Minutes of the Fall 2021 Meeting of the

Advisory Committee on the Appellate Rules

October 7, 2021

Via Microsoft Teams

Judge Jay Bybee, Chair, Advisory Committee on the Appellate Rules, called the meeting of the Advisory Committee on the Appellate Rules to order on Wednesday, October 7, 2021, at 10:00 a.m. EDT. The meeting was conducted remotely, using Microsoft Teams.

In addition to Judge Bybee, the following members of the Advisory Committee on the Appellate Rules were present: Justice Leondra R. Kruger, Judge Carl J. Nichols, Professor Stephen E. Sachs, Danielle Spinelli, Judge Paul J. Watford, Judge Richard C. Wesley, and Lisa Wright. Acting Solicitor General Brian H. Fletcher was represented by H. Thomas Byron III, Senior Appellate Counsel, Department of Justice.

Also present were: Judge John D. Bates, Chair, Standing Committee on the Rules of Practice and Procedure; Judge Frank Hull, Member, Standing Committee on the Rules of Practice and Procedure, and Liaison to the Advisory Committee on the Appellate Rules; Molly Dwyer, Clerk of Court Representative, Advisory Committee on the Appellate Rules; Bridget M. Healy, Acting Chief Counsel, Rules Committee Staff (RCS); Scott Myers, Counsel, RCS; Julie Wilson, Counsel, RCS; Brittany Bunting, Administrative Analyst, RCS; Shelly Cox, Management Analyst, RCS; Burton DeWitt, Rules Law Clerk, RCS; Marie Leary, Senior Research Associate, Federal Judicial Center; Professor Edward A. Hartnett, Reporter, Advisory Committee on the Appellate Rules; Professor Catherine T. Struve, Reporter, Standing Committee on the Rules of Practice and Procedure; and Professor Daniel R. Coquillette, Consultant, Standing Committee on the Rules of Practice and Procedure.

I. Introduction

Judge Bybee opened the meeting and welcomed guests and observers. He welcomed two new members of the Committee, Judge Carl J. Nichols who is replacing Judge Stephen Murphy, and Justice Leondra Kruger who is replacing Justice Judith French. He thanked Judge Murphy and Justice French for their service. He also thanked those who put everything together for the meeting.

II. Report on Meeting of the Standing Committee

The draft minutes of the January Standing Committee meeting are in the agenda book, along with the report of the Standing Committee to the Judicial Conference.

III. Approval of the Minutes

The draft minutes of the April 7, 2021, Advisory Committee meeting were approved.

IV. Discussion of Matter Published for Public Comment

Proposed Amendments to Rules 2 and 4—CARES Act

The Reporter stated that Rule 2 and Rule 4, which had been developed in close coordination with other Advisory Committees and input from the Standing Committee, was published for public comment. Prior to publication of the agenda book, two comments were received and appear in the agenda book (page 123). Since then, another comment has been received. The Reporter did not think that any the comments warranted further discussion by the Committee. No member of the Committee disagreed, nor did any member have anything else to add at this point. The comment period is open until February, so the Committee can review any additional comments at the spring meeting.

V. Discussion of Matters Before Subcommittees

A. Proposed Amendments to FRAP 35 and 40—Rehearing (18-AP-A)

Professor Sachs presented the subcommittee's report regarding Rules 35 (dealing with hearing and rehearing en banc) and Rule 40 (dealing with panel rehearing). (Agenda book page 137). He noted that the Committee has been considering amendments to these rules for some time and had sought the Standing Committee's permission to publish a draft for public comment, but the Standing Committee remanded for the Committee to take a freer hand in combining and clarifying Rules 35 and 40.

A redline of the subcommittee's proposal is in the agenda book (page 138). Rather than describe Rule 30 as abrogated, the proposal describes it as transferred to Rule 40. Rule 40(a) is designed to tell a party exactly what to do, front-loading the general requirement of filing a single document. Rule 40(b)(2) states clearly four grounds for petitioning for rehearing en banc, and Rule 40(c) incorporates those by reference in stating when rehearing en banc is ordinarily granted. It also reiterates clearly that a court may act sua sponte. The time to seek initial en banc hearing is

changed in Rule 40(g) to the date when a party's principal brief is due. Corresponding changes are made to the Committee Note.

