the public might choose to discount the views of such an
387 amicus.

388 The amendment also provides a $100 threshold for
389 the disclosure requirement. Under the existing rule, a non-
390 member of an amicus who contributes any amount, no matter
391 how small, that is earmarked for a particular brief must be
392 disclosed. This can hamper crowdfunding of amicus briefs
393 while providing little useful information to the courts or the
394 public. Contributions of $100 or less are unlikely to run the
395 risk that an amicus is being used as a mouthpiece for others.

396 **Subdivision (f)**. Subdivision (f) retains most of the
397 content of existing subdivision (b) and governs amicus briefs
398 at the rehearing stage. It is revised to largely incorporate by
399 reference the provision applicable to amicus briefs at the
400 initial consideration of the case. Rule 29(f)(1) makes
401 Rule 29(a) through (e) applicable, except as provided in the
402 rest of Rule 29(f) or if a local rule or order in a particular
403 case provides otherwise. As a result, duplicative provisions
404 are eliminated.

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

1 **Rule 32. Form of Briefs, Appendices, and Other**
2 **Papers**[2]

3 * * * * *

4 **(g) Certificate of Compliance.**

5 (1) **Briefs and Papers That Require a**
6 **Certificate.** A brief submitted under Rules
7 28.1(e)(2), 29(a)(5), 29(f)(2) ~~29(b)(4)~~, or
8 32(a)(7)(B)—and a paper submitted under
9 Rules 5(c)(1), 21(d)(1), 27(d)(2)(A),
10 27(d)(2)(C), or 40(d)(3)(A)—must include a
11 certificate by the attorney, or an
12 unrepresented party, that the document
13 complies with the type-volume limitation.

---

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

[2] The changes indicated are to the revised version of Rule 32, not yet in effect.

14 The person preparing the certificate may rely
15 on the word or line count of the word-
16 processing system used to prepare the
17 document. The certificate must state the
18 number of words—or the number of lines of
19 monospaced type—in the document.
20 (2) **Acceptable Form.** Form 6 in the Appendix
21 of Forms meets the requirements for a
22 certificate of compliance.

23 **Committee Note**

24 Rule 32(g) is amended to conform to amendments
25 to Rule 29.

Appendix

Length Limits Stated in the

Federal Rules of Appellate Procedure

| | | | | | |
|---|---|---|---|---|---|
| | | * * * | | | |
| Amicus briefs | 29(a)(5) | • Amicus brief during initial consideration on merits | ~~One-half the length set by the Appellate Rules for a party's principal brief~~ 6,500 | ~~One-half the length set by the Appellate Rules for a party's principal brief~~ Not applicable | ~~One-half the length set by the Appellate Rules for a party's principal brief~~ Not applicable |
| | ~~29(b)(4)~~ 29(f)(2) | • Amicus brief during consideration of whether to grant rehearing | 2,600 | Not applicable | Not applicable |
| | | * * * | | | |

# TAB 5C

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# Comment from STRAW, ANDREW

Posted by the **United States Courts** on Aug 19, 2024

Docket (/docket/USC-RULES-AP-2024-0001)
/ Document (USC-RULES-AP-2024-0001-0001) (/document/USC-RULES-AP-2024-0001-0001) / Comment

Comment

Amicus briefs are an expression of the First Amendment right to petition courts on matters of public interest. It costs virtually nothing to allow amicus briefs to be filed and they should always be allowed regardless of the consent of any party. The Court is under no obligation to do what an amicus wants, but it should always allow such statements in the public record. As a civil rights advocate for people with disabilities, it is exceptionally important to allow these briefs in civil rights cases, but the rule of allowing them without exception should apply to all cases.

**Comment ID**

USC-RULES-AP-2024-0001-0003

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**Received Date**

Aug 15, 2024

U.S. Chamber of Commerce
Litigation Center

March 28, 2024

Honorable Jay S. Bybee
Chair, Advisory Committee on Appellate Rules
Lloyd D. George U.S. Courthouse
333 Las Vegas Boulevard South
Las Vegas, Nevada 89101-7065

Re: Potential Amendments to Federal Rule of Appellate Procedure 29

Dear Judge Bybee:

I write to express the views of the Chamber of Commerce of the United States of America regarding the Advisory Committee's consideration of the latest potential amendments to Rule 29 of the Federal Rules of Appellate Procedure. As discussed below, Rule 29 already safeguards the integrity of the judicial process with respect to amicus briefs, and it does so in a manner consistent with the First Amendment. The contemplated amendments to Rule 29 are unnecessary, and they are not sufficiently tailored to avoid encroachment on the associational rights of membership organizations.

In particular, the Advisory Committee should reconsider the potential amendment requiring amici to disclose the identities of certain non-party associational members who contribute to the preparation of their own association's amicus brief. Such an amendment would infringe on core associational rights. The amendment also discriminates against established membership organizations compared to ad hoc amici by requiring greater disclosure of established organizations' members. That differential treatment, which itself raises First Amendment concerns, should be rejected.

**A. Rule 29 Already Protects the Integrity of Amicus Briefing in a Manner Consistent with the First Amendment**

As an initial matter, it is unclear why Rule 29 should be amended at all. As the Advisory Committee noted in its December 6, 2023 report to the Standing Committee on the Rules of Practice and Procedure, the Advisory Committee appointed a subcommittee to consider potential amendments to Rule 29 only "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," and in anticipation of congressional inquiries regarding the "disclosure requirements for organizations that file amicus briefs." Dec. 6, 2023 Report at 3; *see* Letter from Sen. Sheldon Whitehouse & Rep. Henry C. Johnson to Hon. John D. Bates at 1, 6 (Feb. 23, 2021) (Whitehouse Letter) (encouraging the Standing Committee to "address the problem of inadequate funding disclosure requirements" in order to root out "anonymous judicial lobbying").

Those concerns rested on a fundamental misapprehension of the role and purpose of amicus briefing in the federal courts. Amicus briefing is not a form of lobbying, and the suggestion from

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some members of Congress that membership associations must disclose their members or donors to the public in order to shine a light on the "influence" of those "who seek to shape the law through the courts," Whitehouse Letter at 2, misunderstands the judicial process. The influence of an amicus curiae is directly proportional to the persuasive value of the arguments presented in the briefs submitted by that amicus. Courts do not accord substantial weight to amicus briefs submitted by the ACLU, for instance, because of the identities of that organization's donors. Rather, they accord weight commensurate with the strength of the arguments made in the brief. Indeed, the anonymity of an association's members guarantees that an amicus brief submitted by that association will be accorded weight on the basis of the strength of its arguments, rather than the identities or perceived influence of the association's members. Compelled disclosure of the members or donors of an amicus would create an appearance of judicial influence on the part of those members and donors where there currently is none, either in appearance or in fact.

Concerns over the "influence" of the supporters and members of amicus organizations are therefore unfounded. And the consequent calls for compelled disclosure of associational membership are openly hostile to core First Amendment principles. There is a "vital relationship between [the] freedom to associate and privacy in one's associations." *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373, 2382 (2021) (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958)). Accordingly, the compelled disclosure of an association's members inevitably exerts a "deterrent effect on the exercise of First Amendment rights." *Id.* at 2383 (quoting *Buckley v. Valeo*, 424 U.S. 1, 65 (1976)). For this reason, the First Amendment requires at least "exacting scrutiny" of governmental regulations that compel the disclosure of an association's membership. *Id.* Any such compulsion must serve a "sufficiently important governmental interest," one that "reflect[s] the seriousness of the actual burden on First Amendment rights." *Id.* (quoting *Doe v. Reed*, 561 U.S. 186, 196 (2010)). Furthermore, the form and degree of compulsion must be "narrowly tailored to the government's asserted interest." *Id.*

As it stands—and has stood for years—Rule 29 appropriately conforms to those First Amendment principles. The disclosure requirements of Rule 29 address two concerns. First, they prevent parties from seeking to "circumvent page limits on the parties' briefs" by ghostwriting or otherwise directing the arguments presented in amicus briefs. Fed. R. App. P. 29 advisory committee notes. Second, they "help judges to assess whether the amicus itself considers the [case] important enough to sustain the cost and effort of filing an amicus brief." *Id*.

In its current form, Rule 29 is narrowly tailored to address those concerns. Specifically, Rule 29 requires amici to submit a statement disclosing 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." Fed. R. App. P. 29(a)(4)(E). Those measures protect the integrity of amicus submissions by ensuring that amicus briefs genuinely reflect the views and interests of the amicus itself, and are not simply supplemental party briefs. They do not broadly intrude on the privacy of the relationships among amicus organizations and their members, and thus do not deter amicus organizations or their members from submitting amicus briefs.

### B. The Contemplated Amendments Raise Serious First Amendment Concerns

The amendments contemplated by the Advisory Committee reflect a subtle—but nevertheless significant—departure from the principles that undergird the current disclosure mandates of Rule 29. To be sure, the amendments currently under discussion are not as radical as those previously proposed by certain members of Congress. *See, e.g.*, S. 1411 § 2(a), 116th Cong. (2019) (requiring that every amicus organization filing three or more amicus briefs per year disclose the identity of any person contributing at least $100,000 or 3 percent of the organization's revenues, such information to be "made publicly available indefinitely" by the Administrative Office of the U.S. Courts). But they appear to share some of the same animating premises. As drafted, the amendments go beyond the current objectives of Rule 29—designed to protect the integrity of amicus submissions—by more broadly compelling disclosure of the associational relationships between an amicus and its members. Those new disclosure requirements threaten to infringe the associational rights of amicus organizations and their members.

#### 1. Mandatory Disclosure of the Identities of Significant Contributors Will Inhibit the First Amendment Rights of Amicus Organizations and their Members

First, the amendments under consideration would compel disclosure of the relationships between an amicus and its members in situations where the members are parties to a case in which the amicus submits a brief, and where such parties (either singly or collectively) are significant contributors to the general operations of the amicus. Thus, an amicus would be forced to disclose "whether a party, its counsel, or any combination of parties and their counsel has, during the 12-month period before the brief was filed, contributed or pledged to contribute an amount equal to or greater than 25% of the gross revenue of the amicus curiae for the prior fiscal year." Draft Proposal Rule 29(b)(4). And the amicus would further be required to disclose the identities of any such party or counsel. Draft Proposal Rule 29(c).

These provisions are unnecessary, counterproductive, and chilling. They are unnecessary because Rule 29 already mandates disclosure of instances where a party (including a party that is a member of the amicus organization) has directed or shaped the content of an amicus brief either by authoring it (in whole or in part) or by directly contributing money for the preparation of the brief. Fed. R. App. P. 29(a)(4)(i)-(ii). In those instances, disclosure well serves the purpose of alerting the court to the possibility that the "amicus brief" is substantively a party brief.

But that purpose is not served by mandating disclosure of a donor relationship between the party and the amicus anytime a combination of parties and counsel has contributed 25% or more of the general revenues of the amicus. There are instances in which an amicus organization that represents the interests of a particular industry or trade might have at least one large donor whose contributions account for over 25% of the organization's annual revenues. In those instances, the amicus organization cannot fairly be said to represent only the interests of the large donor; after all, such an organization will have other members and donors that account for up to 75% of its yearly revenues and that care deeply about the issues before the court. Where the large donor is a party to an appeal, an industry or trade association should be able to appear as amicus on behalf of its own interests—and the interests of its non-party members—without fear that its filing will be discounted as the work of the party itself. The disclosure rule under consideration threatens to

deter filings from amici in those cases, thereby reducing the ability of non-party associational members to speak up (through their existing associations) in appeals that affect them.

This concern is especially acute with respect to appeals in which multiple participants in the same industry are named as parties, where the parties' contributions to an industry association may very quickly add up to 25% of the annual revenues of the amicus. In those cases, the interests of an industry-association amicus speaking up in support of those parties are well known. It is not clear what transparency interest is served by requiring the amicus to disclose whether any of those specific parties has chosen to be a member of the association. At the same time, forcing an amicus to disclose those financial ties at the front of its brief implies that the brief is simply a vehicle for those parties to present additional arguments, diminishing the independent interests and contributions of the amicus and its non-party members. And this requirement would impose a significant accounting burden on amicus filers. Even where the parties' contributions do not sum up to the 25% threshold, it will be unduly burdensome for amici to track contributions from numerous parties and their counsel to determine compliance with the rule, particularly in complex cases with many parties.

### 2. Mandatory Disclosure of Contributions for Particular Briefs from Recent Members of Existing Organizations is Arbitrary, and Does Not Withstand Exacting Scrutiny Under the First Amendment

Second, the Advisory Committee proposes to mandate disclosure of any non-party—including an existing member of an amicus organization—"who contributed or pledged to contribute more than $1000 intended to fund (or intended as compensation for) preparing, drafting, or submitting [an amicus] brief," unless the person "has been a member of the amicus *for the prior 12 months*." Draft Proposal Rule 29(d) (emphasis added).[1] Yet the contemplated amendment exempts *newly formed* amicus organizations from this disclosure requirement, providing that if "an amicus has existed for fewer than 12 months, an amicus brief need not disclose contributing members, but must disclose the date of creation of the amicus." *Id.* This proposal would directly interfere with the associational rights of membership organizations.

There is no reason to depart from the existing "member exclusion" to the disclosure requirement. Under Rule 29 as it is currently structured, an amicus is not required to disclose any contribution intended to fund a particular brief if that contribution comes from a member of the amicus organization that is not a party to the case. *See* Fed. R. App. P. 29(a)(4)(E)(ii)-(iii). That sensible rule protects associational rights. Under the First Amendment, amicus organizations that collect supplemental funding from members to budget for a brief have every right to be heard on an equal basis. Any demand for the disclosure of the identities of non-party members who make such contributions naturally imposes considerable burdens on the associational rights of those members. Such demands are justified in only one circumstance: where the member is a party to the case. *See* Fed. R. App. P. 29(a)(4)(E)(ii). Absent a member's participation in a case *as a party*,

[1] It is our understanding that the Amicus Subcommittee has recently suggested lowering the threshold from $1000 to $100. It seems doubtful that organizations could efficiently "crowdfund" solely with contributions less than $100. But regardless of the threshold, any disclosure requirement that does not include an exemption for members of an amicus organization would seriously threaten the First Amendment rights of associations and their members.

there is no threat that a member's contribution for the preparation of an amicus brief would serve an improper purpose.

There is also no sound reason to single out new members in this manner. The December 6, 2023 report to the Standing Committee noted the basis for this singling out, stating that the rule would, "[i]n effect, … treat recent members as nonmembers, thereby blocking the easy evasion of the current rule." Dec. 6, 2023 Report at 5. The idea seems to be that non-party nonmembers of an amicus organization could "evade" disclosure of their earmarked contributions in support of a particular amicus brief by becoming members of the amicus organization. But the First Amendment affirmatively encourages the public to form private associations by shielding those associations from blunderbuss inquiries into the identities of their members. Thus, there would be no evasion in this circumstance; just individuals or entities joining private associations for their intended purpose. A new or "recent" member of a membership association has the same First Amendment rights as other members. Moreover, it is ultimately the *membership organization* that is the amicus presenting the views of *all* its members, no matter when they joined.

Perhaps the concern is *temporary* membership—that is, where a non-party has become a member of the amicus organization solely for the purpose of making a contribution for an amicus brief while intending to withdraw from the amicus organization following submission of the brief. We are not aware of any evidence suggesting that there is a practical problem with temporary members. And even temporary associations are entitled to First Amendment protection so long as they reflect a "collective effort on behalf of shared goals," and the First Amendment looks askance at "intrusion into the internal structure or affairs of an association." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622-23 (1984). Some associations have members who come and go, or who periodically join and leave and re-join; others have members who remain for decades. And many have members whose membership lapses temporarily, sometimes as the result of an oversight or an internal delay, and who then re-join; associations and members should not be penalized for that reason. Policing the degree of associational commitment of an amicus organization's individual members is not an appropriate task for Rule 29—regardless of whether an amicus organization has been around for decades or was newly formed. It is the formation of the association, not its pedigree, that garners First Amendment protection.

Under the contemplated amendments, moreover, a longstanding amicus organization must disclose any earmarked contributions received by its newest members, but an entirely new amicus organization may avoid such disclosure and instead simply note its date of organization. *See* Draft Proposal Rule 29(d). Thus, an ad hoc association organized solely for the purpose of presenting a particular amicus brief in a particular case may shield the identities of all of its member-contributors from disclosure (no matter the size of their contributions), while a longstanding association must disclose the identity of any relatively new member that has made a contribution of more than $1000 (or more than $100) for the preparation of a particular amicus brief. This dichotomy makes little sense, indicating that the amendment is not narrowly tailored to achieve an important objective. For that reason, at least, the current proposal cannot survive even "exacting" judicial scrutiny. *Americans for Prosperity Foundation*, 141 S. Ct. at 2383.

The Chamber appreciates the Advisory Committee's concern for the interests of newly formed amicus organizations and its concomitant interest in "enabling anonymous crowdfunding of an amicus brief." Dec. 6, 2023 Report at 5; *see also* Whitehouse Letter at 6-7 (expressing

concern that existing amicus-disclosure rules disfavor such crowdfunded briefs). Just as debate in the public square is enriched by the proliferation of speech, the proliferation of amicus briefs submitted by new and diverse amicus organizations—including wholly ad hoc groups—promotes speech and can be a significant aid to judicial decisionmaking. But there is no reason why Rule 29 should *discriminate against* existing amicus organizations in favor of new or ad hoc organizations. Longstanding amici often bring greater institutional expertise and perspective to the presentation of legal issues on appeal, and their contributions should be encouraged on an equal basis. There is no sufficient reason for compelling greater levels of membership disclosure with respect to such organizations than with respect to new or ad hoc amicus groups.

The Advisory Committee should therefore retain the existing "member exclusion" in Rule 29—which does not mandate disclosure of the contributions of *any* members—even if the rule provides that earmarked contributions of non-members need not be disclosed if they are less than $1000 (or $100). This approach would protect the First Amendment rights of new and existing membership associations and their members on an equal footing while providing latitude for ad hoc amicus groups to collect contributions for anonymously crowdfunded briefs.

* * *

The Chamber appreciates the careful and deliberate manner in which the Advisory Committee has approached these issues and is grateful for the opportunity to comment on the Advisory Committee's important work. Thank you for your consideration.

Respectfully,

Daryl Joseffer
Executive Vice President and Chief Counsel
U.S. Chamber Litigation Center

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# Comment from Washington Legal Foundation

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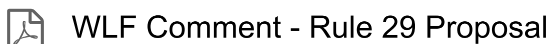

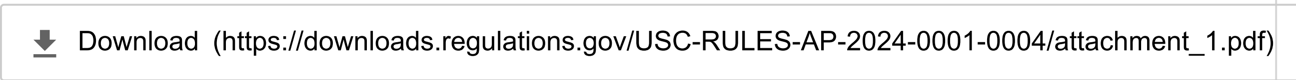

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August 19, 2024

**Submitted via regulations.gov**

Honorable John D. Bates
Chair, Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
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**Re: Proposed Amendments to Federal Rule of Appellate Procedure 29**

Judge Bates:

Washington Legal Foundation submits this comment on proposed amendments to Federal Rule of Appellate Procedure 29. WLF appreciates the chance to weigh in on the proposal to amend the submission and disclosure requirements for amicus curiae briefs. The proposal would require nongovernmental amici to obtain leave of court to file amicus briefs and require intrusive disclosures from amici. As explained below, the Committee should not move forward with the proposal.

## I. WLF Has An Interest In Ensuring That The Process For Filing Amicus Curiae Briefs Is Fair And Efficient.

WLF is a nonprofit, public-interest law firm and policy center with supporters nationwide. It defends free enterprise, individual rights, limited government, and the rule of law. WLF often appears as amicus curiae in all thirteen courts of appeals—filing twelve such briefs over the past year. *See*, *e.g., CVS Pharmacy, Inc. v. Forest Lab'ys Inc.*, 101 F.4th 223 (2d Cir. 2024). WLF also participates in the rulemaking process by submitting comments on proposed amendments to federal rules. *See*, *e.g.*, WLF Comment, *In re Federal Rule of Evidence 702 Amendment* (Dec. 14, 2021); WLF Comment, *In re Proposed Amendments to Federal Rule of Civil Procedure 23* (Feb. 15, 2017). WLF therefore has a strong interest in the proposal.

## II. Requiring Leave Of Court To File An Amicus Brief Is Unnecessary, Inefficient, And Limits Access To The Courts.

The proposal to require every nongovernmental amicus to obtain leave of court to file a brief is an unnecessary step that would decrease judicial efficiency and subvert stakeholders' access to the appellate system. The proposal also misunderstands amicus briefs and will not accomplish its goals.

### A. Rule 29 allows for the efficient screening of amicus briefs.

The proposal seeks to "eliminat[e] uncertainty and provid[e] a filter on the filing of unhelpful briefs." Standing Comm. on Rules of Practice & Proc., Agenda Book, 204 (June 4, 2024), https://perma.cc/DNX3-XAMQ. It tries to accomplish this goal by requiring all nongovernmental amici to seek leave of court to file an amicus brief while "stat[ing] why the brief is helpful and serves the purpose of an amicus brief." *Id.*

But there is no need to decrease the number of amicus briefs in the courts of appeals. Judges have efficient processes for filtering amicus briefs and disregard briefs that they or their clerks find unhelpful. In other words, judges do not—and need not—give each amicus brief equal consideration. A law clerk may spend 10 seconds reading the table of contents of one amicus brief before throwing it in the trash while the judge may spend hours examining the arguments in another amicus brief. Thus, requiring potential amici to file a motion would just increase the workload on chambers. Rather than just reviewing the brief, judges would have to review the motion and then, if leave is granted, the brief.

There are several ways judges quickly decide whether an amicus brief is helpful. First, is the identity of the amicus. For example, Justices Ginsburg, Scalia, and Thomas gave American Civil Liberties Union briefs closer attention. *See* Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J.L. & Pol. 33, 49-50 (2004). This tracks studies showing that judges pay more attention to briefs by amici with a reputation for high-quality work. *See* Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 Va. L. Rev. 1901, 1937 (2016). In other words, judges often use an amicus's reputation based on prior briefs to help decide whether future briefs will be helpful.

Second, judges quickly scan the table of contents to determine whether the brief will be helpful. The same is true of the summary of argument and interest of amicus curiae sections of the brief. Third, the attorneys filing an

amicus brief also convey whether the brief is likely to be helpful. A brief filed by Lisa Blatt or Paul Clement is worth reading. On the other hand, it may not be worthwhile to read an amicus brief by a serial pro se litigant.

The proposal decreases the efficiency of appellate courts' considering amicus briefs. Modern appellate practice includes filing a plethora of motions and responses. In some circuits, judges handle most of these motions. In other circuits, the clerk has the power to decide most motions. And in the Ninth Circuit, a special master is empowered to rule on some motions. 9th Cir. R. 27-7. Requiring amici to move for leave to file briefs in every case would increase the burden on the judiciary without any benefit.

That is why the Supreme Court eliminated the need to seek consent or move for leave to file an amicus brief. *See* Supreme Court, *Memorandum to Those Intending to File an Amicus Curiae Brief in the Supreme Court of the United States,* 1 (Jan. 2023), https://perma.cc/6XTY-ZZF5 (there is "no need for an amicus to file a motion for leave to file" a timely amicus brief). The Court recognized that the time justices and the Clerk's Office were spending on deciding the motions squandered judicial resources. The same is true for the courts of appeals, which have far more crowded dockets. Thus, the proposal is unnecessary to help judges decide whether an amicus brief is helpful and decreases judicial efficiency.

### B. The proposal will increase, not eliminate, uncertainty for amici.

The Committee adds that "some parties might not respond to a request to consent, leaving a potential amicus needing to wait until the last minute to know whether to file a motion." Agenda Book, *supra*, at 203-04. First, this is not a problem that arises often. WLF files many briefs annually in the courts of appeals and rarely must file motions; parties usually consent.

About once a year, parties do not respond to WLF's consent request. While this is frustrating, requiring every potential amicus to seek leave to file is not the solution. WLF's process is to prepare a motion if consent has not been received from all parties two days before the due date. Often, the motion is not filed because parties eventually consent. Other times, parties who failed to respond to a request for consent never bother to file in opposition to WLF's motion. This is a minor inconvenience. But preparing a motion a few times a year that need not be filed is much more efficient for amici and the courts than requiring a motion in every case.

If the Committee truly wants to eliminate the problem of parties not responding to amici, it could require parties to respond to consent requests within a specified time. For example, consent could be presumed unless a party opposes the request within two business days. As uncertainty is not a problem and there are also better, targeted options if the Committee wants to eliminate uncertainty, the proposal is unnecessary.

Rather than decrease uncertainty, the Committee's proposal would increase uncertainty. Judges would have to decide whether a proposed amicus brief met Rule 29's "helpfulness" standard. But deciding whether a brief is helpful would cause uncertainty for amici. The terms "helpful" and "serves the purpose of an amicus brief" are so ambiguous that different judges would interpret those phrases differently. Amici would always be unsure if their brief would be considered, which would discourage amicus filings.

Preparing and filing amicus briefs is not cheap. Many amici are willing to spend scarce resources on amicus briefs because they are confident that parties will consent to the filing and courts will accept the submission. But groups may not be willing to pay for an amicus brief if they must gamble on its acceptance. This will decrease the number of diverse perspectives and arguments submitted by amici. The proposal will have a particularly chilling effect on individuals and smaller groups who want to file amicus briefs.

Besides disproportionately affecting individuals and smaller groups, the proposal will also widen the gap between governments (which need not seek leave to file an amicus brief) and private parties (who must seek leave). True, the rules have special provisions regarding the government. But those rules usually apply equally to all parties. *See, e.g.*, Fed. R. App. P. 4(a)(1)(B). The courts should not "place a finger on the scales of justice in favor of the most powerful of litigants, the federal government, and against everyone else." *Buffington v. McDonough*, 143 S. Ct. 14, 19 (2022) (per curiam) (Gorsuch, J., dissenting from the denial of certiorari). The Supreme Court recognized this fact when eliminating the requirement for private parties to seek consent before filing an amicus brief. There is no reason for the Committee to go in the opposite direction for the courts of appeals.

**C. Amicus briefs play an important role in the judicial process.**

The proposal undersells the critical role that amicus briefs play in our common law system. Federal courts do not issue advisory opinions. *See FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 378 (2024) (citing 13 Papers of George

Washington: Presidential Series 392 (C. Patrick ed. 2007)). Rather, courts announce legal standards and rules as part of resolving cases and controversies between parties. This limit on the judiciary's power is key to separation of powers. But it also means that amicus participation is important.

Amici make arguments that the parties are often unwilling or unable to make. For example, the parties may want the answer to a legal question and so they will not argue that the court lacks subject-matter jurisdiction. Amici, however, can explain why federal courts lack jurisdiction over a case. This helps the court get the decision right. *See Lefebure v. D'Aquilla*, 15 F.4th 670, 675 (5th Cir. 2021) (Ho, J., in chambers) ("courts should welcome amicus briefs for one simple reason: '[I]t is for the honour of a court of justice to avoid error in their judgments" (quoting *Protector v. Geering*, 145 Eng. Rep. 394 (K.B. 1686) (alteration in original))).

Parties to an appeal worry about the outcome of a specific case. Amici, however, have interests beyond that case. They can therefore explain to the court the far-reaching implications of a holding. For example, imagine a plaintiff slips and falls on ice on the defendant's driveway. The parties are only interested in winning the case. An amicus group representing shopping malls may file an amicus brief explaining why the hills and ridges doctrine is important for their business and urging the court to limit the ruling to residential properties or to craft a rule that recognizes the importance of the doctrine. This would help the panel understand the issues. *Cf. Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 976 F.3d 761, 764 (7th Cir. 2020) (Scudder, J., in chambers) (explaining how judges may find amicus briefs helpful). The proposal ignores these benefits associated with amicus briefs.

**D. The explanation for departing from Supreme Court practice is illogical.**

Finally, the proposal departs from the Supreme Court's recent rule change on amicus briefs. Amici may now file briefs without the consent of the parties or leave of court. The Committee explains this departure by stating that the Supreme Court receives far more amicus briefs and, unlike the courts of appeals, amicus briefs cannot cause recusal problems for Supreme Court Justices. Agenda Book, *supra*, at 150-51. Both rationales are illogical.

First, as explained above, the motion requirement would burden judges and staff. But even if that were not true, there is no reason that fewer amicus briefs in the courts of appeals warrants more scrutiny of those briefs. If anything, the opposite is true. It appears as though the Committee was just

searching for any difference between the Supreme Court and the courts of appeals to support its desired outcome of limiting amicus briefs.

Second, the proposal will not help prevent disqualification. The rules allow a court to reject any "amicus brief that would result in a judge's disqualification." Fed. R. App. P. 29(a)(2). Requiring all amici to file a motion will thus not help avoid disqualifications. So neither explanation for departing from the Supreme Court's recent simplification of amicus practice makes sense.

## III. The Proposed Disclosure Requirements Are Unnecessary And Raise First Amendment Concerns.

### A. Forcing amici to disclose their donors is unnecessary.

The proposal would require amici to disclose "whether a party, its counsel, or any combination of parties or their counsel has, during the 12 months before the brief was filed, contributed or pledged to contribute an amount equal to 25% or more of the total revenue of the amicus curiae for the prior fiscal year." Agenda Book, *supra*, at 206. Requiring this disclosure is unnecessary because the current rules, which track the Supreme Court's rule, already ensure that parties do not fund amicus briefs.

Rule 29 requires amici to disclose whether "a party's counsel authored the brief in whole or in part," "a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief," or "a person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief." Fed. R. App. P. 29(a)(4)(E)(i-iii). This stops parties from using amicus briefs to circumvent word limits. *See* Fed. R. App. P. 29 note.

Concerns about party involvement in amicus briefs are thus adequately addressed by the current rule. If a party is paying for an amicus brief, that must be disclosed to the court. Still, the Committee "believes that someone who provides [over 25%] of the revenue of an amicus is likely to have substantial power to influence that amicus." Agenda Book, *supra*, at 206. This argument fails for several reasons.

First, the Committee does not explain why it chose 25% as the cutoff. Because the number is so arbitrary, the Committee must explain its rationale. Although donating a large percentage of an amicus's annual budget may influence the issues that the amicus is interested in, the current rule prevents

that donation from being used to file an amicus brief supporting the donor absent disclosure. That strikes the correct balance.

Second, the most helpful amici often have a strong interest in one industry or issue. For example, the local farm bureau is probably best positioned to file an amicus brief in a right-to-farm case. These industry groups may receive funding from parties because they are members of industry groups. But that should not require disclosure. This is particularly true if multiple industry participants are parties. Thus, there is no need for increased disclosure.

The Committee also believes that some amicus efforts led the Supreme Court to overturn some precedent. But that is no reason to tighten amicus rules at the court of appeals level. Again, the Supreme Court has loosened the requirements for filing amicus briefs there. The Committee fails to explain why amicus influence at the Supreme Court should cause more amicus disclosures in the courts of appeals. Thus, there is no need to force amici to make more disclosures in the courts of appeals.

