COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

MEMORANDUM

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

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

RE: Report of the Advisory Committee on Appellate Rules

DATE: December 6, 2023

I. Introduction

The Advisory Committee on Appellate Rules met on Thursday, October 19, 2023, in Washington, DC. The draft minutes from the meeting accompany this report.

The Advisory Committee has no action items for the January 2024 meeting.

Proposed amendments to Rule 39, dealing with costs on appeal, and to Rule 6, dealing with appeals in bankruptcy cases, have been published for public comment.

The text of those proposed amendments, with Committee Notes, are included in the 2023 Preliminary Draft of Proposed Amendments found at this link. The Advisory Committee expects to present both proposed amendments for final approval at the June 2024 meeting. (Part II of this report.)

It also expects in June 2024 to ask the Standing Committee to publish two proposed amendments for public comment. The first involves Rule 29, dealing with amicus briefs. The second involves Form 4, the form used for applications to proceed in forma pauperis. (Part III of this report.)

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

- creating a rule dealing with intervention on appeal;
- requiring disclosure of third-party litigation funding;
- expanding electronic filing by self-represented litigants; and
- providing greater protection for Social Security numbers in court filings.

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

- making the deadline for electronic filing earlier than midnight;
- a related new suggestion to restore uniformity among courts of appeals by establishing a nationwide filing deadline of 5:00 p.m.;
- a new suggestion regarding Civil Rule 11; and
- a new suggestion to amend Appellate Rule 17 to require the filing of certain material from an agency record.

II. Items Published for Public Comment

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

Rule 39 governs costs on appeal. Some costs are taxable in the court of appeals, while others are taxable in the district court. In *City of San Antonio v. Hotels.com*, 141 S. Ct. 1628 (2021), the Supreme Court held that Rule 39 does not permit a district court to alter a court of appeals' allocation of costs, even those costs that are taxed by the district court. The Court also observed that "the current Rules and the relevant

statutes could specify more clearly the procedure that such a party should follow to bring their arguments to the court of appeals." *Id*. at 1638.

The proposed amendment to Rule 39 is designed to codify the holding in *Hotels.com* while providing a clearer procedure. It does not, however, establish a mechanism to ensure that the judgment winner in district court is aware of the cost of the supersedeas bond early enough to ask the court of appeals to reallocate the costs. At the request of the Appellate Rules Committee, the Civil Rules Committee is considering an amendment to Civil Rule 62 requiring disclosure of that cost.

At the time the Advisory Committee met in October, no comments had been received. Since then, a single comment, addressed to the allocation of costs to indigent litigants, has been received. The Advisory Committee will consider this comment, and any additional comments received, at its April 2024 meeting. It expects to seek final approval, taking into account public comment, at the June 2024 meeting of the Standing Committee.

B. Appeals in Bankruptcy Cases

Rule 6 governs appeal in bankruptcy cases. The proposed amendment to Rule 6 clarifies the time for filing certain motions that reset the time to appeal in cases where a district court is exercising original jurisdiction in a bankruptcy case. It also clarifies the procedure for handling direct appeals from a bankruptcy court to a court of appeals under 28 U.S.C. § 158(d)(2).

No comments have been received. At its April 2024 meeting, the Advisory Committee will consider any comments it receives. It expects to seek final approval, taking into account public comment, at the June 2024 meeting of the Standing Committee.

III. Possible Amendments for Publication at June 2024 Meeting

A. Amicus Disclosures—FRAP 29 (21-AP-C; 21-AP-G; 21-AP-H; 22-AP-A; 23-AP-E)

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

respond that the Advisory Committee on Appellate Rules had already established a subcommittee to do so.

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

> (i) a party's counsel authored the brief in whole or in part;
>
> (ii) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and
>
> (iii) a person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person.

Notably, the existing rule requires disclosure of contributions by nonparties (other than the amicus itself, its members, or its counsel) if those contributions are earmarked for an amicus brief.

After several years of deliberation, the Advisory Committee expects to seek, at the June 2024 meeting of the Standing Committee, publication for public comment of a proposed amendment to Rule 29.

There were three issues discussed at the June 2023 meeting of the Standing Committee that the Advisory Committee has considered further. These are: 1) the appropriate look-back period for party contributions; 2) the exclusion of party contributions made in the ordinary course of business; and 3) the exclusion of earmarked contributions made by members of an amicus.

Look-back period. The Standing Committee discussed competing concerns in choosing between a calendar year and a prior 12-month look-back period. On the one hand, it would be easier to administer a rule that required an amicus to review only its prior calendar year contributions. On the other hand, such a disclosure rule might be too easy to evade and would fail to capture contributions that are of most concern: those made right at the time that the amicus brief is filed.

The Advisory Committee believes that it has found a solution. First, to minimize the burden, use fiscal years rather than calendar years. Second, and more importantly, use the prior fiscal year to determine the disclosure threshold, but the 12-month period before filing the brief to determine what contributions need to be disclosed. Under this approach, an amicus would look at its revenue for the prior fiscal year, calculate 25% of that amount, and then see whether a party has contributed more than that amount in the 12 months before filing the brief.

