Minutes of the Fall Meeting of the

Advisory Committee on the Appellate Rules

October 9, 2024

Washington, DC

Judge Allison Eid, Chair, Advisory Committee on the Appellate Rules, called the meeting of the Advisory Committee on the Appellate Rules to order on Wednesday, October 9, 2024, at approximately 9:00 a.m. EDT.

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

Also present in person were: Judge John D. Bates, Chair, Standing Committee on the Rules of Practice and Procedure; 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; Christopher Wolpert, Clerk of Court Representative; H. Thomas Byron, Secretary to the Standing Committee, Rules Committee Staff (RCS); Bridget M. Healy, Counsel, RCS; Shelly Cox, Management Analyst, RCS; Kyle Brinker, Rules Law Clerk, RCS; Rakita Johnson, Administrative Analyst, RCS; Tim Reagan, Federal Judicial Center; 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, attended via Teams.

I. Introduction and Preliminary Matters

Judge Eid opened the meeting and noted that she was excited and honored to be chairing the committee. She suggested that everyone keep in their thoughts those dealing with the impact of the hurricane. She asked those participating in the meeting to introduce themselves, and welcomed everyone, including members of the public.

Mr. Byron called attention to the rules tracking chart and noted that the amendments to Rules 35 and 40 are scheduled to go into effect this year, and that the amendments to Rules 6 and 39 have been sent to the Supreme Court. (Agenda book

page 22). 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. Brinker referred to the pending legislation chart and noted that there is no recent Congressional action regarding the Federal Rules of Appellate Procedure. (Agenda book page 29).

Mr. Reagan described the FJC's report to the rules committees as explaining what the FJC is doing so that the committees know what it can do and what the committee can ask it to do. The report also contains information about educational activity by the FJC, because one often hears at meetings of the rules committee that education rather than a rule amendment is the proper response to a problem. (Agenda book page 35).

Judge Eid noted the draft minutes of the meeting of the Standing Committee. (Agenda book page 45). The proposed amendments to Rules 6 and 39 were approved, with very minor tweaks. There was also discussion of the pending amicus proposal, which will be taken up later in this meeting.

II. Approval of the Minutes

The reporter noted two typographical corrections to the minutes of the April 10, 2024, Advisory Committee meeting. (Agenda book page 97). "Team" should be Teams" on page 97 and "undated" should be "updated" on page 98. With these two corrections, the minutes were approved without dissent.

III. Discussion of Joint Committee Matters

Professor Struve provided an update regarding electronic filing and service for self-represented parties. (Agenda book page 117). She noted that there had been a very good discussion at the Bankruptcy Rules meeting; perhaps this group can help with some of the concerns.

The working group has two big ideas. The first is that since filings made by non-electronic filers is uploaded by the clerk's office, triggering a notice to electronic filers, there does not seem to be a need to require the non-electronic filer to make copies and mail them to other parties. The second involves making electronic filing more available to self-represented parties.

The first is reflected in a sketch of a possible amendment to Civil Rule 5. It could be adapted to other rule sets, including Appellate Rule 25. In accordance with a suggestion by Ed Hartnett, the sketch flips the order in current Civil Rule 5, making service pursuant to electronic filing primary, and then listing the other alternatives. It also adds a provision allowing service by email to the address that the court uses for Notices of Filing. Such service by email is conditioned on the sender designating

in advance the email address from which service will be made, enabling the receiver to know that the email is not spam and should not be filtered out.

The second is also reflected in a sketch of Civil Rule 5 that would flip the presumption that a self-represented litigant may not file electronically to a presumption that a self-represented litigant may file electronically. A court's ability to bar self-represented litigants from using the court's electronic filing system would be preserved, but a local rule or general court order doing so would have to either allow reasonable exceptions or allow the use of some other electronic method of filing. There are a wide range of views regarding this second proposal, which is less controversial in this committee, because the courts of appeals have been in the forefront of allowing CM/ECF access.

Members of the Bankruptcy Rules Committee support the idea of access and alleviating unnecessary burdens, but they have some resistance and are concerned about having sufficient safeguards. The full sketch may be too adventurous; perhaps simply flipping the presumption is the place to start.

