Minutes of the Spring Meeting of the

Advisory Committee on the Appellate Rules

March 29, 2023

West Palm Beach, Florida

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, March 29, 2023, at 9:00 a.m. EDT.

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

Also present in person were: Judge John D. Bates, Chair, Standing Committee on the Rules of Practice and Procedure; Judge Daniel Bress, Member Advisory Committee on the Bankruptcy Rules and Liaison to the Advisory Committee on the Appellate Rules; Andrew Pincus, Member, Standing Committee on the Rules of Practice and Procedure, and Liaison to the Advisory Committee on the Appellate Rules; H. Thomas Byron, Secretary to the Standing Committee, Rules Committee Staff (RCS); Bridget M. Healy, Counsel, RCS; Marie Leary, Federal Judicial Center; Chris Pryby, Rules Law Clerk, RCS; and 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; Professor Daniel R. Coquillette, Consultant, Standing Committee on the Rules of Practice and Procedure; and Tim Reagan, Federal Judicial Center, attended via Teams.

I. Introduction

Judge Bybee opened the meeting and welcomed everyone, particularly the new member of the Committee, George Hicks, and the new liaison from the Bankruptcy Rules Committee, Judge Daniel Bress.

II. Approval of the Minutes

The Reporter noted that Tom Byron had submitted some typographical corrections to the draft minutes of the October 13, 2022, Advisory Committee meeting. (Agenda book page 74). With those corrections, the minutes were approved.

III. Discussion of Matter Published for Public Comment

Judge Bybee presented the subcommittee report about the proposed amendments to Rule 35 and 40 that have been published for public comment. (Agenda book page 95). These amendments transfer the material from Rule 35 to Rule 40 and eliminate redundancies. We have received few comments. The subcommittee considered those comments, and for the reasons explained in the subcommittee memo, made no changes in the amendments as published. The matter is now before the Committee for final approval.

Judge Bybee invited discussion and comment. The Committee had nothing to add, and it voted unanimously to give its final approval to these amendments and recommend that the Standing Committee give final approval to them as well.

IV. Discussion of Matters Before Subcommittees

A. Costs on Appeal—Rule 39 (21-AP-D)

Judge Nichols presented the report of the amicus subcommittee. (Agenda book page 133). He noted that there is an updated draft after input from the style consultants. (Agenda book page 236). He explained that this project was a response to the Supreme Court's decision in *City of San Antonio v. Hotels.com*, 141 S. Ct. 1628 (2021). There, the Court held that Rule 39 does not permit a district court to alter a court of appeals' allocation of the costs and observed that the Rule could be clearer.

The subcommittee dealt with three concerns. First, it sought to make clearer the distinction between the allocation of costs among the parties and the taxation of costs. Allocation is done by the court of appeals, while taxation is done in whatever court is closest to where the costs were incurred. Second, it sought to not hold up the mandate while the allocation of costs is being revisited. The mandate issues, but the court of appeals retains jurisdiction to decide the question of allocation. Third, it looked for ways to make sure that the judgment winner in the district court knows the cost of a supersedeas bond—which can be quite substantial—early enough to ask the court of appeals to reallocate the costs. It did not find a good way to deal with this concern in the Appellate Rules. (Agenda book page 135). The Reporter for this Committee has spoken to the Reporter for the Civil Rules Committee about the possibility of that Committee considering an amendment to the Civil Rules to call for such disclosure in the district court when the bond is procured.

Along the way, the subcommittee discovered other issues, such as a weird lack of parallelism that it sought to clean up. And the style consultants provided their comments.

Judge Nichols then worked through the draft proposal.

Subdivision (a) provides the default rules for allocating costs: who pays and in what percentage. It uses the word "allocated" rather than "taxed," saving "taxed" for deciding the amount. It leaves the parties free to decide otherwise. It also preserves the power of the court of appeals to order otherwise and depart from these default rules.