### B. The disclosure requirements may violate the First Amendment.

The proposal requires disclosure of "any person—other than the amicus or its counsel—who contributed or pledged to contribute more than $100 to pay for preparing, drafting, or submitting the brief." Agenda Book, *supra*, at 200. Currently, there is no requirement to disclose if an amicus's member(s) paid for a brief. Under the proposal, this exception applies only if a "person [] has been a member of the amicus for the prior 12 months." *Id.*

The Committee claims "the amendment is an anti-evasion rule that treats new members of an amicus as non-members." Agenda Book, *supra*, at 208. The proposal, the Committee says, would deter people from becoming members of an amicus to circumvent the disclosure requirements. But this explanation ignores the associational rights of amici and their new members.

The First Amendment protects the rights of organizations from disclosing their membership absent a "subordinating interest which is compelling" and narrowly tailored to that interest. *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *Bates v. Little Rock*, 361 U.S. 516, 524 (1960). There is a "vital relationship between freedom to associate and privacy in one's associations." *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 606 (2021).

Requiring amici to disclose new members who give more than $100 to prepare an amicus brief is constitutionally suspect. The proposal would deter association with amici by telling potential members that their identities must be disclosed if they help pay for a brief. This "deterrent effect on the exercise of First Amendment rights" requires establishing a compelling interest that is narrowly tailored to advance that interest. *Ams. For Prosperity*, 594 U.S. at 607.

The proposal is not narrowly tailored and does not advance a compelling governmental interest. First, the length of time before a member can be exempt from the disclosure requirement could be shorter. But the proposal instead freezes the associational rights of amici and their members for twelve months. Second, ensuring that the public knows which non-parties are helping pay for amicus briefs is not a compelling governmental interest. The value of an amicus brief is tied to the persuasiveness of its legal analysis, not the identity of its funders. As there is no compelling reason to tighten disclosure requirements, the constitutionality of the proposal is doubtful.

* * *

The proposal is unnecessary, unduly burdensome, and raises constitutional concerns. Courts are not being overrun with useless amicus briefs that judges have trouble filtering out. But requiring all amici to seek leave to file briefs will decrease judicial efficiency and the number of helpful amicus briefs filed. The heightened disclosure requirements are similarly unnecessary and infringe on the associational rights of amici and their members. Thus, WLF urges the Committee to scrap the proposal.

Respectfully submitted,

Dennis Azvolinsky
LAW CLERK

Cory L. Andrews
GENERAL COUNSEL & VICE
PRESIDENT OF LITIGATION

John M. Masslon II
SENIOR LITIGATION COUNSEL

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# Comment from Anonymous

Posted by the **United States Courts** on Sep 12, 2024

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Comment

Thank you for the opportunity to comment anonymously.

I agree with the changes to Rule 29. Amicus briefs have become a conduit for hyper-fixated interest groups, lobbying organizations, and partisan political entities to unduly influence the legal and factual proceedings of federal courts. Naturally, all amicus-filers will post lengthy comments in response to this Proposed Rule — indeed, this is what they love to do most! — lobbing complaints about “limiting access.” They will then go on to speak about how judges have the freedom to ignore any filed amicus briefs they choose. Most importantly, they will bemoan the reduction of their ability to prod their way into cases they have no direct connection to.

Good. All judges know that receiving amicus briefs is like getting junk mail in that you might be fooled into reading a brief in the same way you might be fooled to reading junk mail that uses a font that resembles someone’s natural handwriting. However, at the end of the day, judges know that what’s in amicus briefs is much like what’s in junk mail: something written by an entity that wants to influence you to do something you’d otherwise not do, most often by emotional trickery and undergraduate-psychology-class marketing tactics.

I urge that the proposed amendments for Rule 29 are adopted. Thank you for your consideration.

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**Comment ID**

USC-RULES-AP-2024-0001-0005

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**PUBLIC SUBMISSION**

# Comment from Senator Sheldon Whitehouse & Congressman Hank Johnson

Posted by the **United States Courts** on Sep 13, 2024

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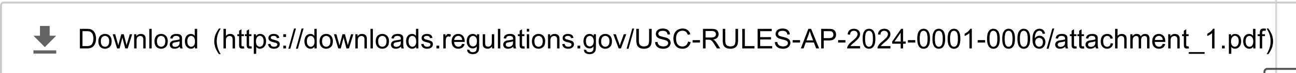
Comment

Please see the attached letter from Senator Sheldon Whitehouse and Congressman Hank Johnson.

Attachments 1

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**Comment ID**

USC-RULES-AP-2024-0001-0006

m0z-jj8i-xaub

**Comment Details**

Congress of the United States
Washington, DC 20510

September 12, 2024

Honorable John D. Bates
Chair, Committee on Rules of Practice and Procedure
One Columbus Circle NE
Washington, D.C. 20544

Dear Judge Bates:

Thank you for the Advisory Committee's long and thorough deliberations on necessary amendments to Federal Rule of Appellate Procedure 29. Without taking a position on other provisions of the proposed amendment, we strongly encourage the Committee to adopt the provisions improving disclosures related to amici curiae. If adopted, the new rule would yield a long-overdue, if incomplete, improvement over existing amicus disclosure requirements. To further bolster the Committee's proposal, we offer several additional recommendations for consideration.

It is important to understand the context that makes these improvements to the rule necessary. In brief summation, a campaign to influence our federal courts began some time ago, signaled by then-attorney Lewis Powell's memorandum to the United States Chamber of Commerce urging the Chamber to join other groups in "exploiting judicial action."[1] According to Powell, "especially with an activist-minded Supreme Court, the judiciary may be the most important instrument for social, economic and political change," making the courts "a vast area of opportunity for the Chamber . . . if . . . business is willing to provide the funds."[2] Industries familiar with the tactic of regulatory capture, sometimes called agency capture, had a ready template from which to proceed in this campaign.

The campaign had multiple vectors: one, to put amenably-minded judges and justices on the bench; two, to forge helpful legal doctrines in amenable think tanks and universities; three, to fund litigating and amicus groups to provide helpful court advocacy regarding those doctrines.

The legal groups operate in various ways. Sometimes they represent a party, often a party they have sought out or recruited; contra the ordinary process of injured parties choosing their lawyers. Although this practice, standing alone, is not always problematic, these groups have taken it to a new level. One nominal plaintiff even ended up on the payroll of the litigating group.[3] Sometimes they swap out plaintiffs and swap in new ones for strategic reasons or to protect their claims to standing.[4] Often, multiple legal groups file amicus briefs aligned with the litigating group, hence the importance of this rule. Sometimes they swap positions: in *Friedrichs*

[1] Memorandum from Lewis F. Powell, Jr. to Eugene B. Snydor, Jr. at 26 (Aug. 23, 1971), https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1000&context=powellmemo.
[2] *Id.* at 26-27.
[3] Mitchell Armentrout, *Mark Janus quits state job for conservative think tank gig after landmark ruling*, CHICAGO SUN-TIMES (July 20, 2018), https://chicago.suntimes.com/2018/7/20/18409126/mark-janus-quits-state-job-for-conservative-think-tank-gig-after-landmark-ruling.
[4] *See* Mary Bottari, *Behind* Janus*: Documents Reveal Decade-Long Plot to Kill Public-Sector Unions*, IN THESE TIMES (Feb. 22, 2018), https://inthesetimes.com/features/janus_supreme_court_unions_investigation.html.

*v. California Teachers Association*, 136 S. Ct. 1083 (2016) (per curiam), petitioner's counsel became an amicus when the same question returned to the Supreme Court in *Janus v. AFSCME*, 585 U.S. 878 (2018);[5] a petitioner's litigating group in *Janus* had been an amicus in *Friedrichs*.[6] Often, they file in orchestrated and harmonized flotillas: the usual number in the chorus is around ten or twelve;[7] in matters of particular impact and importance to the influence campaign, we've seen as many as fifty-five, even at the certiorari stage.[8] In one such case, the petitioner was the 501(c)(3) twin of the 501(c)(4) right-wing political battleship Americans for Prosperity, which sits at the center of the political network that funded numerous of the amicus filers, but none of that was disclosed.[9]

Some advocacy groups seem to have no business or function other than to interpose themselves between corporate interests and courts, screening from the judicial proceedings the corporate identities behind them (some perform that function in administrative proceedings too); some are well-established trade groups recruited to the cause (perhaps for compensation—trade associations like the U.S. Chamber of Commerce refuse to deny or disclose this); some are practically pop-ups, appearing for particular cases, as the Committee has noted with its less-than-twelve-months-of-existence provisions. In sum, a robust and coordinated system operates to flood appellate court proceedings with covertly funded amicus encouragement, while denying courts, the parties, and the public essential knowledge to evaluate the true interests behind the briefing and any resulting conflicts.

Major corporations as parties have been caught funding amici that filed briefs in their case arguing positions helpful to their cause.[10] Major funders of multiple amicus briefs in the same case have been caught "orchestrat[ing] . . . amicus efforts" in addition to helping fund "the actual, underlying legal actions."[11] Entities that are mere "fictitious names" for other entities have filed briefs that failed to disclose the actual corporate entity behind the fictitious name, and failed to disclose that entity's other fictitious names and related corporate entities.[12] We have filed amicus briefs describing for the Supreme Court undisclosed funding links we could find

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[5] *Id.*
[6] *Id.*; Amicus Curiae Brief of the National Right to Work Legal Defense Foundation, Inc., In Support of Petitioners, 578 U.S. 1 (2016) (No. 14-915).
[7] *See* Sheldon Whitehouse, *A Flood of Judicial Lobbying: Amicus Influence and Funding Transparency*, YALE L.J.F. 141, 149-150 (2021).
[8] *Id.* at 147-148 (2021).
[9] *Id.* at 147-149.
[10] *See, e.g.*, Shawn Musgrave, *The Gaping Hole in Supreme Court Rules for Tracking Links Between Litigants and Influence Groups*, THE INTERCEPT (Apr. 18, 2024), https://theintercept.com/2024/04/18/supreme-court-amicus-briefs-secret-conservative-funders/; Naomi Nix & Joe Light, *Oracle Reveals Funding of Dark Money Group Fighting Big Tech*, BLOOMBERG (Feb. 25, 2020), https://www.bloomberg.com/news/articles/2020-02-25/oracle-reveals-it-s-funding-dark-money-group-fighting-big-tech.
[11] Lisa Graves, *Snapshot of Secret Funding of Amicus Briefs Tied to Leonard Leo-Federalist Society Leader, Promoter of Amy Barrett*, TRUE NORTH RESEARCH (Oct. 9, 2020), https://truenorthresearch.org/2020/10/snapshot-of-secret-funding-of-amicus-briefs-tied-to-leonard-leo-federalist-society-leader-promoter-amy-coney-barrett/.
[12] Hansi Lo Wang, *This conservative group helped push a disputed election theory*, NPR (Aug. 12, 2022), https://www.npr.org/2022/08/12/1111606448/supreme-court-independent-state-legislature-theory-honest-elections-project.

among multiple amici appearing in the case, but since so much of the funding of these groups is secret, the linkages we found are necessarily an incomplete picture.[13]

In light of all the above, the chief recommendation we propose is that a subsection be added related to connections among amici. The Committee is justifiably attentive to the difference in burden between disclosing links between amici and parties versus disclosing links between amici and the world at large. Some disclosures by amici are easily managed, however. For example, the Committee should require amici to disclose at least major donors funding multiple amici. To ensure consistency, the Committee could adopt the same disclosure thresholds as it has with respect to amicus-party connections.

While "[t]he burdens of disclosure are far greater with regard to nonparties,"[14] the relevant universe of "flotilla amici" and their major donors amounts to an extremely small list of individuals or entities in most cases, known to each other through coordination and common funding. Amicus organizations should have little difficulty tracking individuals or entities whose contributions amount to at least 25% of the organization's prior year revenue—a number organizations need calculate only once per year. As the Committee notes, "top officials at an amicus are likely to be aware of such a high-level contributor without having to do any research at all."[15] Thus, this is a very simple requirement, and it can be made the responsibility of the lawyers filing the briefs to aver that they have done the necessary due diligence and made the necessary disclosures, subject to discipline by the court where they have failed or misled a court.

Because the nominal plaintiff or petitioner may be a "plaintiff of convenience" but not the real party in interest, requiring disclosure only of links to the nominal party will often be a vain effort. Too often, cases are "faux litigation"—the litigating group found the client, judge-shopped the court, and participated in an orchestrated campaign of judicial lobbying by an amicus flotilla. It is the flotilla of coordinated amicus filings and the common funders and orchestrators of the flotilla that need disclosing. Flotillas of coordinated amicus briefs add little beyond a false appearance of numerosity and a great many extra pages, so there is little added value to the court from all the filings. Redundancy is disfavored, and so should subterfuge be.

[13] *See, e.g.,* Brief of Senators Sheldon Whitehouse and Richard Blumenthal as Amici Curiae in Support of Respondents at 16-17, Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31, 585 U.S. 878 (2018) (No. 16-1466); Brief of Amicus Curiae Senator Sheldon Whitehouse in Support of Respondent at n.18, Kisor v. Wilkie, 588 U.S. 558 (2019) (No. 18-15); Brief of Senators Sheldon Whitehouse et al. as Amici Curiae in Support of Respondents at 8-9, N.Y. State Pistol & Rifle Ass'n v. City of New York, New York, 139 S. Ct. 939 (2019) (No. 18-280); Brief of Amici Curiae U.S. Senators Sheldon Whitehouse et al. in Support of Court-Appointed Amicus Curiae at 19, Seila Law LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197 (2020) (No.19-7); Brief of Senators Sheldon Whitehouse et al. in Support of Respondents at 18-19, Cedar Point Nursery v. Hassid, 594 U.S. 139 (2021) (No. 20-107); Brief of U.S. Senators as Amici Curiae in Support of Respondent at n.29, Ams. for Prosperity Found. v. Bonta, 594 U.S. 595 (2021) (No. 19-251); Brief of U.S. Senators Sheldon Whitehouse et al. as Amici Curiae in Support of Respondents at 14-15, 18-19, West Virginia v. EPA, 597 U.S. 697 (2022) (No. 20-1530); Brief of Amici Curiae U.S. Senator Sheldon Whitehouse and Representative Herny "Hank" Johnson, Jr. in Support of Respondents at 23-28, 30-33, Moore v. Harper, 600 U.S. 1 (2023) (No. 21-1271); Brief of Amici Curiae U.S. Senators Sheldon Whitehouse et al. in Support of Respondents at 15-17, Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2023) (No. 22-451).
[14] Memorandum from Hon. Jay Bybee to Hon. John D. Bates at 16 (Aug. 15, 2024).
[15] *Id.* at 17.

It would require minimal effort for amici to provide the court and the public with important information about the true interests behind the briefs. For instance, the Committee could require amici to disclose known links between them and other amici. An obvious part of this disclosure would be for amici that are part of a network of related corporate entities, as "fictitious names" of other entities or otherwise, to disclose the other entities in the network, including coordination of multiple amici by a third party, as was the case in *Friedrichs* and *King v. Burwell*, 576 U.S. 473 (2015).[16]

Disclosure of links among amici is a burden easily managed, as no one knows better than the amici operating in coordinated flotillas how and why and how much they were coordinated. Unjustified burden is virtually nil. It is really just a matter of disclosing what the lawyers already know or can readily determine. The connected entities in the flotillas have a pretty good idea who they all are, and the number of amici on one side in these cases is usually around a dozen, so the burden of research and disclosure is not great. The importance of courts standing above and apart from the campaign of influence is paramount to public confidence in courts' integrity; it creates a perilous situation when the public cannot tell where the influence campaign ends and the judiciary begins. Disclosure draws a good line. It is in the interest of judicial integrity that entities presenting themselves in judicial proceedings present themselves unmasked, for who they really are. Lawyers who facilitate masking operations degrade the institution of the judiciary, and it is not unreasonable to put them under a duty of candor about proper disclosure.

A related recommendation therefore is that, if the Committee requires disclosure of links among amici, it also require the lawyer presenting an amicus brief make a declaration in the brief that he or she has conducted a duly diligent effort to understand the connections among his or her client and other amicus filers, and has given the court a candid, thorough, plain and honest description of the amicus filer's various funding and additional links with other amici. The requirement that a counsel knowing of a disclosure failure by any amicus must report it is a very good step, but an added requirement of due diligence as to the links with the amicus client would be advisable. In this context, the Committee may want to consider additional language accounting for creative funding structures intended to evade disclosure, such as promises of post-filing payments. This is an area where a lot of hiding is done, and closing off technical loopholes with broad language and broad lawyer candor responsibility would be advisable.

[16] Graves, *supra* note 11.

In Congress, those who lobby the institution must make quite robust disclosures about their activities and payments.[17] It is time to clean up this avenue of anonymous lobbying of the judiciary. We are grateful at the steps you have taken and urge your favorable consideration of the above suggestions.

Sincerely,

SHELDON WHITEHOUSE
Chairman, Senate Judiciary Subcommittee
on Federal Courts, Oversight, Agency Action,
and Federal Rights

HENRY C. "HANK" JOHNSON, JR.
Ranking Member, House Judiciary
Subcommittee on Courts, Intellectual
Property, and the Internet

[17] 2 U.S.C. § 1604.

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# Comment from Senators Mitch McConnell, John Cornyn, and John Thune

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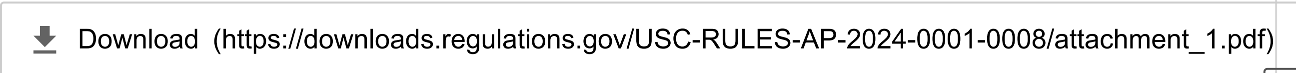
Attachments 1

9.10.24 Amicus Letter Final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**Comment ID**
USC-RULES-AP-2024-0001-0008

**Tracking Number**
m15-b7hf-xhbj

**Comment Details** **Submitter Info**

MITCH McCONNELL
KENTUCKY

United States Senate
REPUBLICAN LEADER

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

September 10, 2024

Dear Judge Bates:

We write to express our strong opposition to the proposed amendments to *amicus* disclosure that the Judicial Conference has been inexplicably considering. These amendments would do nothing to strengthen confidence in the judiciary. They are based on complaints from partisan Democrats who operate under a bad-faith misunderstanding of the judicial process. It's obvious that they seek to use these disclosures to chill core protected speech and associations while bringing the judiciary into disrepute for partisan purposes. We are, frankly, shocked that these discussions have proceeded as far as they have given their obviously partisan genesis and their certain deleterious effects.

## I. The First Amendment Protects the Associational and Speech Rights of Those Seeking to Weigh in on Litigation.

We are firm believers in the rights protected by the First Amendment. Defending the right to free speech has been an animating principle behind our combined more than eighty years in the U.S. Senate.[1] We have therefore been alarmed by the growing hostility to these rights. If the rights of speech and association should find their protection anywhere, it's in the courts—including in the Judicial Conference.

You shouldn't need us to explain the protections the First Amendment provides to speech and association, but this proposal compels us to do so.

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[1] *See, e.g.*, *McConnell v. FEC*, 540 U.S. 93 (2003); Letter from Senator John Thune, et al., to the Hon. Jessica Rosenworcel (June 6, 2024), https://www.thune.senate.gov/public/_cache/files/f6d3f136-5e2e-42d6-a979-6a943dd06162/16768AD893634C882D27CE35E1D5FAE5.06.06.24-letter-to-chairwoman-rosenworcel-re.-ai-and-political-ads.pdf; Glenn Thrush, *W.H. can't assuage Cornyn*, Politico (Aug. 19, 2009), https://www.politico.com/blogs/on-congress/2009/08/wh-cant-assuage-cornyn-020739.

S-230, THE CAPITOL, WASHINGTON, DC 20510–7012
202–224–3135

Under the First Amendment, "Congress shall make no law … abridging the freedom of speech."[2] This freedom of speech includes "a corresponding right to associate with others."[3] The Supreme Court recently explained that "[p]rotected association furthers 'a wide variety of political, social, economic, educational, religious, and cultural ends,' and 'is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.'"[4] As such the Court has long protected those who associate for speech purposes from compelled disclosure of those associations, subjecting any such disclosures to "exacting scrutiny."[5]

The seminal case on this score was *NAACP v. Alabama*, 357 U.S. 449 (1958). There Alabama sought to force the NAACP, a New York non-profit corporation, to disclose the identities of its agents and members to the Alabama Attorney General.[6] The Court held that they couldn't. Noting that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association," Justice Harlan concluded, "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."[7]

The Court rightly observed that this is a rather elementary conclusion, observing, "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action in the cases above were thought likely to produce upon the particular constitutional rights there involved."[8] This is so because—especially as applied to the NAACP in Jim Crow Alabama—"revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility."[9]

Of course, in the context of election-campaign disclosure requirements, the Supreme Court has held that "exacting scrutiny" is satisfied in the context of express advocacy related directly to an election campaign. The Court, in *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (per curiam), identified three purposes justifying disclosure even at the expense of free association: (1) providing the electorate with information as to where money both comes from and is spent in order to make informed voting choices; (2) deterring actual corruption and its appearance by exposing large expenditures; and (3) providing the information needed to detect violations of the campaign-

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[2] U.S. Const. Amend. 1.

[3] *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984).

[4] *Americans for Prosperity Foundation v. Bonta*, 594 U.S. 595, 606 (2021) (quoting *Roberts*, 468 U.S. at 622).

[5] *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (per curiam).

[6] *NAACP v. Alabama*, 357 U.S. 449, 451 (1958).

[7] *NAACP*, 357 U.S. at 460.

[8] *Id.* at 462.

[9] *Id.*

finance laws.[10] And even in the context of political speech courts have differentiated between advocating for issues and advocating for the election or defeat of a candidate.[11]

Obviously courts are not Congress, litigation is not an election, and an appellate docket is not a free-for-all. The justifications for campaign-finance disclosure identified in *Buckley* do not apply here.

First, voters may, indeed, have an interest in knowing who is funding electioneering efforts. Dirty tricks abound in electoral politics. Is this ad in a Republican primary secretly being funded by the Democratic Majority Leader?[12] Disclosure rules perhaps help voters navigate the hurly-burly of politics. We seriously doubt that you think such Nixonian wet works are at play on the federal appellate docket, because they aren't.

Second, campaign disclosure ostensibly deters corruption by blowing the whistle on *the recipient* of the expenditures—i.e. the candidate. Who's the corruptee in this case: the trade associations and think tanks standing as *amici*? That seems improbable. And even if it were true, who cares? The public purpose of campaign disclosures is to ferret out corruption *by elected officials*. Where's the public interest in seeing if, hypothetically, the Sierra Club has been bought off by the green-energy industry? And even if such a public interest did exist, why is it the job of the judicial bureaucracy to play-act as Woodward and Bernstein?

Lastly, there is no FEC of the appellate bar policing a byzantine maze of criminal and civil penalties that requires data to do its job like there is in electoral politics.

In sum, under our Constitution there is a strong presumption against disclosed affiliations. In the rare case that the government has prevailed against that presumption—campaign-finance disclosure for candidate advocacy—the benefits identified by the Supreme Court don't apply in the case of *amicus* briefs. That the Advisory Committee saw fit to analogize the two reflects the judgment of a body that apparently understands neither campaigns nor judging.[13] To the contrary, *amicus* briefs are clearly more analogous to issue advocacy, where disclosure rules are unconstitutional. Regardless, any supposed benefit that could come from election-type transparency being grafted on to *amicus* briefs will be quickly overtaken by harassment of disfavored speakers. Such harassment is not merely hypothetical, as we explain below. Indeed, we cannot help but note the incongruence of this proposal with the Conference's recent, important advocacy to adopt laws that shield from disclosure its judges' personal information, as well as its

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[10] *Buckley*, 424 U.S. at 66–68.

[11] *See Bonta*, 594 U.S. at 608.

[12] *See* Joe Schoffstall, *Schumer-linked PACs spend millions to meddle in GOP primaries*, Fox News (Mar. 24, 2024), https://www.foxnews.com/politics/schumer-linked-pacs-spend-millionsmeddle-gop-primaries.

[13] Judicial Conference of the United States, Committee on Rules of Practice and Procedure, Preliminary Draft of Proposed Amendments to Federal Rules (Aug. 2024) ("Proposed Amendments") at *20 ("Disclosure requirements in connection with amicus briefs serve an important government interest in helping courts evaluate the submissions of those who seek to persuade them, in a way that is analogous to campaign finance disclosures that help voters to evaluate those who seek to persuade them.").

continued, related advocacy for increased security funding to respond to the very real threat environment faced by judges and litigants alike.[14]

Courts rightly maintain various restrictions on who can express themselves in a judicial context through procedural rules, admissions, and inherent judicial powers. The goal of those rules is not political but procedural. They exist to maintain reasonable dockets so as to promote the effectiveness of the adversary process in driving judicial decision-making. The current provisions of Rule 29, for example, prevent litigants from abusing the *amicus* process in order to evade page limits. It's about maintaining a level playing field *for the litigants*. Not so this proposal, which seeks to chill free speech and cast aspersions on federal judges.

We have little doubt that the judges of the Judicial Conference and the Justices of the Supreme Court will immediately see the violence this proposal does to the First Amendment should it reach them. But it's also clear that at each of these subsequent stages in the rulemaking process, judges will be under tremendous pressure to approve the proposed rule lest they seem "political." We would advise them that the inevitable braying of liberal political and academic voices will have it precisely backwards: following the Constitution is not political; rubber-stamping a partisan agenda item is.

If this rule is somehow enacted, we encourage affected parties to challenge it immediately in court. It will be a sorry sight to see the judiciary haled into its own courts for violating one of our most fundamental rights, but it will be necessary. And you won't be able to say that you weren't warned.

## II. The Elected Officials Promoting These Reforms Seek to Intimidate and Undermine the Judiciary.

The elected officials, who spurred this rulemaking and have sponsored similar legislation in Congress, don't care about maintaining the integrity of the judiciary. The Advisory Committee does not shrink from the fact that it sprang into action upon seeing the unfriendly AMICUS Act.[15]

The fact is that the political actors pushing *amicus* disclosure are doing so to intimidate and undermine the judiciary, which is a perceived impediment to their preferred policies. This rule would give credence to their outlandish claims and be weaponized by elected officials as they seek to bully judicial officers and undermine their authority. Indeed, Senate Democrats have gone to great lengths to bully and harass members of the judiciary as well as private individuals engaged in political advocacy.[16] The Democratic theory is that the federal judiciary—and the Supreme

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[14] *See Congress Passes the Daniel Anderl Judicial Security and Privacy Act*, Judiciary News, United States Courts (December 16, 2022), https://www.uscourts.gov/news/2022/12/16/congress-passes-daniel-anderl-judicial-security-and-privacy-act (noting that "the bill was strongly endorsed by the Judicial Conference of the United States"); *see also* Dan Mangan, *1,000 federal judges seek to remove personal info from internet as threats skyrocket*, CNBC (Mar. 17, 2023), https://www.cnbc.com/2023/03/17/federal-judges-remove-personal-information-from-internet.html.

[15] Proposed Amendments at *11.

[16] *See, e.g.,* Press Release, Senators Unveil New Captured Courts Report Exposing the Judicial Crisis Network's Central Role in a Scheme to Capture and Control the Supreme Court, Senator Sheldon Whitehouse, https://www.whitehouse.senate.gov/news/release/senators-unveil-new-captured-courts-report-exposing-the-judicial-

Court in particular—has been the target of a longstanding "scheme" by private interests to take it over for their personal benefit. In short, the Supreme Court doesn't issue originalist rulings because it's majority originalist; it does so because "right-wing special interests" have "captured" it. Of course, what good is having six Justices in your pocket if you can't make sure they know how you want them to rule? That's where the *amicus* briefs come in: these "special interests" organize "flotillas" of briefs to signal to the corrupt Justices how they should rule.[17] Like chalk marks on a mailbox or a misplaced rock, these *amicus* briefs supposedly inform the right-wing sleeper agents at the Supreme Court what to do. Or so these theorists would have us believe.

The reality is that this is not how litigation works. You know it's not how litigation works.[18] Judges read the briefs, they listen to arguments, they do their research, and they rule by applying the law to the facts using their best judgment. Different judges can reach different conclusions based on the same law and facts because people aren't widgets and the law isn't a computer algorithm. Judicial philosophy informs judgment across multiple levels and it affects results. Sometimes we like these results and sometimes we don't. Win or lose, we know that judges are operating in good faith by their best lights, not at the secret instruction of the petrochemical industry, on one hand, or George Soros, on the other. By even countenancing this preposterous proposal, you are giving credence to claims you know to be false about how judges do their jobs.

The goal here is not to help the courts but to undermine the courts. Don't take our word for it: Democrats are up front about what they're doing. In a recent anti-Second Amendment *amicus* brief prominent Senate Democrats said: "The Supreme Court is not well. And the people know it. Perhaps the Court can heal itself before the public demands it be 'restructured in order to reduce the influence of politics.'"[19] The current Senate Majority Leader went to the steps of the Supreme Court and ominously intoned, "I want to tell you, Gorsuch; I want to tell you, Kavanaugh: You have released the whirlwind and you will pay the price. You won't know what hit you if you go forward with these awful decisions."[20] In a highly unusual written response, Chief Justice Roberts said, "Justices know that criticism comes with the territory, but threatening statements of this sort

crisis-networks-central-role-in-a-scheme-to-capture-and-control-the-supreme-court/. *See also* Sheldon Whitehouse & Jennifer Mueller, The Scheme (2022) *and* The Scheme 33: The Undoing of the Modern Regulatory State, Senator Sheldon Whitehouse, https://www.whitehouse.senate.gov/news/speeches/the-scheme-33-the-undoing-of-the-modern-regulatory-state/.

[17] Scheme Speech 9: Amicus Flotillas, Senator Sheldon Whitehouse, https://www.whitehouse.senate.gov/news/speeches/scheme-speech-9-amicus-flotillas/.

[18] The Advisory Committee says otherwise: "But the identity of an amicus does matter, at least in some cases, to some judges." Proposed Amendments at *20. If Judge Bybee and his colleagues believe this, they should name names.

[19] Br. of Senator Sheldon Whitehouse et al., *N.Y. State Rifle & Pistol Association., Inc., v. New York*, No. 18-280 (2020), https://www.whitehouse.senate.gov/wp-content/uploads/imo/media/doc/New%20York%20Rifle%20&%20Pistol%20Association%20v.%20New%20York%20(Whitehouse%20amicus%20FINAL).pdf.

[20] Editorial, *Sen. Chuck Schumer's threatening rhetoric to Supreme Court justices crosses a line*, USA Today (Mar. 5, 2020), https://www.usatoday.com/story/opinion/todaysdebate/2020/03/05/chuck-schumer-threatening-rhetoric-gorsuch-kavanaugh-crosses-line-editorials-debates/4964578002/.

from the highest levels of government are not only inappropriate, they are dangerous."[21] And what happened after Justice Kavanaugh indeed went forward with a decision that liberals didn't like? A man who said he was upset about a leaked Supreme Court decision allegedly traveled to Justice Kavanaugh's Maryland home intending to assassinate Justice Kavanaugh.[22] The man was arrested near Justice Kavanaugh's residence with a pistol, ammunition, a crow bar, a hammer, zip ties, and duct tape.[23]

These efforts to attack and undermine the courts are not restricted to elected Democrats. There's a whole media cottage industry dedicated to attacking Judge Matt Kacsmaryk in the Northern District of Texas for ruling in ways that liberals don't like.[24] Fifth Circuit Judge Jim Ho has been getting his turn in the barrel, too.[25] There was even a concerted effort to paint as corrupt Judges Don Willett of the Fifth Circuit[26] and Cam Barker of the Eastern District of Texas[27] (are you noticing a pattern?) due to non-material, attenuated holdings sleuthed from their financial

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[21] Pete Williams, *In rare rebuke, Chief Justice Roberts slams Schumer for 'threatening' comments*, NBC News (March 4, 2020), https://www.nbcnews.com/politics/supreme-court/rare-rebuke-chief-justice-roberts-slams-schumer-threatening-comments-n1150036.