One possible problem with the service aspect of the proposal is if there is more than one self-represented party in a case. How does a self-represented party know that there is another self-represented party who needs to be served outside of the court's electronic system? When we raised the issue earlier, the district court clerks thought that this was just not a real problem because it would be an issue in so few cases. But in bankruptcy, there may well be multiple self-represented creditors. Is there a technical fix to this problem? Is it a problem only in bankruptcy cases?

Judge Eid invited suggested solutions.

Mr. Wolpert stated that in the Tenth Circuit, a pro se litigant is required to file a consent to electronic service. That goes on the docket with the litigant's email address, so it is clear who has and who has not consented. He understands that things may be different in bankruptcy, but that the additional effort may be worth it compared to the benefit of not having to chase down service issues.

A judge member added that it hasn't been an issue allowing pro se litigants to file in the court of appeals but recognized that it may be different in bankruptcy.

Mr. Wolpert noted that he had some concerns about reasonable conditions, and added that the Tenth Circuit local rules make clear that electronic service is not for case initiating documents, such as those filed under Rules 5, 15, and 21. Professor Struve explained that the point of the "reasonable conditions" provision was to deal with districts that might say, "No, never," and prompt them to do something. Mr. Wolpert replied that this is a wonderful initiative and that the benefits will outweigh the potential for problems.

A judge member asked if anyone was proposing requiring everyone to file electronically, unless allowed not to file electronically. That would solve the notice issue. There is a risk of abuse, but that can be dealt with on an ad hoc basis with individual litigants. Professor Struve stated that she can imagine that world someday, but that we aren't there yet. For many people, their only access to the internet is via a smartphone. Trying to deal with documents on a phone is a recipe for things going disastrously wrong. Such a proposal could cause access problems.

A different judge member added that one kind of reasonable restriction is to limit access to the litigant's own case. That is especially important for prisoners, who may try to learn about cooperating witnesses. A mandate would not work for them. Barring case initiating documents is another reasonable restriction, but case initiation can be done via a form on a website, thereby creating legible filings.

Mr. Wolpert noted that electronic filing is not a problem for appellate courts and that it is nothing but positive. With regard to service by litigants using the email address used by the court, he added that he didn't see a need for a provision requiring the designation for a sending email address. It should be on lawyers to manage their spam filters, just as they have to deal with junk mail.

Professor Struve invited any other input, including any drafting particulars, via email.

Mr. Byron presented an update concerning privacy matters. (Agenda book page 131). 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. That proposal was not immediately acted upon so that the working group could consider a more general review of privacy concerns across all four sets of rules.

The working group considered a variety of potential issues—including ambiguity in the existing exemptions, the scope of the existing waiver provision, the possible expansion of protected information subject to redaction, and the possible addition of other categories of information to be protected—but did not identify a real-world problem demonstrating a need for amendment. It therefore recommends not addressing these additional issues at this time.

Mr. Freeman asked what would be a demonstrated need in this area, a data breach? Mr. Byron responded that the general approach is to look for real world problems that a rule amendment can solve, but he acknowledged that a different approach might be appropriate here: taking a prophylactic step to protect personal information. Mr. Freeman suggested that dates of birth, for example, might be protected.

A liaison member agreed with Mr. Freeman. With the ability to scrape information and attack people for filing, it may be especially important to consider the exemption for court records. Mr. Freeman added, for example, that one court of appeals that requires personal phone numbers on oral argument forms does not make those numbers publicly available.

Professor Struve presented the report of a joint subcommittee on attorney admission. (Agenda book page 140). This joint subcommittee includes members of the Criminal, Civil, and Bankruptcy Rules Committees, and has been considering a suggestion to make it easier to become a member of a district court's bar. A major issue involves districts that require admission to the state bar where the district court is located—especially if that state requires lawyers admitted elsewhere to take the local bar exam. This is not an item for the Appellate Rules Committee, because Appellate Rule 46 makes an attorney eligible for admission to the bar of a court of appeals if the attorney is admitted in any state. Other committees have discussed this issue, including whether admission to the bar of a district court is within the scope of the Rules Enabling Act.

This committee might have experience with Appellate Rule 46, including problems, that would be relevant. A judge member noted that he has chaired the grievance committee in the Second Circuit and that it is very active, with a central staff, an attorney's committee for factfinding, hearings, and reports, and close cooperation with the state bars.

A different judge member noted in the Ninth Circuit they have a different process and are hampered by some state bars. District courts would not want such changes. Pro hac vice lawyers can be a problem, and referrals to bars outside the state are not very effective. Professor Struve noted that it is frequently said that it is a very different world in the district courts than in the courts of appeals.