Judge Bybee thanked Professor Sachs, noting how much time he and the subcommittee had put into this project.

The Reporter added that Professor Struve had noticed that the reference in the conforming amendment to Rule 32(g)(1) should be to Rule 40(d)(3)(A), not simply Rule 40(d)(3). He initially referred to the Appendix regarding length limits, but Professor Struve and Mr. Byron clarified that the text of Rule 32—which governs certificates of compliance—is where the conforming amendment needs to be changed.

A judge member thought that Rule 40(a) should include a reference to "both," not simply a reference to a petition for rehearing or a petition for rehearing en banc. A lawyer member noted that the subcommittee had debated whether it was better to refer to two petitions or a single petition seeking two forms of relief. The judge member asked for more information about the nature of the problem.

Mr. Byron stated that in clarifying and combining Rule 35 and Rule 40, an issue arose about how to talk about the situation where a party seeks both panel rehearing and rehearing en banc. He is a little disappointed with where the subcommittee landed. It could be done more simply if it were not for the desire to allow for local rules providing for separate documents. His recollection is that only the Court of Appeals for the Fifth Circuit has such a local rule, and that inquiry was being made about its attachment to that rule.

Judge Bybee stated that he had reached out to the Chief Judge and not received a response, which he took as standing by the existing local rule, but he will follow up.

The judge member who has asked for more information said that he now understood the nature of the problem, that he had not been aware of the practice in the Fifth Circuit and did not resist adding "or both."

A liaison member provided some background, explaining that the proposed amendment would combine Rule 35 and 40, thereby eliminating lots of redundant material. Her court allows petitions to be joined but receives lots of separate petitions. She always liked including "or both," noting that half of the cases are pro se cases.

Professor Sachs was comfortable with adding "or both," but not "or for both." Consensus was reached that the first sentence of Rule 40(a) should read, "A party may seek rehearing of a decision through a petition for panel rehearing, a petition for rehearing en banc, or both."

A lawyer member praised the revision but asked why Rule 40(c) says that "ordinarily" rehearing en banc will not be ordered unless one of the criteria in Rule 40(b)(2)(A)–(D) is met. Professor Sachs responded that it is in existing Rule 35(a) and is designed to reflect the court's discretion, discretion that there is no need to restrict. Judge Bybee added that there can be infighting in a court of appeals over whether it is permissible to use en banc procedures to engage in error correction; leave in "ordinarily." A judge member agreed.

A lawyer member noted that in some places Rule 40 refers to "the petition" while in others it refers to "a petition." Professor Sachs suggested that dealing with the apparent discrepancy could be left to the style consultants. A judge member suggested changing all instances of "the petition" to "a petition"; Professor Struve noted that the Rules contemplate other kinds of petitions as well. Working on a shared screen, the Reporter changed "the petition" to "a petition" in Rule 40(d)(1)(D), (d)(4), and (d)(5), noting that he can raise the issue with the style consultants.

A judge member suggested referring to a "petition under this Rule." Professor Sachs responded that the Rule also governs petitions for initial hearing en banc. A lawyer member suggested being explicit: "a petition for panel rehearing or rehearing en banc." A liaison member agreed that this adds clarity for the unsophisticated lawyers and pro se litigants. Judge Bybee stated that the phrase should be the same in 40(d) and 40 (e). The Committee agreed that both Rule 40(d) and Rule 40(e) should use the phrase "a petition for panel rehearing or rehearing en banc."

The Reporter noted that Rule 40(b)(2)(C) refers to a decision that has addressed "the issue," while Rule 40(b)(2)(D) refers to "one or more questions" of exceptional importance and that when the style consultants had reviewed an earlier version of this proposal, they had asked about the difference between an "issue" and a "question." Apologizing that he had not raised this with the subcommittee, he suggested that the phrase "that has addressed the issue" be deleted from Rule 40(b)(2)(C). A judge member agreed, observing that for decisions to conflict they must involve the same issue, so the phrase is redundant.