[22] Mara Cramer, *Armed Man Traveled to Justice Kavanaugh's Home to Kill Him, Officials Say*, N.Y. Times, (June 8, 2022), https://www.nytimes.com/2022/06/08/us/brett-kavanaugh-threat-arrest.html.

[23] *California Man Facing Federal Charges in Maryland for Attempted Murder of a United States Judge*, United States Attorney's Office, District of Maryland, (June 8, 2022) https://www.justice.gov/usao-md/pr/california-man-facing-federal-charges-maryland-attempted-murder-united-states-judge.

[24] *See, e.g.*, Ruth Marcus, *Thanks to the Supreme Court, a federal judge in Texas is making foreign policy decisions*, Wash. Post (Aug. 25, 2021), https://www.washingtonpost.com/opinions/2021/08/25/supreme-court-matthew-kacsmaryk-remain-in-mexico-policy/; Melissa Quinn, *Meet the federal judge set to rule in a case that could disrupt access to the abortion pill*, CBS News (Mar. 2, 2023), https://www.cbsnews.com/news/matthew-kacsmaryk-medication-abortion-mifepristone-abortion-pill-judge-texas/; Nate Raymond, *Texas judge in abortion pill lawsuit often rules for conservatives*, Reuters (Apr. 10, 2023), https://www.reuters.com/world/us/texas-judge-abortion-pill-lawsuit-often-rules-conservatives-2023-04-08/; Charlie Savage & Pam Belluck, *Judge's Ruling Against Abortion Pill Is Filled With Activists' Language*, N.Y. Times (Apr. 11, 2023), https://www.nytimes.com/2023/04/11/us/abortion-pill-ruling.html; *Hear what judge who suspended abortion pill said in undisclosed radio interviews*, CNN, https://www.cnn.com/videos/politics/2023/04/20/federal-judge-kacsmaryk-fails-to-disclose-interviews-nomination-kfile-lead-vpx.cnn; Casey Tolan & Isabelle Chapman, *Details about multimillion-dollar stock holding concealed in abortion pill judge's financial disclosures*, CNN (Apr. 21, 2023), https://www.cnn.com/2023/04/21/politics/judge-kacsmaryk-financial-holdings-abortion-pill/index.html; Matt Ford, *A Right-Wing Judge Aims to Undo Free Speech, One Drag Show at a Time*, The New Republic (Sept. 26, 2023), https://newrepublic.com/article/175748/right-wing-judge-aims-undo-free-speech-one-drag-show-time.

[25] Ian Millhiser, *The edgelord of the federal judiciary*, Vox (Aug. 26, 2023), https://www.vox.com/scotus/23841718/edgelord-federal-judiciary-james-ho-fifth-circuit-abortion-guns; James Larock, *The Worst Trump Judge In America Is James Ho*, Balls and Strikes (June 15, 2023), https://ballsandstrikes.org/legal-culture/the-worst-trump-judge-in-america-is-james-ho/; Ansev Demirhan & Evan Vorpahl, *Judge James Ho's Connections to the Anti-Abortion Movement*, Ms. (Oct. 5, 2023), https://msmagazine.com/2023/10/05/judge-james-ho-abortion/; Amanda Yen, *Wife of Judge on Mifepristone Case Was Paid by Anti-Abortion Group*, The Daily Beast (Mar. 25, 2024), https://www.thedailybeast.com/wife-of-james-ho-judge-on-mifepristone-case-was-paid-by-anti-abortion-group; Joe Patrice, *Judge James Jo Delivers Tour De Force In Disingenuous Bulls*t*, Above the Law (Apr. 18, 2024), https://abovethelaw.com/2024/04/judge-ho-conservative-forum-shopping/.

[26] *Watchdog: Conflicted 5th Circuit Judge Must Recuse in U.S. Chamber Lawsuit Against CFPB Credit Card Rule*, Accountable.Us (Apr. 9, 2024), https://accountable.us/watchdog-conflicted-5th-circuit-judge-must-recuse-in-u-s-chamber-lawsuit-against-cfpb-credit-card-rule/.

[27] David Dayen, *Judge Hearing Noncompete Cases Holds Stock in Companies That Use Noncompetes* (May 9, 2024), https://prospect.org/justice/2024-05-09-judge-barker-noncompete-cases-stocks-conflict/

disclosures. Unlike when the media decried it as a threat to democracy when the previous president attacked judges he perceived as opponents, the media now happily pass the ammunition because it's "conservative" judges being attacked.

This proposal will only provide more grist for the mill of attacking judges who stand up to powerful cultural forces.

## III. The Other Goal and Certain Result of These Reforms Will Be the Harassment of Private Parties in a Concerted Effort to Chill Speech and Association.

Recent years have seen an explosion of harassment against people whose political activities are disclosed.

Prominent Democrats attack their opponents' donors, like when the late Senator Harry Reid attacked the Koch Brothers[28] or when President Obama said one of Mitt Romney's donors was "betting against America" and had a "less-than-reputable" record.[29] A center-right legislative reform organization's donors were famously harassed into stopping their donations.[30] Chick-Fil-A was even forced to stop donating to the Salvation Army and the Fellowship of Christian Athletes following a proverbial "fifteen minutes of hate."[31] And the harassment endured by supporters of California's Proposition 8 is too extensive to list beyond the high-profile dismissals[32] and "cancellations"[33] it spawned.

Even liberals understand the danger proposed by disclosure. When one anti-court activist group accidentally sent its donor list to a center-right media outlet, its president complained, "I have only two foundations that give me money, and if their names become public, they're never going to talk to me again...."[34] Indeed.

One would have to be naïve to think that once these donors are "outed" for funding *amicus* briefs in cases protecting minority constitutional rights, the machinery of punishment from the dominant culture will not spring into action against them. The contemporary push for disclosure shares the same illiberal impulses that it had in 1950s Alabama.

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[28] Dana Milbank, *Harry Reid has a Koch problem*, Washington Post (Apr. 30, 2014), https://www.washingtonpost.com/opinions/dana-milbank-harry-reid-has-a-koch-problem/2014/04/30/49c5e406-d0af-11e3-9e25-188ebe1fa93bstory.html.

[29] Kimberly A. Strassel, *The President Has a List*, Wall St. J. (Apr. 26, 2012), https://www.wsj.com/articles/SB10001424052702304723304577368280604524916.

[30] Editorial, *Shutting Down ALEC*, Wall St. J. (Apr. 18, 2012), https://www.wsj.com/articles/SB10001424052702304432704577347763603932288.

[31] Justin Kirkland, *Chick-fil-A Will No Longer Act as a Shield for Hateful People*, Esquire (Nov. 19, 2019), https://www.esquire.com/food-drink/food/a29836910/chick-fil-a-donation-lgbtq-announcement-backlash/.

[32] Jon Swaine, *Mozilla CEO Brendan Eich resigns in wake of backlash to Prop 8*, The Guardian (Apr. 3, 2014), https://www.theguardian.com/technology/2014/apr/03/mozilla-ceo-brendan-eich-resigns-prop-8.

[33] Hunter Baker, *The Vilification of Orson Scott Card*, hunterbaker.wordpress.com (Nov. 2, 2013), https://hunterbaker.wordpress.com/2013/11/02/the-villification-of-orson-scott-card/.

[34] Gabe Kaminsky, *Supreme Court 'transparency' charity director panics over IRS donor leak: 'I just f***ed up'*, Washington Examiner (May 17, 2023), https://www.washingtonexaminer.com/news/2201699/supreme-court-transparency-charity-director-panics-over-irs-donor-leak-i-just-fed-up/.

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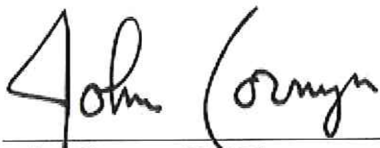
It's unfortunate that the Judicial Conference's committees have decided to spend five years dancing a jig to a nakedly partisan tune. While we understand the impulse in a non-political body like the Judicial Conference to humor bad-faith political actors by indulging their complaints, doing so only incentivizes further partisan harassment. Worse still, when you go beyond indulgence to acquiescence you open up your committee to consistent, open lobbying and nuisance. If an elected official has nowhere near the votes to pass his judicial-reform legislation—but he can get it from the judiciary if he complains—his colleagues and allies would be remiss not to start complaining, too. When you reward a child's whining with treats, you can expect a lot more whining. It's human nature and basic politics.

Perhaps the Judicial Conference will need to adopt rules requiring disclosure requirements for the inevitable flotillas of public-and-private-sector harassers, cajolers, and lobbyists who will be seeking future "reforms" from its committees now that they know they can get their way.

Scrap this ill-begotten, quasi-legislative proposal and focus on issues that actually matter to the courts of appeals.

Sincerely,

Mitch McConnell, U.S. Senator



John Cornyn, U.S. Senator

John Thune, U.S. Senator

# TAB 5D

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett

Re: Form 4

Date: September 6, 2024

Proposed amendments to Form 4, dealing with applications for in forma pauperis (IFP) status, were published in August 2024 for public comment. The public comment period ends on February 17, 2025. To date, we have received no public comments.

For this reason, the IFP subcommittee did not meet. It plans to meet before the spring 2025 meeting to consider any comments submitted.

# TAB 5E

# UNITED STATES DISTRICT COURT

for the

<__________________> DISTRICT OF <__________________>

| | | |
|---|---|---|
| <Name(s) of plaintiff(s)>, | ) | |
| | ) | |
| Plaintiff(s) | ) | |
| | ) | |
| v. | ) | |
| | ) | Case No. <Number> |
| <Name(s) of defendant(s)>, | ) | |
| | ) | |
| Defendant(s) | ) | |
| | ) | |

**AFFIDAVIT ACCOMPANYING MOTION**
**FOR PERMISSION TO APPEAL IN FORMA PAUPERIS**

**Affidavit in Support of Motion**

I swear or affirm under penalty of perjury that, because of my poverty, I cannot prepay the filing fees of my appeal or post a bond for them. I believe I am entitled to relief. I swear or affirm under penalty of perjury under United States laws that my answers on this form are true and correct. (28 U.S.C. § 1746; 18 U.S.C. § 1621.)

Signed: ___________________________________ Date ____________

The court may grant a motion to proceed in forma pauperis if you show that you cannot pay the filing fees and you have a non-frivolous issue on appeal. Please state your issues on appeal. (Attach additional pages if necessary.)

| My issues on appeal are: |
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|---|---|---|
| 1. | What is your monthly take-home pay from work? | $________ |
| 2. | What is your monthly income from any source other than take-home pay from work (such as unemployment benefits, alimony, child support, public assistance, pension, and social security)? | $________ |
| 3. | How much are your monthly housing costs (such as rent and utilities)? | $________ |
| 4. | How much are your monthly costs for other necessary expenses (such as food, medical care, childcare, and transportation)? | $________ |
| 5. | What is the total value of all your assets (such as bank accounts, investments, market value of car or house)? | $________ |
| 6. | How much debt do you have (such as credit cards, mortgage, and student loans)? | $________ |
| 7. | How many people (including yourself) do you support? | |
| 8. | Do you receive SNAP (Supplemental Nutrition Assistance Program), Medicaid, or SSI (Supplemental Security Income)? | Yes No |

**No matter how you answered the questions above, if you are a prisoner seeking to appeal a judgment in a civil action or proceeding, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts.** If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

If there is anything else that you think explains your inability to pay the filing fees, please feel free to explain below. (Attach additional pages if necessary.)

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**Committee Note**

Revised Form 4 simplifies the existing Form 4, reducing the existing form to two pages. It is designed not only to reduce the burden on individuals seeking IFP status but also to provide the information that courts of appeals need and use, while omitting unnecessary information.

# TAB 6

# TAB 6A

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Intervention Subcommittee

Re: Possible new rule regarding intervention on appeal

Date: September 8, 2024

The subcommittee had previously generated a working draft of a possible rule governing intervention on appeal. The working draft helped focus discussion on possible issues that such a rule should or could address. The subcommittee is not proposing a new rule draft at this time.

At the last Advisory Committee meeting, several members expressed concerns with the approach in the working draft. The Department of Justice (DOJ) highlighted three concerns. First, the district court is where the scope of an action should be shaped, and an appeal should remain focused on the correctness of the district court decision. A rule on intervention might skew incentives and encourage parties to wait until an appeal to intervene. Second, existing parties should generally be able to make strategic decisions whether to appeal at all or to limit any appeal they take. Third, to the extent that the current desire to intervene is driven by courts issuing remedies that reach beyond the parties to the case, limitations on that practice would reduce the need for a rule on intervention, so waiting to see if such limitations are imposed may be appropriate.[1]

The Advisory Committee decided to seek additional information about the circumstances in which intervention on appeal is sought and in which there might be problems that a new rule could address. Among other things, the Committee requested that the DOJ canvass its own litigating sections and share their experiences with intervention on appeal, and also requested research assistance from the Federal Judicial Center.

The DOJ reports that, in the main and setting aside the handful of high-profile, politically charged matters that generate headlines, its litigating sections do not tend to encounter problems with intervention on appeal. The most frequent circumstance in which DOJ encounters appellate intervention is in agency direct-review cases. Intervention in such cases is common, especially in the D.C. Circuit, and is rarely

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[1] Since the meeting of the Advisory Committee, five justices have expressed doubts about the propriety of remedies that reach beyond the parties to the case. *Labrador v. Poe by & through Poe*, 144 S. Ct. 921 (2024) (Gorsuch, J., joined by Thomas and Alito, JJ.) (criticizing the "universal injunction"); *id*. at 931 (Kavanaugh, J., joined by Barrett, J.) (noting that "prohibiting nationwide or statewide injunctions may turn out to be the right rule as a matter of law").

controversial. Similarly, various statutes authorize the government to intervene in a court of appeals in specific circumstances, such as to defend the constitutionality of an Act of Congress; although the DOJ has encountered occasional issues with intervention in such cases, those problems tend to be case-specific or circuit-specific. Beyond these categories of cases, intervention on appeal is not common in DOJ's experience. There are occasional cases in which foreign sovereigns or Indian tribes seek to join a case to protect their interests on appeal, or when leaseholders or possessors of mining or grazing rights on federal land seek to intervene in appeals involving or affecting the relevant parcel (*e.g.*, environmental litigation). These cases tend to be resolved as one might expect, according to their factual permutations—*i.e.*, intervention on appeal is often denied, but is sometimes granted for parties who have genuine interests at stake and who had good reasons for not seeking to intervene earlier in the litigation. The DOJ also sometimes sees cases in which litigants who were denied the right to intervene in district court seek to intervene on appeal, rather than appeal the district court's denial of their intervention motions. In the DOJ's experience, the courts of appeals typically deny intervention in those circumstances. Likewise, pro se litigants sometimes seek to intervene in appeals involving government programs in which they assert an interest. Again, in the DOJ's experience, the courts of appeals typically deny such motions.

The Federal Judicial Center (FJC) has begun work, and a preliminary report from the FJC follows this memo.

Some preliminary thoughts for consideration:

- It may be that intervention in cases seeking review or enforcement of agency action is both quite common and largely unproblematic. In many cases, there are multiple parties before the agency, the aggrieved party seeks review, and the other parties seek intervention in the court of appeals. In some patent cases, the parties before the agency are parties to the case seeking review in the court of appeals, but the agency is not—so the agency must seek intervention if it wishes to be a party in the court of appeals.
    - Perhaps any rule should be addressed to appeals from district court, leaving practice in agency review cases as it is.

- It may be that intervention is particularly a problem in actions seeking non-party (universal) injunctions or vacatur of agency rules. There is reason to think that intervention in the district courts poses unique problems in such cases. *See* Monica Haymond, *Intervention and Universal Remedies*, 91 U. Chi. L. Rev. __ (2024) (forthcoming).
    - Perhaps any rule should be addressed to these kinds of cases, or perhaps the Advisory Committee might wait to see if efforts to limit those kinds of cases bear sufficient fruit to make such a rule more limited or even unnecessary.

- There is some dispute whether the traditional approach to intervention on appeal—whereby intervention on appeal is available "only in an exceptional case for imperative reasons," *McKenna v. Pan Am. Petroleum Corp.*, 303 F.2d 778, 779 (5th Cir. 1962) (per curiam)—is still the correct approach. *See East Bay Sanctuary Covenant v. Biden*, 102 F.4th 996, 1003 (2024) (VanDyke, J., dissenting from denial of motion to intervene), *petition for cert. filed*, 23-16032 (June 28, 2024); *Humane Society of the United States v. United States*, 54 F.4th 733, 736 (2022) (Rao, J., dissenting from denial of motion to intervene).
    - A rule might be useful in resolving this uncertainty, or the Advisory Committee might decide to await further developments along these lines.

The subcommittee will continue to gather information. It would be particularly useful for the Advisory Committee to provide some guidance to the FJC regarding the scope and focus of its continuing research.

# TAB 6B

Date: September 6, 2024

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Tim Reagan and Kristin Garri
Federal Judicial Center

Re: Possible Federal Judicial Center Research on Intervention on Appeal

This memorandum describes the type of research that the Federal Judicial Center could do to inform considerations of whether the Federal Rules of Appellate Procedure should be amended to provide instruction on intervening in appellate cases.

We have reviewed local rules on intervention for the thirteen courts of appeals, and we present them in section 1 of this memorandum. We also have demonstrated how we might assemble case studies to illustrate how intervention currently works in the thirteen federal appellate courts. That information is in section 2.

## SECTION 1
## LOCAL RULES ON INTERVENTION

Intervention is mentioned in four Appellate Procedure Rules: 15 (agency review), 26.1 (disclosure statement), and 28.1 and 32 (brief covers). Some courts elaborate or clarify how these rules apply in their courts. Some courts provide additional elaborations or clarifications on other issues. A summary of how local rules address intervention follows, organized by topic. Rule excerpts follow that.

Local rules for three courts of appeals—for the First, Second, and Eighth Circuits—do not mention intervention.

*Federal Rule of Appellate Procedure 15. Review or Enforcement of an Agency Order—How Obtained; Intervention*

Section (d) of Federal Rule 15 states that intervention in agency appeals is by motion. Six courts have rules further clarifying intervention in agency appeals.

District of Columbia Circuit Rule 15 clarifies,

> A motion to intervene in a case before this court concerning direct review of an agency action will be deemed a motion to intervene in all cases before this court involving the same agency action or order, including later filed cases, unless the moving party specifically states otherwise, and an order granting such motion has the effect of granting intervention in all such cases.

Eleventh Circuit Rule 15-4 sets the deadline for the intervention motion as within thirty days of the filing of the review petition.

Tenth Circuit Rule 15.4 provides that intervention by a party to the agency proceeding is by notice and intervention by a nonparty is by motion stating "the reasons why the parties cannot adequately protect the interest asserted." Any opposition to the motion is due within two weeks.

Fifth Circuit Rule 15.5 provides a deadline for the intervention motion of two weeks before the due date for the party supported by the intervenor. Fifth Circuit Rule 15.3 provides slightly different procedures for intervention in reviews of orders by the Federal Energy Regulatory Commission depending on whether the intervenor was a party to the commission proceeding.

Ninth Circuit Rule 15-3 specifies requirements for intervention in reviews under the Pacific Northwest Electric Power Planning and Conservation Act: "Notwithstanding FRAP 15(d), motions to intervene may be filed within 30 days of the expiration of the time to file petitions for review from the final action or decision at issue."

The court of appeals for the Federal Circuit includes practice notes among its local rules. The practice note for Rule 15 includes a caution and a deadline. The caution: "A party with the right to appeal or to petition for review may not, instead of exercising that right, intervene in another appeal or petition to seek relief in its own case." The deadline:

> Because the United States or an agency of the United States is often the only appellee or respondent in cases under this rule, any other party seeking to intervene on the side of the appellee or respondent must move for leave to intervene within thirty (30) days after the date when the petition for review or notice of appeal is filed.

*Federal Rule of Appellate Procedure 26.1. Disclosure Statement*

Section (a) of Federal Rule 26.1 states that a nongovernmental corporation seeking to intervene in an appellate proceeding must file the same sort of corporate ownership statement as parties that are nongovernmental corporations.

Eleventh Circuit Rule 26.1-1 includes intervenors among the case participants required to file certificates of interested persons within four weeks of an appeal's docketing.

Federal Circuit Rule 47.4 also includes intervenors among the case participants required to file certificates of interest so that judges can determine whether recusal is necessary or appropriate.

District of Columbia Circuit Rules 12 and 15 state that the Rule 26.1 disclosure statement must accompany an intervention motion.

Fourth Circuit Rule 26.1 also states that disclosure-statement requirements apply to intervenors, with an exception specified in section (a)(1)(A): "a state or local government is not required to file a disclosure statement in a case in which the opposing party is proceeding without counsel."

*Docketing*

District of Columbia Circuit Rule 15(c)(1) specifies that intervenors be included in service of the docketing statement.

According to the practice notes for Federal Circuit Rule 12, “Parties permitted to intervene in the trial court as plaintiffs or defendants will usually be identified only as plaintiff or defendant on the official caption to avoid confusion with any third party permitted to intervene in the appeal.”

*Appearance*

Federal Circuit Rule 47.3 includes counsel for each intervenor among those who must file an entry of appearance contemporaneously with the first other document filed.

*Motions*

Fourth Circuit Rule 12(e) states, “A party who appeared as an intervenor in a lower court proceeding shall be considered a party to the appeal upon filing a notice of appearance. Otherwise, a motion for leave to intervene must be filed with the Court of Appeals.”

Rule 1(c)(7) of the operating procedures for the Seventh Circuit’s court of appeals classifies some motions as routine and some motions as nonroutine; motions to intervene as of right are classified as routine.

The practice notes for Federal Circuit Rule 27 classify motions for leave to intervene as nonprocedural motions.

Third Circuit Rule 27.0 states that “ordinarily a single judge will not entertain and grant or deny . . . a motion for leave to intervene.”

Fifth Circuit Rule 27.2.2, on the other hand, lists a motion to permit intervention in agency proceedings under Federal Rule of Appellate Procedure 15(d) as one that can be ruled on by a single judge.

*Briefs*

Federal Rules 28.1(d) and 32(a)(2) state that green is the correct color for the cover of an intervenor’s brief. Five courts have additional rules for intervenors’ briefs.

Fifth Circuit Rule 31 sets the deadline for an intervenor’s brief as one week after the filing of the principal brief supported by the intervenor.

Federal Circuit Rule 30 states that the appendix should include “pages specifically cited in the briefs of the parties, including the briefs of intervenors and amici.”

District of Columbia Circuit Rules 28 and 32 also include intervenors among the case participants subject to brief requirements. Rule 28(d) makes clear, among other things, that briefs in intervention should not duplicate what is said in principal briefs.

Fourth Circuit Rule 28(a) states that related cases will be consolidated, and one brief will be permitted per side, including intervenors, absent court order to the contrary.

Tenth Circuit Rule 31.3 similarly states, “In civil cases involving more than one appellant or appellee, including consolidated cases, all parties on a side (including intervenors) must—to the extent practicable—file a single brief.”

*Oral Argument*

Sixth Circuit Rule 34(e) states, "An intervening party may request oral argument."

On the other hand, District of Columbia Circuit Rule 34(d) states, "Unless otherwise ordered, counsel for an intervenor will be permitted to argue only to the extent that counsel for the party whose side the intervenor supports is willing to share allotted time."

*Costs*

District of Columbia Circuit Rule 39(a) includes briefs and appendices served on intervenors as included among expenses recoverable as costs. According to Rule 39(c), however, "No taxation of costs for briefs or intervenors or amici curiae or separate replies thereto will be assessed unless allowed by the court on motion."

Similarly, according to Federal Circuit Rule 39(e), "No costs will be taxed in favor of intervenors without leave of court."

## Excerpts from Local Rules

## District of Columbia Circuit

*District of Columbia Circuit Rule 12. Docketing Statement in Appeal from a Judgment or Order of the District Court; Statement by Appellee, Intervenor, or Amicus Curiae*

. . .

(f) Statement by Appellee, Intervenor, or Amicus Curiae. Within 7 days of service of the docketing statement, an appellee must file with the court any statement required by FRAP 26.1 and Circuit Rule 26.1.

Any disclosure statement required by Circuit Rule 26.1 must accompany a motion to intervene, a written representation of consent to participate as amicus curiae, or a motion for leave to participate as amicus.

*District of Columbia Circuit Rule 15. Petition for Review or Appeal from Agency Action; Docketing Statement*

. . .

(b) Intervention. For purposes of FRAP 15(d), a motion to intervene in a case before this court regarding review of agency action must be served on all parties to the case before the court. A motion to intervene in a case before this court concerning direct review of an agency action will be deemed a motion to intervene in all cases before this court involving the same agency action or order, including later filed cases, unless the moving party specifically states otherwise, and an order granting such motion has the effect of granting intervention in all such cases.

(c) Docketing Statement

(1) Timing. As directed by the court, appellant or petitioner must file a docketing statement and serve a copy on all parties (including intervenors) and amici curiae appearing before this court at that time.

. . .
(6) Statement by Respondent, Appellee, Intervenor, or Amicus Curiae. Within 7 days of service of the docketing statement, a respondent or appellee must file with the court any statement required by Circuit Rule 26.1. Any disclosure statement required by Circuit Rule 26.1 must accompany a motion to intervene, a written representation of consent to participate as amicus curiae, or a motion for leave to participate as amicus.

*District of Columbia Circuit Rule 28. Briefs*

(a) Content of Briefs: Additional Requirements. Briefs for an appellant/petitioner and an appellee/respondent, and briefs for an intervenor and an amicus curiae, must contain the following in addition to the items required by FRAP 28:

(1) Certificate Immediately inside the cover and proceeding the table of contents, a certificate titled "Certificate as to Parties, Rulings, and Related Cases," which contains a separate paragraph or paragraphs, with the appropriate heading, corresponding to, and in the same order as, each of the subparagraphs below.

(A) Parties and Amici. The appellant or petitioner must furnish a list of all parties, intervenors, and amici who have appeared before the district court, and all persons who are parties, intervenors or amici in this court. An appellee or respondent, intervenor, or amicus may omit from its certificate those persons who were listed by the appellant or petitioner, but must state: "[Except for the following,] all parties, intervenors, and amici appearing [before the district court and] in this court are listed in the Brief for _____."

. . .

(B) Rulings Under Review. . . .

. . .

(4) Statement of Jurisdiction. The brief of the appellant or petitioner must set forth the jurisdictional statement required by FRAP 28(a)(4). Any party, intervenor, or amicus curiae may include in its brief a counter statement regarding jurisdiction.

. . .

. . .

(d) Briefs for Intervenors. The rules stated below apply with respect to the brief for an intervenor in this court. For purposes of this rule, an intervenor is an interested person who has sought and obtained the court's leave to participate in an already instituted proceeding.

(1) Except by permission or direction of the court, the brief must conform to the brief lengths set out in Circuit Rule 32(e)(2).

(2) The brief must avoid repetition of facts or legal arguments made in

the principal (appellant/petitioner or appellee/respondent) brief, and focus on points not made or adequately elaborated upon in the principal brief, although relevant to the issues before this court.

(3) Except as otherwise directed by the court, the brief must be filed in accordance with the time limitations described in FRAP 29.

(4) Intervenors on the same side must join in a single brief to the extent practicable. This requirement does not apply to a governmental entity. (For this purpose, the term "governmental entity" includes the United States or an officer or agency thereof, the District of Columbia, or a State, Territory, or Commonwealth of the United States.) Any separate brief for an intervenor must contain a certificate of counsel plainly stating why the separate brief is necessary. Generally unacceptable grounds for the filing of separate briefs include representations that the issues presented require greater length than these rules allow (appropriately addressed by a motion to exceed length limits), that counsel cannot coordinate their efforts due to geographical dispersion, or that separate presentations were allowed in earlier proceedings.

(5) A reply brief may be filed for an intervenor on the side of appellant or petitioner at the time the appellant's or petitioner's reply brief is due.

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

. . .

(e) Form of Briefs. Except as provided below, the form of briefs is governed by FRAP 28.1 and 32(a).

. . .

(2) Length of Briefs for Intervenors

(A) Page limitation. A principal brief for an intervenor may not exceed 19 pages, and a reply brief 9 pages, unless it complies with Circuit Rule 32(e)(2)(B).

(B) Type-volume limitation

(i) A principal brief is acceptable if:

- it contains no more than 9,100 words; or
- It uses a monospaced face and contains no more than 813 lines of text.

(ii) A reply brief is acceptable if it contains no more than half of the type volume specified in Circuit Rule 32(e)(2)(B)(i).

*District of Columbia Circuit Rule 34. Oral Argument*

. . .

(d) Apportionment of Time Among Parties. In the absence of an order of this court, and subject to the provision as to number of counsel stated in paragraph (c), counsel for the parties on each side of a case, including counsel for any intervenor, may agree on the apportionment of the time allotted. In the event of a failure to agree, the court will allocate the time

upon motion duly filed and served. Unless otherwise ordered, counsel for an intervenor will be permitted to argue only to the extent that counsel for the party whose side the intervenor supports is willing to share allotted time.

*District of Columbia Circuit Rule 39. Costs*

(a) Allowable Items. Costs will be allowed for the docketing fee and for the cost of reproducing the number of copies of briefs and appendices to be filed with the court or served on parties, intervenors, and amici curae, plus 3 copies for the prevailing party. The costs of reproducing the required copies of briefs and appendices will be taxed at actual cost or at a rate periodically set by the clerk to reflect the per page cost for the most economical means of reproduction available in the Washington metropolitan area, whichever is less. Charges incurred for covers and binding may also be claimed at actual cost not to exceed a rate similarly determined by the clerk. The rates set by the clerk will be published by posting in the clerk's office and on the court's web site, and publication in *The Daily Washington Law Reporter*.

. . .

(c) No Costs Taxed for Briefs for Amici or Intervenors. No taxation of costs for briefs for intervenors or amici curiae or separate replies thereto will be assessed unless allowed by the court on motion.

## First Circuit

No local rule on intervention.

## Second Circuit

No local rule on intervention.

## Third Circuit

*Third Circuit Rule 27.0. Motions*

27.5 Powers of Single Judge

A single judge of the court may not grant or deny a motion that the court has ordered to be acted on by the court or a panel thereof, and ordinarily a single judge will not entertain and grant or deny a motion for release or for modification of the conditions of release pending review in a criminal case, a motion for leave to intervene, or a motion to postpone the oral argument in a case which has been included by the clerk in the argument list for a particular weekly session of the court. The action of a single judge may be reviewed by a panel of the court.

## Fourth Circuit

*Docketing the Appeal; Filing a Representation Statement; Filing the Record*

12(e) Intervention

A party who appeared as an intervenor in a lower court proceeding shall be considered a party to the appeal upon filing a notice of appearance. Otherwise, a motion for leave to intervene must be filed with the Court of Appeals. Any notice of appearance or motion to intervene should indicate the side upon which the movant proposes to intervene. The provisions of FRAP 15(d) govern intervention in appeals from administrative agencies. Intervenors are required to join in the brief for the side which they support unless leave to file a separate brief is granted by the Court.

