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



# MEMORANDUM

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

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

**RE:** Report of the Advisory Committee on Appellate Rules

**DATE:** May 13, 2022

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## I. Introduction

The Advisory Committee on Appellate Rules met on Wednesday, March 30, 2022, in San Diego, California. The draft minutes from the meeting are attached to this report.

The Advisory Committee seeks final approval of two matters.

First, it seeks final approval of proposed amendments to Appellate Rule 2 and Appellate Rule 4. These proposed amendments are discussed in a separate memo contained in the agenda book as part of the package of CARES Act amendments.

Second, it seeks final approval of proposed amendments to Appellate Rule 26 and Appellate Rule 45 to reflect a new federal holiday, Juneteenth National Independence Day, June 19. These proposed amendments have not been published for public notice and comment. The Advisory Committee does not believe that publication and comment are necessary, because these amendments simply conform to a new statute. (Part II of this report.)

The Advisory Committee also seeks publication of a minor change to the Appendix of Length Limits. (Part III of this report.)

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

- expanding disclosures by amici curiae;
- clarifying the process for challenging the allocation of costs on appeal;
- regularizing the criteria for granting in forma pauperis status and revising Form 4;
- in conjunction with other Advisory Committees, expanding electronic filing by pro se litigants;
- in conjunction with other Advisory Committees, making the deadline for electronic filing earlier than midnight;
- in conjunction with the Civil Rules Committee, amendments to Civil Rules 42 and 54 to respond to the Supreme Court's decision in *Hall v. Hall*, 138 S. Ct. 1118 (2018), which held that consolidated actions retain their separate identity for purposes of appeal; and
- a new suggestion to identify the amicus or counsel who triggered the striking of an amicus brief.

The Advisory Committee also considered one item and removed it from its agenda (Part V of this report):

- a suggestion to create standards for recusal based on the submission of amicus briefs.

## II. Action Item for Final Approval

### Juneteenth

On June 17, 2021, President Biden signed into law the Juneteenth National Independence Day Act, P.L. 117-17 (2021) which amends 5 U.S.C. § 6103(a) to add to the list of public legal holidays "Juneteenth National Independence Day, June 19."

To reflect the new public legal holiday, the Advisory Committee approved an amendment to Federal Rule of Appellate Procedure 26(a)(6)(A) to insert the words "Juneteenth National Independence Day," immediately following the words "Memorial Day." The Advisory Committee further recommends that this amendment be given final approval without publication. See Procedures for Committees on Rules of Practice and Procedure § 440.20.40 ("The Standing Committee may also eliminate public notice and comment for a technical or conforming amendment if the Committee determines that they are unnecessary.").

After the meeting, the Advisory Committee noticed that the list of holidays is repeated in Federal Rule of Appellate Procedure 45(a)(2) and voted by email to add Juneteenth to that Rule as well.

Other Advisory Committees have considered parallel amendments. Here is the proposed amended text of Rule 26(a)(6):

**Rule 26. Computing and Extending Time**

**(a) Computing Time. * * ***

*** * * * ***

(6) **"Legal Holiday" Defined.** "Legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Juneteenth National Independence Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, or Christmas Day;

(B) any day declared a holiday by the President or Congress; and

(C) for periods that are measured after an event, any other day declared a holiday by the state where either of the following

is located: the district court that rendered the challenged judgment or order, or the circuit clerk's principal office.

* * * * *

**Committee Note**

The amendment adds "Juneteenth National Independence Day" to the list of legal holidays. See Juneteenth National Independence Day Act, P.L. 117-17 (2021) (amending 5 U.S.C. § 6103(a)).

And here is the proposed amended text of Rule 45(a)(2):

**Rule 45. Clerk's Duties**

**(a) General Provisions.**

* * * * *

(2) **When Court Is Open.** The court of appeals is always open for filing any paper, issuing and returning process, making a motion, and entering an order. The clerk's office with the clerk or a deputy in attendance must be open during business hours on all days except Saturdays, Sundays, and legal holidays. A court may provide by local rule or by order that the clerk's office be open for specified hours on Saturdays or on legal holidays other than New Year's Day, Martin Luther King, Jr.'s Birthday, Washington's Birthday, Memorial Day, Juneteenth National Independence Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day.

* * * * *

**Committee Note**

The amendment adds "Juneteenth National Independence Day" to the list of legal holidays. See Juneteenth National Independence Day Act, P.L. 117-17 (2021) (amending 5 U.S.C. § 6103(a)). A stylistic change was made.

## III. Action Item for Approval for Publication

### Appendix on Length Limits (18-AP-A)

At its last meeting in January 2022, the Standing Committee approved proposed amendments to Rules 35 and 40, along with conforming amendments to Rule 32(g) and the Appendix of Length Limits, for publication. These proposed amendments are scheduled to be published in August 2022.