Mr. Wolpert stated that Rule 46 works fine. When problems arise, it is important to remember that Rule 46 sets forth eligibility requirements but does not require admission. For example, someone was admitted to a tribal court, used that to become in-house in Wisconsin, and used that (in turn) to be admitted to the Eastern District of Wisconsin, but had never taken a bar exam. The Court of Appeals for the Tenth Circuit denied admission.

IV. Discussion of Matters Published for Public Comment

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)

The Reporter presented the report of the amicus subcommittee. (Agenda book page 170). Proposed amendments to Rule 29 were published for public comment. (Agenda book page 173).

The proposed amendments address two major areas.

First, they address disclosures by amici. The committee has been working on this issue for years. It has received considerable feedback from the Standing Committee that has been incorporated into the proposal published for public comment. As of the meeting of the subcommittee, we had received two comments (in addition to ones received before the comment period opened and docketed as new suggestions). Since then, more have come in. We expect still more before the comment period ends on February 17, 2025. We also expect that there will be people who wish to testify at the hearing scheduled for January and February of 2025.

Second, the proposed amendments address an issue that arose later in the process, whether to change the requirements for filing an amicus brief. Current Rule 29(a)(2) permits a nongovernmental party to file an amicus brief during a court's initial consideration of a case either by making a motion or by obtaining the consent of the parties. Current Rule 29(b)(2) requires a motion at the rehearing stage.

The proposal published for public comment would eliminate the consent option from Rule 29(a)(2), requiring a motion during a court's initial consideration of the case. There was substantial concern about this proposal at the Standing Committee, particularly about the additional work for lawyers and courts on motions that are not currently required.

The Reporter suggested that the Advisory Committee might wish to focus its discussion on the second issue. It has discussed the first issue at length and will revisit it in light of full public comment. But it has not discussed the second issue as extensively and may want to consider the concerns of the Standing Committee.

A judge member stated that he had no problem with the disclosure requirements. The consent option is an issue in the Ninth Circuit and other circuits. An amicus brief that is filed by consent can lead to the recusal of a judge. In one case, an amicus brief required the recusal of 10 judges. Striking a brief doesn't solve the problem, especially at the en banc stage. A judge who is recused is not eligible to be drawn for an en banc panel. If as many as 10 judges are recused from being eligible to be drawn, something is amiss.

And the consent option does affect cases from the beginning. Many judges in the Ninth Circuit are recusal hawks. The computer program checks for recusals and will block a case from being assigned to a judge before the case is assigned to a panel. No judge decides whether to strike the brief; the judge is stricken at the outset as a result of the consent of the parties. The Court of Appeals for the Ninth Circuit is considering a local rule that would eliminate the consent option. The attorney advisory group is supportive. Whatever happens with the national rule, there should be at least a Ninth Circuit carve out.

Mr. Wolpert favored eliminating the consent option. The Tenth Circuit also has recusal hawks. Having a single track for amicus briefs and requiring a motion would be good.

A different judge member from a different circuit agreed that requiring a motion at both the initial hearing and rehearing stage should be required.

A liaison member noted that he has had a brief bounced at the panel stage because a judge would otherwise be recused. Apparently, different circuits do things differently. Would the result of eliminating the consent requirement be that, in the Ninth Circuit, if any judge were recused, the brief would be bounced?

The first judge said no. Instead, eliminating the consent option would give a judge the option to decide whether to recuse or not and whether to strike the brief. The point is to have a judge decide rather than simply have the computer not assign the judge in the first place.

The liaison member suggested surveying the circuits for the Standing Committee. Judge Bates added that it is important to get some sense of every circuit; at least one had a quite different reaction at the Standing Committee.

The liaison member added that a motion is not a major undertaking, but that local rules generally require stating the position of other parties regarding a motion, so it will be necessary to ask for consent anyway.

Mr. Wolpert noted that if the position he favors—eliminating the consent option—does not carry the day, he can manage.

A circuit judge added that circuits should be allowed to opt out. Some states hire law firms in order to knock out certain judges. If a circuit assigns cases to panels as they come through the door, consent amicus briefs are okay. But if a circuit assigns cases to panels later, the result can be that a judge gets disqualified without any involvement in that decision.