Ordinary course of business. Prior working drafts excluded from disclosure "amounts unrelated to the amicus curiae's amicus activities that were received in the form of investments or in commercial transactions in the ordinary course of business." Discussion at the June 2023 meeting of the Standing Committee suggested that this provision was confusing. The Advisory Committee thinks it best to drop this provision. It was derived from the AMICUS Act, which set a disclosure threshold at 3%. However sensible the exclusion might be with a 3% threshold, it seems unnecessary with a 25% threshold. Not only is the burden of disclosure much less with the higher threshold, but the reason for the exclusion is also much less.

Earmarked contributions by members of an amicus. It is important to emphasize that the current rule requires disclosure of any contribution earmarked for a particular brief—no matter how small the amount—unless the contributor is the amicus itself, its members, or its counsel. That is, the current rule broadly requires the disclosure of earmarked contributions, even by a nonparty, while also protecting from disclosure all earmarked contributions by members of an amicus (other than by a party or its counsel).

At the June 2023 meeting of the Standing Committee, the Advisory Committee presented two different options. One option was essentially the same as the current rule in that it would require disclosure of any contribution earmarked for a particular brief—no matter how small the amount—unless the contributor is the amicus itself, its members, or its counsel. The second option would set a dollar threshold for disclosure of earmarked contributions, thereby compensating to some extent for the elimination of the exception for members and enabling anonymous crowdfunding of an amicus brief.

The Advisory Committee thinks that the best solution is to set a dollar threshold and retain the member exclusion, but to limit the member exclusion to those who have been members for at least 12 months. In effect, such a rule would treat recent members as nonmembers, thereby blocking the easy evasion of the current rule. A newly created amicus would not have to reveal its members but would have to state the date of its creation.

A clean version of a working draft along these lines follows. The Advisory Committee particularly welcomes comments from the Standing Committee whether the approaches to these three issues appropriately resolve the competing concerns.

Rule 29. Brief of an Amicus Curiae

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

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

(2) **When Authorized**. An amicus curiae brief that brings to the court's attention relevant matter not already brought to its attention by the parties may be of considerable help to the court. An amicus curiae brief that does not serve this purpose burdens the court, and its filing is not favored.

(3) **Striking a Brief**. A court of appeals may strike an amicus brief that would result in a judge's disqualification.

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

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

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

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

(D) a concise description of the identity, history, experience, and interests of the amicus curiae, together with an explanation of how the brief and the perspective of the amicus will be helpful to the court;

(E) unless the amicus is the United States or its officer or agency or a state, the disclosures required by Rule 29(b) and (d);

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

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

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

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

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

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

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

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

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

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

(4) whether a party, 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.

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

(d) **Disclosing a Relationship Between the Amicus and a Nonparty**. An amicus brief must name any person—other than the amicus, or its counsel—who contributed or pledged to contribute more than $1000 intended to fund (or intended as compensation 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. 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.

(e) During Consideration of Whether to Grant Rehearing.

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

(2) **Length**. The brief must not exceed 2,600 words.

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

Two other issues arose at the October meeting of the Advisory Committee. The Advisory Committee will consider these further in the spring but would welcome any comments now.

First, there is some question whether—and how far—the Appellate Rules should follow the Supreme Court in permitting amicus briefs. The current Appellate Rule requires most amici (other than the United States or a state) to obtain either leave of court or consent of the parties. The Supreme Court has recently amended its Rule 37 to eliminate the requirement that an amicus obtain either leave of court or consent of the parties. When the Advisory Committee first discussed this development, it saw no reason not to follow the Supreme Court's lead. But at its October 2023 meeting, new concerns were raised, particularly the risk that an amicus brief filed at the petition for rehearing stage could require the recusal of a judge and

that the provision to strike such a brief doesn't solve the problem because there is a window of time—after the panel decision but before en banc review is granted—when there is no entity in a position to strike such a brief. For this reason, the Advisory Committee is considering leaving the current requirements in place, at least at the rehearing stage.

We note for the Committee's information that, subsequent to the October meeting of the Advisory Committee, the Supreme Court promulgated its Code of Conduct. It provides, "Neither the filing of a brief *amicus curiae* nor the participation of counsel for *amicus curiae* requires a Justice's disqualification." Canon 3B(4). This provision of the Supreme Court's Code does not match current Appellate Rule 29(a)(2), which empowers a court of appeals to strike or prohibit the filing of an amicus brief that would result in a judge's disqualification. The Supreme Court explained this provision of its Code of Conduct this way:

> In contrast to the lower courts, where filing of *amicus* briefs is limited, the Supreme Court receives up to a thousand *amicus* filings each Term. In some recent instances, more than 100 *amicus* briefs have been filed in a single case. The Court has adopted a permissive approach to *amicus* filings, having recently modified its rules to dispense with the prior requirement that *amici* either obtain the consent of all parties or file a motion seeking leave to submit an *amicus* brief. In light of the Court's permissive *amicus* practice, *amici* and their counsel will not be a basis for an individual Justice to recuse. The courts of appeals follow a similar approach to ameliorating any risk that an *amicus* filing could precipitate a recusal. Federal Rule of Appellate Procedure 29(a)(2) states that "a court of appeals may prohibit the filing of or may strike an *amicus* brief that would result in a judge's disqualification."