Judge Bybee stated that if there were no further comment, he would invite a motion to approve the draft, with the changes made during this conversation, and ask the Standing Committee for permission to publish the proposal for public comment. The motion was made and approved without dissent.

B. Amicus Disclosures—FRAP 29 (21-AP-C)

Danielle Spinelli presented the report of the AMICUS subcommittee. (Agenda book page 153). She explained that the subcommittee has been discussing possible modifications to Rule 29's disclosure requirements. The AMICUS Act would institute a registration and disclosure system like the one that applies to lobbyists and apply

to those who filed three or more amicus briefs per year. What is within our bailiwick are the disclosure requirements of Rule 29.

The underlying concern is transparency. There may be no way to know who exactly is speaking if an amicus is funded by a party or a single entity funds numerous amici. The primary focus of the AMICUS Act is the Supreme Court, but this Committee and the Standing Committee have been asked to consider the issue in the context of the courts of appeals.

The current rule is reproduced on page 153 of the Agenda book. Subsection (i)—which deals with authorship of an amicus brief by a party's counsel—is not at issue. But subsection (ii)—which deals with contributions by a party or its counsel intended to fund an amicus brief—and subsection (iii)—which deals with such contributions by any person other than the amicus itself, its members, or its counsel—are at issue. Subsection (ii) gets at whether a party is really behind an amicus brief. Subsection (iii) gets at whether a non-party is really behind an amicus brief. It is important to note that the existing rule already reaches funding by non-parties. The question is whether the existing rule should be made stronger and less easy to evade.

The subcommittee report addresses the issues involving parties separately from the issues involving non-parties.

It is possible to construe the existing requirement of disclosure regarding contributions "intended to fund preparing or submitting the brief" so narrowly that it covers only the printing and filing of the amicus brief. That problem is easy to fix.

A more complicated issue to deal with involves contributions that are not earmarked for a particular brief but instead are made to the general funds of an amicus with the tacit or implicit understanding that the amicus will advance a party's agenda.

The drafts in the agenda book are not even suggestions. They are thought exercises about what could be done, if the Committee decides to do it, to make the current rule less easily evaded.

The simpler issue can be handled by adding the word "drafting" to the second bullet point on page 158 of the agenda book.

The draft sketches out two possible ways in which the more complicated issue might be addressed. One way is with a rule that requires disclosure if a party has a 10% or greater ownership interest in the amicus curiae, or if a party 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. This is similar to, but is by no means identical to, the AMICUS Act. For example, the AMICUS Act sets the level lower, at 3%. A second way would be with a standard that would call for disclosure if a party

had sufficient ownership of or made sufficient contributions to an amicus that a reasonable person would attribute significant influence regarding the filing or content of the brief. The Committee might choose one, both, or neither. Either approach would call for disclosure, if otherwise appropriate, even if the party were a member of the amicus. Again, the purpose of these drafts is to help the Committee think through the issues.

Issues involving non-parties are more complex, raising arguable constitutional concerns. The subcommittee draft is designed for discussion. It essentially makes the same kinds of changes just discussed to provisions governing non-parties.

The subcommittee seeks further direction from the Committee on how to proceed.

Mr. Byron noted the complexity of the issues and asked whether there is a lot of pressure to address through rulemaking what the proposed legislation is concerned about or whether the issue is just left to the Committee's own judgment whether it is a good idea.

Judge Bates responded that there isn't pressure, but the letter was addressed to the Supreme Court and the Court, rather than doing anything with its own rules, sent it to this process. Ultimately, the issue is perhaps for the Supreme Court, and this Committee should not feel that it has to do something or feel constrained in addressing the issue. Judge Bybee agreed, noting that the issues involving amici are ones that mostly arise in the Supreme Court.