The Reporter asked and received confirmation that the Advisory Committee did not want to discuss the disclosure amendments today, but instead would await full public comment.

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

The Reporter stated that the IFP subcommittee did not meet to discuss the proposed amendments to Form 4 because no comments had been received before the agenda materials were prepared. (Agenda book page 228). Since then, one favorable comment has been received.

The Advisory Committee declined to discuss the proposed amendments at this time, awaiting the completion of the public comment period.

The Advisory Committee took a short break before resuming at approximately 10:45.

V. Discussion of Matters Before Subcommittees

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

Mr. Freeman presented the report of the intervention on appeal subcommittee. (Agenda book page 235). There is currently no Appellate Rule governing intervention, other than Rule 15 which sets a deadline but no criteria for intervention in agency cases. In the past, the Advisory Committee decided not to pursue creating a new rule governing intervention on appeal.

At the last meeting, we decided to step back and ask, "What is the problem?" Judge Bybee asked the FJC to research the actual circumstances in which intervention is sought. The vast majority of decisions on such motions are not reported, so the FJC can use its access to ECF filings and dispositions. We will hear about the FJC research in a moment. The Reporter did some research into reported cases, and Mr. Freeman gathered information from the Department of Justice.

That DOJ information is not complete or systematic. But the impression it provides is that the cases in which intervention on appeal is sought fall into distinct categories.

First, there are big national cases where an ideological plaintiff or a state files a case and later there is a change in the administration of the government (President or Governor) whose law or policy is challenged. These are high profile, but small in number.

Outside of these cases, there does not seem to be a functional problem.

There are agency direct review cases. Here, the person who lost before the agency seeks review, and the person who prevailed before the agency seeks to intervene to support the agency. The court of appeals is the first Article III court to consider the case, and the proposed intervenor participated in and shaped the record in the agency proceeding.

There are cases presenting constitutional challenges and the government entity whose action is being challenged seeks to intervene. These are typically granted. Similarly, sometimes the interest of a foreign sovereign or a tribe becomes clear for the first time on appeal.

There are environmental cases involving matters such as grazing rights. These tend not to be problematic because the interests are quite concrete. They tend to be resolved the way we would expect: if the person passed up an opportunity to intervene in the district court, the motion is denied. But if it just became clear now that the person's interests are at stake, the motion is granted.

Another set of cases involves persons who move to appeal in the court of appeals rather than appeal from the denial of intervention in the district court (with its deferential standard of review). These motions are typically denied.

The first category might become much larger. But creating a rule might invite more opportunistic behavior.

The report identifies some possible takeaways.

First, it might be that agency review cases are sufficiently different that they can be handled separately from appeals from district courts. The FJC research is relevant here.

Second, there are some recent cases in which some judges appear to view Civil Rule 24 as applying to intervention on appeal more of its own force, as opposed to the traditional statement that intervention on appeal is available only in exceptional cases for imperative reasons. If that view prevails in a circuit, clarification may be particularly important.

Third, the problem of intervention on appeal may be acute in cases involving universal remedies. One common response 15 years ago to a motion to intervene would be, "File your own lawsuit, and appeal." But if the remedy at issue applies to you already, your desire to intervene increases. We may want to see how this plays out. In the *Labrador* case, five justices expressed interest in prohibiting such remedies, but have not done so yet. There is some movement on that front.

Mr. Reagan from the FJC began by stating that the FJC provides objective independent research; it does not solve problems identified by an Advisory Committee or tell an Advisory Committee what to do. The FJC has access to all cases, run of the mill cases, not just those few that result in decisions on Westlaw or memorable cases. So far, he has done a feasibility study to see what can be done, checking all docket sheets in a given period for the string "interven"; that string should appear on the docket of any case where there is a motion to intervene. He has selected random cases from that group. They fall into two major categories, agency appeals and appeals from district courts in civil cases. There does not appear to be a significant issue in criminal cases. Going forward, he can be more targeted on civil appeals in all circuits.

Circuits vary on who decides motions to intervene: 3 judge panels, 2 judge panels, single judges, and the clerk. Except in the Sixth Circuit, which issues short opinions, there are almost never reasons.

His plan is to use a filing cohort, appeals that were filed during a certain period. He noted that the Reporter had pointed out that we might be interested in motions to intervene late in a case. At some point, it might be worth looking at a termination cohort. But he does not want to start there, because some recently terminated appeals may involve appeals filed decades ago. He expects that it would be a one-to-two-year project; if the committee would like, he would be happy to do it.