*Disclosure Statement*

26.1 Disclosure Statement

(a) Disclosure Requirements Applicable to Parties and Proposed Intervenors

(1) Who Must File

(A) Civil, Agency, Bankruptcy, and Mandamus Cases. A party or proposed intervenor in a civil, agency, bankruptcy, or mandamus case, other than the United States or a party proceeding in forma pauperis, must file a disclosure statement, except that a state or local government is not required to file a disclosure statement in a case in which the opposing party is proceeding without counsel.

. . .

(2) Information to Be Disclosed by Parties and Proposed Intervenors

(A) Information Required by FRAP 26.1. A party or proposed intervenor must make the disclosures required by FRAP 26.1.

(B) Information About Other Financial Interests. A party or proposed intervenor must identify any publicly held corporation, whether or not a party to the present litigation, that has a direct financial interest in the outcome of the litigation by reason of a franchise, lease, other profit sharing agreement, insurance, or indemnity agreement, or state that there is no such corporation.

(C) Information About Other Publicly Held Legal Entities. Whenever required by FRAP 26.1 or this rule to disclose information about a corporation that has issued shares to the public, a party or proposed intervenor shall also disclose information about similarly situated master limited partnerships,

real estate investment trusts, or other legal entities whose shares are publicly held or traded, or state that there are no such entities.

(D) Information About Trade Association Members. A trade association proceeding as a party or proposed intervenor must identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member.

*Briefs*

28(a) Consolidated Cases and Briefs

Related appeals or petitions for review will be consolidated in the Office of the Clerk, with notice to all parties, at the time a briefing schedule is established. One brief shall be permitted per side, including parties permitted to intervene, in all cases consolidated by Court order, unless leave to the contrary is granted upon good cause shown. In consolidated cases lead counsel shall be selected by the attorneys on each side and that person's identity made known in writing to the clerk within 14 days of the date of the order of consolidation. In the absence of an agreement by counsel, the clerk shall designate lead counsel. The individual so designated shall be responsible for the coordination, preparation and filing of the briefs and appendix.

## Fifth Circuit

*Fifth Circuit Rule 15. Review or Enforcement of an Agency Order—How Obtained; Intervention*

15.3 Proceedings for Review of Orders of the Federal Energy Regulatory Commission

. . .

15.3.3 Intervention

(a) Party. A party to a commission proceeding may intervene in a review of the proceeding in this court by filing a notice of intervention. The notice must state whether the intervenor is a petitioner who objects to the order or a respondent who supports the order. A notice of intervention confers petitioner or respondent status on the intervening party as to all proceedings.

(b) Nonparty. A person who is not a party to a commission proceeding desiring to intervene in a review of that proceeding must file with the clerk, and serve upon all parties to the proceeding, a motion for leave to intervene. The motion must contain a concise statement of the moving party's interest, the grounds upon which

intervention is sought, and why the interest asserted is not adequately protected by existing parties. Oppositions to such motions must be filed within 14 days of service.

15.3.4 Docketing Statement. . . .

. . .

. . . Every party who intervenes after the filing of the docketing statement must specify in the notice of intervention any exceptions taken to the issues listed in the docketing statement.

15.3.5 Prehearing Conference. . . .

. . .

Except for good cause, any party who petitions for review or intervenes after prehearing conference has been held is bound by the result of the prehearing conference.

15.5 Time for Filing Motion for Intervention. A motion to intervene under Fed. R. App. P. 15(d) should be filed promptly after the petition for review of the agency proceeding is filed, but not later than 14 days prior to the due date of the brief of the party supported by the intervenor.

27.2 Single Judge May Rule on Certain Motions. . . .

. . .

27.2.2 To permit interventions in agency proceedings pursuant to Fed. R. App. P. 15(d).

*Fifth Circuit Rule 31. Filing and Service of a Brief*

31.2 Briefs—Time for Filing Briefs of Interventors or Amicus Curiae. The time for filing the brief of the intervenor or amicus is extended until 7 days after the filing of the principal brief of the party supported by the intervenor or amicus.

## Sixth Circuit

"An intervening party may request oral argument." 6th Cir. R. 34(e).

## Seventh Circuit

The court's operating procedures classify some motions as routine and some motions as nonroutine; motions to intervene as of right are classified as routine. 7th Cir. I.O.P. 1(c)(7).

## Eighth Circuit

No local rule on intervention.

## Ninth Circuit

*Ninth Circuit Rule 15-3. Procedures for Review Under the Pacific Northwest Electric Power Planning and Conservation Act*

15-3.3 Intervention

Any petitioner in any consolidated case and any party granted leave to

intervene in any consolidated case will be deemed to have intervened in all the consolidated cases. Notwithstanding FRAP 15(d), motions to intervene may be filed within 30 days of the expiration of the time to file petitions for review from the final action or decision at issue. A motion to intervene must state on its face the date of the final action or decision from which review is sought, the title (if one exists), the BPA docket number (if one exists) and the Ninth Circuit docket numbers of any known petitions for review of the same final action or decision.

## Tenth Circuit

*Fed. R. App. P. Rule 15. Review or Enforcement of an Agency Order—How Obtained; Intervention*

. . .

15.4 Intervention

(A) Notice of Intervention by a party. A party to an agency proceeding may intervene in a review of that proceeding by filing a notice of intervention in the court. The notice must state whether the party wishes to intervene as a petitioner in opposition to the agency order or as a respondent in support of the order.

(B) Motion to intervene

(1) Content. In addition to the requirements of Federal Rule of Appellate Procedure 15(d), a nonparty motion must state the reasons why the parties cannot adequately protect the interest asserted.

(2) Opposition. Opposition to a motion to intervene must be filed within 14 days after the motion is served.

*Fed. R. App. P. Rule 31. Serving and Filing Briefs*

. . .

31.3 Joint briefing in civil appeals

(A) Multiple parties. In civil cases involving more than one appellant or appellee, including consolidated cases, all parties on a side (including intervenors) must—to the extent practicable—file a single brief. Where, however, multiple response briefs are filed pursuant to Rule 31.3(B), the appellant may file only one reply except upon motion to the court seeking an exemption.

## Eleventh Circuit

*FRAP 15. Review or Enforcement of an Agency Order—How Obtained; Intervention*

. . .

15-4 Motion for Leave to Intervene. A motion for leave to intervene or other notice of intervention authorized by applicable statute may be filed within 30 days of the date on which the petition for review is filed.

*FRAP 26.1. Disclosure Statement*

26.1-1 Certificate of Interested Persons and Corporate Disclosure Statement (CIP): Filing Requirements

(a) Paper or E-Filed CIPs

. . .

(3) Also, all appellees, intervenors, respondents, and all other parties to the case or appeal must file a CIP within 28 days after the date the case or appeal is docketed in this court, regardless of whether appellants and petitioners have filed a CIP. If appellants and petitioners have already filed a CIP, appellees, intervenors, respondents, and all other parties may file a notice either indicating that the CIP is correct and complete, or adding any interested persons or entities omitted from the CIP.

## Federal Circuit

*Federal Circuit Rule 12. Docketing the Appeal*

Practice Notes to Rule 12

. . .

Trial Court Intervenors. Parties permitted to intervene in the trial court as plaintiffs or defendants will usually be identified only as plaintiff or defendant on the official caption to avoid confusion with any third party permitted to intervene in the appeal.

*Federal Circuit Rule 15. Review of an Agency Order or Action*

Practice Notes to Rule 15

. . .

Intervention. A party with the right to appeal or to petition for review may not, instead of exercising that right, intervene in another appeal or petition to seek relief in its own cause. Because the United States or an agency of the United States is often the only appellee or respondent in cases under this rule, any other party seeking to intervene on the side of the appellee or respondent must move for leave to intervene within thirty (30) days after the date when the petition for review or notice of appeal is filed. A motion for leave to intervene out of time will be granted only in extraordinary circumstances.

*Federal Circuit Rule 27. Motions*

Practice Notes to Rule 27

. . .

Authority to Act on Motions; Motions Referred to Panel. Neither the clerk of court nor the court is required to grant relief just because the parties agree it should be granted. The clerk of court's authority to act on procedural or unopposed nonprocedural motions includes the authority to grant or deny the requested relief in whole or in part or to refer the motion to a judge or a panel. Examples of procedural motions include motions for

extensions of time, motions to reform the caption, motions to withdraw counsel, and motions for leave to proceed in forma pauperis. Examples of nonprocedural motions include motions to dismiss, motions to remand, motions to transfer, motions to summarily affirm, motions for stays of injunctions, motions for injunctions, motions to strike, motions for leave to intervene, motions for leave to file briefs as amici curiae, etc. Motions to exceed the permitted word or page limitation for a brief will be decided by a judge. If the clerk of court grants a motion to extend the time to file a principal brief by sixty (60) days, no further extensions should be anticipated. Once a case is assigned to a merits panel, the clerk of court refers all motions to the merits panel.

*Federal Circuit Rule 30. Appendix to the Briefs*

. . .

(b) Preparing the Appendix

. . .

(5) Preparation of Appendix. The appellant must prepare the appendix by selecting from the designated material only items required by these rules and pages specifically cited in the briefs of the parties, including the briefs of intervenors and amici. Pages not cited in the briefs—other than items required by these rules—must be omitted from the appendix. If all material designated by the parties comprises no more than 100 pages, the entire designation may be filed as the appendix and combined with the appellant's principal brief pursuant to Federal Circuit Rule 30(d).

. . .

(e) Separate or Supplemental Appendix. . . .

. . .

(2) Appendix Filed by the United States as an Appellee or Intervenor. If all appellants have failed to participate in determining the contents of the appendix or have filed an inadequate appendix, the United States or an officer or agency of the United States, as an appellee or intervenor, may file an appendix containing material permitted by Federal Circuit Rule 30(a).

*Federal Circuit Rule 39. Costs*

. . .

(e) Costs in Favor of Intervenors. No costs will be taxed in favor of intervenors without leave of court.

*Federal Circuit Rule 47.3. Representation and Appearance*

. . .

(b) Appearance

. . .

(3) Intervenor and Amicus Curiae. Counsel for each intervenor, amicus curiae, or movant must file an entry of appearance

contemporaneously with the first document filed by that intervenor, amicus curiae, or movant.

*Federal Circuit Rule 47.4. Certificate of Interest*

(a) Purpose; Contents. A certificate of interest is required to determine whether recusal by a judge is necessary or appropriate. The certificate must contain the information below in the order listed. For purposes of subsections (1)–(4) below, “entity” revers to any party, intervenor, amicus curiae, or movant represented in the case by the counsel filing the certificate of interest. Negative responses, if applicable, are required as to each item.

. . .

(b) Filing. Each party, intervenor, amicus curiae, or movant must file a certificate of interest. The certificate must be filed contemporaneously with the first-filed entry of appearance. However, the United States, or its officers or agencies, and unrepresented individuals are exempt from filing a certificate of interest unless disclosing information under Federal Circuit Rule 47.4(a)(6) in compliance with Federal Rule of Appellate Procedure 26.1(b). The certificate must also be included with each motion, petition, or related response, and in each principal brief and brief amicus curiae.

## SECTION 2
## INTERVENTION MOTIONS AND RULINGS

We can describe intervention motions and rulings with small case studies that examine motions and rulings in recent appeals.

As a demonstration, we examined all docket entries made in the courts of appeals in 2023. We selected five cases from each circuit at random among those with intervention requests or decisions, except for the First Circuit, where we found only four such cases.[1] Some cases are consolidations. Each of the following analyses describes the nature of each case, the nature of intervention sought, and any court action permitting or denying intervention.

Intervention appears to be relatively common in agency appeals. In an agency appeal, the entity in the role of appellee is the agency whose decision is reviewed, so parties before the agency who have not sought the review need to intervene in order to participate before the court of appeals.

Intervention in a civil appeal is much more in the nature of bringing a new party to the litigation.

In some circuits, intervention is by motion; in others, it can sometimes be by notice. Depending on the circuit, intervention decisions can be made by a two-judge motion panel, a single motion judge, the clerk of court, or a three-judge panel. Intervention decisions typically do not include reasons, but intervention decisions in the Sixth Circuit are often issued by three-judge panels in short opinions. One of the intervention decisions we studied in the Fourth Circuit was a published opinion

1. Among the thirteen courts, there were 9,870 docket entries in 2023 that included the character string “interven.” We examined these docket entries in random order to find five cases per circuit.

issued by a three-judge court. Ass'n for Educ. Fairness v. Montgomery Cnty. Bd. of Educ., 88 F.4th 495 (4th Cir. 2023).

This case-study approach can be applied to a larger group of cases, perhaps by looking at docket entries in a one-year filing cohort, all cases filed over a one-year period. Courts of appeals categorize their cases by type, and we can examine civil appeals more thoroughly than agency appeals, for example. We can also target other categories of cases, such as criminal appeals.

## District of Columbia Circuit[2]

In the District of Columbia Circuit, intervention in agency appeals can be granted by the clerk of court. In one case, intervention was denied as untimely by a three-judge panel. All selected cases are agency appeals.

*Various Petitioners v. EPA, 15-rev-1381, 15-rev-1396, 15-rev-1397, 15-rev-1399, 15-rev-1434, 15-rev-1438, 15-rev-1448, 15-rev-1456, 15-rev-1458, 15-rev-1463, 15-rev-1468, 15-rev-1469, 15-rev-1481, 15-rev-1482, 15-rev-1484, 16-rev-1218, 16-rev-1220, 16-rev-1221, and 16-rev-1227*

Petitions for review challenged the EPA's "Reconsideration of Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units." Environmental and public-health advocacy organizations, several states and one city, and some energy companies moved to intervene. The clerk of court granted intervention in the first fifteen cases in January 2016. He granted additional intervention motions in April. The fifteen cases were consolidated in July. Additional intervention motions were granted in August in a consolidation that then included nineteen cases. Some intervenors supported the petitioners, and some supported the EPA. In March 2023, the clerk of court granted a state's motion to withdraw as an intervenor. The cases remain pending further EPA action.

*SGCI Holdings Ill. LLC v. FCC, 23-app-1083*

Broadcasters appealed from an FCC order denying applications to transfer station licenses. On March 29, 2023, the clerk of court granted an unopposed motion to intervene. According to the motion, "Each of the Movants filed petitions to deny the applications for transfer of licenses here at issue. Their petitions were partially granted by the designation of a hearing to which they have been made parties." The court granted a motion to dismiss the case on April 3.

*Two Petitioners v. STB, 23-rev-1125 and 23-rev-1131*

May 2013 petitions challenged the acquisition of control by Canadian Pacific Railway Limited of Kansas City Southern, and through it, of The Kansas City Southern Railway Company. Canadian Pacific Kansas City Limited and another railroad company moved to intervene. In June, the clerk of court granted the

2. The character string "interven" appeared in 3,403 District of Columbia Circuit docket entries in 2023.

intervention motions. The first case was dismissed voluntarily, and the second was dismissed by the court.

*Various Petitioners v. EPA, 23-rev-1143, 23-rev-1144, 23-rev-1145, 23-rev-1146, 23-rev-1147, and 23-rev-1148*

Petitions for review challenged the EPA's "California State Motor Vehicle and Engine Pollution Control Standards; Heavy-Duty Vehicle and Engine Emission Warranty and Maintenance Provisions; Advanced Clean Trucks; Zero Emission Airport Shuttle; Zero Emission Power Train Certification; Waiver of Preemption." On July 24, 2023, the clerk of court granted three motions to intervene. The cases are held in abeyance pending resolution of other cases.

*Various Petitioners v. EPA, 23-rev-1157, 23-rev-1181, 23-rev-1183, 23-rev-1190, 23-rev-1191, 23-rev-1193, 23-rev-1195, 23-rev-1199, 23-rev-1200, 23-rev-1201, 23-rev-1202, 23-rev-1203, 23-rev-1205, 23-rev-1206, 23-rev-1207, 23-rev-1208, 23-rev-1209, 23-rev-1211, 23-rev-1306, 23-rev-1307, 23-rev-1314, 23-rev-1315, 23-rev-1316, and 23-rev-1317*

Petitions for review challenged the EPA's "Federal 'Good Neighbor Plan' for the 2015 Ozone National Ambient Air Quality." On August 4, 2023, the clerk of court granted intervention in eleven cases. On August 10 and October 11, he granted intervention to additional parties in the first eleven cases plus seven more. He granted intervention in an additional two cases on November 15. On May 16, 2024, however, a three-judge panel denied intervention in twenty-four cases to two parties, stating, "Movants have not shown good cause for the untimely filing of their motion." The cases remain pending.

## First Circuit[3]

Orders on intervention motions signed by the clerk of court are attributed to individual circuit judges in the docket sheets. We found only four First Circuit cases with intervention litigation in 2023: three civil appeals and one agency appeal.

*Housatonic River Initiative v. EPA, 22-ag-1398*

A May 19, 2022, petition challenged an EPA permit decision. On June 16, the permittee moved to intervene. On the following day, an intergovernmental committee that participated in mediation between the stakeholders also moved to intervene. The clerk of court granted the motions on June 22. On July 25, 2023, the court denied the review petition. 75 F.4th 248.

*Estados Unidos Mexicanos v. Smith & Wesson Brands Inc., 22-civil-1823*

On December 5, 2022, Mexico appealed from a dismissal by the District of Massachusetts of Mexico's action against seven gun manufacturers and one distributor. On April 3, 2023, a disbarred attorney filed a motion to intervene in the case to protect his First Amendment right to practice law. The clerk of court denied

3. The character string *interven* appeared in 99 First Circuit docket entries in 2023.

the motion on April 24. On January 22, 2024, the court reversed the dismissal, holding that the complaint plausibly alleged a valid claim. 91 F.4th 511.

*GoldenTree Asset Mgmt. LP v. FOMB, 23-civil-1737*

A September 7, 2023, appeal arose from a district-court order denying appellants relief from a bankruptcy stay respecting bonds issued by the Puerto Rico Electric Power Authority. On September 13, the Official Committee of Unsecured Creditors of all Title III Debtors moved to intervene. The electric company consented to intervention. On September 22, the clerk of court agreed to the committee's participation in the case. On September 26, a bank acting as trustee moved to intervene. On the following day, the clerk agreed that "the trustee may participate in this appeal by filing the contemplated brief within three days of the date of this order." On January 22, 2024, the court affirmed the district court's judgment.

*Anderson v. Donovan, 23-civil-1765*

A pro se complaint was dismissed for failure to prosecute it, and the plaintiffs filed a September 20, 2023, appeal. An attorney "referenced throughout the complaint and whose file the plaintiffs seek, giving rise to this lawsuit," moved on September 22 to intervene in the appeal. The case remains pending.

## Second Circuit[4]

In the Second Circuit, intervention can be granted or denied by the clerk of court. All selected cases are civil appeals.

*Doe v. East Lyme Bd. of Educ., 21-cv-28, 22-cv-1504, and 23-cv-171*

In underlying litigation, a mother, the pro se appellant before the court of appeals, sought remedies from a school district for the education of her disabled son. D. Conn. No. 3:11-cv-291. The law firm that initially represented the mother in the district court moved to intervene in the appeal to protect its interest in attorney fees. A three-judge panel granted intervention while denying various pro se motions by the appellant. On March 18, 2024, the merits panel largely affirmed the district court's orders, but it vacated a denial of post-judgment interest. 2024 WL 1152494.

*Upsolve, Inc. v. James, 22-cv-1345*

New York's attorney general appealed from a preliminary injunction allowing nonlawyers to provide free assistance to low-income clients facing debt defaults. According to the attorney general's opposition to an intervention motion, the pro se movant was a disbarred attorney who was denied intervention in the district court's case. The clerk of court denied intervention, and later she denied reconsideration. She subsequently denied a motion for the merits panel to revisit the intervention denial and then later denied the movant's several additional intervention motions. Also in the case, a debtor filed a pro se motion to intervene

4. The character string *interven* appeared in 279 Second Circuit docket entries in 2023.

in support of the plaintiffs, and the clerk of court denied the motion. The appeal was heard on May 29, 2024.

*Giambalvo v. New York, 23-cv-208*

A February 16, 2023, appeal challenged an Eastern District of New York's denial of a preliminary injunction in a class action challenging firearm-licensing policies. E.D.N.Y. No. 2:22-cv-4778. New York's attorney general moved to intervene in the appeal to defend New York's laws at issue. The clerk of court granted intervention. The court decided to hold the appeal in abeyance pending a decision in another case.

*East Fork Funding LLC v. U.S. Bank Nat'l Assoc., 23-cv-659*

An April 21, 2023, appeal challenged summary judgment for the plaintiff discharging a mortgage. E.D.N.Y. No. 1:20-cv-3404. New York's attorney general moved to intervene in the appeal to defend the constitutionality of a statute restoring a common-law principle "that a lender's unilateral, voluntary discontinuance of a prior foreclosure action does not, standing alone, reset the applicable six-year statute of limitations for future foreclosure actions." The clerk of court granted intervention. The appeal was heard in February 2024.

*Carroll v. Trump, 23-cv-793*

A May 11, 2023, appeal challenged a civil judgment against former President Trump. S.D.N.Y. No. 22-cv-10016. A motion to intervene stated that the movant had concrete proof the jury's verdict form "made absolutely no sense and was totally wrong." The clerk of court denied the motion. The appeal remains pending.

## Third Circuit[5]

Third Circuit Rule 27.0 states that "ordinarily a single judge will not entertain and grant or deny . . . a motion for leave to intervene," but we observed two examples of single motion judges deciding intervention motions. Three of the selected cases are civil appeals, and two are agency appeals.

*Crystallex Int'l Corp. v. Venezuela, 23-cv-1117*

A January 24, 2023, civil appeal challenged the district court's denying the appellant intervention in a foreign-judgment case. In addition to the untimeliness of the district-court intervention motion, the appellant was unwilling to contribute what the district judge believed to be an equitable share of the expenses of a special master. On the day the appeal was filed, the clerk of court notified the parties that were able to intervene in the district court that they had two weeks to notify the court whether they wished to intervene in the appeal. Two intervenors in the district court were recognized as intervenors in the court of appeals. On July 9, 2024, the court of appeals determined that the district court's denial of intervention was not an abuse of discretion. 2024 WL 3342444.

5. The character string *interven* appeared in 1,311 Third Circuit docket entries in 2023.

*Litigation Between United Scrap Metal PA LLC and NLRB, 23-nlrb-1583, 23-ag-1758, 23-nlrb-2367, and 23-ag-2561*

On March 30, 2023, the NLRB filed an application to enforce its designation of a union as the exclusive bargaining representative of a business's employees. The business filed a review petition on April 20. The union sought intervention on June 13. The NLRB filed a second enforcement application on July 31, the employer filed a second petition on August 25, and the court ordered them consolidated with the first two cases. A motion judge granted intervention on August 17, excusing the late motion in the earlier cases, and the clerk of court granted intervention in the last case on August 28. The cases were submitted on June 27, 2024.

*Litigation with Petróleos de Venezuela and Venezuela, 23-cv-1647, 23-cv-1648, 23-cv-1649, 23-cv-1650, 23-cv-1651, and 23-cv-1652*

On April 11, 2023, Petróleos de Venezuela filed six appeals from a denial of sovereign immunity in six District of Delaware actions to collect on judgments against Venezuela. The court of appeals consolidated its six cases. On May 1, the court consolidated the six cases with a seventh appeal filed by Venezuela challenging the judgment in one of the district-court cases. On May 17, Venezuela moved to intervene in the appeals from the other five cases. A three-judge panel granted intervention on the following day. The court affirmed the district court's judgment on July 7. 73 F.4th 157, *cert. denied*, 601 U.S. ___, 144 S. Ct. 549 (2024).

*PJM Power Providers Grp. v. FERC, 23-ag-1778, 23-ag-1790, 23-ag-1808, 23-ag-1984, 23-ag-2544, 23-ag-2559, 23-ag-2560, and 23-ag-2612*

Three petitions filed in April and May 2023 challenged the FERC's electricity-generation tariff. The court consolidated the petitions. Seven intervention motions followed, one to support the petitioners and six to support the respondent. On June 1, the court consolidated a fourth petition with the first three. Two more motions to intervene followed, one to support the petitioners and one to support the respondent. On June 20, the clerk of court granted unopposed motions to support the respondent and referred to a panel of the court motions to support petitioners and an opposed motion to support the respondent. A motion judge granted the other intervention motions on July 10. On August 31, the court consolidated an additional three petitions with the first four. An eighth case was consolidated with the first seven on September 7. Another intervention motion followed on September 22. The clerk of court granted the motion as to the last-filed cases, but she referred the motion as to the first four because the motion was filed more than thirty days after the cases were filed. A motion judge granted the motion as to all eight cases on November 9. The court granted the petitioners relief on March 12, 2024. 96 F.4th 390.

*Cutillo v. Cutillo, 23-cv-2382*

An August 11, 2023, civil appeal challenged partial summary judgment awarded defendants in a family dispute over a natural-hormone-balancing business. A business affiliated with the defendants that was not named in the complaint was granted intervention in the district court. On the day that the appeal was filed, the

court of appeals instructed the intervenor to advise the court within two weeks whether it intended to continue intervention on appeal. The intervenor responded that it might intervene in the appeal, depending on what issues would be briefed. So the clerk of court added the district-court intervenor as an appellate intervenor. The court of appeals affirmed the district court's judgment on July 1, 2024. 2024 WL 3250364.

## Fourth Circuit[6]

In the Fourth Circuit, "A party who appeared as an intervenor in a lower court proceeding shall be considered a party to the appeal upon filing a notice of appearance. Otherwise, a motion to intervene must be filed with the Court of Appeals." 4th Cir. R. 12(e). Four of the selected cases are agency appeals in which the clerk of court granted intervention. The other case is a civil appeal, in which a three-judge court denied intervention.

*Two Petitioners v. FCC, 22-rvw-2220 and 23-rvw-1096*

The FCC granted a telecommunications company partial relief against an electric company in an action concerning pole-attachment rates. The electric company sought review in the Fourth Circuit on November 28, 2022. On December 29, the clerk of court granted the telecommunications company's motion to intervene. On January 26, 2023, the telecommunications company's petition for review was transferred from the District of Columbia Circuit. On January 30, the clerk of court granted the electric company's motion to intervene in the second case. The petitioners moved to dismiss the cases as settled in January 2024.

*S.C. State Ports Auth. v. NLRB, 23-rvw-1059*

On January 17, 2023, an employer sought review of an NLRB decision that a union's lawsuit and its contract with an association of employers did not violate the National Labor Relations Act. The clerk of court granted intervention motions by the union, the employer association, and the State of South Carolina, all parties in the agency action. On July 28, the court denied the petition, agreeing with the NLRB's decision. 75 F.4th 368, *cert. denied*, 601 U.S. ___, 144 S. Ct. 873 (2024).

*Ass'n for Educ. Fairness v. Montgomery Cnty. Bd. of Educ., 23-cv.pri-1068*

A civil complaint alleged that a school district's admissions process intended to increase Black and Hispanic enrollment improperly disadvantaged Asian American students. On July 29, 2022, a District of Maryland judge dismissed the complaint, concluding, "The Amended Complaint fails to make plausible that the Pandemic Plan disparately impacts Asian American students or had been implemented with discriminatory intent." 617 F. Supp. 3d 358. The judge denied as moot a motion to intervene filed by "a multi-racial coalition of five organizations that serve thousands of Asian American, Black, and Latino students and families across Montgomery County." On March 2, 2023, proposed district-court intervenors moved to intervene in the January 20 appeal by the plaintiff organization. In a published

6. The character string *interven* appeared in 161 Fourth Circuit docket entries in 2023.

opinion on December 8, a three-judge panel denied intervention as unnecessary because the proposed intervenors could participate as amici and because their interests were so closely aligned with the appellees. 88 F.4th 495. The case otherwise remains pending.

*Appalachian Power Co. v. FERC, 23-rvw-1192*

On February 21, 2023, an energy company challenged FERC's allowing energy consumers to use batteries to store electricity during low-demand periods to avoid high-demand prices. On March 22, the petitioner before the FERC moved to intervene. That day, a deputy clerk notified the FERC that a response to the motion was due by April 3. On March 24, the FERC stated that it did not oppose intervention, which the clerk of court granted on March 27. Oral argument is set for September 26, 2024.

*Appalachian Voices v. U.S. Dep't of the Interior, 23-1384, and Wilderness Soc'y v. BLM, 23-rvw-1592 and 23-rvw-1594*

An April 10, 2023, petition challenged the Fish and Wildlife Service's biological opinion and incidental take statement for the Mountain Valley Pipeline. On April 11, the clerk of court granted an intervention motion filed that day by the Mountain Valley Pipeline. Two June 1 petitions challenged the Bureau of Land Management's granting a permit to a "Mountain Valley Pipeline and Equitrans Expansion Project." Mountain Valley Pipeline moved to intervene on June 5, and the clerk of court granted intervention that day. The clerk granted a motion to consolidate the three cases on July 12. On August 11, the court concluded that intervening congressional action ratified the agencies' actions, so the court dismissed the environmental-group petitions. 78 F.4th 71.

## Fifth Circuit[7]

Fifth Circuit Rule 27.2.2 includes motions to intervene among those that can be decided by a single judge. Three of the selected cases are agency appeals, and two are civil appeals.

*SEC v. Barton, 22-usc-11132 and 22-usc-11242*

A September 23, 2022, SEC complaint filed in the Northern District of Texas alleged fraudulent securities offerings related to real-estate investments in Texas. No. 3:22-cv-2118. The lead defendant filed interlocutory notices of appeal in November and December 2022. The receiver appointed by one of the orders appealed from moved to intervene in the appeal. Rather than grant intervention, a motion judge allowed the receiver to participate as an amicus curiae. On August 31, 2023, the court of appeals vacated the order appointing the receiver. 79 F.4th 573.

*Various Refining Companies v. EPA, 22-ag-60266, 22-ag-60425, 22-ag-60433, and 22-ag-60434*

Four 2022 petitions challenged the EPA's denying the petitioners small-refinery

7. The character string *interven* appeared in 840 Fifth Circuit docket entries in 2023.

hardship relief. Organizations involved in renewable fuels moved to intervene in support of the EPA decision. Concluding that intervention complied with the court's liberal application of Federal Rule of Civil Procedure 24(a)(2), a motion judge granted intervention. The court of appeals vacated the EPA's rulings on November 22, 2023. 86 F.4th 1114, *cert. pending*, U.S. Nos. 23-1229 and 23-1230.

*Caballero v. Rosneft Trading, 23-pcf-20115*

The March 24, 2023, appeal arose from a Southern District of Texas judgment on the pleadings granted to a third party accused of ties to an allegedly terrorist organization, against which the plaintiff received a default judgment in the Southern District of Florida. The garnishee in the district court, holding assets of the third party, filed an unopposed motion to intervene. A motion judge granted intervention. The appeal was later dismissed as settled.