Mr. Byron asked if the subcommittee was making a recommendation, and Ms. Spinelli answered that it was not making one. Mr. Byron thought that this was telling; he doesn't see a problem that needs to be addressed in the appellate rules. Ms. Spinelli responded that the subcommittee sees legitimate concerns, and that while amicus practice is much more significant at the Supreme Court, we have been asked by the Supreme Court to consider the issue. We should be reluctant to say that it is not a problem in the court of appeals so we are not going to do it. There are legitimate concerns about evasion and transparency, but the solution may be too onerous or infringe on constitutional rights. The subcommittee is teeing up these issues for the Committee.

A judge member observed that there does not seem to be a problem in the courts of appeals, but putting that aside, he is not troubled with a percentage rule. It is easy to understand, and the rules already require corporate disclosure. He would be troubled by a standard. That would be a nightmare to police, raising all kinds of factual issues. Ms. Spinelli noted that her preference was also for a rule over a standard, but there was disagreement on the subcommittee so both approaches were presented to the Committee. The judge member responded that some litigation goes for years with the parties fighting over everything, including $500 in costs. The bar

understands the current 10% rule regarding corporate disclosure; the right percentage is open to debate.

The Committee took a short break. When the meeting resumed, the Reporter reminded the Committee that it had begun to discuss rules vs. standards. Ms. Spinelli stated that there are broader concerns to be addressed to provide guidance to the subcommittee.

Professor Coquillette stated that, historically, the committees have favored rules over standards. A judge member observed that a standard would lead to an enormous amount of litigation without extensive guidance. An academic member pointed out that a rule could be overinclusive or underinclusive. Mr. Byron stated that he was not a huge advocate for standards, but that a standard might lead an amicus to err on the side of disclosure. However, if it could lead to motions for sanctions for failure to disclose, that would be problematic. A standard captures the purpose better; he worries that a rule might not do a good job. The 10% threshold, borrowed from Rule 26.1, serves a very different purpose.

Another judge member agreed that rules are preferable to standards. More generally, changes are not necessary for the courts of appeals. The subcommittee memo was helpful in distinguishing between party and non-party. He might be interested in knowing if an amicus is a close affiliate of a party because it could affect the weight judges give to the filing. The issue isn't public appearances; the issue is what weight judges give to an amicus brief. With a non-party, the concerns are way more attenuated, as the memo puts it, whether the amicus is serving as a paid mouthpiece for some other person. Where an amicus has a track record, judges know how much weight to give its brief. The concern that there will be a large number of amicus briefs giving the illusion of broad support is remote at the court of appeals. Maybe there is no real problem calling for any change; alternatively, maybe any amendments should be limited to parties.

Mr. Byron noted that the concerns articulated in the Committee Notes for the existing rule are different than those addressed by the AMICUS Act. Ms. Spinelli agreed, adding that the current rule does reach non-parties, although the rationale for that is harder to see. Concerns regarding parties are clearer and less problematic.

Professor Struve did not recall that there was any deep discussion of parties vs. non-parties at the time the current rule was adopted. It was modeled on Supreme Court Rule 37.6, which included both.

An academic member stated that the existing rule deals with the one-off case where an amicus is acting as a sock puppet. In such a case, where someone funds one brief, it is likely to mislead about who is speaking while unlikely to affect an amicus' ability to function. There is a much greater worry if an amicus must reveal a non-party who provides 10% of the funding of an amicus. CERCLA disclosures can lead

people to decline to enter a transaction. In a trade association, it may be controversial who is paying—or not paying. There will be some chilling of amici, and the benefit to the court is lower. For example, if the Cato Institute submits a brief, we know who they are and learning who funds them does not tell us anything new.

Judge Bybee stated that this is largely a Supreme Court problem, but if this Committee declines to act, then legislation might be enacted, or the Supreme Court might act on its own so that we wind up with it anyway. It's better if we get our first shot at it. We have to take the constitutional question seriously, perhaps with an internal opinion. Judge Bates added that the Supreme Court will get a crack at anything that the rulemaking process produces.

A judge member added that in addition to the Supreme Court, the Standing Committee will look at it. He stated that he's not sure that there's a constitutional problem: the scope is limited to filing a brief in a judicial proceeding. Some kinds of cases in the courts of appeals do draw amici, and sometimes the judges know who an amicus is (the ACLU, the Sierra Club) but sometimes they judges have no idea who they are. Judges don't look to see which way the amicus wind is blowing, but industry information and prognostications about the results of a decision can be useful.