Subsequently, the Advisory Committee learned that one additional conforming amendment should be made to the Appendix of Length Limits. As approved in January, the proposed amendment to the Appendix of Length Limits would change the table that lists the document types and applicable limits, but it would not change the bullet points prior to the table.

The third bullet point currently reads:

* * *

○ For the limits in Rules 5, 21, 27, 35, and 40:

* * *

Given the proposal to transfer the content of Rule 35 to Rule 40, the reference to Rule 35 should be deleted. This bullet point should be amended as follows:

* * *

○ For the limits in Rules 5, 21, 27, ~~35,~~ and 40:

* * *

This correction can be made before publication if the Standing Committee approves.

## IV. Other Matters Under Consideration

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

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

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

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

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

The question of amicus disclosures involves important and complicated issues. One concern is that amicus briefs filed without sufficient disclosures can enable parties to evade the page limits on briefs or produce a brief that appears independent of the parties but is not. Another concern is that, without sufficient disclosures, one person or a small number of people with deep pockets can fund multiple amicus briefs and give the misleading impression of a broad consensus. There are also broader concerns about the influence of "dark money" on the amicus process. Any disclosure

requirement must also consider First Amendment rights of those who do not wish to disclose themselves. *See, e.g., Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

In order to focus the Advisory Committee's consideration of these issues, it reviewed a discussion draft of a possible amendment to Rule 29 prepared by a subcommittee. Neither the Advisory Committee nor its subcommittee endorsed this discussion draft. Again, the point was to provide a basis for a focused discussion of the issues. Underscoring that point, the discussion draft included a series of questions to prompt the Advisory Committee's consideration.

The discussion draft was not presented as a redlined amendment to Rule 29(a)(4)(E), but instead as two new subdivisions of Rule 29, one dealing with disclosures of the relationship between the amicus and a party, Rule 29(c) and one dealing with disclosures of the relationship between the amicus and a nonparty, Rule 29(d).

Here is the discussion draft:

**Rule 29. Brief of an Amicus Curiae**

* * * * *

**(c) Disclosures of Relationship Between the Amicus and a Party**. Unless the amicus curiae is one listed in the first sentence of Rule 29(a)(2), an amicus brief must include the following disclosures:

(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) drafting, preparing, or submitting the brief;

(3) whether a party is a member of the amicus curiae;

[Issue to discuss: should the rule require disclosure that a party is a member of the amicus curiae?

In evaluating the arguments made by an amicus, it is important for a court to know whether an amicus is independent of a party. If an amicus is understood to speak for its members, and one of the members for which it is speaking is a party, but the court does not know about this relationship, the court might think the amicus is more independent of the party than it is.

On the other hand, a party may be a member of an amicus for reasons that have nothing to do with the amicus brief. The risk of disclosure might dissuade some people from joining an organization. And the need to disclose might dissuade an organization from filing an amicus brief. Depending on the size and structure of an organization, an individual member may have little or no control over decisions by the amicus.

A narrower means of furthering the goal of determining whether an amicus is independent of a party might be the next provision.]

(4) whether a party or its counsel has (or two or more parties or their counsel collectively have) a 50% or greater interest in the ownership or control of the amicus curiae; and

[Issue to discuss: should the rule require disclosure that a party or its counsel has control over an amicus, or require disclosure of some lesser interest in the amicus?

As with the prior provision, in evaluating the arguments made by an amicus, it is important for a court to know whether an amicus is independent of a party. If a party has majority ownership or control of an amicus, but the court does not know about this relationship, the court is likely to think that the amicus is more independent of the party than it is.

On the other hand, the need to disclose might dissuade some from filing an amicus brief.

Setting the percentage at 50% means that some parties with considerable influence over an amicus will not be disclosed. Consider, for example, someone with a 40% interest where no one else has more than a 2% interest.

On the other hand, setting the percentage at a lower rate increases the risk that the need to disclose might dissuade some from filing an amicus brief.

The higher percentage might be viewed as a narrower means of furthering the goal of determining whether an amicus is independent of a party. It is less burdensome. But it is also underinclusive.]

(5) whether a party or its counsel has (or two or more parties or their counsel collectively have) contributed 10% or more of the gross annual revenue of the amicus curiae during the twelve-month period preceding the filing of the amicus brief. 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 may be disregarded.

[Issue to discuss: should the rule require disclosure of contributions to an amicus by a party or its counsel and, if so, at what level?

Again, in evaluating the arguments made by an amicus, it is important for a court to know whether an amicus is independent of a party. A party that makes significant contributions to an amicus may have significant influence over that amicus. And if the court does not know about this relationship, it may think that the amicus is more independent of the party than it is.