*System Energy Resources v. FERC, 23-ag-60110 and 23-ag-60482*

A March 8, 2023, petition challenged a FERC order on electric-plant-capacity rates. Three participants in the FERC action filed notices of intervention. Local Rule 15.3 permits parties in FERC actions to intervene in reviews of FERC actions by notice. The court agreed to stay the action pending further FERC actions on rehearing. On September 8, the original petitioners and the first intervenor filed a second petition challenging additional FERC decisions in the same case. The second intervenor filed a notice of intervention in the second case. The cases are tentatively set for argument in October 2024. All but the third intervenor have filed briefs.

*BNSF Ry. Co. v. STB, 23-ag-60402*

A July 28, 2023, petition sought review of a decision by the Surface Transportation Board concerning the transportation of coal. The petitioner in the STB proceeding sought intervention before the court of appeals. A motion judge granted intervention. The appeal was resolved by settlement.

## Sixth Circuit[8]

The cases selected include four agency appeals and one civil appeal. In two agency appeals, intervention was granted by the clerk of court. In the other cases, intervention was granted by three-judge panels with short opinions.

*Yelder v. U.S. Dep't of Labor, 21-ag-3857*

A September 23, 2021, pro se petition challenged a decision by the Department of Labor's Administrative Review Board. On May 2, 2022, the petitioner's employer moved to intervene, claiming lack of service as a justification for the late motion. In a three-page opinion issued on March 9, 2023, a three-judge panel excused the late motion and granted it. On August 8, a different three-judge panel denied the petition.

8. The character string *interven* appeared in 592 Sixth Circuit docket entries in 2023.

*NLRB v. Macomb, 23-nlrb-1335 and 23-1403*

On April 12, 2023, the NLRB filed an application to enforce its order against an employer, and on May 3, the employer filed a petition to review the NLRB order. A union who was the charging party before the NLRB moved to intervene on May 8, and the clerk of court granted intervention on May 15. The cases were heard on April 30, 2024.

*Quickway Transp. v. NLRB, 23-nlrb-1780 and 23-nlrb-1820*

On August 28, 2023, a commercial motor carrier sought review of an NLRB finding of unfair labor practices. The NLRB filed a cross-application for enforcement on September 7. A union, a party before the NLRB, moved to intervene on September 27, and the clerk of court granted the motion on October 4. The case was heard on July 24, 2024.

*Various Parties, 23-cv-5447, 23-cv-5451, 23-cv-5453, 23-cv-5454, and 23-cv-5455*

Two of the defendants in five similar civil actions against a police department and some if its officers appealed from dismissals granted to the plaintiffs on settlement with the defendants' insurer. The insurer moved to intervene in the appeals. With a four-page opinion, a three-judge panel granted intervention. On February 29, 2024, a different three-judge panel affirmed the dismissals. 2024 WL 869931.

*Various Petitioners v. FERC, 21-ag-4072, 22-ag-3351, 23-ag-3196, 23-ag-3324, 23-ag-3366, and 23-ag-3417*

From November 16, 2021, to May 9, 2023, six petitions for review challenged FERC orders addressing whether Ohio providers of electricity were eligible for regional transmission-organization adders. In a three-page opinion issued on August 9, a three-judge panel granted intervention to several parties in the actions before the FERC. The cases were heard on May 8, 2024.

## Seventh Circuit[9]

In the Seventh Circuit, motions such as intervention motions typically are decided by single judges. We found precisely five Seventh Circuit cases with intervention litigation in 2023: two civil appeals and three agency appeals.

*Various Petitioners v. STB, 22-ag-3289 and 23-ag-1160*

A December 29, 2022, railroad petition challenged an STB rule establishing a voluntary arbitration program for small rate disputes. On January 1, 2023, the STB filed a notice that the same rule was also challenged in a petition before the Eleventh Circuit, No. 22-14285. The Judicial Panel on Multidistrict Litigation randomly selected the Seventh Circuit "in which to consolidate these petitions for review." The Seventh Circuit's court of appeals consolidated the two cases, the new one receiving a Seventh Circuit case number, No. 23-1160. On January 27, four organizations representing shippers by rail filed four motions to intervene. On January 30, a trade association that was a party of record before the STB also moved

9. The character string *interven* appeared in 112 Seventh Circuit docket entries in 2023.

to intervene. A motion judge granted the intervention motions on February 9. The case is held in abeyance pending further proceedings before the STB.

*Grove v. NLRB, 22-ag-2674, 23-ag-1014, and 23-ag-3172*

An employer's petition for review filed in the District of Columbia Circuit, No. 22-1247, "including the motion for leave to intervene," was transferred to the Seventh Circuit on November 21, 2022. No. 23-ag-1014. The petition sought review of an NLRB ruling that the petitioner improperly interfered with a labor strike. A labor union sought intervention as a successful charging party. Intervention was granted by a motion judge. On November 21, 2023, the court consolidated the case with two others: a petition for review by the union, No. 22-ag-2674, and a cross-application for enforcement by the NLRB, No. 23-ag-3172. A motion judge had granted the employer intervention in the union's petition. On July 23, 2024, the court denied the petitions for review and granted the cross-application for enforcement. 109 F.4th 905.

*Bevis v. City of Naperville, 23-cv-1353, 23-cv-1793, 23-cv-1825, 23-cv-1826, 23-cv-1827, and 23-cv-1828*

A February 23, 2023, appeal challenged a Northern District of Illinois decision denying a temporary restraining order and a preliminary injunction against a municipality's enforcement of a statute and an ordinance banning the sale of assault weapons. Illinois intervened in the trial court to defend the state statute and sought intervention in the court of appeals. A motion judge granted intervention on March 2.

In four appeals raising similar issues, Illinois's attorney general was already a defendant. In another case, the defendant was the director of the Illinois State Police, represented by the Office of the Attorney General. On November 3, 2023, the court concluded that civilian possession of assault weapons is not protected by the Second Amendment. 85 F.4th 1175, *cert. denied*, 603 U.S. ___, 144 S. Ct. 2491 (2024).

*Schneider v. Schneider, 23-cv-1806*

An April 27, 2023, civil appeal challenged summary judgment granted in a family dispute over operation of an automobile dealership. Following notification that the appellant dealership was in receivership, a motion judge invited the receiver to seek intervention, a motion that another motion judge granted on August 2. On October 3, a three-judge panel dismissed the dealership as a party: "only the receiver has authority to litigate in the company's name." The case otherwise remains pending.

*Coalition to Stop CPKC v. STB, 23-ag-1894*

A May 11, 2023, petition challenged STB approval of Canadian Pacific Railway's acquiring control of the Kansas City Southern Railway. On May 30, Canadian Pacific Kansas City, the company created as a result of the STB decision, moved to intervene. A motion judge granted intervention on June 1. Another railroad, which actively participated in the STB's proceeding, moved to intervene on June 12. A motion judge granted intervention on June 15. On June 28, another motion judge

transferred the case to the District of Columbia Circuit. The intervenors appear to be recognized as intervenors in the District of Columbia Circuit case without additional motion, and the case remains pending. No. 23-1165.

## Eighth Circuit[10]

The cases selected include one civil appeal and four agency appeals.

*Two Petitioners v. STB, 22-ag-3648 and 23-ag-1325*

In December 2022 and February 2023, two petitions for review challenged the Surface Transportation Board's adoption of a rule to establish a new procedure for challenging the reasonableness of rail carrier rates in smaller cases. On February 7, 2023, the clerk of court granted five intervention motions in the first case: by the National Grain and Feed Association, which actively participated in the STB proceeding that the petitioner has asked the court to review; by the National Industrial Transportation League, whose members ship various products using rail and other modes of transportation; by the Fertilizer Institute, whose members often rely on rail transportation to ship fertilizer; by the Corn Refiners Association, whose members rely extensively on rail transportation of their resources and products; and by the American Chemistry Council, which represents many chemical companies, an industry that is one of the largest customers of rail transport. On August 20, 2024, the court vacated the STB's rule. ___ F.4th ___, 2024 WL 3869770.

*NLRB v. Noah's Ark Processors, LLC, 23-ag-1895*

On April 28, 2023, the NLRB filed an application to enforce its order against an employer found to have engaged in bad-faith bargaining with a union. The union sought intervention on May 19. On May 23, the clerk of court notified the parties that intervention would be granted in eight days absent written objection. The clerk granted intervention on June 1. The court granted enforcement on April 8, 2024. 98 F.4th 896.

*Arkansas v. EPA, 23-ag-2769*

Arkansas's August 2, 2023, petition for review challenged an EPA federal implementation plan concerning ozone emissions that travel from Arkansas to neighboring states. On September 1, an organization whose members would be burdened by the implementation plan sought intervention in support of the petitioners, also filing their own petition for review in the District of Columbia Circuit, No. 23-1211.[11] On September 5, the clerk of court filed a notice that intervention would be granted absent a filed written objection. He granted intervention on September 18. The case is held in abeyance pending the result of other litigation.

*Missouri v. EPA, 23-ag-2771*

Missouri's August 3, 2023, petition for review challenged an EPA federal

10. The character string *interven* appeared in 746 Eighth Circuit docket entries in 2023.

11. This case also was selected for this study.

implementation plan concerning interstate transport of air pollution. On September 1, the Sierra Club moved to intervene in support of the EPA action, an action in the Sierra Club's advocacy interest. On September 5, the clerk of court issued an order stating that without the filing of an objection to the motion, the motion would be granted. Also on September 5, a utility company moved to intervene in support of the petitioner. On September 6, the clerk of court issued his notice order. The petitioner opposed the Sierra Club's intervention motion. The case is in abeyance pending resolution of another case.

*Turtle Mountain Band of Chippewa Indians v. Two Respondents, 23-cv-3655 and 23-cv-3697*

A December 6, 2023, appeal challenged a district-court conclusion on November 17, 2023, that American Indian tribes had proved improper dilution of Native American voting strength by North Dakota's legislative redistricting. On December 17, North Dakota's legislative assembly moved to intervene. The assembly filed a separate appeal challenging the district court's denial of its motion to intervene before the district court, a motion filed after the voting-rights decision was issued. North Dakota's secretary of state said that he did not oppose intervention, but the tribes did. Other parties submitted six "amicus/intervenor" briefs, which are sealed on the docket pending approval for filing. The cases remain pending.

## Ninth Circuit[12]

In the Ninth Circuit, intervention on appeal apparently is governed by Federal Rule of Civil Procedure 24. Bates v. Jones, 127 F.3d 870, 873 (9th Cir. 1997). In four of the cases examined, decisions on intervention were made by motion panels. In another case, the intervention decision was made by a merits panel. The cases selected include two prisoner appeals and three other civil cases.

*Devas Multimedia Private Ltd. v. Antrix Corp., 20-cv-36024*

A November 25, 2020, appeal challenged a Western District of Washington decision confirming an International Chamber of Commerce arbitration award in a dispute between Indian corporations. Three intervention motions sought a limited remand so that the district court could consider pending intervention motions there for the purpose of seeking a temporary restraining order. A motion panel of the court of appeals granted the limited remand. The district court granted intervention and preliminary relief in light of a pending hearing in India. Opinion, Devas Multimedia Private Ltd. v. Antrix Corp. Ltd., No. 2:18-cv-1360 (W.D. Wash. Feb. 24, 2021), D.E. 76, 2021 WL 735225.

After resolution of the limited remand, shareholders and a subsidiary moved to intervene in the appeal in defense of the district court's award confirmation, including an argument that they be recognized as parties to the appeal because they had become parties in the district court. A new motion panel granted intervention but denied substitution as parties on appeal.

12. The character string *interven* appeared in 616 Ninth Circuit docket entries in 2023.

On August 1, 2023, a merits panel reversed the district court's exercising personal jurisdiction over the defendant. Opinion, Devas Multimedia Private Ltd. v. Antrix Corp. Ltd., No. 20-36024 (9th Cir. Aug. 1, 2023), D.E. 105, 2023 WL 4884882. This had the effect of reversing the district court's allowing the intervenors to register the district court's judgment in the Eastern District of Virginia.

*Hernandez Roman v. Mayorkas, 20-pr-56026, 20-pr-56257, 20-pr-56329, 21-pr-55510, and 21-pr-56128*

The case in the district court sought habeas corpus relief from close quarters in immigration detention at a time of dangerous Covid-19 infectiousness. Petition, Hernandez Roman v. Wolf, No. 5:20-cv-768 (C.D. Cal. Apr. 13, 2020), D.E. 1. From October 5, 2020, to October 14, 2021, the government appealed several district-court orders in the case.

The operator of a detention facility and its employees' union moved to intervene in the appeals on May 12, 2023, arguing that "COVID-19-related legal limitations on immigration into the U.S. have now expired." A motion panel denied intervention on July 26.

Pending mediation, the appeals were administratively closed on September 25. A motion panel denied a renewed intervention motion on May 21, 2024. Mediation remains pending.

*Mayes v. Biden, 22-cv-15518*

According to the appellant brief in this April 11, 2022, appeal, "The principal question in this case is whether the President of the United States may require federal agencies to do business only with contractors that impose [a Covid-19] vaccination requirement on their employees." The underlying action was brought by Arizona's attorney general; in light of more narrow relief sought by the attorney general's successor, legislative entities sought intervention. The merits panel granted intervention to the Arizona Chamber of Commerce & Industry "based on no opposition from the parties." Order, Mayes v. Biden, No. 22-15518 (9th Cir. Feb. 28, 2023), D.E. 65. The court granted the legislature intervention because it found the requirements of Rule 24(b) on permissive intervention satisfied. The appeal became moot following the president's rescinding the executive order at issue.

*Brown v. Maricopa Cnty. Att'y's Off., 23-pr-15141*

A pro se action by nine prisoners in Arizona court was removed to federal court and severed into separate actions. This February 1, 2023, appeal is from the trial judge's denying reconsideration of his decision to close the multi-plaintiff case. Three pro se motions to intervene were filed in April and May, relying on Civil Rule 20, "Permissive Joinder of Parties." The plaintiffs supported and the defendants opposed the motions. A motion panel denied the intervention motions. The case remains pending.

*Elorreaga v. ViacomCBS Inc., 23-cv-16041*

The plaintiff claimed asbestos injuries while in the Navy by products supplied by the defendant. In a July 27, 2023, case, the court of appeals granted permission for

an interlocutory appeal from the plaintiff's partial summary judgment concerning liability under maritime law. A motion panel granted intervention to two codefendants. The case remains pending.

## Tenth Circuit[13]

By local rule, "A party to an agency proceeding may intervene in a review of that proceeding by filing a notice of intervention in the court." 10th Cir. R. 15.4(A). Four of the cases selected are agency appeals, and one is a civil appeal.

*Garfield County v. Biden, 23-cv-4106, and Dalton v. Biden, 23-cv-4107*

In two cases filed on August 15 and 16, 2023, plaintiffs appealed from decisions by the district court to dismiss their challenge to the creation of national monuments in Utah. The district court had granted intervention to several tribes and organizations. Orders, Garfield County v. Biden, No. 4:22-cv-59 (D. Utah Dec. 8, 2022, and Mar. 17, 2023), D.E. 52, 122. On October 11, the court of appeals denied intervention to three groups of organizations. "These groups may instead consider filing *amici curiae* briefs." The cases remain pending.

*Various Petitioners v. EPA, Nos. 23-agpet-9509, 23-agpet-9512, 23-agpet-9514, 23-agpet-9520, 23-agpet-9521, 23-agpet-9529, 23-agpet-9531, 23-agpet-9533, 23-agpet-9534, and 23-agpet-9537*

Ten petitions to review an EPA decision disapproving twenty-one states' plans to prevent ozone contamination of neighboring states were filed from February 13 to April 14, 2023.

On March 15, two environmental organizations moved to intervene in the first case, arguing also that venue properly belonged in the District of Columbia Circuit. In response to agency motions to transfer the cases to the court of appeals for the District of Columbia Circuit or dismiss them for improper venue, the court decided on April 27 to leave that as a merits-panel question. In a case-management order issued the following day, the court issued an order respecting intervention. The pending intervention motion noted "that in the D.C. Circuit, a motion to intervene filed in one case is deemed a motion to intervene in all cases before that court involving the same agency action or order. This circuit does not have a similar rule." The court ordered the prospective interveners to seek intervention in any other case they desired to have intervention within five days. On May 18, the court denied the organizations' intervention in the seven cases in which they sought intervention (nos. 23-9509, 23-9512, 23-9514, 23-9520, 23-9521, 23-9533, and 23-9534). "As appropriate, Movants may file an amicus brief or motion in accordance with Federal Rule of Appellate Procedure 29."

In January 2024, the cases with Wyoming petitioners were voluntarily dismissed (nos. 23-9529, 23-9531, and 23-9537). In February, the court transferred cases with Oklahoma and Utah petitioners to the District of Columbia Circuit (nos. 23-9509, 23-9512, 23-9514, 23-9520, 23-9521, 23-9533, and 23-9534). Two petitions

13. The character string *interven* appeared in 245 Tenth Circuit docket entries in 2023.

for certiorari are pending among the three Utah cases (U.S. no. 23-1068 for 10th Cir. no. 23-9512, U.S. no. 23-1067 for 10th Cir. no. 23-9514.).

*Evergy Kan. Cent. v. FERC, 23-agpet-9524 and No. 23-agpet-9558*

In petitions for review of FERC decisions filed on March 24 and June 26, 2023, an energy company objected, respectively, to (1) a finding that the energy company had overstated its rate requirement and (2) a modified ruling reaching the same result. In both cases, energy companies who had challenged the petitioner's rate before FERC filed notices of intervention. The cases were dismissed as settled in August.

*Ctr. for Biological Diversity v. EPA, No. 23-agpet-9565, and Colorado v. EPA, 23-agpet-9566*

On July 10, 2023, two organizations challenged an EPA ruling approving a clean-air plan by Colorado, and Colorado challenged portions of the ruling unfavorable to Colorado. On August 9, Colorado filed a notice of intervention in the first case as a party to the agency action, and the organizations filed a motion to intervene in the second case. On August 10, the clerk granted the intervention motion. The first case remains pending. The second case is abated pending reconsideration by the agency.

*Ctr. for Biological Diversity v. EPA, No. 23-agpet-9603*

A petition to review an EPA decision was filed on November 17, 2023. As a party to the underlying agency action, the State of Colorado filed a notice of intervention on Friday, December 8, to defend the agency action. One week later, the operator of a refinery (1) moved to intervene in defense of the agency action granting the refinery an operating permit and (2) filed a notice of intervention as a party to the agency action. On Monday, the clerk recognized the refinery as a rightful intervener. The case remains pending.

## Eleventh Circuit[14]

Four of the cases selected are agency appeals, and one is a civil appeal.

*Hunt Refining Co. v. EPA, 22-agen-11617 and 22-agen-12535*

Petitions challenged the EPA's denying small-refinery hardship relief. After the appellant brief was filed, trade associations moved to intervene in support of the EPA to ensure "that the renewable fuel standards are not unlawfully reduced by [small-refinery exemptions]." A motion judge denied intervention. On January 11, 2024, the court dismissed the review petitions, concluding that the case should have been filed in the District of Columbia Circuit. 90 F.4th 1107.

*Gladden v. ARB, 23-agen-12133*

A petition for review challenged an ARB decision affirming an administrative-law judge's denying reconsideration of a dismissal of a complaint filed before OSHA.

14. The character string *interven* appeared in 334 Eleventh Circuit docket entries in 2023.

The employer against whom the petitioner filed the original action moved to intervene. A motion judge granted intervention.

*Georgia v. Meadows, 23-pricivil-12958*

A state-court criminal defendant appealed from the federal court's declining jurisdiction over the prosecution of a former White House Chief of Staff. Noting that a pro se document titled "Amicus – Friend of the Court Brief – Motion to Intervene" was filed by someone with a history of frivolous filings in high-profile cases, the clerk of court denied the filer participation in the case.

*Am. Sec. Ass'n v. SEC, 23-agen-13396*

Stock exchanges moved to intervene in support of an SEC decision that was the subject of a petition for review. The motions were granted by a motion judge. The case remains pending.

*Colonial Pipeline Co. v. FERC, 23-agen-13831*

An interstate pipeline system petitioned for review of FERC orders on the petitioner's rates. Several companies that were complainants in the FERC proceedings moved to intervene in the court of appeals. The case is held in abeyance pending further FERC proceedings.

## Federal Circuit[15]

Two of the cases are petitions to review decisions by the International Trade Commission, and three are challenges to decisions by the Patent and Trademark Office. The patent cases are structured differently from other agency cases, and it is the agency that has to intervene to participate.

*Volvo Penta of the Americas, LLC v. Brunswick Corp., 22-bcaag-1765*

A May 10, 2022, appeal by a patent owner challenged a PTO decision of unpatentability. Following a settlement between the appellant and the appellee, the court invited the PTO to intervene on June 15, 2023. The PTO filed a notice of intervention on the following day. On August 24, the court vacated the PTO decision. 81 F.4th 1202.

*Litigation with Realtek Semiconductor Corp., 23-cvPri-1056, 23-cvPri-1057, and 23-ag-1187*

A November 29, 2022, petition challenged an ITC decision denying the petitioner sanctions. No. 23-1187. The petition stated that it was related to two pending cases: appeals from the Western District of Texas's denial of sanctions, No. 23-1056, and attorney fees, No. 23-1057. On December 28, the plaintiff in the district court moved to intervene in the new Federal Circuit case. A motion judge granted intervention on January 24, 2023. The cases remain pending.

15. The character string *interven* appeared in 1,132 Federal Circuit docket entries in 2023.

*Estech Systems, Inc. v. Two Appellees, 23-cvPri-1199, 23-bcaag-1241, and 23-bcaag-1242*

A December 12, 2022, appeal by a patent owner, No. 23-bcaag-1242, challenged a PTO decision of unpatentability. On February 1, the court assigned the case to the same panel that was presiding over two earlier cases brought by the appellant: one challenging a PTO decision, No. 23-1241, and one challenging a Western District of Texas decision, No. 23-1199. Following a settlement between the appellant and the PTO petitioner, the court sought notice on July 24, 2023, whether the PTO would intervene. The PTO filed a notice of intervention on August 23. Oral argument was scheduled for September 6, 2024.

*Shockwave Med., Inc. v. Cardiovascular Sys., Inc., 23-bcaag-1864*

A May 9, 2023, appeal by a patent owner challenged PTO rulings of unpatentability. On November 15, the PTO filed a notice of intervention. The clerk of court granted intervention on December 4. The case remains pending.

*HC Robotics v. ITC, 24-ag-1193*

A November 28, 2023, petition challenged the ITC's resolution of an investigation. The complainant in the commission investigation moved to intervene on December 18. The clerk of court granted intervention on December 29. The case remains pending.

# TAB 6C

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: FRAP 15 Subcommittee

Re: FRAP 15 (24-AP-G)

Date: September 4, 2024

At the spring 2024 meeting, the Advisory Committee considered a suggestion by Judge Randolph that FRAP 15 be amended in a way similar to the way in which FRAP 4 was amended in 1993. Prior to that amendment, premature notices of appeal from district courts under FRAP 4 would self-destruct if a party filed certain post-judgment motions in the district court, requiring the filing of a new notice of appeal. Something similar happens on review of agency actions under FRAP 15, under what is known as the "incurably premature" doctrine.

Judge Randolph writes that this doctrine "deserves reconsideration, either by our court en banc or through an amendment to Rule 15 of the Federal Rules of Appellate Procedure." *Nat'l Ass'n of Immigration Judges v. Fed. Labor Relations Auth.*, 77 F.4th 1132, 1139 (D.C. Cir. 2023) (Randolph, J., concurring). He explains that, under that doctrine:

> if a petition for judicial review of agency action is rendered non-final by the filing of a motion for agency reconsideration, the petition will be deemed "incurably premature." That is, the petition will not ripen or become valid to confer appellate jurisdiction even after the agency disposes of the reconsideration motion. If the party aggrieved by agency action fails to file another petition for review after the agency acts on the reconsideration motion, our court must dismiss the party's original petition for judicial review.
>
> In the past, a similar regime controlled appeals from judgments of the district courts. Like petitions seeking judicial review of agency action, appeals from district court judgments – with a few exceptions – had to be from "final decisions." Rule 4(a) of the Federal Rules of Appellate Procedure had provided that if a litigant files a notice of appeal before a post-judgment motion was made or while a post-judgment motion was pending, the court of appeals lacked jurisdiction unless the litigant timely filed a new notice of appeal after the district court acted on the post-judgment motion. . . .
>
> In 1993, appellate Rule 4(a)(4) was amended to eliminate this "particular wrinkle." Since then, if "a party files a notice of appeal" before the district court disposes of a post-judgment motion, "the notice becomes effective to appeal a judgment or order, in whole or in part,

> when the order disposing of the last such remaining motion is entered." Fed. R. App. P. 4(a)(4)(B)(I).
>
> The case for reform of our "incurably premature" doctrine is even stronger than reasons for amending Rule 4(a)(4) in 1993. Both dealt with "final decisions" and both set a "trap for the unwary." But at least the pre-1993 requirement that a new notice of appeal had to be filed was set forth in the Federal Rules of Appellate Procedure, although the rule was "complicated" and "buried in Rule 4 of the appellate rules, which anyway are less familiar than the rules of [civil] procedure." In contrast, the "incurably premature" doctrine is nowhere to be found in the appellate rules, including where one would expect to find such a requirement – that is, in either Rule 15 itself, which is entitled "Petition for Review or Appeal of Agency Action; Docketing Statement," or in our Circuit Rule 15. . . .
>
> A petition for review filed during the pendency of a motion for reconsideration could automatically be stayed, and then automatically become effective after—but only after—the agency rules on the pending reconsideration motion. That is the approach now embodied in Rule 4 of the Federal Rules of Appellate Procedure.

*Nat'l Ass'n of Immigration Judges*, 77 F.4th at 1139-40 (citations omitted).

At the spring 2024 meeting, a subcommittee was appointed to consider this suggestion.

The subcommittee discovered that a proposal along these lines was published for public comment back in 2000. The latest version of that proposed amendment considered by the Advisory Committee read as follows:

> **Rule 15. Review or Enforcement of an Agency Order—How Obtained; Intervention**
>
> * * *
>
> **(f) Premature Petition or Application**. If a petition for review or application to enforce is filed after an agency announces or enters its order—but before it disposes of any petition for rehearing, reopening, or reconsideration that renders that order non-reviewable—the petition or application becomes effective to appeal or seek enforcement of the order when the agency disposes of the last such petition for rehearing, reopening, or reconsideration.

Although the Advisory Committee at the time appears to have favored the amendment, the strong opposition of the D.C. circuit judges led the Advisory Committee to abandon it. Some of the material from the Committee's prior consideration is attached to this memo.

The subcommittee thinks that there may have been enough changes to warrant pursuing this proposal again. For one thing, there has been almost a complete turnover among active judges on the Court of Appeals for the D.C. Circuit. In addition, the proportion of administrative agency cases handled in other circuits has increased. Moreover, technological and administrative changes may reduce the burdens that concerned the circuit judges decades ago.

For these reasons, the benefits of such an amendment may be more important now than in the past, and the downsides of such an amendment may be more manageable now than in the past. In particular, the value of procedural uniformity across circuits, only some of which have adopted the "incurably premature" doctrine, may have grown over time.

If the Advisory Committee decides to consider an amendment along these lines again, there are a few additional aspects to consider:

First, because review of agency action is party-specific (unlike the case-as-a-whole norm in civil appeals from district courts), it might be better to make the petition or application effective "when the agency disposes of such petition for rehearing, reopening, or reconsideration," rather than the "*the last* such petition."

Second, the way a premature filing is treated may interact with the timing requirements embedded in other rules, doctrines, or statutes. This includes the Multicircuit Petition Statute, 28 U.S.C. § 2112.

Third, to the extent that anyone is worried about court statistics looking bad if an amendment results in a case being held in the courts of appeals for months or years while an agency decides whether to reconsider, the amendment might draw from existing Rule 4's treatment of notices of appeal that are filed after the announcement of a decision but before its entry. Such notices of appeal are "treated as filed on the date of and after the entry." FRAP 4(a)(2).

Fourth, it may well be worth clarifying—because review of agency action is more similar to civil appeals than to criminal appeals—that if a party intends to challenge the agency's disposition of the request for reconsideration it must file a notice of appeal or amended notice of appeal. That is what must be done in civil appeals. FRAP 4(a)(4)(B)(ii). In contrast, in criminal appeals, such a premature notice of appeal "is effective—without amendment—to appeal from an order disposing of" certain post-judgment motions. FRAP 4(b)(3)(C).

# TAB 6D

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett

Re: FRAP 15

Date: March 6, 2024

Judge Randolph has suggested that FRAP 15 be amended in a way similar to the way in which FRAP 4 was amended in 1993. Prior to that amendment, premature notices of appeal from district courts under FRAP 4 would self-destruct if a party filed certain post-judgment motions in the district court, requiring the filing of a new notice of appeal. Something similar happens on review of agency actions under FRAP 15, under what is known as the "incurably premature" doctrine.

Judge Randolph writes that this doctrine "deserves reconsideration, either by our court en banc or through an amendment to Rule 15 of the Federal Rules of Appellate Procedure." *Nat'l Ass'n of Immigration Judges v. Fed. Labor Relations Auth.*, 77 F.4th 1132, 1139 (D.C. Cir. 2023) (Randolph, J., concurring). He explains that, under that doctrine:

> if a petition for judicial review of agency action is rendered non-final by the filing of a motion for agency reconsideration, the petition will be deemed "incurably premature." That is, the petition will not ripen or become valid to confer appellate jurisdiction even after the agency disposes of the reconsideration motion. If the party aggrieved by agency action fails to file another petition for review after the agency acts on the reconsideration motion, our court must dismiss the party's original petition for judicial review.
>
> In the past, a similar regime controlled appeals from judgments of the district courts. Like petitions seeking judicial review of agency action, appeals from district court judgments – with a few exceptions – had to be from "final decisions." Rule 4(a) of the Federal Rules of Appellate Procedure had provided that if a litigant files a notice of appeal before a post-judgment motion was made or while a post-judgment motion was pending, the court of appeals lacked jurisdiction unless the litigant timely filed a new notice of appeal after the district court acted on the post-judgment motion. . . .
>
> In 1993, appellate Rule 4(a)(4) was amended to eliminate this "particular wrinkle." Since then, if "a party files a notice of appeal" before the district court disposes of a post-judgment motion, "the notice becomes effective to appeal a judgment or order, in whole or in part,

when the order disposing of the last such remaining motion is entered." Fed. R. App. P. 4(a)(4)(B)(I).

> The case for reform of our "incurably premature" doctrine is even stronger than reasons for amending Rule 4(a)(4) in 1993. Both dealt with "final decisions" and both set a "trap for the unwary." But at least the pre-1993 requirement that a new notice of appeal had to be filed was set forth in the Federal Rules of Appellate Procedure, although the rule was "complicated" and "buried in Rule 4 of the appellate rules, which anyway are less familiar than the rules of [civil] procedure." In contrast, the "incurably premature" doctrine is nowhere to be found in the appellate rules, including where one would expect to find such a requirement – that is, in either Rule 15 itself, which is entitled "Petition for Review or Appeal of Agency Action; Docketing Statement," or in our Circuit Rule 15. . . .
>
> A petition for review filed during the pendency of a motion for reconsideration could automatically be stayed, and then automatically become effective after – but only after – the agency rules on the pending reconsideration motion. That is the approach now embodied in Rule 4 of the Federal Rules of Appellate Procedure.