Judge Bates asked Mr. Freeman if he was lumping together vacatur of agency rules with universal injunctions. Mr. Freeman responded that there is pressure on both, but that they might change differently, referring to the quip that DC circuit judges vacate 5 rules before breakfast. Nationwide injunctions are declining sharply; vacatur may continue. A lawyer member of the committee expressed interest in this area, noting that apart from the issue of universal injunctions, there are different approaches in the circuits. It would be nice to have a uniform rule.

Mr. Freeman stated that nationwide courts draw on Civil Rule 24 and that there is a body of caselaw that says that intervention on appeal should be rare. Adopting a rule can change behavior, not only based on the content of the rule, but the existence of a rule can appear to bless the idea of intervention on appeal and lead to more motions.

A liaison member asked if there was any sense of where the issue is most in play. Sometimes the issue arises at a very late stage, where the government changes position or does not want to seek further review.

Mr. Freeman noted that the Supreme Court has granted cert on this issue three times. There is no political valence; it happens both ways. Often there is a question of timeliness. There is also a question of who represents, and what it means to represent adequately. For example, the SG may decide not to seek en banc rehearing in a particular case, but a private party might care about *this* case.

A different liaison member observed that there is a real difference between cases that originate in the courts of appeals (where the DOJ is okay with intervention) and cases in the district court seeking universal vacatur (where the DOJ often opposes intervention). He agreed with Judge Bates that the APA is different. He is more concerned that once a district judge grants a universal remedy, people want to intervene. If the government accedes to a universal remedy, that can be a shortcut to repealing a rule and avoiding notice and comment.

There are a bunch of cases where the issue arises, and there is a serious problem with the lack of standards. The stakes of the case have changed, or the

government's position has changed. There are reasons to have a rule that addresses it. Civil Rule 24 isn't focused on the key issue of what changed.

Judge Bates added that he sees the merits of a broad intervention rule. Maybe there are three or four different rules, dealing with agency cases, APA cases that were filed in the district court, universal injunctions, and the rest of the civil docket.

A liaison member noted that it is kaleidoscopic. But it is possible to find general principles. Civil Rule 24 has sort of worked to focus the inquiry. Keep Rule 15 the way it is; focus on other cases. I think it is possible to identify the process and considerations and provide a structure.

Mr. Freeman stated that he appreciated the comments. There are several different problems. Civil Rule 24 is ambiguous; it uses the term "interest," not "legal interest," but the Supreme Court in *Cameron* used the phrase "legal interest." The subcommittee does not want to take a position on Civil Rule 24 or replicate its problems. If someone who seeks intervention is denied in the district court, the proposed intervenor can appeal. If intervention is granted, the intervenor is a party, is bound by the judgment, and engages in discovery.

But the DOJ thinks that is different on appeal. Someone who has not been a part of discovery in the district court and is not bound by the district court judgment now seeks to intervene. That feels different, including as a matter of fairness to litigants. What is an appeal? It is a proceeding to determine whether there was error in the judgment. Intervenors with new claims and theories are not showing that there was error in the district court's judgment.

Settlement presents different questions, questions that the Supreme Court has been unable to resolve.

Is there a useful rule that we could draft, putting aside agency cases? It could require timeliness, reasons, interest, why amicus status is insufficient, and state that allowing intervention on appeal is uncommon. The hard question is what interests are sufficient. Some are not controversial. But should the possibility of a future claim against the proposed intervenor be enough?

The Reporter asked if the consensus was that the FJC should continue its work but not focus on appeals from administrative agencies that go directly to the courts of appeals. Mr. Freeman said yes, but that some agencies, like the NLRB, are structured so that they bring enforcement proceedings in the courts of appeals.

Mr. Reagan stated that, methodologically, the FJC would continue to look at all case types. Concentration on case types of greatest interest can come later.

A judge member stated that we have not answered the earlier question of the liaison member. In hard cases, courts are probably asking the right questions in the absence of a rule. Is there some benefit here, some problem being fixed, other than that there is no rule. By comparison, in the costs on appeal area, the Supreme Court had identified a problem. Maybe the absence of a rule is enough, but there are possible negative effects. Can we set a standard that we all agree is correct? Can we get there? Will it dictate particular outcomes?