Professor Struve noted that, pursuant to the policy of the Judicial Conference, any memo that went to the full Committee would be part of the public record.

An academic member stated that the need for a constitutional memo should make the Committee hesitate. Even if an amendment would not violate the Constitution, constitutional interests counsel against getting within shouting distance of a constitutional violation. Yes, it would be nice to know who is behind an amicus brief, but we often don't know who is behind speech. If Citizen for Goodness and Wellness file an amicus brief, the danger caused by not knowing who they are is lower than the danger of chilling speech by requiring disclosure.

A judge member stated that we are not talking about all donors, just those who contribute 10% or more. If Mark Zuckerberg is giving 15% of the revenue of an amicus in a case involving section 230 of the Communications Decency Act, that might be worth knowing. Ms. Spinelli reminded the Committee that the existing rule already reaches non-parties. An academic member noted that the current rule reaches one-off amicus briefs while the Committee is considering taking a much more aggressive stance. Rule 26.1 is limited to public companies because it is designed to facilitate recusal. Extending disclosure to non-public companies is a vast expansion. There are dangers from this loss of privacy that have to be compared to the benefits.

The Reporter added that while it is common for this Committee to decline to propose an amendment if it does not see a sufficient problem in the courts of appeals, that approach may not be appropriate in this case. The Supreme Court does not have an Advisory Committee like this one.

A liaison member stated that in her court there are frequently three or four amici on each side, often with acronyms, leaving the judges to not know who they are. A lot of the concern is with the public perception that judges might be influenced by people and not know who they are. A rule would be better than a standard.

Judge Bybee stated that the discussion has been very helpful, that he did not want to cut it off, but asked if the subcommittee had enough guidance.

Ms. Spinelli responded that the discussion was extremely helpful, and that she is happy to hear from judges what they want to know. It seems that the Committee is interested in taking a hard look at more disclosure regarding parties, prefers a rule to a standard, and agrees that a constitutional analysis is needed, while some members are interested in more disclosure regarding non-parties as well.

A lawyer member asked about the exclusion for members, noting that an amicus can switch from calling something a donation to calling it a membership fee. Should this membership loophole be eliminated?

Ms. Spinelli responded that if the disclosure requirements are made more stringent it would make sense to keep the exclusion for members, noting that the letter from Scott Harris indicated that the Supreme Court rule deliberately excluded members in response to a concern about protecting membership lists. An academic member said that the membership provision should not be viewed as a loophole because an amicus is speaking for itself; the concern under the existing rule is that if non-members are funding a particular brief, then it is not that group speaking for itself. The exclusion of members from this provision usefully signals its purpose. He is concerned that if an amicus has nine members, all must be disclosed. PETA and the Sierra Club would have to disclose which members gave more than 10%; he thinks that the number of front groups is much lower than the number of established groups with a donor who gives greater than 10%.

In response to a question from Judge Bates, Ms. Spinelli stated that the subcommittee had not yet addressed issues regarding recusal but that it intends to do so. The Reporter added that the subcommittee might conclude that the issue of recusal is outside the Committee's bailiwick.

Returning to the issue of excluding members from disclosure, Ms. Spinelli indicated her inclination to continue to exclude them. The Reporter noted that there is some tension between expanding the disclosure requirements regarding non-parties while keeping the membership exclusion because an amicus could change donations into membership fees. To use the Mark Zuckerberg example, instead of simply making a large contribution to an amicus, he could become a member of that amicus.

A judge member stated that the devil is in the details. What is a member?

An academic member flagged an additional issue: Does an amicus have to have the capacity to sue and be sued? What kind of entity can be an amicus? As a matter of professional responsibility, it must at least be capable of hiring and firing a lawyer.

The Committee took a lunch break and resumed at 1:45.