On the other hand, a party may make significant contributions to an amicus for reasons that have nothing to do with the amicus brief. And the need to disclose contributors might dissuade some people from making significant contributions. Or it might dissuade some recipients of contributions from filing an amicus brief. Depending on the size and structure of an organization, a contributor—even a significant contributor—may have little or no control over decisions by the amicus.

The lower the percentage that triggers disclosure, the greater the burden. But the higher the percentage that triggers disclosure, the greater the likelihood that some parties with considerable influence over an amicus will not be disclosed.

As with the prior provision, the higher percentage might be viewed as a narrower means of furthering the goal of determining whether an amicus is independent of a party. But it is also underinclusive.]

Any required disclosure must identify the name of the party or counsel.

**(d) Disclosures of Relationship Between the Amicus and a Nonparty**. Unless the amicus curiae is one listed in the first sentence of Rule 29(a)(2), an amicus brief must include the following disclosures:

(1) whether any person—other than the amicus, its members, or its counsel—contributed or pledged to contribute money intended to fund (or intended as compensation for) drafting, preparing, or submitting the brief;

[Issue to discuss: should the rule exclude from the disclosure requirement those earmarked contributions to an amicus that are given by a nonparty who is a member of the amicus curiae?

The current rule requires disclosure of earmarked contributions by nonparties, but it excludes earmarked contributions by members of the amicus.

The current rule can be understood as seeking to make sure that the amicus is speaking for itself and its members, rather than simply being a paid mouthpiece for someone else. If an amicus is serving as a paid mouthpiece for someone else but the court does not know this, the court may think that the amicus is presenting its own views rather than the views of the one who funded this brief.

The current rule is easily evaded so long as the nonparty making the earmarked contribution is willing to become a member of the amicus. The distinction between a member and a contributor

might be viewed as artificial, depending on the structure of the amicus. Expanding the disclosure requirement so that earmarked contributions by members must be revealed would block this easy evasion.

On the other hand, members of an organization speak through the organization, and an organization speaks for its members. Having to disclose that a nonparty member made earmarked contributions would discourage members from making such contributions and discourage organizations from submitting such amicus briefs. And the direction of causation may not be clear: Did the member make the earmarked contribution because the amicus wanted to file the brief, needed funding, and asked a generous member? Or did the member make the contribution to prompt the filing of the brief?

The current rule might be viewed as a narrower means of furthering the goal of determining whether an amicus is speaking for itself. But it is also underinclusive because of the possibility of evasion.]

(2) whether any person has a 50% or greater interest in the ownership or control of the amicus curiae; and

[Issue to discuss: should the rule require disclosure that a nonparty has control over an amicus, or require disclosure of some lesser interest in the amicus?

In evaluating the arguments made by an amicus, a court may want to know whether an amicus is controlled by someone else. A person who controls the amicus might have interests that would affect a court's evaluation of the amicus brief but that are obscured by speaking through the amicus. Knowing the identity of such a person would allow a court to take those interests into account.

On the other hand, the need to disclose might dissuade some from filing an amicus brief. This would be more likely than if such disclosure were limited to a controlling interest in the amicus by a party. That's because a rule that requires disclosure of a controlling interest by a nonparty would require disclosure in *every* amicus brief filed by that amicus.

Setting the percentage at 50% means that some nonparties with considerable influence over an amicus will not be disclosed. On the other hand, setting the percentage at a lower rate increases the risk that the need to disclose might dissuade some from filing an amicus brief.

A higher percentage might be viewed as a narrower means of furthering the goal of determining whether an amicus is independent of a nonparty. It is less burdensome. But it is also underinclusive.

There is another approach to the problem that an amicus might effectively be a front for someone else: caveat lector. That is, perhaps courts should simply be skeptical of amicus briefs submitted by unknown entities that do not provide an adequate account of their "interest" as required by Rule 29(a)(3)(A). An amicus with a long track record is far less likely to be a front than one created during litigation.]

(3) whether any person has contributed 40% or more of the gross annual revenue of the amicus curiae during the twelve-month period preceding the filing of the amicus brief. 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 may be disregarded.

[Issue to discuss: should the rule require disclosure of contributions to an amicus by a nonparty and, if so, at what level?

In evaluating the arguments made by an amicus, a court may want to know whether an amicus is being influenced by someone else. A party that makes significant contributions to an amicus may have significant influence over that amicus. A person with significant influence over the amicus might have interests that would affect a court's evaluation of the amicus brief but that are obscured by speaking through the amicus. Knowing the identity of such a person would allow a court to take those interests into account. And knowing the identity of significant contributors behind a number of amici in a given case would enable the court to see that what may appear to be broad support for a position has been manufactured.

On the other hand, a party may make significant contributions to an amicus for reasons that have nothing to do with the amicus brief. And the need to disclose contributors might dissuade some people from making significant contributions. Or it might dissuade some recipients of contributions from filing an amicus brief. Depending on the size and structure of an organization, a contributor—even a significant contributor—may have little or no control over decisions by the amicus.