Mr. Freeman stated that he has the same questions. A draft could clarify that there are two aspects to the timeliness analysis, both timely in the appeal and timely in the case as a whole. There is also the harder question of what is a valid basis for intervening.

The Reporter said that on the harder question, there is the hope of limiting the range of debate. Even if the question of whether an interest is sufficient is a hard question in particular cases, a rule might avoid replicating the ambiguity of Rule 24 and make clear that only a legal interest counts. That would be especially useful if a court of appeals adopts the apparent view of some circuit judges that Rule 24 applies without the filter of "exceptional cases for imperative reasons."

There are two possible developments that the committee might decide to wait for. First, there are some circuit judges who seem to view Civil Rule 24 as more directly applicable and therefore view intervention on appeal more widely available than the traditional doctrine that calls for intervention on appeal to be rare. The committee might wait to see if that view ever carries the day in a circuit. Second the committee might wait to see what develops regarding universal or nonparty injunctions. Should we wait? Or should we keep going, knowing that the need will be greater or less depending on those developments?

A liaison member said that the timelines question is a real question. Plus, a rule can put the right factors on the table and be more cabined. A lawyer member added that borrowing from Civil Rule 24 is not doing everything we need in this context, and that while a definitive new rule might be too difficult, a new rule might be able structure the analysis, make clear that most prior caselaw is still good law, and help frame things,

A judge member noted that this proposal puts pressure on the question of whether there is really a problem. If there had been a rule in place for 50 years, that would be great, but we don't. Maybe the absence of a rule is itself enough of a problem.

Judge Bates observed that it is about more than just timing. Some problems cannot be solved by a rule. We won't solve government transitions by rule.

Mr. Freeman stated that a rule may not be worth the candle. But it could require timeliness, make clear that intervention on appeal is rare, that intervention

requires showing that amicus participation is not adequate, and clarify that an interest in precedent is not enough. There are then the harder questions about the nature of the interest. There is not a reason to give up yet.

A judge member stated that he did not favor tabling the matter. We should keep thinking about it and trying to size it correctly. The subcommittee should keep thinking, with the FJC's research, and we should talk about it again in six or twelve months.

A different judge member noted that intervention on appeal comes in so many different flavors that it is hard to craft a rule that applies to all cases. Sometimes someone will seek to intervene solely to be able to file a cert petition. Courts can reach a fair resolution in the absence of a rule. A rule could produce a lot more motions to intervene.

Mr. Reagan confirmed that the FJC was happy to continue to work on this project. It's busy, but busy doing things like this.

B. Rule 15 (24-AP-G)

Professor Huang presented the report of the Rule 15 subcommittee. ((Agenda book page 271). The subcommittee is considering a suggestion to fix a potential trap for the unwary in Rule 15. The "incurably premature" doctrine, which governs in the D.C. Circuit and maybe in others, holds that if a motion to reconsider an agency decision makes that decision unreviewable in the court of appeals, then a petition to review that agency decision is not just held in the court of appeals awaiting the agency's decision on the motion to reconsider. Instead, the petition for review is dismissed, and a new petition for review must be filed after the agency decides the motion to reconsider.

Rule 4, dealing with appeals from district court judgments, used to work in a similar way with regard to various post-judgment motions. But in 1993, Rule 4 was amended to provide that such a premature notice of appeal becomes effective when the post-judgment motion is decided. The suggestion is to do for Rule 15 what was done for Rule 4.

Mark Freeman and his team discovered that this suggestion was previously made by Judge Williams in 1995. Some of the material from the committee's prior consideration of that suggestion is in the agenda book at page 202. The suggestion advanced far enough to be published for public comment, and the latest version of the proposal before the committee is in the agenda book at page 272.

The committee dropped the proposal due to the strong opposition of the D.C. circuit judges who were active at the time. Based on a reading of the minutes from that prior consideration, it seems that the committee favored the proposal and was

not terribly persuaded by the D.C. circuit judges. But it nevertheless dropped the proposal due to their opposition.

The subcommittee thinks that it could make some changes to improve the prior proposal and is open to studying the matter further. Technology and administrative changes might reduce the concerns that motivated the D.C. circuit judges in the past. Plus, while this is very much a D.C. Circuit issue, a broader range of circuits deal with agency challenges. Should we see what that D.C. Circuit thinks now? Its docketing statement asks if there has been a motion for reconsideration.