*Nat'l Ass'n of Immigration Judges*, 77 F.4th at 1139-40 (citations omitted).

I suggest the appointment of a subcommittee to consider this suggestion.

# TAB 6E

77 F.4th 1132
United States Court of Appeals, District of Columbia Circuit.

NATIONAL ASSOCIATION OF IMMIGRATION JUDGES, INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS JUDICIAL COUNCIL 2, Petitioner
v.
FEDERAL LABOR RELATIONS AUTHORITY, Respondent

No. 22-1028
|
Argued November 17, 2022
|
Decided August 11, 2023

Per Curiam:

For over four decades, immigration judges employed by the Executive Office for Immigration Review have collectively bargained through a certified union. Four years ago, that office asked the Federal Labor Relations Authority to determine that immigration judges are management officials barred from inclusion in a bargaining unit. The Authority agreed. Following an unsuccessful reconsideration motion, and with a second reconsideration motion still pending before the Authority, the union petitioned this court for review of both the Authority's initial decision and its decision denying reconsideration. The union contends that, in issuing those decisions, the Authority violated the union's substantive and procedural due process rights.

We do not reach the merits of those arguments. Because the union filed its petition for review in our court at a time when its second reconsideration motion remained pending before the Authority, the union's petition was incurably premature. We therefore dismiss the petition for lack of jurisdiction.

* * *

Randolph, Senior Circuit Judge, concurring:

I agree that the law of our circuit requires dismissal of the National Association of Immigration Judges' (NAIJ's) petition for review because it was “incurably premature,” and because NAIJ failed to file a new petition for judicial review after the agency denied its request for reconsideration.

I write because the “incurably premature” doctrine, announced in *TeleSTAR, Inc. v. FCC*, 888 F.2d 132 (D.C. Cir. 1989) (per curiam), deserves reconsideration, either by

our court *en banc* or through an amendment to Rule 15 of the Federal Rules of Appellate Procedure.

*TeleSTAR* announced a new rule for administrative law cases on direct review, a rule it made prospective only. After *TeleSTAR*, if a petition for judicial review of agency action is rendered non-final by the filing of a motion for agency reconsideration,[1] the petition will be deemed "incurably premature." That is, the petition will not ripen or become valid to confer appellate jurisdiction even after the agency disposes of the reconsideration motion. *See id.* at 134. If the party aggrieved by agency action fails to file another petition for review after the agency acts on the reconsideration motion, our court must dismiss the party's original petition for judicial review. *See, e.g.*, *Snohomish Cnty., Washington v. Surface Transp. Bd.*, 954 F.3d 290, 298 (D.C. Cir. 2020); *Flat Wireless, LLC v. FCC*, 944 F.3d 927, 933 (D.C. Cir. 2019); *Clifton Power Corp. v. FERC*, 294 F.3d 108, 111 (D.C. Cir. 2002).

The theory is that the agency's action will turn into a "final" action subject to judicial review only at the moment the agency decides the reconsideration motion and starts the clock running for the filing a new petition for review.[2]

In the past, a similar regime controlled appeals from judgments of the district courts. Like petitions seeking judicial review of agency action, appeals from district court judgments – with a few exceptions – had to be from "final decisions." 28 U.S.C. § 1291. Rule 4(a) of the Federal Rules of Appellate Procedure had provided that if a litigant files a notice of appeal before a post-judgment motion was made or while a post-judgment motion was pending, the court of appeals lacked jurisdiction unless the litigant timely filed a new notice of appeal after the district court acted on the post-judgment motion. *See* Fed. R. App. P. 4(a) (1979); Fed. R. App. P. 4(a) advisory committee's note to 1993 amendment.

In a typically forceful opinion, Judge Richard Posner wrote that "this particular wrinkle in the appellate rules is a trap for the unwary into which many appellants ... have fallen, with dire consequences since there is no way they can reinstate their appeal if the second notice of appeal is untimely. The mistake these litigants make is thoroughly understandable. ... The idea that the first notice of appeal lapses rather than merely being suspended is not intuitive." *Averhart v. Arrendondo*, 773 F.2d 919, 920 (7th Cir. 1985); *see also Harcon Barge Co. v. D & G Boat Rentals, Inc.*, 746 F.2d 278, 281 (5th Cir. 1984) ("The harsh result of this mandated rigid application of this

---

[1] *See, e.g.*, *United Transportation Union v. ICC*, 871 F.2d 1114, 1118 (D.C. Cir. 1989).

[2] Another twist is that "the filing of an untimely petition for agency reconsideration does not render incurably premature an otherwise valid petition for judicial review." *Gorman v. Nat'l Transp. Safety Bd.*, 558 F.3d 580, 587 (D.C. Cir. 2009).

seemingly functionless provision of the rule is, in our view, that we must dismiss this appeal.”).

In 1993, appellate Rule 4(a)(4) was amended to eliminate this “particular wrinkle.” Since then, if “a party files a notice of appeal” before the district court disposes of a post-judgment motion, “the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.” Fed. R. App. P. 4(a)(4)(B)(I).

The case for reform of our “incurably premature” doctrine is even stronger than reasons for amending Rule 4(a)(4) in 1993. Both dealt with “final decisions” and both set a “trap for the unwary.” But at least the pre-1993 requirement that a new notice of appeal had to be filed was set forth in the Federal Rules of Appellate Procedure, although the rule was “complicated” and “buried in Rule 4 of the appellate rules, which anyway are less familiar than the rules of [civil] procedure.” *Averhart*, 773 F.2d at 920. In contrast, the “incurably premature” doctrine is nowhere to be found in the appellate rules, including where one would expect to find such a requirement – that is, in either Rule 15 itself, which is entitled “Petition for Review or Appeal of Agency Action; Docketing Statement,” or in our Circuit Rule 15.

It is no answer to say that the incurably premature doctrine saves the court from the “pointless waste of judicial energy” required “to process any petition for review before the agency has acted on the request for reconsideration.” *TeleSTAR*, 888 F.2d at 134. If this is a concern, there is a far simpler solution. A petition for review filed during the pendency of a motion for reconsideration could automatically be stayed, and then automatically become effective after – but only after – the agency rules on the pending reconsideration motion. That is the approach now embodied in Rule 4 of the Federal Rules of Appellate Procedure. As the First Circuit has acknowledged, “holding [a] petition in abeyance serve[s] equally the interests of judicial economy” as does dismissing premature petitions outright. *Craker v. DEA*, 714 F.3d 17, 25–26 (1st Cir. 2013).

# TAB 6F

## V. Discussion Items

### A. Item No. 95-03 (new FRAP 15(f) — prematurely filed petitions to review)

Judge Alito said that Item No. 95-03 arose out of a suggestion by Judge Stephen Williams of the D.C. Circuit, a former member of this Committee. In 1995, Judge Williams recommended that a new Rule 15(f) be added to the Appellate Rules to provide that when, under governing law, an agency order is rendered non-reviewable by the filing of a petition for rehearing or similar petition with the agency, any petition for review or application to enforce that non-reviewable order would be held in abeyance and become effective when the agency disposes of the last such review-blocking petition. Judge Williams's suggestion was inspired by Rule 4(a)(4)(B)(i) and was intended to align the treatment of premature petitions for review of agency orders with the treatment of premature notices of appeal of judicial decisions.

The Committee approved a proposal to add such a Rule 15(f), and the proposal was published for comment in August 2000. In response, Judge A. Raymond Randolph, the Chief Judge of the D.C. Circuit, wrote to the Committee and expressed the "unanimous" and "strong" opposition of the Circuit's judges and its Advisory Committee on Procedures to proposed Rule 15(f). In light of that opposition, this Committee deferred further action on Rule 15(f).

Judge Alito said that he had talked to Judge Williams, and that Judge Williams confirmed that his colleagues were strongly opposed to new Rule 15(f). Judge Alito said that, given that the problem that Rule 15(f) is intended to solve is a problem affecting mainly the D.C. Circuit, and given the strong opposition of that circuit to the proposed rule, the proposed rule had little chance of clearing the Standing Committee or the Judicial Conference. For that reason, Judge Alito asked the Committee to remove Item No. 95-03 from the study agenda.

A couple of members affirmed that they continued to believe that proposed Rule 15(f) makes sense on the merits. There is a "trap" in the D.C. Circuit, and, unless the Appellate Rules are amended to fix that trap, it will continue to be easy for litigants unknowingly to forfeit their right to appellate review of agency action. However, these members also acknowledged the political realities of the situation and the fact that Item No. 95-03 had now been pending on the study agenda for seven years.

A member moved that Item No. 95-03 be removed from the Committee's study agenda. The motion was seconded. The motion carried (unanimously).

1 **Rule 15. Review or Enforcement of an Agency Order — How Obtained; Intervention**

2 **(f)** **Petition or Application Filed Before Agency Action Becomes Final.** If a petition for

3 review or application to enforce is filed after an agency announces or enters its order —

4 but before it disposes of any petition for rehearing, reopening, or reconsideration that

5 renders that order non-final and non-appealable — the petition or application becomes

6 effective to appeal or seek enforcement of the order when the agency disposes of the last

7 such petition for rehearing, reopening, or reconsideration.

8 **Committee Note**

9

10 **Subdivision (f).** Subdivision (f) is modeled after Rule 4(a)(4)(B)(i) and is intended to
11 align the treatment of premature petitions for review of agency orders with the treatment of
12 premature notices of appeal. Subdivision (f) does not address whether or when the filing of a
13 petition for rehearing, reopening, or reconsideration renders an agency order non-final and hence
14 non-appealable. That is left to the wide variety of statutes, regulations, and judicial decisions that
15 govern agencies and appeals from agency decisions. *See, e.g.*, *ICC v. Brotherhood of Locomotive*
16 *Eng'rs*, 482 U.S. 270 (1987). Rather, subdivision (f) provides that when, under governing law,
17 an agency order is rendered non-final and non-appealable by the filing of a petition for rehearing,
18 petition for reopening, petition for reconsideration, or functionally similar petition, any petition for
19 review or application to enforce that non-final order will be held in abeyance and become effective
20 when the agency disposes of the last such finality-blocking petition.

21

22 Subdivision (f) is designed to eliminate a procedural trap. Some circuits hold that
23 petitions for review of agency orders that have been rendered non-final (and hence non-
24 appealable) by the filing of a petition for rehearing (or similar petition) are "incurably premature,"
25 meaning that they do not ripen or become valid after the agency disposes of the rehearing petition.
26 *See, e.g.*, *TeleSTAR, Inc. v. FCC*, 888 F.2d 132, 134 (D.C. Cir. 1989) (per curiam); *Chu v. INS*,
27 875 F.2d 777, 781 (9th Cir. 1989), *overruled on other grounds by Pablo v. INS*, 72 F.3d 110 (9th
28 Cir. 1995); *West Penn Power Co. v. EPA*, 860 F.2d 581, 588 (3d Cir. 1988); *Aeromar, C. Por A.*
29 *v. Department of Transp.*, 767 F.2d 1491, 1493-94 (11th Cir. 1985). In these circuits, if a party
30 aggrieved by an agency action does not file a second timely petition for review after the petition
31 for rehearing is denied by the agency, that party will find itself out of time: Its first petition for
32 review will be dismissed as premature, and the deadline for filing a second petition for review will
33 have passed. Subdivision (f) removes this trap.

United States Court of Appeals
District of Columbia Circuit
333 Constitution Ave., N.W.
Washington, DC 20001-2866

00-AP-20

A. Raymond Randolph
United States Circuit Judge

February 12, 2001

Peter G. McCabe
Secretary of the Committee on
Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

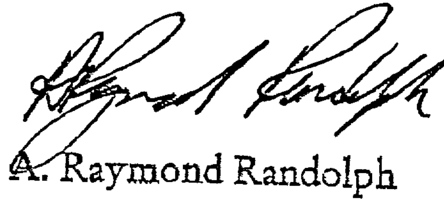
Dear Mr. McCabe:

Enclosed are comments on the Preliminary Draft of the Proposed Amendments to the Federal Rules of Appellate Procedure. The comments were prepared by the D.C. Circuit's Advisory Committee on Procedures after careful consideration and several meetings. Each of the active judges on our court has reviewed the comments and unanimously endorse them.

While the comments speak for themselves, the judges of this court would like to draw the Committee's attention to our strong opposition to the proposed addition of Rule 15 (f) governing the filing of premature petitions for review. As set out more fully at pages six through nine of the comments, this new rule would emasculate the D.C. Circuit's "incurably premature" jurisprudence, introduce new uncertainties in handling petitions for review, cause substantial additional work for the Court, and have an adverse effect on its docket. Because the D.C. Circuit handles the largest percentage of petitions for review from the agencies most likely to be affected by this rule, namely the Federal Energy Regulatory Commission, the Environmental Protection Agency, and the Federal Communications Commission, the adverse impact of this proposed rule would be much greater on the D.C. Circuit than on other circuits.

Thank you for the opportunity to comment on these proposed amendments.

Sincerely,



A. Raymond Randolph

ARR/jac

cc: Maureen E. Mahoney, Esq.
Chair
Advisory Committee on Procedures
Latham & Watkins
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2505

## Rule 15(f) (Petition Filed Prior to Final Agency Action)

As set forth more fully below, the Judges of the D.C. Circuit strongly oppose the proposed addition of Rule 15(f), as do we. In the Judges' view, the suggested change would create a host of new problems for the courts of appeals and litigants. Consequently, we urge the Committee to abandon the proposed amendment. Alternatively, we recommend substantial revisions.

1. New Rule 15(f) would address petitions for review or applications to enforce agency action filed after the agency has announced or entered its order but before it has disposed of any petition for rehearing, reopening, or reconsideration that renders that order non-final and non-appealable. Under new Rule 15(f) the petition for review or application to enforce would become effective to appeal or seek enforcement of the order when the agency disposes of the last such petition for rehearing, reopening, or reconsideration.

As the Committee Note explains, "Subdivision (f) is modeled after Rule 4(a)(4)(B)(i) and is intended to align the treatment of premature petitions for review of agency orders with the treatment of premature notices of appeal." It would apply when the filing of a petition with the agency for reconsideration would render an agency order "non-final and hence non-appealable" under "the wide variety of statutes, regulations, and judicial decisions that govern agencies and appeals from agency decisions. *See, e.g., ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270 (1987)."

The Note states that "Subdivision (f) is designed to eliminate a procedural trap" that arises because "[s]ome circuits hold that petitions for review of agency orders that have been rendered non-final (and hence non-appealable) by the filing of a petition for rehearing (or similar petition) are 'incurably premature,' meaning that they do not ripen or become valid after the agency disposes of the rehearing petition. *See, e.g., TeleSTAR, Inc. v. FCC*, 888 F.2d 132, 134 (D.C. Cir. 1989) (per curiam)," whereas "if a party aggrieved by an agency action does not file a second timely petition for review after the petition for rehearing is denied by the agency, that party will find itself out of time."

The Court, however, advises that the Circuit's "incurably premature" doctrine causes few, if any, surprises for litigants. Conversely, the Court anticipates that, if adopted, the proposed rule would cause substantial additional work for the Court and have an adverse effect on its docket. For these reasons, we oppose the proposed amendment.

The D.C. Circuit has exclusive or concurrent jurisdiction over many cases seeking direct review of administrative agency actions. In recent years, administrative agency cases have constituted 35 - 40 % of the D.C. Circuit's docket. Many of those cases involve agencies that frequently conduct extensive reconsideration or rehearing proceedings, such as the Federal Communications Commission and the Federal Energy Regulatory Commission. Consequently, the proposed rule is likely to have the greatest effect on the D.C. Circuit.

Because parties would no longer be constrained by the D.C. Circuit's "incurably premature" doctrine, the number of court cases filed concurrently with petitions for agency reconsideration might increase, resulting in a significant increase in the number of cases that must be held in abeyance and monitored by the Court.

The administrative burdens associated with such increased case filings and monitoring could include: dual case openings; identifying cases that need to be held in abeyance or processing motions to hold such cases in abeyance and preparing appropriate orders; processing periodic status reports filed by the parties in each case; reactivating cases; soliciting and processing motions to govern future proceedings once the administrative proceedings have terminated; determining which parties remain interested in participating in the reactivated cases; directing the parties to file current disclosure statements once a case has been reactivated and processing those statements; identifying and consolidating related appeals from the initial administrative order and the subsequent orders on rehearing; and processing multiple sets of motions to intervene.

Apart from these practical considerations, the proposed rule change is likely to skew the judicial administration statistics significantly, particularly for this Circuit, making them less useful and informative. The anticipated increased filings and larger number of cases held in abeyance would artificially inflate the number of pending cases, the age of pending cases, and the age of terminated cases.

Finally, as currently drafted the proposed rule is likely to generate considerable litigation over its scope and effect, creating additional burdens for the courts. Given the plethora of agency statutes and regulations, it is not possible to sweep the concept of finality into one general rule. Rather, we should continue to rely on the courts of appeals to determine whether and when additional agency proceedings render an appeal premature. We accordingly do not believe any amendment is necessary.

2. Alternatively, if the Committee determines that some amendment is required, the D.C. Circuit's precedent respecting premature appeals or petitions

for review of agency decisions could be codified. If the rule makes clear that a party may not simultaneously pursue administrative reconsideration and judicial review, unless specifically provided by statute, *see, e.g.*, 42 U.S.C. § 7607(b)(1) (under Clean Air Act, filing of petition for reconsideration by Administrator "shall not affect the finality" of rule or action for purposes of judicial review), there would be no trap.

3. Whether or not the Committee is inclined to adopt either of these proposals, we perceive other problems with the amendment. The proposed language could have some undesirable and presumably unintended results in some contexts, particularly in rulemaking or adjudication proceedings involving numerous parties before certain agencies, such as the Surface Transportation Board and Securities and Exchange Commission, where applicable law does not require a party to file a petition for agency rehearing or the like before seeking judicial review in a court of appeals. We suggest several changes.

a. The terms "non-final" and "non-appealable" may be confusing by suggesting that these are separate criteria, when the intent, reflected in the Note, was to refer to orders that are "non-final and *hence* non-appealable." We therefore suggest adding "hence" before "non-appealable."

b. A more fundamental problem concerns the potential application of the proposed rule to agency orders entered in proceedings involving multiple parties not subject to statutory requirements to petition for agency reconsideration of an order before seeking judicial review. In that context, it is quite common for some parties to seek agency rehearing and others to seek judicial review, either as to the same aspects of the agency's action or as to different aspects. Either way, a petition for agency reconsideration by one party ordinarily does not affect the finality and hence reviewability of the agency order as to other parties. *E.g., Columbia Falls Aluminum Co. v. EPA*, 139 F.3d 914, 919 (D.C. Cir. 1998) (party's pending request for agency reconsideration renders underlying agency action nonfinal "with respect to that party"); *City of New Orleans v. U.S.S.E.C.*, 137 F.3d 638, 639 (D.C. Cir. 1998) ("order is rendered nonfinal as to that party"). In such cases, depending upon the relationship of the issues raised by the petition for review or by the petition for rehearing, the court may or may not defer handling and disposition of the petitions for judicial review until disposition of the petitions for agency rehearing. In some cases the agency decision on rehearing will make material changes, and the petitioner for rehearing may or may not choose to seek judicial review, depending on such factors as the effect of the original agency order in light of the agency order on rehearing, or possibly a settlement with the agency or other parties.

The differential party-by-party approach to the timeliness of judicial review of agency action contrasts with the approach of the Federal Rules of Appellate Procedure, Rule 4(a)(4)(A) of which specifies that certain post-judgment motions by "a party" defer the time for appeal "for all parties." This difference creates potential problems in relying on Rule

4(a)(4)(B)(i) as a model and providing comparable treatment of "premature" petitions for review and "premature" notices of appeal. Accordingly, we suggest that the proposed subsection be limited in application to petitions for judicial review filed by a party who also files a petition for agency rehearing.

c. The proposed rule would also defer the effectiveness of the petition for judicial review or application for enforcement until "the agency disposes of the last such petition for rehearing, reopening, or reconsideration." If the change suggested in the preceding paragraph is made, we suggest deletion of "the last."

d. A further problem with the reference to the agency's disposal of "a petition for rehearing" concerns situations where the petition for agency rehearing is withdrawn or dismissed by the petitioner, in which event the agency may not have occasion to "dispose" of it by any clearly definable action. It has been held that withdrawal or dismissal of an optional petition for rehearing has the same effect as agency disposition on the tolling of the time within which to seek judicial review. *Columbia Falls*, 139 F.3d at 919; *Melcher v. FCC*, 134 F.3d 1143, 1164 (D.C. Cir. 1998).

The heading and text of subsection (f) as revised to reflect these alternative foregoing suggestions would provide as follows:

**(f) Premature Petition or Application.** If a party files a petition for judicial review or application to enforce after an agency issues its order -- but before the agency disposes of a petition for rehearing, reopening, or reconsideration that renders the order non-final and hence non-appealable as to that party, or before such administrative petition is withdrawn by the party who filed it -- the party's petition for judicial review or application for enforcement, except as otherwise provided by statute, is incurably premature and will be dismissed.

If the Committee adheres to the approach of its proposed subsection, then the last clause in the foregoing alternative should be replaced by: "becomes effective for that party to seek review or enforcement of the order upon such agency disposition, dismissal or withdrawal."

Corresponding changes in the Committee Note would also be required.

# TAB 7

# TAB 7A

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett

Re: New suggestion from Judge Sutton

Date: September 5, 2024

FRAP 4 permits a district court to reopen the time to appeal in limited circumstances. In particular:

> The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:
>
> > (A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77 (d) of the entry of the judgment or order sought to be appealed within 21 days after entry;
> >
> > (B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77 (d) of the entry, whichever is earlier; and
> >
> > (C) the court finds that no party would be prejudiced.

FRAP 4(a)(6). *See also* 28 U.S.C. 2107(c).

In *Winters v. Taskila*, 88 F.4th 665 (2023), a habeas petitioner did not receive notice of the district court's decision denying him relief until more than two months after it was entered. He filed a notice of appeal two weeks later, far more than 30 days after the entry of judgment. The court of appeals dismissed the appeal, but left open the possibility that the district court could reopen the time to appeal.

The district court construed the notice of appeal as a motion and granted it. So construed, the motion to reopen was timely.

With Chief Judge Sutton writing, the court of appeals held that, because the notice of appeal was not barebones, but also explained the reason for the delay and functionally satisfied the requirements for a motion to reopen, the district court acted within its discretion in treating the notice of appeal as a motion to reopen. *Id*. at 671.

The court of appeals also concluded that the petitioner did not need to file a new notice of appeal, reasoning that the premature notice of appeal ripened once the district court granted the motion to reopen the time to appeal.

Because the case involved the denial of habeas relief, the court of appeals also construed the notice of appeal as a request for a certificate of appealability.

Chief Judge Sutton then added:

> A final point. One could fairly wonder when it might be appropriate to draw the line on how many functions a single pleading may serve. A critic of our approach might characterize our forgiving assessment of this two-sentence pleading in this way: (1) It looked like a notice of appeal but we did not treat it as one because it was late; (2) it then looked like a motion for an extension of time (given the excuse in it) but we did not treat it as one because that too would have been late; (3) it then became a motion to reopen, which was not late; and (4) it then served as a request for a certificate of appealability. We appreciate the point. We appreciate as well that the courts of appeal are not all in tune on these issues. *Compare, e.g., Poole*, 368 F.3d at 269 (3d Cir. 2004), with Sanders v. United States, 113 F.3d 184, 187 (11th Cir. 1997) (per curiam) (construing notice of appeal as motion to reopen); *Parrish v. United States*, 74 F.4th 160, 163 (4th Cir. 2023) (one document cannot serve as both a notice of appeal and a motion to reopen), with *United States v. Withers*, 638 F.3d 1055, 1062 (9th Cir. 2011) (one document can serve as both a notice of appeal and a motion to reopen). As it happens, there is a body whose charge it is to review issues of precisely this sort (the Advisory Committee on the Federal Rules of Appellate Procedure) and a statute (the Rules Enabling Act, 28 U.S.C. §§ 2071–77) that is designed to create a process for improving the rules where needed. That may be a profitable next stage for this debate.

*Id*.

Subsequent to the *Winters* decision, the United States Court of Appeals for the Fourth Circuit denied a petition for rehearing en banc in the *Parrish* case noted by Chief Judge Sutton. Judge Niemeyer agreed with the denial of rehearing en banc, and explained that the court of appeals had construed the plaintiff's initial notice of appeal as a motion to reopen and remanded to the district court to consider that motion. The district court granted the motion, giving the plaintiff 14 days after its entry to file his appeal. "Despite the clear language of the district court's order, Parrish never filed an appeal within the time specified. In such circumstances, we were required to dismiss the appeal for lack of jurisdiction." *Parrish v. United States*, 2024 WL 1736340 at *1 (April 23, 2024).

Six judges voted to grant rehearing en banc, and Judge Gregory (joined by three others) stated:

> Both 28 U.S.C. § 2107(c) and the Federal Rules of Appellate Procedure are silent regarding whether an untimely notice of appeal may be validated by a district court's subsequent grant of a Rule 4(a)(6) motion. They also fall short in answering whether a single filing may serve as both a motion to reopen the appeal period and a notice of appeal. As our sister circuit acknowledged, guidance from the Advisory Committee on the Federal Rules of Appellate Procedure appears necessary. *See Winters v. Taskila*, 88 F.4th 665, 671 (6th Cir. 2023) (collecting cases and stating that comment from the Advisory Committee "may be a profitable next stage for this debate"). Absent such guidance from the architects of the rules, however, it is no wonder that circuit courts and judges are split regarding the most appropriate course of action under the circumstances. The Fourth Circuit is no exception. Even a cursory review of our prior cases presenting this issue illustrates that our Court's treatment has not been uniform.

*Id*. at *2 (Gregory, J., dissenting).

In light of these calls for this Committee to consider the issue, I suggest the formation of a subcommittee.

# TAB 7B

88 F.4th 665
United States Court of Appeals, Sixth Circuit.

Da'Rell Antoin WINTERS, Petitioner-Appellant,
v.
Kristopher TASKILA, Warden, Respondent-Appellee.

No. 21-2615
|
Argued: December 6, 2023
|
Decided and Filed: December 15, 2023

**Synopsis**
**Background:** Following affirmance of his state conviction for armed robbery, 2015 WL 4751159, and affirmance of his sentence, 2017 WL 6542554, state prisoner filed pro se petition for federal habeas relief. The United States District Court for the Eastern District of Michigan, George Caram Steeh III, J., 2021 WL 915615, denied petition and denied a certificate of appealability. After prisoner received notice of district court's decision over two months later, prisoner filed notice of appeal. The Court of Appeals dismissed appeal as untimely. Prisoner thereafter moved to reopen the time to appeal. The District Court, Steeh, J., granted the motion by retroactively construing prisoner's notice of appeal as a motion to reopen and then transferred notice of appeal to the Court of Appeals. The Court of Appeals directed counsel to address whether the appeal was timely.

**Holdings:** The Court of Appeals, Sutton, Chief Judge, held that:

district court did not exceed its discretion in treating prisoner's notice of appeal as a motion to reopen the time for appeal, and

the Court of Appeals could treat prisoner's notice of appeal also as a request for certificate of appealability.

Ordered accordingly.

**Procedural Posture(s):** Appellate Review; Post-Conviction Review.

***667** Appeal from the United States District Court for the Eastern District of Michigan at Detroit. No. 2:18-cv-12668—George Caram Steeh III, District Judge.

**Attorneys and Law Firms**

ARGUED: Sarah Welch, JONES DAY, Cleveland, Ohio, for Appellant. Scott R. Shimkus, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellee. ON BRIEF: Sarah Welch, Amanda R. Parker, JONES DAY, Cleveland, Ohio, for Appellant. Scott R. Shimkus, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellee.

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Before: SUTTON, Chief Judge; WHITE and BUSH, Circuit Judges.

**OPINION**

SUTTON, Chief Judge.

Da'Rell Winters sought to appeal the district court's decision denying his application for habeas relief. But he did not receive the district court's notice in time to appeal. When he eventually did file a notice of appeal on his own behalf, he explained the reason for his delay without formally seeking to reopen the time to appeal. This explanation, we hold, sufficed to allow the district court to construe his notice as a motion to reopen. We therefore deem his appeal timely.

I.

A jury convicted Winters of armed robbery in 2014. After a protracted series of appeals in the Michigan state courts, Winters applied to a federal court for habeas relief in 2018. Representing himself, Winters argued that his conviction was not supported by sufficient evidence, that there was an error in the jury instructions, that the trial court committed several errors at sentencing, and that the court erred in denying several other motions. On March 10, 2021, the federal district court denied Winters's habeas application and denied a certificate of appealability.

The district court's order and judgment, as it happened, took months to reach Winters. The court mailed the documents to Winters at the St. Louis Correctional Facility on March 10. But Winters was no longer there, prompting the post office to return the orders as undeliverable. The court re-sent the documents to Winters at a different prison, and he received them "on or about" May 18. R.17 at 1.

***668** On June 1, Winters filed a notice of appeal with respect to the district court's March 10 judgment. The filing consisted of two sentences:

> Notice is hereby given that Da'Rell Winters, petitioner in the above named case, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the final judgment dismissing his habeas corpus petition entered in this action on the 10 day of March, 2021. Petitioner received this judgement via prison legal mail and was signed on or about the 18th of May, 2021. *Id.*

The district court served a copy of the notice of appeal on this Court, and we dismissed the appeal. Winters had 30 days after the district court's March 10 decision to file a notice of appeal, we noted, meaning he had to file the appeal by April 9, 2021. Winters's June 1 notice of appeal missed that deadline. A party who does not timely receive notice of a district court's judgment, it is true, may move the district court to reopen the time to file an appeal. *See* Fed. R. App. P. 4(a)(6). But the district court had not considered or granted such a motion at that point. We accordingly dismissed Winters's appeal on August 26, 2021, and directed that "[a]ny effort to reopen the time for appeal should take place, if at all, in the district court." Dkt. 7 at 2.

Winters moved the district court to reopen the time to appeal on September 2. The district court granted the motion. In doing so, it retroactively construed Winters's June 1 notice of appeal as a motion to reopen. With this reopened time limit, the district court concluded that Winters's June 1 notice of appeal was timely.

The case languished in the district court for over a year with no activity. After Winters sent a letter to our Court inquiring about this case and moved the district court to transfer his June 1 notice of appeal to our Court, the district court transferred the notice on December 8, 2022. We reinstated the case and appointed counsel, Sarah Welch, to represent Winters. We directed counsel to address "whether this appeal is timely and whether we have jurisdiction to hear it." Dkt. 13 at 1.

II.

After a loss in the district court, the door to the appellate courts is open to all but not open for all time. Congress sets the time to appeal. In civil cases that do not involve the federal government, it says, "no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree." 28 U.S.C. § 2107(a).