The lower the percentage that triggers disclosure, the greater the burden. But the higher the percentage that triggers disclosure, the greater the likelihood that some persons with considerable influence over an amicus will not be disclosed.

In balancing these two, it might be appropriate to set a higher percentage for nonparty contributors than party contributors. A party obviously has a stake in the outcome, while a nonparty contributor may not.

Here again, caveat lector might be an alternative. If a court doesn't know—and can't tell from the statement of interest submitted by the amicus—that an amicus (or group of amici) warrants trust, it shouldn't provide that trust.]

Any required disclosure must identify the person.

### *Rule 29(c)—Relationship Between the Amicus and a Party*

*Rule 29(c)(3)*. The discussion draft includes a provision, Rule 29(c)(3), that would require the disclosure of whether a party is a member of the amicus. The Advisory Committee does not think that this information is sufficiently helpful to warrant disclosure. Membership by itself does not indicate influence by the party over the amicus. And disclosure may produce substantial costs.

*Rule 29(c)(4)*. The discussion draft includes a provision, Rule 29(c)(4), that would require the disclosure of whether a party or counsel has a 50% or greater interest in the ownership or control of the amicus. There is more support for this kind of disclosure because it does indicate whether a party can tell an amicus what to file.

*Rule 29(c)(5)*. The discussion draft includes a provision, Rule 29(c)(5), that would require the disclosure of whether a party or counsel has contributed 10% or more of the gross annual revenue of the amicus during the prior twelve months. The 10% figure was drawn from the corporate disclosure rule, Rule 26.1, but only as a place to start discussion.

Members of the Advisory Committee have a variety of views on this provision. One view is that it should not be adopted at any level: no matter how high the percentage of contributions, what matters is control, and that is covered by (c)(4); alternatively, the percentage should be 50%. Another view is that while 10% is too low, once a contributor is providing 25% or 33% of the revenue of an amicus, that's substantial.

And whatever level is set here, perhaps it should be the same in (c)(4) and (c)(5). There may not be a sufficient difference between the ownership and control issue in (c)(4) and the contribution issue in (c)(5) to warrant different percentages.

### *Rule 29(d)—Relationship Between the Amicus and a Nonparty*

*Rule 29(d)(1)*. The current rule requires disclosure of earmarked contributions by nonparties, but it excludes earmarked contributions by members of the amicus. A key question here is whether to maintain that exclusion.

The Advisory Committee is struggling with this issue. One perspective is that the worry is an amicus serving as a paid mouthpiece. Because an amicus speaks for its members, the exclusion should remain.

Another perspective is that if someone is funding a specific brief—as opposed to supporting the organization more generally—judges are entitled to know. In addition, a member exclusion makes for easy evasion: an outsider who wants to make an earmarked contribution without disclosure can simply become a member.

But different amicus organizations operate differently. Some may do more general funding. Others may do funding project by project. The risk of evasion by becoming a member may be low compared to the chilling effect of disclosure. Perhaps only earmarked contributions by members that are sufficiently large should be disclosed. Disclosure that many people have contributed small amounts is not useful.

Disclosure of whether someone funded more than one amicus brief in a case might be useful, but no one amicus may know this information and be able to disclose it.

The Advisory Committee will give more thought to (d)(1).

*Rule 29(d)(2)*. The discussion draft includes a provision, Rule 29(d)(2), that would require the disclosure of whether a nonparty has a 50% or greater interest in the ownership or control. It is parallel to Rule 29(c)(4).

*Rule 29(d)(3)*. The discussion draft includes a provision, Rule 29(d)(3), that would require the disclosure of whether a nonparty has contributed 40% or more of the gross annual revenue of the amicus during the prior twelve months. It is parallel to Rule 29(c)(5), but with a 40% threshold.

Both provisions might help courts and the parties get a better understanding of who is behind amicus briefs and whether someone is single handedly creating what looks like a broad array of amicus briefs—without earmarking contributions for those briefs. There is also a concern that when this happens, it can erode faith and trust in the judiciary by giving the appearance of judges tolerating it and being hoodwinked.

But there are substantial doubts among members of the Advisory Committee whether there is a sufficient interest in having such information about nonparties to outweigh the concerns, including constitutional concerns, with requiring disclosure. One less intrusive way to deal with the risk of less disclosure is *caveat lector*: perhaps courts should be skeptical of amicus briefs that do not provide enough information to warrant trust.

### B. Costs on Appeal—Rule 39 (21-AP-D)

The Advisory Committee is exploring whether any amendments to Federal Rule of Appellate Procedure 39 might be appropriate in light of the Supreme Court's decision in *City of San Antonio v. Hotels.com*, 141 S. Ct. 1628 (2021). There, the Court held that Appellate Rule 39 does not permit a district court to alter a court of appeals' allocation of the costs listed in subdivision (e) of that Rule. The Supreme Court observed that the current rules could specify more clearly the procedure that a party should follow to bring their arguments about costs to the court of appeals. It also

noted, without further comment, an argument that the current Rule impermissibly allows for the recovery of costs not listed in 28 U.S.C. § 1920.