Subdivision (b) is new. It is not intended to be a substantive change, but to clarify how a party can ask the court of appeals to reconsider the allocation of costs. It makes clear that the mandate is not delayed, and that the court of appeals retains jurisdiction to decide a motion to reconsider the allocation of costs.

Subdivision (c) is also new. It makes clear that the allocation of costs by the court of appeals applies both to costs taxed in the court of appeals and costs taxed in the district court.

In subdivision (d), the word "assessed" is changed to "allocated" in keeping with the distinction between allocation and taxation.

The first part of subdivision (e) is new, fixing a lack of parallelism in the current rule between the costs taxable in the court of appeals, which are not listed in the current rule, and the costs taxable in the district courts, which are listed in the current rule. The rest of subdivision (e) is unchanged, except for clarifying and conforming amendments.

Subdivision (f) is unchanged, other than being relettered (f).

At the last meeting of this Committee, there was discussion of whether this project is worth it. Given the directive from the Supreme Court that the Rule could be clearer, the subcommittee took one more shot. The subcommittee has addressed as many issues as it thinks we can. A big caveat is that the proposal does not include a requirement for the timely disclosure of the cost of a supersedeas bond. Instead, that issue is left for further discussions with the Civil Rules Committee.

Judge Nichols noted that the subcommittee thinks it landed in the right place, that the proposed amendment is ready for publication, and invited discussion. Judge Bates noted that there is an extra "that" in the Committee Note. (Agenda book page 238). A liaison member suggested a more descriptive title for subdivision (c), and the Committee settled on "Costs Governed by Allocation Determination." Mr. Freeman suggested that the Committee Note be expanded to clarify the distinction between

the docketing fee taxable in the court of appeals under 39(e)(1) and the filing fee for the notice of appeal taxable in the district court under 39(f)(4). The Reporter agreed. A judge member noted that 39(f) does not specify a procedure for taxing costs in the district court. The Reporter noted that the rule would leave that to the district court, and Judge Nichols added that litigants would look elsewhere than the Federal Rules of Appellate Procedure for any such rule. The judge member was satisfied with this explanation, and observed that the proposed amendment provides clarity.

The Committee unanimously approved the text of the proposed amendment for publication, with the Reporter to come back later in the meeting with a revised Committee Note.

At the end of the meeting, the Reporter presented the revised Committee Note and it was approved without dissent.

B. Direct Appeals in Bankruptcy—Rule 39

Danielle Spinelli presented the report of the subcommittee on direct appeals in bankruptcy. (Agenda book page 141). She explained that Appellate Rule 6(c) governs direct appeals to the court of appeals in bankruptcy cases. Typically, a bankruptcy court decision is appealable to the district court or bankruptcy appellate panel before it can be appealed to the court of appeals. This two-step takes time, and sometimes bankruptcy appeals need speed. In 2005, Congress added 28 U.S.C. § 158(d)(2), which allows direct appeals from a bankruptcy court to the court of appeals.

There are three steps in this process. First, the bankruptcy court, the district court, the bankruptcy appellate panel, or all of the parties can certify that the statutory criteria for a direct appeal are present. These criteria are similar to those set forth in 28 U.S.C. § 1292(b), but looser, joined by "or" rather than "and." Second, the appellant must file a notice of appeal. Once these two steps are taken, any party may request the court of appeals to authorize a direct appeal.

Appellate Rule 5 was originally designed to deal with permission to appeal under 28 U.S.C. § 1292(b). In 2014, Appellate Rule 6 was amended so that Rule 5 would largely cover direct appeals in bankruptcy as well. It's become clear, however, that Rule 5 doesn't work that well. Rule 5 was written for the situation where there is no appeal at all without authorization by the court of appeals. But in the context of direct appeals in bankruptcy, there is an appeal; the question is which court will hear that appeal.

The subcommittee decided to make Rule 6(c) largely self-contained rather than broadly incorporate Rule 5. It does, however, refer to Rule 5 where necessary.