Code of Conduct Commentary at 11-12.

Second, a question arose whether the term "revenue" adequately captures how nonprofits are funded. Research by the Reporter after the October 2023 meeting reveals that tax forms use either "total revenue" (for non-profits) or "total income" (for business corporations, partnerships, individuals, and trusts and estates). The Advisory Committee will further consider the most appropriate term or terms.

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

The Advisory Committee has been considering suggestions to establish more consistent criteria for granting IFP status and to revise the FRAP Form 4 to be less intrusive. It focused its attention on the one aspect of the issue that is clearly within

the purview of the Committee, Form 4. Form 4 is a form adopted through the Rules Enabling Act, not a form created by the Administrative Office.

The Advisory Committee has developed a working draft of a simplified Form 4 and expects to seek publication for public comment at the June 2024 meeting of the Standing Committee.

IV. Other Matters Under Consideration

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

The Advisory Committee has begun to work on the possibility of a new Federal Rule of Appellate Procedure governing intervention on appeal. About a dozen years ago, the Advisory Committee explored the issue and decided not to take any action. Since then, the Supreme Court has observed that there is no appellate rule on this question. *Cameron v. EMW Women's Surgical Ctr.*, 142 S. Ct. 1002, 1010 (2022). Twice in recent years it has granted cert to address intervention on appeal, but both cases became moot. An academic brief in one of those cases suggested rule making and included a list of items that rule makers might consider. The issue does not seem to be going away.

Initially, the Advisory Committee is looking to follow the general approach of the courts of appeals and limit intervention on appeal to exceptional cases for imperative reasons. It does not want to encourage circumvention of district court discretion or the standard of review. And it does not want to replicate the ambiguity of Civil Rule 24—or take a position on the proper interpretation of that Rule.

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

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

C. Social Security Numbers in Court Filings (22-AP-E)

Previously, the Advisory Committee on Appellate Rules, like other Advisory Committees, have let the Bankruptcy Rules Committee—where the issue is most serious—take the lead. It now appears unlikely that the Bankruptcy Rules Committee will propose amendments requiring full redaction of social security numbers. For that reason, the Advisory Committee on Appellate Rules will address whether the value of consistency across the various sets of rules outweighs the value of requiring full redaction in the Civil, Criminal, and Appellate Rules. Because

Appellate Rule 25 incorporates the other rules, it may not be necessary to amend the Appellate Rules. On the other hand, if there are few if any appellate cases in which it would be necessary for a publicly filed brief or appendix to include a social security number, perhaps the Appellate Rules should broadly require full redaction.

D. Unrepresented Parties; Filing and Service

The Advisory Committee defers to the Reporter for the Standing Committee for any update regarding the joint project dealing with electronic filing and service by unrepresented parties.

E. Comment on Amicus Disclosures (23-AP-E)

A comment on the amicus disclosure project has been submitted by People United for Privacy Foundation. (Agenda book page 203). Because no proposal has yet been published for public comment, this has been docketed as a new suggestion and referred to the amicus subcommittee.

V. Items Removed from the Advisory Committee Agenda

A. Earlier Deadlines (19-AP-E)

The Advisory Committee defers to the Reporter for the Standing Committee for the general update regarding the recommendations of the joint subcommittee dealing with the suggestion that the midnight deadline for electronic filing be moved to an earlier time than midnight.

It adds that, in keeping with the recommendations of that joint subcommittee, the Advisory Committee, without dissent, removed this item from its agenda.

B. Nationwide Filing Deadline (23-AP-F)

Closely related to but distinct from the suggestion just discussed, the Advisory Committee received a new suggestion in response to the adoption of a local rule setting a 5:00 p.m. deadline for filing in the Court of Appeals for the Third Circuit. This suggestion, submitted by Howard Bashman, suggested establishing a nationwide filing deadline of 5:00 p.m. to restore uniformity among courts of appeals. Alternatively, he suggested that the Committee examine the authority of the Court of Appeals for the Third Circuit to have established a 5:00 p.m. deadline in that circuit or that the Committee recommend that it reinstate the midnight deadline.

The Advisory Committee, without dissent, removed this item from its agenda.

C. Civil Rule 11 (23-AP-G)

The Advisory Committee received a new suggestion by Andrew Straw, who disagrees with a passage contained in the Spring 2023 agenda book of the Civil Rules Committee.

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

D. Record in Agency Cases—Rule 17 (23-AP-H)

The Advisory Committee received a new suggestion by Thomas Dougherty, who suggests the Rule 17 be amended to require an agency, if it cites a page of its record in a brief, to file the pages of the full section or titled portion containing that page, as well as any pages that are cross-referenced on that cited page. Such a rule would require the inclusion of completely unnecessary material. In addition, it is not clear why the existing rule—which requires that any part of the record must be sent to the court if the court or a party so requests—is inadequate.

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