The Advisory Committee believes that while costs on appeal are usually modest, one kind of cost—the premium paid for a bond to preserve rights pending appeal (traditionally known as a supersedeas bond)—can be considerable. These bonds are approved by the district court to secure a stay of enforcement of a judgment. For that reason, while the court of appeals allocates which party must pay these costs, the bill of costs is filed in the district court.

While the Advisory Committee is not yet making a proposal, it is currently considering adding a short provision to Appellate Rule 39 that would make clear that a party may seek reconsideration of the allocation of appellate costs by filing a motion in the court of appeals within 14 days after entry of judgment.

The Advisory Committee considered other alternatives. One possibility was an explicit authorization of a motion in the court of appeals after the bill of costs has been filed in the district court. But at that point, the mandate would already have issued. And there would be proceedings involving the same bill of costs pending in both the district court and the court of appeals at the same time. The Advisory Committee also considered the possibility of empowering the district court to do what the Supreme Court held that the current rule does not allow: allocate the costs itself. But this would mean that the district court (which had just been reversed) would be evaluating the relative success of the parties in the court of appeals.

The major difficulty presented by the Advisory Committee's preferred approach is that the party who prevailed in the district court may not know the premium paid for the supersedeas bond at that time. Under the current rules, disclosure of the premium paid might not be made until the party who lost in the district court but prevailed on appeal files the bill of costs in the district court on remand. For that reason, the Advisory Committee suggests that this amendment be coordinated with the Civil Rules Committee. Perhaps Civil Rule 62—which already requires the district court to approve the bond or other security before the stay takes effect—could be amended to require that the premium paid for the bond be disclosed before the bond is approved. That way, the prevailing party in the district court would know well in advance the cost it might be facing if the court of appeals reverses. (Indeed, it might inform some prevailing parties who would otherwise be unaware that they face this risk at all.) Such knowledge might induce the prevailing party to suggest lower cost options or even waive the requirement for a bond. It might also encourage parties to negotiate not only over the face value of the bond, but perhaps even agree on some "other security," Civil Rule 62(b), that protects the interests of the district court winner at little or no out-of-pocket cost to the district court loser.

Negotiations might be more fruitful if the district court's approval of the cost of the premium were required as well.

It might be worth pursuing the amendment to Appellate Rule 39 even if the Civil Rules Committee declines to act. But there is no urgency and there are benefits to coordination. In addition to possible coordination with the Civil Rules Committee, the Appellate Rules Committee also intends to further explore where in Rule 39 the new provision is best placed and whether some time frame other than 14 days may be better.

Here is a working draft:

**Rule 39. Costs**

**(a) Against Whom Assessed.** The following rules apply unless the law provides or the court orders otherwise:

(1) if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise;

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

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

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

A party may seek reconsideration of the allocation of costs by filing a motion within 14 days after entry of judgment.

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

**(c) Costs of Copies.** Each court of appeals must, by local rule, fix the maximum rate for taxing the cost of producing necessary copies of a brief or appendix, or copies of records authorized by Rule 30(f). The rate must not exceed that generally charged for such work in the area where the clerk's office is located and should encourage economical methods of copying.

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

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

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

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

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

(1) the preparation and transmission of the record;

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

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

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

The Supreme Court in *Hotels.com* also dropped a footnote to mention an issue that it was not deciding:

> As the United States points out, see Brief for United States as *Amicus Curiae* 19, n. 4, we have interpreted Rule 54(d) to provide for taxing only the costs already made taxable by statute, namely, 28 U.S.C. § 1920. See *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 441–442 (1987). Supersedeas bond premiums, despite being referenced in Appellate Rule 39(e)(3), are not listed as taxable costs in § 1920. San Antonio has not raised any argument that Rule 39 is inconsistent with § 1920 in this respect. We accordingly do not consider this issue.

*Hotels.com*, 141 S. Ct. at 1636 n.4.

The inclusion of the premium for a supersedeas bond as a recoverable cost has been a part of the Federal Rules of Appellate Procedure since their promulgation in 1967. The Advisory Committee at the time noted:

> Provision for taxation of the cost of premiums paid for supersedeas bonds is common in the local rules of district courts and the practice is established in the Second, Seventh, and Ninth Circuits. *Berner v. British Commonwealth Pacific Air Lines, Ltd*., 362 F.2d 799 (2d Cir. 1966); *Land Oberoesterreich v. Gude*, 93 F.2d 292 (2d Cir., 1937); *In re Northern Ind. Oil Co.*, 192 F.2d 139 (7th Cir., 1951); *Lunn v. F. W. Woolworth*, 210 F.2d 159 (9th Cir., 1954).