This 30-day deadline has a few exceptions, two of which bear on this appeal and both of which appear in a federal statute (28 U.S.C. § 2107) and the Appellate Rules (Rule 4). Under the statute, an aspiring appellant who misses the deadline may seek an extension of time or seek to reopen the time-for-appeal window. Extension: "The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing an appeal, extend the time for appeal upon a showing of excusable neglect or good cause." 28 U.S.C. § 2107(c). Reopening: "[I]f the district court finds—(1) that a party entitled to notice of the entry of judgment or order did not receive such notice ... within 21 days of its entry, and (2) that no party would be prejudiced, the district court may, upon motion ... reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal." *Id.*

***669** Consistent with the statute, Rule 4(a)(5) of the Federal Rules of Appellate Procedure permits time extensions. It says that a district court "may extend the time to file a notice of appeal" if "a party so moves" within 30 days after the time to appeal expires, and if "that party shows excusable neglect or good cause." Likewise, Rule 4(a)(6) permits the district court to reopen the time to appeal. It says that a district court "may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if ... (A) the court finds that the moving party did not receive notice" within 21 days of the entry of judgment, "(B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice ..., whichever is earlier; and (C) the court finds that no party would be prejudiced." These timetables, found in the statute and the Appellate Rules, limit a federal appellate court's subject matter jurisdiction. *See Bowles v. Russell*, 551 U.S. 205, 213–14, 127 S.Ct. 2360, 168 L.Ed.2d 96 (2007) (treating time limits in the Appellate Rules as jurisdictional when they turn on a congressional time limit).

The deadlines apply to habeas cases. Habeas proceedings are "proceeding[s] of a civil nature," making them subject to the ordinary time limits on filing a notice of appeal for civil cases. 28 U.S.C. § 2107(a); *see also* Rules Governing Section 2254 Cases in the United States District Courts 11(b) ("Federal Rule of Appellate Procedure 4(a) governs the time to appeal" a district court's denial of habeas relief); *Bowles*, 551 U.S. at 213, 215, 127 S.Ct. 2360 (applying the time limits to a habeas case).

Our jurisdiction over this appeal thus turns on whether Winters complied with the pertinent filing deadlines. All agree that Winters missed the initial 30-day deadline for filing a notice of appeal. He therefore needed to file either a motion to extend

the appeal deadline within 30 days of the district court's March 10 judgment (by April 9) or a motion to reopen the time to appeal within 14 days of his May 18 receipt of notice of the judgment (by June 1). Had Winters filed a motion to reopen on June 1, this case would be easy. But he did not. He instead filed a notice of appeal.

At stake is whether we can fairly construe this June 1 notice of appeal as a motion to reopen.

In resolving this issue, the parties share some common ground. They agree that the form of a pleading does not by itself control the inquiry. A pro se prisoner could comply with these filing deadlines even if he captions a request with the wrong label or fails to satisfy a non-significant requirement of a notice of appeal. *See Young v. Kenney*, 949 F.3d 995, 997 (6th Cir. 2020) (per curiam) (construing a filing styled as a "notice of appeal" as a Rule 4(a)(5) motion for an extension); *Reho v. United States*, 53 F.4th 397, 399 (6th Cir. 2022) (order) (treating a motion for an extension of time to file a request for a certificate of appealability as a motion for an extension of time to file an appeal); *Smith v. Barry*, 502 U.S. 244, 249, 112 S.Ct. 678, 116 L.Ed.2d 678 (1992) (explaining that the rules "do not preclude an appellate court from treating a filing styled as a brief as a notice of appeal"); *Becker v. Montgomery*, 532 U.S. 757, 765–66, 121 S.Ct. 1801, 149 L.Ed.2d 983 (2001) (finding no jurisdictional bar to accepting a notice of appeal that did not satisfy the signature requirement); Fed. R. App. P. 3(c)(7) ("An appeal must not be dismissed for informality of form or title of the notice of appeal ...."). Substance, not style, function, not form, drives the inquiry.

The parties also agree that a single pleading may serve more than one function—for ***670** example, that a brief may serve as a notice of appeal and that a notice of appeal may serve as a motion for an extension of time. Confirming the point, the Supreme Court has held that, even though the Appellate Rules "envision that the notice of appeal and the appellant's brief will be two separate filings," they may be the same document under some circumstances. *Smith*, 502 U.S. at 249, 112 S.Ct. 678. The Appellate Rules specifically permit dual filings in some settings. They say, for example, that a habeas petitioner's notice of appeal may be treated as a request for a certificate of appealability. Fed. R. App. P. 22(b)(2).

The parties, last of all, agree that two cases provide the bookends to this inquiry: *Martin v. Sullivan*, 876 F.3d 235 (6th Cir. 2017) (per curiam), and *Young v. Kenney*, 949 F.3d 995 (6th Cir. 2020) (per curiam). In *Martin*, a pro se prisoner filed a late notice of appeal without filing a separate motion to reopen. 876 F.3d at 236, 238. The notice read as follows: "Notice is hereby given that [Petitioner] appeals to the United States Court of Appeal for the Sixth Circuit from the Judgment entered in this action on 5/31/17." Notice of Appeal at 1, *Martin v. Sullivan*, No. 2:17-cv-10815-DPH-DRG (E.D. Mich. July 28, 2017), ECF No. 11. This barebones notice of appeal, we explained, could not be construed as a motion to reopen. *Martin*, 876 F.3d at 237. "[I]f a losing party wants more time to file an appeal, it must file a motion in the district court asking for more time." *Id.* "[M]erely filing a notice of appeal does not amount to a motion for more time to file an appeal." *Id.*

In *Young*, a habeas petitioner filed a notice of appeal eight days late. 949 F.3d at 996. While the notice did not seek an extension of time, it acknowledged the lateness of the appeal and included a thorough explanation for the delay. *See* Notice of Appeal at 1–2, *Young v. Kenney*, No. 5:19-cv-00135-TBR (W.D. Ky. Dec. 30, 2019), ECF No. 18. Young "state[d] that he did not see" the judgment when it issued because "he was placed on dry cell protocol." *Young*, 949 F.3d at 996. He then explained that he went to a different prison and was "placed in the prison's psychiatric unit 'pending a mental health evaluation and stabilization.' " *Id.* at 997. He added "that inmates in the psychiatric unit are not permitted to have property in their possession," and attached an exhibit confirming this account. *Id.* We held that this notice of appeal "effectively read[ ]" as a Rule 4(a)(5) motion for an extension of time and could "be treated as such." *Id.*

Against this backdrop, it is easy to see what separates the parties: a disagreement over whether this case is more like *Martin* or *Young*.

In our view, a key dichotomy emerges from the two cases. In one direction, a barebones notice of appeal that is late will not serve by itself as a motion for an extension or a motion to reopen. That is the *Martin* rule, and it mirrors the decisions of other courts of appeals from across the country. *See Poole v. Fam. Ct. of New Castle Cnty.*, 368 F.3d 263, 268 (3d Cir. 2004) (motion to reopen); *Ladeairous v. Garland*, 45 F.4th 188, 192 & n.3 (D.C. Cir. 2022) (motion to reopen); *see also* 16A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3950.3 n.54 (5th ed. 2019) (collecting cases concerning motions for extension). In the other direction, a notice of appeal that adds other information—say, that the appeal is late, that explains what happened, that explains why the appellant could not have filed it earlier—may in some circumstances be construed as a motion for extension or to reopen even though it does not explicitly use those words.

***671** The district court in this instance did not exceed its discretion in treating this notice of appeal as a motion to reopen. In the first place, this was not a barebones notice of appeal. In addition to appealing the judgment below, it contained an explanation for the delay. "Petitioner," it said, "received this judgement via prison legal mail and was signed on or about the 18th of May, 2021." R.17 at 1. *Martin* thus does not directly control this case.

In the second place, this notice of appeal functionally satisfied the requirements for a motion to reopen. Under Rule 4(a)(6), a motion to reopen must satisfy three requirements: (1) The appellant must file the request no later than 14 days after receiving notice of the district court's decision, (2) the court must find "that the moving party did not receive notice ... of the entry of judgment ... within 21 days after entry," and (3) the court must find "that no party would be prejudiced." Fed. R. App. P. 4(a)(6). Winters filed the pleading within 14 days of obtaining notice of the district court's decision. And his pleading acknowledged its tardiness—that Winters did not receive notice of the district court's decision until May 18, 2021. The notice, it is true, does not address the last requirement for a motion to reopen—that the opposing party will not suffer "prejudice." But it is difficult to see what Winters could have said about this issue anyway. It is usually not within an appellant's ken to know how the opposing party might or might not be prejudiced by reopening the appeal period. The point makes no difference today anyway. To his credit, counsel for the Warden acknowledged this reality at oral argument and denied that the Warden would be prejudiced here. All in all, the district court did not exceed its discretion in treating this notice of appeal as a motion to reopen.

In addition, it bears adding, Winters did not need to file a new notice of appeal after the district court granted the motion to reopen. A notice of appeal filed too early, generally speaking, ripens when the window to appeal begins. *See Good v. Ohio Edison Co.*, 104 F.3d 93, 95 (6th Cir. 1997); *Bonner v. Perry*, 564 F.3d 424, 428 (6th Cir. 2009); *see also FirsTier Mortg. Co. v. Inves. Mortg. Ins. Co.*, 498 U.S. 269, 273, 111 S.Ct. 648, 112 L.Ed.2d 743 (1991) (recognizing that "unlike a tardy notice of appeal, certain premature notices do not prejudice the appellee," so it makes little sense for "the technical defect of prematurity" to "extinguish an otherwise proper appeal"). Rule 4(a)(2) says that notices of appeal filed early—those filed "after the court announces a decision or order [ ] but before the entry of the judgment or order"—are "treated as filed on the date of and after the entry."

That Winters has timely filed his appeal does not perfect his appeal in full. Recall that he is a habeas applicant and that the district court rejected his request for a certificate of appealability. He thus must obtain permission from us to file the appeal. Winters has not filed a request for a certificate of appealability in our court. But consistent with Fed. R. App. P. 22(b)(2), we may treat his notice of appeal as a request for a certificate of appealability. In due course, we will consider that separate jurisdictional requirement. *See Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003).

A final point. One could fairly wonder when it might be appropriate to draw the line on how many functions a single pleading may serve. A critic of our approach might characterize our forgiving assessment of this two-sentence pleading in this way: (1) It looked like a notice of appeal but we did not treat it as one because it was late; (2) it then looked like a motion for an extension of time (given the excuse in it) but we did not treat it as one because that too would have been late; (3) it then ***672** became a motion to reopen, which was not late; and (4) it then served as a request for a certificate of appealability. We appreciate the point. We appreciate as well that the courts of appeal are not all in tune on these issues. *Compare, e.g.*, *Poole*, 368 F.3d at 269 (3d Cir. 2004), *with Sanders v. United States*, 113 F.3d 184, 187 (11th Cir. 1997) (per curiam) (construing notice of appeal as motion to reopen); *Parrish v. United States*, 74 F.4th 160, 163 (4th Cir. 2023) (one document cannot serve as both a notice of appeal and a motion to reopen), *with United States v. Withers*, 638 F.3d 1055, 1062 (9th Cir. 2011) (one document can serve as both a notice of appeal and a motion to reopen). As it happens, there is a body whose charge it is to review issues of precisely this sort (the Advisory Committee on the Federal Rules of Appellate Procedure) and a statute (the Rules Enabling Act, 28 U.S.C. §§ 2071–77) that is designed to create a process for improving the rules where needed. That may be a profitable next stage for this debate.

We conclude that Winters's appeal is timely. The Clerk's Office is directed to set a briefing schedule over whether to grant a certificate of appealability in this appeal.

**All Citations**

88 F.4th 665, 117 Fed.R.Serv.3d 957

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# TAB 7C

2024 WL 1736340
Only the Westlaw citation is currently available.
United States Court of Appeals, Fourth Circuit.

Donte PARRISH, Plaintiff - Appellant
v.
UNITED STATES of America, Defendant - Appellee
Professor Bryan Lammon, Amicus Supporting Rehearing Petition

No. 20-1766
|
Filed: April 23, 2024

(1:17-cv-00070-IMK)

**Attorneys and Law Firms**

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ORDER

***1** The court denies the petition for rehearing en banc.

A requested poll of the court failed to produce a majority of judges in regular active service and not disqualified who voted in favor of rehearing en banc. Chief Judge Diaz and Judges Wilkinson, Niemeyer, Agee, Harris, Richardson, Quattlebaum, Rushing, and Heytens voted to deny rehearing en banc. Judges King, Gregory, Wynn, Thacker, Benjamin, and Berner voted to grant rehearing en banc.

Entered at the direction of Judge Niemeyer.

NIEMEYER, Circuit Judge, in support of denial of the supplemental petition for rehearing:
The issue in this case does not rise to the level that would justify an en banc rehearing, as it involves a straightforward application of 28 U.S.C. § 2107(c), which establishes a jurisdictional requirement for effecting an appeal, and Federal Rule of Appellate Procedure 4(a)(6), which implements § 2107(c).

When Donte Parrish filed a notice of appeal in this case that was over two months late, the untimeliness of his notice precluded us, as a jurisdictional matter, from considering his appeal. But upon receiving his explanation claiming that he had not timely

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received a copy of the district court's judgment dismissing his case, we treated his untimely notice of appeal as a motion to reopen the appeal period under Rule 4(a)(6) and remanded the case to the district court for consideration of that motion. *Parrish v. United States*, 827 F. App'x 327, 327 (4th Cir. 2020) (per curiam); 28 U.S.C. § 2107(c) (providing district courts with authority to "reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal"); Fed. R. App. P. 4(a)(6) (similarly authorizing a district court to "reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered").

On remand, after concluding that Parrish satisfied the requirements for reopening the time for filing an appeal, the district court entered an order authorizing Parrish to file a notice of appeal within a 14-day window that commenced with the date of the court's order. The order provided, "the Court REOPENS the time for Parrish *to file his appeal* for fourteen (14) days *following the entry of this Order.*" (Emphasis added). Despite the clear language of the district court's order, Parrish never filed an appeal within the time specified. In such circumstances, we were required to dismiss the appeal for lack of jurisdiction. *See Bowles v. Russell*, 551 U.S. 205, 214 (2007) (holding that a court of appeals was *without jurisdiction* when the appellant failed to file the appeal within 14 days, as required by § 2107(c), and instead filed his appeal 16 days after the district court's reopening order, as the district court itself had authorized). It is thus clear that the texts of § 2107(c) and Rule 4(a)(6) did not permit a resurrection of Parrish's earlier notice of appeal, which was rendered ineffective because it was not only filed late but also filed beyond the period where an extension could have been granted under Federal Rule of Appellate Procedure 4(a)(5). Rather, § 2107(c) and Rule 4(a)(6) authorized the court to reopen the time to file an appeal but *required* that the notice be filed within a specified time, *i.e.*, 14 days after the date *of the reopening order.*

***2** In his opinion dissenting from the denial of en banc rehearing, Judge Gregory laments that applying Rule 4(a)(6) to deny Parrish the right to appeal forecloses "access to our Court" and is most likely to affect the "elderly, unhoused, detained, imprisoned, and differently abled," suggesting that they should not be bound by the rule's requirements. Yet, gracious as such a position is, we are not free to rely on graciousness to bypass jurisdictional requirements established by Congress, including those in § 2107(c). *See Bowles*, 551 U.S. at 214.

Resolution of Parrish's appeal thus involved a straightforward application of § 2107(c) and Rule 4(a)(6), which need not be reviewed en banc.

GREGORY, Circuit Judge, with whom Judges WYNN, THACKER, and BERNER join, dissenting from denial of Appellant's petition for rehearing en banc:

At its core, this case requires us to determine whether access to our Court should be foreclosed for failure to refile a notice of appeal during the newly reopened period following success under Rule 4(a)(6). Section 2107(c) and Rule 4(a)(6) authorize a district court to, in its discretion, reopen the appeal period where the moving party files a motion within the earlier of 180 days of the district court's judgment or 14 days of receiving notice of the judgment; and the court finds that the moving party did not receive notice of the judgment within 21 days of its entry, and that no party would be prejudiced by its grant of the motion. 28 U.S.C. § 2107. The "hail mary" afforded by this rule, as compared to Rule 4(a)(5), is therefore permitted only under exceptional circumstances, rather than following a mere missed deadline or common mistake.

Given the infrequency with which district courts fail to issue notice of their judgments, Rule 4(a)(6) is usually invoked under circumstances where a party relocates, is relocated, or is otherwise unable to receive mail at the address listed with the court. Such relief is therefore most commonly, if not exclusively, sought by pro se litigants who were unable to notice their intent to seek our review during the statutory appeals period, often due to no fault of their own.

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Both 28 U.S.C. § 2107(c) and the Federal Rules of Appellate Procedure are silent regarding whether an untimely notice of appeal may be validated by a district court's subsequent grant of a Rule 4(a)(6) motion. They also fall short in answering whether a single filing may serve as both a motion to reopen the appeal period and a notice of appeal. As our sister circuit acknowledged, guidance from the Advisory Committee on the Federal Rules of Appellate Procedure appears necessary. *See Winters v. Taskila*, 88 F.4th 665, 671 (6th Cir. 2023) (collecting cases and stating that comment from the Advisory Committee "may be a profitable next stage for this debate"). Absent such guidance from the architects of the rules, however, it is no wonder that circuit courts and judges are split regarding the most appropriate course of action under the circumstances. The Fourth Circuit is no exception. Even a cursory review of our prior cases presenting this issue illustrates that our Court's treatment has not been uniform.

The Government contends that this issue will occur less frequently in the future as electronic filings and notifications become more prevalent. However, technological advances are often slow to reach members of our society unable to afford or access the luxuries those advances provide. The elderly, unhoused, detained, imprisoned, and differently abled are a few of the populations who may not be able to consistently access information electronically. Members of those populations and others similarly situated will presumably continue to rely on the protections of Rule 4(a)(6) despite the benefits that the era of electronic filing will unquestionably provide to others. More importantly, the infrequency of the occurrence of an issue does not speak to its significance and is not dispositive in determining whether en banc review should be granted.

***3** Rule 35 of the Federal Rules of Appellate Procedure reserves en banc determinations for those instances necessary to secure uniformity of this Court's case law or resolve a question of exceptional importance. This case meets both standards. Yet our Court has elected to close its door to litigants who fail to make a futile, likely duplicative filing within the 14 days following the often-hard-fought success of a Rule 4(a)(6) motion. As a result, litigants fortunate enough to obtain Rule 4(a)(6) relief will barely finish celebrating the success of the motion before facing the defeat of dismissal. In opting to require more of those who obtain relief under Rule 4(a)(6) than we do of those who obtain relief pursuant to Rule 4(a)(5), we seem to be requiring more of those who have less.

The Court's decision here demonstrates that even where both parties agree that the majority's jurisdictional conclusion was erroneous, en banc review may be denied where the issue will impact only a few individuals, despite the gravity of the impact on those it affects. I must dissent.

**All Citations**

Not Reported in Fed. Rptr., 2024 WL 1736340

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# TAB 7D

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett

Re: New suggestion regarding administrative stays

Date: September 5, 2024

FRAP 8 governs stays and injunctions pending appeal. There is no specific provision governing administrative stays.

Will Havemann of Hogan Lovell has called for rulemaking to address administrative stays:

> The rules should be amended to require that administrative stays be limited to the purpose of deciding whether to grant a stay pending appeal, and to specify that administrative cases can't be used to grant indefinite relief. Critically, the rules should mandate that an administrative stay expire no later than the end of a limited period—say, 10 business days.

*Supreme Court's Texas Order Highlights Abuse of Dubious Shortcut*, US Law Week (March 26, 2024).

In the case that prompted Mr. Havemann's suggestion, Justice Barrett, joined by Justice Kavanaugh, wrote:

> If the Fifth Circuit had issued a stay pending appeal, this Court would apply the four-factor test set forth in *Nken v. Holder* . . . to decide whether to vacate it. 556 U.S. 418, 434 (2009). But the Fifth Circuit has not entered a stay pending appeal.
>
> Instead, in an exercise of its docket-management authority, it issued a temporary administrative stay and deferred the stay motion to a merits panel . . . .
>
> Administrative stays do not typically reflect the court's consideration of the merits of the stay application. Rather, they "freeze legal proceedings until the court can rule on a party's request for expedited relief." R. Bayefsky, *Administrative Stays: Power and Procedure*, 97 Notre Dame L. Rev. 1941, 1942 (2022) (Bayefsky). Deciding whether to grant a stay pending appeal requires consideration of the four *Nken* factors, which include an assessment of the applicant's likelihood of success on the merits. That is not always easy to evaluate in haste, and an administrative stay buys the court time to deliberate. . . . . After

> receiving an emergency application, this Court frequently issues an administrative stay to permit time for briefing and deliberation . . . . The courts of appeals use the procedure to the same end.
>
> That such stays are "administrative" does not mean they are value neutral. Their point is to minimize harm while an appellate court deliberates, so the choice to issue an administrative stay reflects a first-blush judgment about the relative consequences of staying the lower court judgment versus allowing it go to into effect.
>
> . . . .
>
> The real problem—and the one lurking in this case—is the risk that a court will avoid *Nken* for too long. An administrative stay should last no longer than necessary to make an intelligent decision on the motion for a stay pending appeal. Once the court is equipped to rule, its obligation to apply the *Nken* factors is triggered—a point that some judges have pressed their Circuits to consider. The United States suggests that, on several occasions, the Fifth Circuit has allowed administrative stays to linger for so long that they function like stays pending appeal.

*United States v. Texas*, 144 S. Ct. 797, 800 (2024) (Barrett, J., concurring in denial of applications to vacate stay) (footnotes and citations omitted).

Justice Sotomayor, joined by Justice Jackson, dissented:

> An administrative stay . . . is intended to pause the action on the ground for a short period of time until a court can consider a motion for a stay pending appeal. For that reason, at a minimum, administrative relief should (1) maintain the status quo and (2) be time limited. The Fifth Circuit's administrative stay here was neither, and thus constituted an abuse of discretion.

*United States v. Texas*, 144 S. Ct. 797, 802 (2024) (Sotomayor, J., dissenting). Justice Kagan also dissented:

> I do not think the Fifth Circuit's use of an administrative stay, rather than a stay pending appeal, should matter. Administrative stays surely have their uses. But a court's unreasoned decision to impose one for more than a month, rather than answer the stay pending appeal issue before it, should not spell the difference between respecting and revoking long-settled immigration law.

*United States v. Texas*, 144 S. Ct. 797, 805 (2024) (Kagan, J., dissenting).

An analogy might be drawn to Civil Rule 65(b), which limits temporary restraining orders to 14 days, with the possibility of a 14 day extension with the reasons for an extension entered in the record. In that context, an order designated as a temporary restraining order that last longer than permitted by the rule is considered a preliminary injunction, at least for purposes of appeal. As the Supreme Court explained, "A district court, if it were able to shield its orders from appellate review merely by designating them as temporary restraining orders, rather than as preliminary injunctions, would have virtually unlimited authority over the parties in an injunctive proceeding." *Sampson v. Murray*, 415 U.S. 61, 86–87 (1974); *see also* 11A Wright & Miller, Fed. Prac. & Proc. Civ. § 2953 (3d ed.) (noting that "it undoubtedly is appropriate to allow an appeal from the restraining order in order to test its validity once it has been extended beyond the time allowed by the rule").

I suggest the appointment of a subcommittee to consider this suggestion.

# TAB 7E

US Law Week
March 26, 2024, 4:30 AM EDT

# Supreme Court's Texas Order Highlights Abuse of Dubious Shortcut

*Hogan Lovells' Will Havemann says the Supreme Court order allowing a Texas immigration law to go into effect is the latest example of litigants abusing the low bar for securing administrative stays.*

The US Supreme Court will likely one day decide the constitutionality of the Texas immigration law it allowed to take effect this month, but the court's March 19 order in the case turned on an arcane procedural device that has emerged in recent years—the so-called administrative stay.

Administrative stays are an under-the-radar scandal, and the time has come to rein them in.

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When used for its intended purpose, an administrative stay is a sensible short-term tool that allows appellate courts to maintain the status quo as they take a few days to decide whether the extraordinary relief of a stay pending appeal is warranted.

But administrative stays can be—and ever more frequently have been—used by courts of appeals to award indefinite relief without bothering to resolve the underlying stay request. The practice has metastasized in recent years, and it effectively gives parties a stay pending appeal without any showing that they deserve one.

The Supreme Court's immigration order spotlights this misuse of administrative stays. After Texas passed its controversial law allowing state officials to arrest individuals suspected of entering the country illegally, a trial court quickly declared the law unconstitutional. Texas then asked for a stay pending appeal from the US Court of Appeals for the Fifth Circuit.

Before even awaiting the plaintiffs' full response, the Fifth Circuit granted what it called an "administrative stay," then deferred the motion for a stay pending appeal to the merits panel. For all practical purposes, this gave Texas a stay pending appeal without any finding that it had met the high bar for one.

The Supreme Court blessed this maneuver. While the majority didn't explain its reasoning, Justice Amy Coney Barrett, joined by Justice Brett Kavanaugh, justified the decision not to intervene on the ground that the Fifth Circuit had merely entered an "administrative stay" and "has not yet rendered a decision on whether a stay pending appeal is warranted."

In her dissenting opinion, Justice Sonia Sotomayor noted the Fifth Circuit's "troubling habit of leaving 'administrative' stays in place for weeks if not months." But the Fifth Circuit is hardly the only offender. The practice has become ubiquitous throughout the courts of appeals.

The most egregious case I'm aware of came out of the US Court of Appeals for the District of Columbia Circuit—and I was on the wrong end of it.

The issue arose in landmark litigation addressing whether the House of Representatives had authority to bring suit in federal court to enforce a congressional subpoena against former White House Counsel Don McGahn during the run-up to the first impeachment of former President Donald Trump. The House Office of General Counsel (where I then worked) in 2019 persuaded Ketanji Brown Jackson, then a district court judge, to order McGahn to comply with the subpoena.

The D.C. Circuit granted an administrative stay, noting the stay "should not be construed in any way as a ruling on the merits of either the motion for stay pending appeal or the appeal."

But it then left that so-called administrative stay in place for more than a year and a half—until the election of President Joe Biden forced the parties to a negotiated resolution of the case. As a result of the administrative stay, the House didn't obtain the testimony from McGahn that could have made a difference in its impeachment effort.

Even as she acquiesced to the Fifth Circuit's administrative stay, Barrett noted that an "administrative stay should last no longer than necessary to make an intelligent decision on the motion for a stay pending appeal." I agree. In the world of high-stakes appellate litigation, delay can be the whole ballgame, and the practice of granting an administrative stay as a substitute for a stay pending appeal is indefensible.

Because improper administrative stays are equal-opportunity offenders, they provide a rare opportunity for reform. The Judicial Conference Advisory Committee on Appellate Rules, which helps set the rules that govern litigation in the federal courts of appeals, should amend the Federal Rules of Appellate Procedure to prevent the misuse of administrative stays.

The rules should be amended to require that administrative stays be limited to the purpose of deciding whether to grant a stay pending appeal, and to specify that administrative stays can't be used to grant indefinite relief. Critically, the rules should mandate that an administrative stay expire no later than the end of a limited period—say, 10 business days.

This common-sense reform will ensure administrative stays continue to serve their intended purpose, without allowing administrative stays to convert what should be the extraordinary relief of a stay pending appeal into ordinary relief available in most every case.

The case is United States v. Texas, U.S., No. 23A814, 3/19/24.

*This article does not necessarily reflect the opinion of Bloomberg Industry Group, Inc., the publisher of Bloomberg Law and Bloomberg Tax, or its owners.*

**Author Information**

Will Havemann is senior associate and an appellate litigator at Hogan Lovells. He was associate general counsel at the US House of Representatives from 2019 to 2021.

**Write for Us: Author Guidelines**

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# TAB 7F

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett

Re: New suggestions from Sai (24-AP-H through K)

Date: September 11, 2024

Sai has submitted four new suggestions.

1. Require that names in filings be produced using normal case and diacritics;

2. Adopt common local rules into federal rules;

3. Create a set of common federal rules that apply across rule sets; and

4. Standardize page equivalents for words and lines.

**Names**. Sai suggests that filings, whether by litigants or courts, avoid using all caps for the names of persons and that proper diacritics be used. He notes that some names use capitals other than (or in addition to) an initial cap, so that using all caps is inaccurate and obscures actual differences in names. In addition, all caps is bad typography, causes wasted time when cutting and pasting, and can feed into nonsensical claims by sovereign citizens and the like. Not using proper diacritics has some of the same problems.

Sai appears to be correct in his critique. But whether this is the sort of problem well addressed by a rule amendment is another question. Some might think that the proposal would micromanage the drafting of documents too closely. But note that FRAP 32 does contain some rather precise formatting requirements, including some dealing with margins, spacing, and typefaces.

**Common Local Rules.** Sai suggests that there are many local rules that are universal or near universal and that these could usefully be moved from local rules into the Federal Rules themselves.

Without doing the full survey of local rules that he suggests, it is hard to be confident about the correctness of this claim, but it is not hard to imagine that there may be many such local rules.

**New Federal Common Rules.** The various advisory committees seek, wherever possible, to make the separate sets of rules uniform in those instances where they have similar provisions. Sai suggests a different approach: to the extent that there are similar provisions in the various sets of rules, those provisions should be moved to a set of Federal Common Rules that govern across the various sets of

rules, except to the extent that a particular set of rules specifically calls for a difference.

If starting from scratch, there is much to be said for such an approach. For example, the rules governing New Jersey state courts begin with a set of rules—Part I—that govern in the Supreme Court, the Superior Court, the Tax Court, the surrogate's courts, and the municipal courts, unless otherwise provided. Part I is then followed by Parts that provide rules for appeals, rules for criminal cases, rules for civil cases, rules for family actions, rules for special civil cases, rules for municipal courts, and rules for the tax court.

Reformulating the various sets of Federal Rules in this way would be a major undertaking and beyond the reach of any one advisory committee.

**Standardizing page equivalents for words and lines.**

Length limits in the Federal Rules of Appellate Procedure are variously stated in terms of words, lines, and pages. For example, FRAP 32(a)(7) provides:

> **Length.**
>
> **(A) Page Limitation.** A principal brief may not exceed 30 pages, or a reply brief 15 pages, unless it complies with Rule 32(a)(7)(B).
>
> > **(B) Type-Volume Limitation.**
> >
> > (i) A principal brief is acceptable if it:
> >
> > • contains no more than 13,000 words; or
> >
> > • uses a monospaced face and contains no more than 1,300 lines of text.
> >
> > (ii) A reply brief is acceptable if it contains no more than half of the type volume specified in Rule 32(a)(7)(B)(i).

Sai suggests standardizing and simplifying whatever rules are warranted to convert from pages to words and lines. Sai also observes that monospace is bad typography and could be eliminated. It also appears that the Federal Rules of Appellate Procedure are not consistent in the ratio between number of words and number of pages. Rule 32(a)(7) uses a ratio of approximately 433 words per page. But FRAP 5(c), 21(d), and 27 use a ratio of 260 words per page.

It is not clear whether there is any value in retaining the option of monospaced fonts and the option of a line count rather than a word count for any computer-

generated document. For computer-generated documents, proportional fonts and word counts are readily available. For those litigants—almost certainly self-represented and proceeding in forma pauperis—who use typewriters or handwriting, page limits rather than word limits are important. But it might be worth considering making the word limits primary, retaining page limits only for typewritten or handwritten documents, and setting those pages limits based on the same ratio for all rules.

* * *

The Committee should consider which, if any, of these suggestions are worth pursuing at this time.