A judge member noted that this is not just a D.C. Circuit issue. Some 38% of the cases in the Ninth Circuit are agency cases. A different judge member noted that he is open to taking a look at this. A liaison member added that the D.C. Circuit is not as dominant in this area as it used to be. Mr. Freeman observed that he is not sure that the issue arises in immigration cases, with a judge member adding that in the immigration context a motion for reconsideration does not affect the finality of a removal order. Mr. Freeman added that the governing statutes vary on this issue from one agency to another. The doctrine puts the government in an uncomfortable position of winning by default rather than on the merits. It is particularly uncomfortable dealing with self-represented litigants who ask if their petition for review is still good; DOJ can't give them legal advice, but there is a trap for the unwary.

A judge member noted that the subcommittee report which suggests (Agenda book 273) that a premature petition could be "treated as filed" on the date the reconsideration motion is decided doesn't solve the problem. There is still an open appeal that is abated. Professor Huang responded that the time it is deemed filed may affect things other than the stats, such as the statute dealing with petitions filed in multiple circuits. The subcommittee has not studied that possible interaction.

Judge Eid said that she would follow up with chief judge of the D.C. Circuit. Judge Bates suggested other circuits would be interested as well. A judge member noted that the Ninth Circuit sees lots of FERC cases.

The committee took about a one-hour break for lunch and resumed at approximately 1:05.

VI. Discussion of Recent Suggestions

A. Reopening Time to Appeal (24-AP-M)

The Reporter presented a new suggestion from Chief Judge Sutton regarding Rule 4. (Agenda book page 292). Rule 4(a)(6) permits a district court to reopen the time to appeal in limited circumstances. In the *Winters* case [*Winters v. Taskila*, 88

F.4th 665 (6th Cir. 2023)], a habeas petitioner did not receive notice of the district court's decision denying relief until long after the time to appeal. The court of appeals held that the district court properly treated the notice of appeal as a motion to reopen the time to appeal and granted that motion. There was no need to file an additional notice of appeal because the original notice of appeal ripened once the motion to reopen the time to appeal was granted. In addition, the notice of appeal was construed as a request for a certificate of appealability.

Chief Judge Sutton noted that one could fairly wonder about allowing a single two-sentence document to be a notice of appeal, a motion for an extension of time, a motion to reopen, and a request for a certificate of appealability. He pointed out the lack of agreement in the courts of appeals on these issues, and suggested this committee take a look.

Later, the Court of Appeals for the Fourth Circuit insisted that an appellant must file a notice of appeal after a motion to reopen the time to appeal is granted—and cannot rely on an earlier notice of appeal that was treated as a motion to reopen. [*Parrish v. United States*, No. 20-1766, 2024 WL 1736340 (4th Cir. Apr. 23, 2024)]. Judge Gregory, joined by three other judges, dissented from rehearing en banc, and urged this Committee to provide guidance.

In light of these opinions, the Reporter suggested the creation of a subcommittee. Judge Eid appointed Mr. Hicks, Judge Nichols, Judge Wesley, and Mr. Wolpert.

B. Administrative Stays (24-AP-L)

The Reporter presented a suggestion by Will Havemann to amend Rule 8 to provide limits on administrative stays. (Agenda book 307). Several justices of the Supreme Court have noted problems with the use of administrative stays. A rule could make clear the purpose of administrative stays and perhaps limit their length, by analogy to the way Civil Rule 65 treats TROs. Mr. Freeman agreed that the matter deserves exploration, even if the rules may not be able to solve all the issues.

Judge Eid appointed a subcommittee consisting of Mr. Freeman, Professor Huang, and Mr. Pincus.

C. Various Suggestions from Sai (24-AP-H through K)

The Reporter presented a series of suggestions from Sai. (Agenda book page 237).

Sai suggests that filings avoid using all caps for the names of persons and that proper diacritics be used. Sai appears to be correct, but there is a question whether

this is the sort of problem that is well addressed through rule making. Rule 32 does have some rather precise formatting requirements.

In response to a question, Mr. Wolpert stated that courts of appeal use the district court docket to set up the docket in the court of appeals. He worried about policing the kinds of requirements suggested. A judge member agreed that Sai's approach is better, but deferred to Mr. Wolpert, not wanting to give the clerk's office one more task in bouncing briefs.