A few years before the promulgation of the Federal Rules of Appellate Procedure, the Supreme Court had suggested in dictum that district judges may use Civil Rule 54 to tax costs not specifically authorized by statute. *Farmer v. Arabian Am. Oil Co.*, 379 U.S. 227, 235-36 (1964). But the Supreme Court disapproved that dictum in *Crawford*. 482 U.S. at 443. It held "that § 1920 defines the term 'costs' as used in Rule 54(d). Section 1920 enumerates expenses that a federal court may tax as a cost under the discretionary authority found in Rule 54(d). It is phrased permissively because Rule 54(d) generally grants a federal court discretion to refuse to tax costs in favor of the prevailing party." *Id*. at 441-42. *See also Rimini Street, Inc. v. Oracle USA, Inc.*, 139 S. Ct. 873, 878 (2019) ("Our cases, in sum, establish a clear rule: A statute awarding 'costs' will not be construed as authorizing an award of litigation expenses beyond the six categories listed in §§ 1821 and 1920, absent an explicit statutory instruction to that effect.").

The Court of Appeals for the Seventh Circuit has treated Rule 39(e)(3) as valid under the supersession clause of the Rules Enabling Act,[1] stating that "Congress approved Rule 39 after it passed § 1920." "In short, because Rule 39(e) expressly authorizes the taxation of supersedeas bond costs, it is binding on district courts regardless of whether § 1920 authorizes an award of those costs. By contrast, Rule 54(d) does not outline any specific costs taxable by the district court, and therefore, as discussed in *Crawford*, remains limited by § 1920." *Republic Tobacco Co. v. N. A. Trading Co., Inc.*, 481 F.3d 442, 448 (7th Cir. 2007). *But see Winniczek v. Nagelberg*, 400 F.3d 503, 504 (7th Cir. 2005) ("The counterpart to Rule 54(d) of the civil rules is Rule 39 of the appellate rules, and since section 1920 applies to all federal courts, Rule 39 should likewise be subject to that statute."). The Solicitor General has noted

[1] 28 U.S.C § 2072 ("Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.").

that the opinion in *Republic Tobacco* overstates the approval of Congress: failure to reject is not the same as affirmative approval.

Wright and Miller takes the position that *Republic Tobacco* represents the better view:

> 28 U.S.C.A. § 1920 provides a statutory basis for the recovery of certain costs on appeal. Rule 39(e) contemplates the taxation of some other costs besides those listed in Section 1920; it provides that "premiums paid for a bond or other security to preserve rights pending appeal" are "taxable in the district court." Though the Supreme Court held in the *Crawford Fitting* case that Civil Rule 54(d)'s directive that "costs" should generally be allowed to the prevailing party does not permit a district court to include among those costs items not listed in Section 1920, and though one court has applied the *Crawford Fitting* approach to Appellate Rule 39, the better view is that Appellate Rule 39 merits a different approach: The rulemakers, when they adopted and later amended Rule 39, were well aware that Section 1920 did not list the cost of a bond, and they nonetheless deliberately specified that cost in Rule 39(e).

16AA Fed. Prac. & Proc. Juris. § 3985 (5th ed.) (footnotes omitted). The Solicitor General has noted that clear intentions by rulemakers do not provide rulemakers with authority.

While the Advisory Committee acknowledges these questions, it is not inclined to revisit whether Rule 39(e)(3) is valid under the Rules Enabling Act. That provision has been a part of the Federal Rules of Appellate Procedure for more than fifty years, and the Advisory Committee does not believe that it is necessary to revisit its validity in order to proceed with the minor amendment under consideration.

### C. 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 in forma pauperis (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.

Based on informal information gathering about IFP practice in the courts of appeals, the Advisory Committee thinks that IFP status is rarely denied because the applicant has too much wealth or income and that Form 4 could be substantially simplified while still providing the courts of appeals with enough detail to decide

whether to grant IFP status. Attached to this report is a working draft of a revised Form 4, drawing upon existing and proposed forms created for similar purposes.

Before proceeding further with this project, the Advisory Committee plans to consult first with senior staff attorneys in the circuits. In addition, because Supreme Court Rule 39.1 calls for the use of Appellate Form 4 by applicants for IFP status in the Supreme Court, the Advisory Committee would confer with the Clerk of the Supreme Court before recommending publication.

In reviewing this working draft, the Standing Committee should bear in mind the governing statute. The statute, as amended by the Prison Litigation Reform Act, makes little sense. It provides, in relevant part, that:

> any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor.