C. Relation Forward of Notices of Appeal—Rule 4 (20-AP-A)

Mr. Byron presented the report of the subcommittee (Agenda book page 175). He explained that the Committee had previously decided not to recommend a suggestion that would broadly permit premature notices of appeal to ripen upon entry of a final judgment, fearing that such a rule would create more problems than it would solve and invite premature notices of appeal.

At its last meeting, the subcommittee then focused on two issues.

The first issue involved a circuit split regarding relation forward of notices of appeal taken from orders that could have been, but were not, certified under Civil Rule 54(b). The subcommittee concluded that there is a fairly clean circuit split with the Eighth Circuit not permitting relation forward and most others permitting it. (The Federal Circuit is harder to classify.)

But it is not clear whether it is worth trying to resolve the circuit split. For one thing, the problem is in considerable measure one of the parties' own making: one party files a premature notice of appeal and the other party does nothing about it but continues to litigate the case in the district court. In addition, the Supreme Court might ultimately side with the Eighth Circuit; its approach may be better reasoned if not the better policy. Moreover, among the courts that permit relation forward, there is another split regarding whether that result is based on an interpretation of Rule 4(a)(2) or instead is based on earlier case law. Any amendment would also need to deal with this underlying question. There is also an issue about the scope of the appeal: does it reach decisions made after the notice of appeal but before final judgment? An argument that the pending amendment to Rule 3 might be construed to allow the scope of appeal to reach such decisions is sketched in footnote 1 of the subcommittee report. (Agenda book page 177). It is unlikely that courts will adopt that construction, but we can't be certain.

One possible approach would be to limit Rule 4(a)(2) to its classic, core situation where an appealable decision is announced but, before it is entered on the docket, a notice of appeal is filed, while permitting a court the discretion in other situations to allow relation forward, looking to factors such as whether allowing relation back would prejudice the appellee, how obviously premature the notice of appeal was, and whether the appellee did anything to put the appellant on notice of the problem.

The Reporter added that the subcommittee had considered a more detailed rule but rejected that approach as too complicated. A lawyer member stated that the idea of the approach in the subcommittee report was to capture in a rule what was being done even though not within the plain language of the rule, thereby allowing courts to continue existing practice.

An academic member noted that he appreciated the memo and thought it made a good case for doing something. He did not think the Committee should wait for the Supreme Court to resolve the conflict; it's not the kind of problem that the Supreme Court really has to care about. It's perfectly appropriate for the Court as a rule maker to write a better rule rather than act as an interpreter and shoehorn good policy into the existing rule.

Professor Struve pointed out that this issue is a hardy perennial. About a decade ago the Supreme Court denied a cert. petition and this Committee took up the issue. It declined to act, in part because of the complexities in trying to address the issue and in part because the circuit splits seemed too narrow. The current discussion is a thoughtful one, but the language in the subcommittee report would narrow the grounds for relation forward even as to some situations that the Supreme Court has seemed to have already endorsed (by citing lower court decisions with apparent approval). In particular, the Court seems to have endorsed allowing relation forward when a district court renders a decision that is not final—because contingent on a future event—once the contingency occurs. Perhaps the Committee is now willing to go where it previously feared to tread.

Judge Bybee observed that maybe we are brave or maybe just naïve.

Professor Coquillette recalled some history: He and Judge Lee Rosenthal had been invited to meet with several Justices and received the clear message that the Court does not like to resolve circuit splits regarding procedure. He is not sure that this is the best example, but in general it is appropriate for the Committee to seek to resolve a circuit split rather than wait for the Supreme Court.

Judge Bybee pointed to the open-ended grant of discretion that would be provided by the word "may" without any other qualifications. An academic member noted that "may" could lead to different litigants being treated differently and offered "good cause" as an alternative.

Mr. Byron noted that the subcommittee had not tried to resolve the merger question discussed in footnote one of the memo. Professor Struve agreed that it would be surprising if a court were to buy the argument suggested in that footnote. Plus, no one is likely to rely on that argument: anyone who dug deeply enough to figure out that argument would also have figured out that the better thing to do would be to amend the notice of appeal.