The Reporter mentioned that there is a typography guide in the Seventh Circuit. A lawyer member did not think that this is much of an appellate problem.

Without opposition, the committee agreed to remove this item from its agenda.

Sai suggests that many local rules are universal or nearly so and could usefully be moved into the national rules. A judge member stated that there does not appear to be an identified problem and without that would not undertake such significant work. A lawyer member agreed that it would be a lot of work, and he wasn't sure what the payoff would be without a real problem. The judge member moved to remove the item from the agenda, and the Committee agreed without opposition.

Sai suggests that, where the various rules have similar provisions, they be moved to a set of Federal Common Rules. That way, instead of having to coordinate any changes to such provisions across the various rule sets, they could be done in one place. The individual rule sets could provide for differences from the Common Rules where appropriate. If starting from scratch, there is much to be said for such an approach. It is, for example, the way that New Jersey Court Rules work. A judge member agreed that this makes sense in an ideal world. But it would be a lot of work, a massive undertaking, and there is no particular problem. It's not worth the candle. The Committee, without opposition, approved a motion to remove the item from the agenda.

Sai suggests standardizing the page equivalents for words and lines in the various provisions of the Federal Rules. The ratio of words to page in some rules is 260, but in another is about 433 words per page. Sai also suggests eliminating the option of using monospace.

Professor Struve explained that reducing length limits for briefs was the most contentious issue this Committee has faced. The 260-word ratio was selected as the most accurate one; the 30-page limit (which results in the 433 word/page ratio) was chosen as a safe harbor.

The Reporter suggested that it could be simplified today, with the greater availability of word processing. Only briefs prepared without a word processor would need a page or line count option. Mr. Freeman asked how many non-word-processed

briefs are filed. Mr. Wolpert responded that they are mostly by pro se prisoners. If someone uses a word processor, they can use the word limits.

The Reporter suggested that the word limits could be made primary, and the page limit available only for those submitting non-word-processed briefs. Professor Struve said that those who made the earlier changes thought that's what they were doing.

A judge member suggested that there was no real problem and not worth it. A different judge member suggested that maybe everyone should have to comply with the word limit; what would happen if a self-represented person simply stated a word count? Mr. Wolpert said that the clerk's office would generally trust that word count unless a judge cried foul. There is not a problem that needs fixing; he has never seen a line count and doesn't know what monospace is.

Mr. Freeman clarified that if the word to page ratio were fixed, that would allow for more pages by pro se litigants. A lawyer member wondered whether any pro se briefs were long enough for this to matter.

The Committee, without opposition, approved a motion to remove the item from the agenda.

D. Standard of Review (24-AP-E)

The Reporter presented a suggestion from Jonathan Cohen that Rule 29, which requires a statement of the standard of review, be amended to provide guidance about those standards. (Agenda book page 334). He doubted the Federal Rules of Appellate Procedure were an appropriate vehicle for such guidance, but perhaps brief mention of the major examples of standards of review could be helpful to litigants.

A judge member stated that he would not want a brief from someone who needs this and that there is no identified problem. A lawyer member agreed, adding that it could be distracting and invite lots of discussion. Mr. Freeman stated that the most useful clarification regarding standards of review could be whether it should be a freestanding part of the brief or part of the argument section. It seems that whichever one is picked, the brief gets bounced. This is a local rules matter.

The Committee, without opposition, approved a motion to remove the item from the agenda.

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 339). This matter is placed on the agenda to provide an opportunity to discuss whether anybody has noticed

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

VIII. Old Business

The Reporter suggested formal action on suggestions that had been previously considered by not formally acted upon. (Agenda book page 342). These include two suggestions that are being held awaiting action by the Criminal Rules Committee (24-AP-B and 24-AP-C), a comment regarding amicus briefs that was submitted prior to the publication of a proposal for public comment that has been treated as comment by the amicus subcommittee (24-AP-F), and a belated comment on Rule 39 (24-AP-F).

No member of the Committee voiced any concerns about these actions. Mr. Byron stated that no formal action was required on the first three. A judge member moved to remove the final item from the agenda. This motion was approved without opposition.

IX. New Business

No member of the Committee raised new business.

X. Adjournment

Judge Eid thanked everyone for their hard work. She announced that the next meeting will be held on April 2, 2025. The location has not been decided, but it will most likely be somewhere east of the Mississippi.

The Committee adjourned at approximately 1:50 p.m.