# TAB 7G

Dear Committees on Appellate, Bankruptcy, Criminal, and Civil Rules —

I respectfully make 4 primary rules suggestions:

1. style names in normal case and diacritics;
2. adopt common local rules into federal rules;
3. extract common rules; and
4. standardize page equivalents for words and lines.

I also make several simplification suggestions along the way, but those are only incidental. Likewise, I am sure that the Committees can improve on my proposed language and examples. Please consider the underlying substance and intent, not just the examples given.

Sincerely,
Sai[1]
President, Fiat Fiendum
August 22, 2024

[1] Sai is my full legal name; please use gender-neutral language and no title. I am partially blind; please send all communications, in § 508 accessible format, by email.

## 1. Name styling

### *a. Avoidable trigger for OPCA litigants; low level waste*

All-caps names are one of the main bugbears of sovereign citizen / organized pseudolegal commercial argument (OPCA)[2] type litigants, who think that e.g. ALICE SMITH refers to a quasi-corporate entity created by the government[3], whereas Alice Smith refers to an actual human.

This is of course utterly without merit. However, as a pragmatic, descriptive statement: the use of all-caps names causes easily avoidable vexatious litigation. This is burdensome for everyone — and this common distraction for OPCA litigants obscures their potential legitimate claims. It harms nothing to put "Alice Smith" on a summons, subpoena, case caption, etc. — rather than "ALICE SMITH" — and would avoid triggering this particular hang-up.

### *b. Inaccuracy and insult*

Capitalization and diacritics are an inherent part of names, just as much as spacing and letters. Changes to them will often be culturally insulting.

Putting all names in all caps is inaccurate, and obscures actual differences in names.[4] For example:

- Shauna MacDonald, Canadian actress
- Shauna Macdonald, Scottish actress
- Leroy Van Dyke, American singer
- Lawrence VanDyke, 9th Cir. judge
- Cornelius Vanderbilt, American businessman

---

[2] *See* e.g. *Meads v Meads* 2012 ABQB 571 (exhaustively documenting OPCA), *cited by* e.g. *U.S. Bank N.A. v. Janelle*, No. 20-cv-337 (D. Me. Oct. 15, 2021)

[3] *See Meads* at [7], [75]–[76], [211]–[212], [323]–[324] (collecting cases), & [417]–[446] ("strawan").

[4] Names vary to an extent that you may not be aware of; for background, I suggest reading e.g. Patrick McKenzie & tony rogers' *Falsehoods Programmers Believe About Names – With Examples* and W3C's *Personal names around the world*. In short, leaving a name in its original form is the only accurate practice.
This extensive compilation of explainers includes many which are likely of interest and relevance, e.g. about Bitcoin, email, video, postal addresses, and typography (e.g., particularly relevant here, one about case).

- Laura van den Berg, American novelist
- Ed Vande Berg, American baseball player
- Jeff Vandeberg, American architect
- Ana de Alba, 9th Cir. judge

Many fonts lack diacritics on capitals, so e.g. 1st Cir. judges Myrna Pérez & José A. Carbanes would often have their names be rendered PEREZ & JOSE rather than PÉREZ & JOSÉ. Although rare, these can be minimal pairs — e.g. Chris Perez and Chris Pérez are different people (baseball player and guitarist, respectively), as are John van Dyke (canoeist) and John Van Dyke (politician).

*c. Annoyance and time waste*

When drafting, party and case names set in all-caps[5] waste time, since copying citations and quotes often requires resetting them into normal case. This is minor, sure — but a couple minutes routinely wasted, added over the whole system, collectively wastes substantial time, annoyance, and expense.

*d. Bad style*

Using all-caps is bad typography and more difficult to read.[6]

Example: USING ALL-CAPS IS BAD TYPOGRAPHY AND MORE DIFFICULT TO READ.

[5] E.g. *Janelle*, *supra*.
[6] *See* e.g. Matthew Butterick, *Typography for Lawyers*, regarding all caps & caption pages.

*e. Suggestion*

There is no reason to have names in all caps, and good reasons — simple respect, accuracy, pragmatic avoidance of OPCA, avoidance of waste, and legibility — to style them in their normal fashion.

I therefore suggest that the FRAP, FRBP, FRCrP, & FRCvP be amended to add a style[7] requirement for names to always be set in their normal case and diacritics.

I suggest, for example, the following:[8]

- FRAP 32(a)(*new* 8): *Names.*

  All[9] names must be set in their normal case and diacritics. In headings, lower-case letters may be set in small caps.

  *Committee note:* E.g. William McKinley, not WILLIAM MCKINLEY; Johannes van der Waals, not JOHANNES VAN DER WAALS; João da Silva Feijó, not JOAO DA SILVA FEIJO; Michael ffrench-O'Carroll, not MICHAEL FFRENCH-O'CARROLL; JPMorgan Chase, not JPMORGAN CHASE. In a heading (but not a caption), e.g. Affidavit of William McKinley is also permissible.

  Errors due to mistake or technical inability[10] should be corrected where feasible, but not rejected.

- FRAP 32(*new* h): *Use by court.*

  Every document created by the court or clerk must comply with Rules 32(a)(1), (4), (5), (6), and (8).

- FRAP 27(d): *amend to add* ", and the name styling requirements of Rule 32(a)(8)".

---

[7] I note that FRAP 32 & FRBP 8015 require particular typefaces and other typography requirements, as do many LCvR and LCrR. This suggestion is more substantive, since it is for fidelity to actual differences, not just presentation.

[8] My intent with this suggestion is only to add a name style rule into existing style rules, and have courts follow the same style (so that e.g. subpoenas & summons are captured, and court-issued documents' & forms' style can be copied by filers). FRCrP & FRCvP lack style rules (though they are in local rules), so I gave illustrative examples to cover all four Rules sets; that is only incidental, and is a distinct suggestion (see suggestion 2). I list them as separate rules only to make this suggestion self-sufficient; I believe that these should all be moved to common rules (together with all or nearly all of e.g. FRAP 32 & FRBP 8014), instead of creating substantive new rules or cross-citing FRAP (see suggestion 3).

[9] This is intended to cover humans in particular, but all other names also. The example of JPMorgan Chase for the notes is meant to demonstrate that "all" means all, without having to state it explicitly.

[10] My intent here is to make this a "best effort" type rule — e.g. many people don't know how to type ō (or more difficult diacritics like Vietnamese, e.g. Nguyễn Ngọc Trường Sơn); one may not know if a name should have diacritics or internal capitalization (e.g. where prior records didn't reflect them, as is common), etc. Reasonable attempts that don't comply shouldn't be taken as grounds for rejection, but one should at least make a reasonable attempt.

- FRBP 8015(a)(*new* 8) & note: *add* identical to FRAP 32(a)(8)
- FRBP 8015(*new* i): *Use by court.*

  Every document created by the court or clerk must comply with Rules 8015(a)(1), (4), (5), (6), and (8).

- FRBP 8014(f)(2) *amend to add* "and name styling" *after* "type style"
- FRCvP *new* 5.3: *Form of Papers.*

  (a) *Format.*

  All papers, except exhibits in their original form[11], must comply with Fed. R. App. P. 32(a)(1), (4), (5), (6), and (8).

  (b) *Nonconforming documents.*[12]
  If a document does not conform to the requirements of this Rule and Rule 10(a), the Clerk will notify the filing party of the identified deficiency and request that the deficiency be corrected by the end of the next business day. If a deficiency is not corrected by the end of the next business day, the Clerk will forward the pleading to the assigned judge with notice of the identified deficiency and a recommendation, if appropriate, that the pleading be stricken for failure to comply with applicable rules.

  (c) *Use by court.*

  Every document created by the court or clerk must comply with Rule 5.3(a).

- FRCrP 49(*new* e)(1–3), *Form of Papers*: *add* identical to FRCvP 5.3(a–c)

[11] My intent here is to exempt documents that were not created under the Rules, and are from some prior or external source that the filer doesn't control — i.e. to *not* impose a re-formatting requirement like Sup. Ct. R. 33.1 — while capturing all documents created under the Rules, i.e. which the filer does control.

[12] This is verbatim D.D.C. LCvR 5.1(g) (other than substituting "Fed. R. Civ. P." with "Rule"), simply because that's the first one I looked at. I have no comment on its merit relative to other courts' local rules on handling nonconforming documents, but I think some such provision is worthwhile. Again, this is distinct and incidental; see suggestion 2.

## 2. Adopting common local rules into federal rules

### *a. Context*

There are many local rules that are universal (or near universal), yet are not in the federal rules. Adopting a common baseline would simplify local rules, ensure that their provisions are in fact deliberate variations rather than oversights in the federal rules, simplify matters for people who practice in multiple courts, and simplify case law on the rules.

For example:[13]

- no ex parte communication, e.g. D.D.C. LCvR 5.1(a), 9th Cir. R. 25-2
- fax & email require permission, e.g. D.D.C. LCvR 5.1(b), 9th Cir. R. 25-3
- first filing should include name & contact info, e.g. FRAP 32(a)(2)(F), D.D.C. LCvR 5.1(c), 9th Cir. R. 3-2(b), 21-2(a), 27-3(c)(i)
- filing format, e.g. D.D.C. LCvR 5.1(d), 9th Cir. R. 25-5(d)
- exhibits on complaints etc should be essential, e.g. D.D.C. LCvR 5.1(e)
- 28 USC 1746 declaration, e.g. FRAP 25(a)(2)(A)(3), D.D.C. LCvR 5.1(f), 9th Cir. R. 4-1(c)(1), (c)(2), (e)
- handling of nonconforming documents, e.g. D.D.C. LCvR 5.1(g)
- filing sealed documents, e.g. D.D.C. LCvR 5.1(h), 9th Cir. R. 27-13

### *b. Suggestion*

I suggest that the Committees:

- systematically survey the local rules,
- identify types[14] of provisions that are frequent in local rules but are not covered by the federal rules, and

[13] Again, using D.D.C. LCvR & 9th Cir. R. merely by way of example. As best I can recall, similar provisions are in nearly all local rules I've personally read:
[14] By "type" I mean the minimal synopsis form, as I gave above — virtually all courts will have filing format requirements, procedure for filing under seal, etc., even if their details differ.

- adopt the most common[15] version[16] as the baseline default in the federal rules, so as to most simplify the most local rules.

Where feasible, these should be merged into common rules (as proposed below), or at least be concordant with them (e.g. having consistent words per page provisions[17]).

Local rules can of course still vary. I explicitly do *not* here suggest any override of local rules, à la FRAP 32.1(a). Although I think that standardization would be beneficial for rules that don't have a genuine reason for local differences, here I am only proposing system-level simplification and collection, not substantial substantive change (other than to apply defaults when an unusual court's local rules haven't spoken to it).

I believe that the vast majority of local rules cover issues the federal rules simply fail to address, or have merely incidental differences between local rules — rather than expressing a genuine difference of opinion and decision to have a procedural "circuit split" (as it were). Those common rules are ripe for simplification, and the federal rules would benefit from covering the issues they address.

By way of metric, consider the combined page length of the entire set of federal rules — including all local rules. My suggestion is to reduce system-wide complexity, i.e. that combined page length, by turning local rules into federal ones that most courts would adopt with relatively little substantive variation. The simpler, the better.[18]

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[15] "Common" can be a functionally identical majority, or an approximate middle ground that would work as a consensus baseline (e.g. for page length limits).

[16] By "version" I mean the particular choice of rule for a given type, i.e. the details.

[17] n.b. FRAP & FRBP's words per page conversions are not currently consistent; see suggestion 4

[18] To recapitulate Pascal: if I'd had more time and energy, I would've made these suggestions more concise too. I have tried to at least be clear, so the Rules can be more concise than I am here.

### 3. Extracting a new Federal Common Rules and deduplicating extant Rules

#### *a. Suggestion*

A substantial amount of the Rules are needlessly duplicative, not just between courts but between Rules sets — for example, FRBP 8015 & FRAP 32. This adds needless complexity, creates potential for issues of surplusage, and makes the Rules harder to maintain.

I therefore suggest:

- create a new Rules set — the Federal Common Rules — which is to include only matters which are shared between the specific Rules sets
- move to the FCR all
  - duplicative FRAP, FRBP, FRCrP, & FRCvP rules, and
  - rules substantively applicable to all or nearly all courts (e.g. FRCvP 11)
- replace the moved rules with a very short application of the FCR, and — only if there is a difference that the Committees actually want to keep — an override statement.[19]

Not everything in the FCR has to be applicable to *all* courts. For example, I would expect that rules for service, summons, e-discovery, CM/ECF, FRCvP 11 type sanctions, form and format, handling sealed filings, correction of technical errors, etc. should generally be identical — but appellate courts don't tend to issue summons or have discovery (except in some rare cases of original appellate jurisdiction). That doesn't prevent them from being in the FCR.

[19] In programming jargon: be DRY — Don't Repeat Yourself. Put the shared rules in one place, point to them, and only state overrides.

Likewise, some things may be different in certain Rules sets. E.g. for motions, length limits are:

- FRAP 27(d)(2) & FRBP 8013(f)(3): 20p motion & opposition, 10p reply
- FRCrP & FRCvP: none in the federal rules[20]
  - e.g. D.D.C. LCrR 47(e) & LCvR 7(e): 45p motion & opposition, 25p reply

*b. Worked example* [21]

For instance, FRAP, FRBP, LCrR, & LCvR format & length rules could be extracted as follows:

FCR 5[22] Form of papers

*(... et cetera ...)*

*(d) Format*
Unless otherwise ordered by the court, all filings must:

(1) be on 8½×11 inch paper or electronic equivalent
(2) be double spaced, except that single spaced is allowed for
  (i) quotations more than two lines long and indented
  (ii) headings
  (iii) footnotes
(3) have 1 inch margins on all sides
(4) have no text in the margins, except pagination
(5) be submitted in native electronic PDF format, if electronically produced
(6) be in 12 point font or larger, except that
  (i) 10 point font or larger is allowed in footnotes

*(e) Length limits*
(1) *Generally*[23]
Unless otherwise ordered by the court, filings are length limited as follows. Items in FCR 5(e)(3) are excluded from the length limits.

  (i) Handwritten or typewritten filings must follow the page-based limit.
  (ii) Electronically produced filings must follow either:
    (A) the word-based limit; or
    (B) if monospaced, and if a line-based limit is listed, the

[20] The federal rules probably should create a default, as this is likely in all local rules; see suggestion 2 above.
[21] I have tried to combine and simplify the various rules into a single, clear statement.
[22] The FCR numbering is made up arbitrarily just to illustrate the example.
[23] I think that the absence of a page based limit only for supplemental authorities and for amicus briefs on rehearing is so nonsensical that I have added those in, following the same ratios as the other rules — it seems to me clear that e.g. a handwritten statement of authorities is not intended to be required to count words when handwritten filings in general are not, nor that there is intended to be a difference between amicus briefs on merits and rehearing as to whether they can/must use a page, line, or word based limit equivalence. I have no idea why line based limits are only sometimes present, nor why the word based limits have different ratios, so have left them as-is. On both points, see suggestion 4.

line-based limit.

(2) *Limits*

(i) *Motion:*

(A) *FRAP & FRBP*: 20 pages or 5,200 words, except

(i) *Motion for rehearing:* 15 pages or 3,900 words

(B) *FRCrP & FRCvP*: 45 pages or 11,700 words[24]

(ii) *Opposition to motion:*

(A) *FRAP & FRBP*: 20 pages or 5,200 words

*(B) FRCrP & FRCvP*: 45 pages or 11,700 words

(iii) *Reply to motion:*

(A) *FRAP & FRBP*: 10 pages or 2,600 words

*(B) FRCrP & FRCvP*: 25 pages or 6,500 words

(iv) *Principal brief:* 30 pages, 13,000 words, or 1,300 lines

(v) *Reply brief:* 15 pages, 6,500 words, or 650 lines

(vi) *Combined principal and reply brief:* 35 pages, 15,300 words, or 1,500 lines

(vii) *Supplemental authorities:* 2 pages or 350 words

(viii) *Amicus brief on merits:* 15 pages, 6,500 words, or 650 lines

(ix) *Amicus brief on rehearing:* 10 pages or 2,600 words

(3) *Items excluded from length limits:*[25]

(i) factual exhibits, including

(A) affidavits not containing legal argument

(B) copies of record

(C) addenda of statutes, rules or regulations

(ii) cover pages

(iii) disclosure statements

(iv) indexes, including

(A) tables of contents

(B) tables of citations

(C) indexes of record

(v) certificates of compliance with any rule

(vi) signature blocks

(vii) proofs of service

*(4) Certificate of compliance with length limits*

*(... et cetera ...)*

[24] My example FRCvP & FRCrP limits just copy from D.D.C. local rules — namely LCvR 7(e) & (o), LCvR 84.6(a), LCrR 47(e), and DCtLBR 9033-1(f) — and apply the 260 words per page equivalent used in FRAP & FRBP for motions. See suggestion 2 regarding a substantive FRCrP & FRCvP length limit rule.

[25] I have omitted FRAP 32(f)'s "any item specifically excluded" item because that's tautological. I have also incidentally simplified, combined, & organized a few items from FRAP 32(f) & FRBP 8013(a)(2)(C).

Then replace the extant rules as follows:

- FRAP 32(a)(4), FRBP 8015(a)(4): *Common format*. The brief must comply with FCR 5(d).
- FRAP 21(d) (last sentence & subparagraphs):
  *Non-common length limit*. A petition must comply with FCR 5(e), with a limit of 7,800 words or 30 pages.
- FRAP 5(c) (last sentence & subparagraphs): A paper must comply with FCR 5(e)
- FRAP 27(d)(2), FRBP 8013(f)(3), 8022(b) (last sentence & subparagraphs): *Common length limit*. A motion, response, or reply must comply with FCR 5(e).
- FRAP 28.1(e), 29(a)(5), 29(b)(4), 32(a)(7), FRBP 8015(a)(7), 8016(d), 8017(a)(5), 8017(b)(4): *Common length limit*. A brief must comply with FCR 5(e).
- FRAP 35(b)(2), 40(b) (last sentence & subparagraphs): *Common length limit*. The petition must comply with FCR 5(e).
- FRAP 28(j) (second to last sentence): The letter must comply with FCR 5(e).
- FRBP 8014(f) (second to last sentence): The submission[26] must comply with FCR 5(e).

Or, better, delete all of those, and replace with:

FRAP 32(*new* h) Common format and length

*(1) Common format*
All filings must comply with FCR 5(d) except as specified in this rule or its local rule counterpart.

*(2) Override of common format*
FCR 5(d)(6): all text must be in 14 point font or larger.[27]

*(3) Common length limit*
All filings must comply with FCR 5(e) except as specified in this rule or its local rule counterpart.

*(4) Non-common length limits*
(i) petitions under FRAP 21 (extraordinary writs): 7,800 words or 30 pages

FRBP 8015(*new* i) Common format and length

*(a) Common format*
All filings must comply with FCR 5(d) except as specified in this rule or its local rule counterpart.

*(b) Common length limit*
All filings must comply with FCR 5(e) except as specified in this rule or its local rule counterpart.

[26] I have kept these with their current terminology. I suggest that the FRAP 28(j) & 8014(f) be conformed to use the same term — perhaps one of “letter” or “submission”, perhaps a more descriptive one like “update” or “notification”.
[27] Current FRAP 39(a)(5)(A).

For parallelism, add:[28]

FRCvP *new* 7.2 Common format and length

(a) *Common format*
All filings must comply with FCR 5(d) except as specified in this rule or its local rule counterpart.

(b) *Common length limit*
All filings must comply with FCR 5(e) except as specified in this rule or its local rule counterpart.

(c) *Non-common length limits*
(1) *Mediation statement:* 2,600 words or 10 pages [29]

FRCrP *new* 47.1 Common format and length

(a) *Common format*
All filings must comply with FCR 5(d) except as specified in this rule or its local rule counterpart.

(b) *Common length limit*
All filings must comply with FCR 5(e) except as specified in this rule or its local rule counterpart.

Example revised local rule merger and override:

W.D. Mo. LCvR 7.0(d) *Length Limits*

1. *Common length limit*
All filings must comply with FCR 5(e) except as specified in this rule.

2. *Override of common length limits:*
A. *Motion:* 780 words or 3 pages[30]
B. *Opposition to motion:* 780 words or 3 pages
C. *Reply to motion:* 780 words or 3 pages

3. *Non-common length limits:*
A. *Suggestions on motion:* 3,900 words or 15 pages
B. *Suggestions on opposition to motion:* 3,900 words or 15 pages
C. *Suggestions on reply to motion:* 2,600 words or 10 pages

[28] This is just for illustration, supposing that these are adopted per suggestion 2.
[29] D.D.C. LCvR 84.6 says 10 pages; I've added the 260 words per page equivalent used in most of FRAP & FRBP. This is just an illustration of how a given Rules set might have additions to the Common Rules, supposing for the sake of example that FRCvP were to adopt rules about mediation under suggestion 2.
[30] This part is not specified in W.D. Mo. LCvR 7.0, and I do not know W.D. Missouri practice, but it appears to be implied by the separation into motions (etc) plus separate suggestions (i.e. memorandum of facts & law). I looked at a few filings of W.D. Mo. motions and suggestions in RECAP in order to infer the implied rule for the main document length limit, just to give an example of a local rule override. Even with the override, FCR 5(e)(2), (3), & (4) are kept.

c. *Comments*

This is merely an *example* to illustrate how extracted and simplified Rules and Common Rules would look. Any extraction will have to simplify and standardize things, but the Committees may well choose differently than I did.

Please don't get hung up on the particular choices that I used here — particularly not the ones described in footnotes. None of them are essential parts of this suggestion, and they should be treated as distinct suggestions, not blocking this.

My choice of illustrating this with length limits is likewise just an example. Common Rules should address anything that is in scope. Please don't let perfect be the enemy of good; these can and should be done incrementally, one type of rule at a time — not all held off until a never-reached future where all of the Rules are wholesale revised at once.

To recapitulate: this suggestion is specifically about extracting rules that are currently in common across different sets of rules into a unified Common Rules, so that

- they're not specified redundantly in the FRAP, FRBP, FRCrP, & FRCvP, and
- the Rules remove distinctions without a difference that make things unnecessarily complex.

When there are actual differences — e.g. (currently only local) FRCrP & FRCvP have different motion page limits; FRAP alone has petitions for extraordinary writs, and gives them a distinct length limit; FRCrP and FRCvP both have discovery and preemptive disclosure obligations which substantially overlap, but FRCrP 16(a) & *Brady/Giglio* obligations differ from FRCvP 26(a) — only the difference should be stated in particular rules, with the shared parts moved to Common Rules.

**4. Standardizing page equivalents for words and lines**

I note that the extant FRAP & FRBP length limits have unexplained differences in lines and words per page equivalence. I've no idea why this is, so I flag it for the Committees to consider normalization (or at least explanation in notes). See:

- words per page:
  - none[31]: FRAP 28(j), 29(b)(4); FRBP 8014(f), 8017(b)(4)
  - 260: FRAP 5(c), 21(d), 27(d)(2), 35(b)(2), 40(b); FRBP 8013(f)(3), 8022(b)
  - ~433: FRAP 28.1(e) (principal, response), 32(a)(7); FRBP 8015(a)(7), 8016 (principal, reply)
  - ~437: FRAP 28.1(e) (combined); FRBP 8016(d) (combined)

- lines per page:
  - none: FRAP 5(c), 21(d), 27(d)(2), 28(j), 29(b)(4), 33(b)(2), 40(b); FRBP 8013(f)(3), 8014(f), 8017(b)(4), 8022(b)
  - ~43: FRAP 28.1(e), 32(a)(7); FRBP 8015(a)(7), 8016(d)

I suggest standardizing and simplifying the statement of whatever conversion rules are wanted. E.g.:

FCR 5(e) Length limits

(5) *Definition of 'pages'*

Length limits are generally stated in terms of pages ('*p*'). Filings are acceptable if they meet any of the following:

(i) no more than *p* handwritten or typewritten pages;

(ii) no more than 43×*p*[32] lines of monospaced text, e.g. 1,290 lines if "30 pages";[33]

(iii) no more than 260×*p* words, e.g. 7,800 words if "30 pages"; or

(iv) in a brief, no more than 433×*p* words, e.g. 12,990 words if "30 pages".

If this is adopted, then the various "*P* pages or *W* words or *L* lines" limits above, and in the current rules, could be simplified to just "*P* pages", and the "if stated" caveat for line limits could be deleted.

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[31] These have word limits but not page limits. I believe this is due to oversight, not intention.

[32] I realize that this formulation is unusual in US law. I have adopted it from UK law, where it is common; see e.g. Working Time Regulations 1998 SI 1998/1822 part II. I believe it is an improvement to state the formula outright, rather than obfuscating it behind a disconnected set of parallel word, line, and page limits that create a trap for the unwary.

[33] I believe this is likely no longer in use, and monospace is bad typography, so suggest deleting it. It can be retained if the Committees think it still relevant. In any event, it should be changed to a clear, simple, consistent statement as here.

# TAB 7H

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett

Re: New suggestions concerning standards of review (24-AP-E)

Date: September 5, 2024

Jonathan Cohen has suggested that FRAP 28—which requires a statement of the standard of review—be amended to provide guidance about those standards. His suggested amendment accompanies this memo.

I doubt that the Federal Rules of Appellate Procedure are an appropriate vehicle for providing guidance about the standards of review. And the proposed amendment gives me even less confidence about the likelihood that any such amendment would be sufficiently comprehensive and accurate to the helpful.

Perhaps litigants might benefit from a brief mention of major examples of standards of review so that they know what the rule is getting at. For example, it might require "a concise statement of the applicable standard of review—such as plenary, clearly erroneous, or abuse of discretion." But FRAP 28 does not offer illustrations of other terms, including "subject matter jurisdiction," "a final order," or "the procedural history."

I recommend removing this suggestion from the Committee's agenda.

# TAB 7I

Jonathan Cohen

March 28, 2024

H. Thomas Byron III
Secretary
Committee on Rules of Practice and Procedure
Administrative Office of United States Courts
Room 7-300
One Columbus Circle, NW
Washington, D.C. 20544

re: Proposal for an amendment to Federal Rules of Appellate Procedure
(Standards of Review)

To Whom It May Concern,

This is a proposal for an amendment to the Federal Rules of Appellate Procedure.

Under the current Federal Rules of Appellate Procedure, Rule 28(a)(8), an appellant's brief must contain "a concise statement of the applicable standard of review…" However, the federal rules do not define what a Standard of Review is.

I propose a rule amendment or advisory comment to provide guidance on the standards of review. A draft rule, FRAP 28(h), is enclosed on the next page.

Sincerely,
Jonathan Cohen

Draft rule FRAP 28(h)

(a) When a party proposes the standards of review, for the appellate court to apply in the course of its appellate jurisdiction, the party may address any of the following issues:

(1) When the appellate court may affirm, reverse, modify, set aside, or vacate the judgment or order below, or address other issues
(2) Whether the issues on appeal are questions of law, questions of fact, questions of judicial or agency discretion, or a combination of the foregoing
(3) Whether any court or administrative agency below was required to defer to the decision of another court or administrative agency, a jury, or one of the parties
(4) Whether the appellate court should review any of the issues with additional scrutiny or lenity
(5) Any other issue relevant to how the appellate court should review the case

(b) If a party identifies any of the issues on appeal as questions of discretion, the party may further explain how the court or agency below abused its discretion or did not abuse its discretion with respect to any of the following issues:

(1) Reasonableness
(2) Sequencing the issues
(3) Weighing multiple factors
(4) Ruling on discovery issues
(5) Including/excluding evidence
(6) Granting/denying any request
(7) Use of legal citations and authority
(8) Responding to or ignoring arguments
(9) Including/excluding points of discussion
(10) Ordering an examination of any party
(11) Addressing issues *sua sponte* or *sub silencio*
(12) Logical reasoning
(13) Explaining the decision
(14) Surprise or delay
(15) Fairness
(16) Procedures
(17) Other relevant issues

(c) If a party explicitly identifies an established standard of review, the party may make an argument for the extension, modification, or reversal of existing standards of review

# TAB 8

| Effective Date | Rule | Summary |
|---|---|---|
| December 2018 | 8, 11, 39 | Conforms the Appellate Rules to a proposed change to Civil Rule 62(b) that eliminates the antiquated term “supersedeas bond” and makes plain an appellant may provide either “a bond or other security.” |
| | 25 | Amendments to Rule 25 are part of the inter-advisory committee project to develop coordinated rules for electronic filing and service. |
| | | |
| December 2019 | 3, 13 | Changes the word "mail" to "send" or "sends" in both rules, although not in the second sentence of Rule 13. |
| | 26.1, 28, 32 | Rule 26.1 amended to change the disclosure requirements, and Rules 28 and 32 amended to change the term "corporate disclosure statement" to "disclosure statement" to match the wording used in amended Rule 26.1. |
| | 25(d)(1) | Eliminated unnecessary proofs of service in light of electronic filing. |
| | 5.21, 26, 32, 39 | Technical amendment that removed the term "proof of service." |
| | | |
| December 2020 | 35, 40 | Amendment clarifies that length limits apply to responses to petitions for rehearing plus minor wording changes. |
| | | |
| December 2021 | 3 | Amendment addresses the relationship between the contents of the notice of appeal and the scope of the appeal. The structure of the rule is changed to provide greater clarity, expressly rejecting the expressio unius approach, and adds a reference to the merger rule. |
| | 6 | Amendment conforms the rule to amended Rule 3. |
| | Forms 1 and 2 | Amendments conform the forms to amended Rule 3, creating Form 1A and Form 1B to provide separate forms for appeals from final judgments and appeals from other orders. |
| | | |
| December 2022 | 25 | Treats remote electronic access to Railroad Retirement Act cases like Social Security cases. |
| | 42 | Requires dismissal of appeal if parties agree. |
| | | |

| | | |
|---|---|---|
| December 2023 | 2, 4 | Rules for Future Emergencies |
| | 26, 45 | Add Juneteenth as holiday |

# TAB 9

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett

Re: Formal action on suggestions (24-AP-B; 24-AP-C; 24-AP-D; 24-AP-F)

Date: September 10, 2024

Last spring, the Department of Justice (DOJ) suggested that pseudonyms rather than initials be used for minors. (24-AP-B). This suggestion was included in the agenda book and discussed in connection with the report on the privacy working group. The suggestion is primarily addressed to Criminal Rule 49.1, but is relevant to the Appellate Rules because FRAP 29(a)(5) incorporates Criminal Rule 49.1.

I do not believe that the Advisory Committee formally acted to defer action on this suggestion while awaiting consideration by the Criminal Rules Committee. I suggest that it do so.

The American Association for Justice and the National Crime Victim Bar Association wrote to support the DOJ's proposal, adding that gender-neutral pseudonyms and pronouns should be used. This has been docketed as a new suggestion. (24-AP-C). I suggest that the Committee defer action pending consideration by the Criminal Rules Committee.

The Chamber of Commerce submitted a comment regarding amicus briefs prior to the proposal being published for public comment and therefore was docketed as a new suggestion. (24-AP-D). I suggest that this be formally referred to the amicus subcommittee, which has treated it as a comment.

Finally, in April 2024 we received a belated comment on Rule 39 that was docketed as a new suggestion. (24-AP-F). The comment did not lead any member of the Advisory Committee to seek to reopen Rule 39. I suggest that it be formally removed from the agenda.