Judge Bybee asked Professor Struve for her reaction to a good cause standard. She replied that it would override a lot of case law and subject parties to the slings and arrows of discretion. She also noted that it would clash in spirit with the pending amendment to Rule 3, which is designed to reduce the loss of appellate rights. There might be pain in the transition, but litigants can adjust.

The Reporter stated that the language in the agenda book is just a sketch designed to get the Committee's feedback on whether something along those lines is worth pursuing. Further refinement would be necessary to deal with the contingency situations noted by Professor Struve as well as situations involving belated Rule 54(b) certifications.

Mr. Byron clarified that these concerns apply not only to a "good cause" standard but also the text as written in the subcommittee report. Perhaps it is better to leave a lopsided circuit split than to risk unknown mischief. Ms. Dwyer stated that pro se litigants—which are involved in half the cases—fall into this trap. The Court of Appeals for the Ninth Circuit liberally construes pro se submissions; there are ugly things under these rocks. The status quo is just fine.

An academic member stated that the reason for the first sentence in the subcommittee language is to narrow existing case law as to when relation forward is mandatory, but a court could rely on its existing case law to determine when it is appropriate to exercise its discretion, under both the "good cause" and "may" standard. Alternatively, a rule could spell out when relation forward is allowed, permitting it if the other party doesn't object and the court didn't notice.

He also asked what happens if the district court wants to reconsider while an appeal is pending. Professor Struve noted that case law allows a district court to proceed if a party notices an appeal from a clearly non-appealable order. The Reporter noted that the subcommittee had considered but decided against codifying that process.

Mr. Byron stated that Rule 4(a)(2) hides some chaos, but that he is not as worried about that as he is about making things more complex and creating more opportunities for motion practice. Existing practice is not perfect and may be rough justice, but an amendment is not necessary; the problem doesn't warrant it.

Judge Bybee asked Mr. Byron and the Reporter whether the subcommittee had enough guidance from the Committee. Both answered no.

A lawyer member stated that she was persuaded by the discussion today to not pursue the amendment. A judge member said it was time to pull the plug. An academic member concluded that if others aren't interested, he will give up. Mr. Byron favored taking it off the agenda.

Mr. Byron then turned to the second issue addressed by the subcommittee, noting that it was more straightforward (Agenda book page 179). Rule 4 treats the need to file a new or amended notice of appeal after disposition of a motion that resets appeal time differently in civil and criminal cases. A new or amended notice is needed in civil cases, but not in criminal cases.

The subcommittee was not satisfied that there was a good reason for this difference in treatment, although it considered some speculation that might be thought to justify it. But either way of making them uniform was not great. If criminal were aligned with civil, there would be a real risk of loss of appellate rights and claims of ineffective assistance of counsel. So, any change would be in the other direction, making civil like criminal. But there does not appear to be a problem calling for a solution.

Ms. Dwyer said that she was unaware of any problem; leave it alone. An academic member agreed.

Mr Byron moved to have the entire item removed from the agenda. There was no objection to the motion. The matter was removed from the agenda and the subcommittee discharged with thanks.

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

Judge Bybee stated that the subcommittee had been waiting for the results of a survey done by Lisa Fitzgerald. Those results have now been received and should be very useful. The subcommittee will review them and report to the Committee. (Agenda book page 182).

VI. Discussion of Matters Before Joint Subcommittees

The Reporter provided a brief update on the status of two matters before joint subcommittees.

First, the joint subcommittee considering the midnight deadline for electronic filing is continuing to gather information. (Agenda book page 185). A judge member noted that he had received lots of calls about this saying that how late associates have to work is none of our business.

Second, the joint subcommittee considering the final judgment rule in consolidated actions is continuing its study. Research by the Federal Judicial Center did not reveal significant problems, but problems may remain hidden. (Agenda book page 187).

VII. Discussion of Recent Suggestions

A. Costs on Appeal—Rule 39 (21-AP-D)

The Reporter introduced the suggestion from Dean Alan Morrison. (Agenda book page 190). Dean Morrison brought to the Committee's attention a then-pending Supreme Court case that led him to believe that Rule 39 is unclear. The Supreme Court has now decided that case and held that Rule 39 does not permit a district court to alter a court of appeals' allocation of the costs. *City of San Antonio v. Hotels.com*, 141 S.Ct. 1628 (2021).