28 U.S.C. § 1915. It switches, mid-sentence, from referring to a "person" who submits an affidavit to "such prisoner" whose assets must be stated in the affidavit and then back again to the "person" who is unable to pay fees. To make sense of this provision, courts have generally read it to require any *person* seeking IFP status to submit a statement of all assets such *person* possesses, even if the person is not a prisoner.

The working draft Form 4 does require that applicants for IFP status state their total assets. It does not, however, require applicants to separately state each asset. Perhaps some big-ticket items should be broken out.

### D. Joint Projects

The Advisory Committee has nothing new to report regarding:

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

2) the joint subcommittee considering the final judgment rule in consolidated actions after *Hall v. Hall*, 138 S. Ct. 1118 (2018), decided that consolidated actions retain their separate identity.

With regard to the issue of electronic filing by pro se litigants, the reporters have met and discussed a preliminary draft of a detailed study by the Federal Judicial

Center. At this preliminary stage, what appears most significant from the perspective of the Appellate Rules is that some courts of appeals generally permit pro se litigants to use electronic filing, that all do at least sometimes, and that courts that have allowed electronic filing generally find that the reality is better than their fears.

### E. New Suggestions

Three comments have already been received regarding amicus disclosures. Because there has not yet been a proposal published for public comment, these comments have been docketed as new suggestions. (21-AP-G; 21-AP-H; 22-AP-A). The amicus subcommittee has treated these comments as intended.

Another new suggestion is related to amicus briefs and disqualification. The suggestion is that when an amicus brief is not allowed to be filed or is struck under Rule 29, the court identify each amicus or counsel that would cause the disqualification. (22-AP-B). It will be considered by a subcommittee and is related to—but distinct from—the item discussed below that the Advisory Committee removed from its agenda.

## V. Item Removed from the Advisory Committee Agenda

### Amicus Briefs and Recusal—Rule 29 (20-AP-G)

In 2018, Rule 29 was amended to empower a court of appeals to prohibit the filing of an amicus brief or strike an amicus brief if that brief would result in a judge's disqualification. The Rule, however, does not provide any standards for when an amicus brief triggers disqualification. Dean Alan Morrison suggested that the Advisory Committee, or perhaps the Administrative Office or the Federal Judicial Center, study the issue and recommend guidelines for adoption.

The Advisory Committee concluded that this matter is not within its purview and removed the suggestion from its agenda.

Appendix

Length Limits Stated in the

Federal Rules of Appellate Procedure

This chart summarizes the length limits stated in the Federal Rules of Appellate Procedure. Please refer to the rules for precise requirements, and bear in mind the following:

- In computing these limits, you can exclude the items listed in Rule 32(f).
- If you use a word limit or a line limit (other than the word limit in Rule 28(j)), you must file the certificate required by Rule 32(g).
- For the limits in Rules 5, 21, 27, ~~35,~~ and 40:

* * *

| | | | | | |
|---|---|---|---|---|---|
| | | * * * | | | |
| Rehearing and en banc filings | ~~35(b)(2) & 40(b)~~<br><br>40(d)(3) | • Petition for initial hearing en banc<br>• Petition for panel rehearing; petition for rehearing en banc<br>• Response if requested by the court | 3,900 | 15 | Not applicable |

# 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** | **Instructions** |
|---|---|
| I swear or affirm under penalty of perjury that, because of my poverty, I cannot prepay the docket fees of my appeal or post a bond for them. I believe I am entitled to redress. 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.) | Complete all questions in this application and then sign it. Do not leave any blanks: if the answer to a question is "0," "none," or "not applicable (N/A)," write in that response. If you need more space to answer a question or to explain your answer, attach a separate sheet of paper identified with your name, your case's docket number, and the question number. |
| Signed: | Date: |

My issues on appeal are:

1. *For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.*

| **Income source** | **Average monthly amount during the past 12 months** | | **Amount expected next month** | |
|---|---|---|---|---|
| | You | Spouse | You | Spouse |
| Employment | $ | $ | $ | $ |
| Self-employment | $ | $ | $ | $ |
| Income from real property (such as rental income) | $ | $ | $ | $ |
| Interest and dividends | $ | $ | $ | $ |
| Gifts | $ | $ | $ | $ |
| Alimony | $ | $ | $ | $ |
| Child support | $ | $ | $ | $ |
| Retirement (such as social security, pensions, annuities, insurance) | $ | $ | $ | $ |
| Disability (such as social security, insurance payments) | $ | $ | $ | $ |
| Unemployment payments | $ | $ | $ | $ |
| Public-assistance (such as welfare) | $ | $ | $ | $ |
| Other (specify): | $ | $ | $ | $ |
| **Total monthly income:** | **$** | **$** | **$** | **$** |

2. *List your employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)*

| **Employer** | **Address** | **Dates of employment** | **Gross monthly pay** |
|---|---|---|---|
| | | | $ |
| | | | $ |
| | | | $ |