That result seems untroubling. But while typical costs on appeal are modest, such as the appellate docket fee and the costs of printing, Rule 39(e)(3) includes as taxable costs the premium paid for a bond to preserve rights pending appeal, traditionally known as a supersedeas bond. Such a bond is posted by a defendant so that a money judgment is not enforceable pending appeal; the bond protects the ability of a plaintiff to collect if the plaintiff prevails on appeal. The cost of securing such a bond can be high. Under Rule 39, the district court taxes these costs because they were incurred in the district court, but the court of appeals (not the district court) has discretion to apportion those costs.

The Supreme Court stated that the current rules could specify more clearly the procedure that a party should follow to bring their arguments to the court of appeals. It suggested a motion, but there might be difficulties with a post-mandate motion.

In light of the Supreme Court's comment about the current rules, the Reporter suggested the appointment of a subcommittee. Another aspect that the subcommittee might consider is that when a district court is deciding whether to approve a bond it may be concerned with whether the bond is adequate to cover the judgment and whether the surety can pay the bond, but it may not be concerned with the premium paid for the bond. There may also be a question whether the premium for the bond should be a taxable cost at all.

Judge Bybee called for volunteers and appointed a subcommittee. Judge Nichols is the chair of the subcommittee. Judge Wesley and Mr. Byron are members.

B. Electronic Filing by Pro Se Litigants (21-AP-E)

The Reporter introduced the suggestion by Sai to permit electronic filing by pro se litigants. (Agenda book page 213). He noted that this issue has come up repeatedly and that the last time the Committee considered the issue, it decided to await consideration by the Civil Rule Committee. It appears that the various Committees are doing an Alphonse and Gaston routine, waiting for the others to go first. This Committee might decide to continue to wait for Civil, might seek a joint subcommittee or because traditionally Circuit Clerks have been more open to

electronic filing by pro se litigants than District Clerks (perhaps because of the greater number of filings in a case in a district court) this Committee might choose to go first.

Judge Bates stated that with Bankruptcy, Civil, and now Appellate confronting this question, he has decided to convene the reporters to discuss the way to proceed. Professor Coquillette noted that the Committee on Court Administration and Case Management (CACM) has a role as well. An academic member noted that this Committee could also allow pro se electronic filing in any case where it was permitted in the district court. Professor Struve added that each Committee has its own issues to address. There are lots of events in bankruptcy. Some district courts allowed pro se electronic filing because of COVID and did okay. Civil has to deal with case initiating filings, which is not as much of an issue for Appellate. The different committees may recommend different rules. The reporters will coordinate and welcome feedback.

C. Time Frame to Rule on Habeas Corpus (21-AP-F)

Judge Bybee introduced Gary Peel's suggestion that we put into the rules a time frame for the courts of appeals to decide habeas matters. He predicted considerable resistance if we were to attempt to do so.

A lawyer member moved to remove the item from the agenda, and this was done without objection.

VIII. Review of Impact and Effectiveness of Recent Rule Changes

The issue we have been watching is whether courts of appeals are still requiring proof of service despite the 2019 amendment to Rule 25(d) to no longer require proof of service for documents that are electronically filed. Mr. Byron stated that it still happens on occasion in various circuits, but the only one where it continues to be a regular practice is in the Fifth Circuit. He did not ask the Committee to take any action, noting that perhaps the best thing to do would be to bring it to the attention of a local rules advisory committee if one exists in the Fifth Circuit. Ms. Dwyer offered to contact her counterpart in the Fifth Circuit.

IX. New Business

No member of the Committee presented any new business.

X. Adjournment

Judge Bybee thanked the participants, stating that it is a pleasure to work with everyone involved.

The next meeting will be held on March 30, 2022. The hope is that it will be in person. The spring meeting is traditionally in some location other than Washington D.C.

The Committee adjourned at approximately 3:10.