3. *List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)*

| **Employer** | **Address** | **Dates of employment** | **Gross monthly pay** |
|---|---|---|---|
| | | | $ |
| | | | $ |
| | | | $ |

4. *How much cash do you and your spouse have? $_____*

*Below, state any money you or your spouse have in bank accounts or in any other financial institution.*

| **Financial Institution** | **Type of Account** | **Amount you have** | **Amount your spouse has** |
|---|---|---|---|
| | | $ | $ |
| | | $ | $ |
| | | $ | $ |

***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.***

5. *List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.*

| **Home** | **Other real estate** | **Motor vehicle #1** |
|---|---|---|
| (Value) $ | (Value) $ | (Value) $ |
| | | Make and year: |
| | | Model: |
| | | Registration #: |

| **Motor vehicle #2** | **Other assets** | **Other assets** |
|---|---|---|
| (Value) $ | (Value) $ | (Value) $ |
| Make and year: | | |
| Model: | | |

| | | |
|---|---|---|
| Registration #: | | |

6. *State every person, business, or organization owing you or your spouse money, and the amount owed.*

| **Person owing you or your spouse money** | **Amount owed to you** | **Amount owed to your spouse** |
|---|---|---|
| | $ | $ |
| | $ | $ |
| | $ | $ |
| | $ | $ |

7. *State the persons who rely on you or your spouse for support.*

| **Name [or, if under 18, initials only]** | **Relationship** | **Age** |
|---|---|---|
| | | |
| | | |
| | | |

8. *Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate.*

| | **You** | **Your Spouse** |
|---|---|---|
| Rent or home-mortgage payment (include lot rented for mobile home)<br>Are real estate taxes included? [ ] Yes [ ] No<br>Is property insurance included? [ ] Yes [ ] No | $ | $ |
| Utilities (electricity, heating fuel, water, sewer, and telephone) | $ | $ |
| Home maintenance (repairs and upkeep) | $ | $ |
| Food | $ | $ |
| Clothing | $ | $ |
| Laundry and dry-cleaning | $ | $ |
| Medical and dental expenses | $ | $ |
| Transportation (not including motor vehicle payments) | $ | $ |

| | | |
|---|---|---|
| Recreation, entertainment, newspapers, magazines, etc. | $ | $ |
| Insurance (not deducted from wages or included in mortgage payments) | | |
| Homeowner's or renter's: | $ | $ |
| Life: | $ | $ |
| Health: | $ | $ |
| Motor vehicle: | $ | $ |
| Other: | $ | $ |
| Taxes (not deducted from wages or included in mortgage payments) (specify): | $ | $ |
| Installment payments | | |
| Motor Vehicle: | $ | $ |
| Credit card (name): | $ | $ |
| Department store (name): | $ | $ |
| Other: | $ | $ |
| Alimony, maintenance, and support paid to others | $ | $ |
| Regular expenses for operation of business, profession, or farm (attach detailed statement) | $ | $ |
| Other (specify): | $ | $ |
| **Total monthly expenses:** | **$** | **$** |

9. *Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?*

   [ ] Yes [ ] No If yes, describe on an attached sheet.

10. *Have you spent — or will you be spending — any money for expenses or attorney fees in connection with this lawsuit?* [ ] Yes [ ] No

    *If yes, how much?* $ _____

11. *Provide any other information that will help explain why you cannot pay the docket fees for your appeal.*

12. *State the city and state of your legal residence.*

*Your daytime phone number*: (____) _____

*Your age*: _____ *Your years of schooling*: _____

*Last four digits of your social-security number*: _____

# 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 docket fees of my appeal or post a bond for them. I believe I am entitled to redress. 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 legal issue on appeal. Please state your issues on appeal. (Attach additional pages if necessary.)

| My issues on appeal are: |
|---|
| |
| |
| |
| |
| |
| |
| |
| |
| |

| | | |
|---|---|---|
| 1. | Do you receive SNAP (Supplemental Nutrition Assistance Program)? | Yes No |
| 2. | Do you receive Medicaid? | Yes No |
| 3. | Do you receive SSI (Supplemental Security Income)? | Yes No |
| 4. | What is your monthly take home pay from work? | $_____ |
| 5. | What is your monthly income from any other source? | $_____ |
| 6. | How much are your monthly housing costs (such as rent and utilities)? | $_____ |
| 7. | How much are your monthly costs for other necessary expenses (such as food, medicine, childcare, and transportation)? | $_____ |
| 8. | What are your total assets (such as bank accounts, investments, market value of car or house)? | $_____ |
| 9. | How much debt do you have (such as credit cards, mortgage, student loans)? | $_____ |
| 10. | How many people (including yourself) do you support? | |

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 affects your ability to pay the filing fee, please feel free to explain below. (Attach additional pages if necessary.)

| |
|---|
| |
| |
| |
| |
| |