Judge Bybee observed that a lot of work went into this proposal and that the Committee is fortunate to have Ms. Spinelli. Professor Struve added that she has

watched the progress of this project with admiration; it's a beautiful job, fantastic work. She did have one concern: proposed Rule 6(c)(2)(J) refers only to "sending the record." Back in 2014, this Committee deliberately decided to use the phrase "making the record available"; Rule 6(b)(2)(C) has "make the record available" all over it. She suggested that there was no need for an additional sentence calling for particular action once the court of appeals authorizes a direct appeal.

Ms. Spinelli observed that there could be situations where the district court or BAP has ordered paper records and then the court of appeals authorizes a direct appeal after the record has been sent to the district court or BAP. Professor Struve responded that Bankruptcy Rule 8010 puts the burden on the appellant. Ms. Spinelli asked if we could count on the court to make the record available to the court of appeals. The Reporter stated that a reviewing court of appeals does not necessarily have access to an electronic record unless someone makes it available. Professor Struve noted that this part of the Rule could be short because it is written for the clerks. Mr. Byron stated that "make available" is broader because it encompasses both paper records and various electronic ways.

After some detailed wordsmithing on a shared screen, the Committee reached a tentative consensus on using the title ("Making the Record Available") and the first sentence ("Bankruptcy Rule 8010 governs completing the record and making it available.") from the existing Rule and changing the second sentence in (J) to "When the court of appeals enters the order authorizing the direct appeal, the bankruptcy clerk must make the record available to the circuit clerk." This creates some redundancy with Bankruptcy Rule 8010, but the redundancy doesn't hurt, and it is much simpler than what appears in the agenda book.

The Reporter stated that we had started this discussion by jumping right into the weeds of proposed Rule 6(c)(2)(J) and suggested that we step back and get everyone up to speed. He thought it might make sense for Ms. Spinelli to walk through the rest of the proposal.

She began with Rule 6(b)(1)(C), which inadvertently lacks the word "bankruptcy" before "appellate panel."

Turning to Rule 6(c), the title is changed to match section 158(d)(2).

In subdivision, 6(c)(1), the key change is to make Rule 5 inapplicable except as provided in Rule 6 itself. This reduces the confusion of having to figure out how Rule 5 and Rule 6 go together. It also makes it possible to eliminate the confusing provision in current 6(c)(1)(C).

Subdivision 6(c)(2) provides the additional rules applicable to direct appeals. Subdivision 6(c)(2)(A) provides for the petition authorizing a direct appeal. The petition is also provided for in Bankruptcy Rule 8006, but it is useful to have it in the

Appellate Rules as well. Subdivision 6(c)(2)(B) describes the contents of the petition, requiring the material required by Rule 5(b)(1), the certification, and the notice of appeal. Subdivisions 6(c)(2)(C) and (D) refer to Rule 5. Subdivision 6(c)(2)(E) clarifies what is implicit in the existing rule, that no new notice of appeal is required. Subdivision 6(c)(2)(F) takes some material from Rule 5, but modified for the circumstances of a direct appeal. In particular, it makes clear how to handle filing fees if a fee has already been paid for the appeal to a district court or BAP.

Judge Bybee wondered if the fee for an appeal to a district court or BAP might ever be higher than the fee for an appeal to a court of appeals. No one seemed to think that was a likely possibility.

Mr. Freeman suggested that there was no need for subdivision 6(c)(2)(G), dealing with bonds for costs on appeal. He noted that subdivision 6(c)(1) makes Rule 7 applicable and provides that references in Rule 7 include a bankruptcy court or BAP. Ms. Spinelli agreed that it should be taken out; unlike Rule 5, there is no deadline set.

Subdivision 6(c)(2)(H) provides that Bankruptcy Rule 8007 governs any stay pending appeal. Professor Struve suggested that it would be better if this said that Bankruptcy Rule 8007 "applies to" stays pending appeal, language chosen in the past so as not to suggest that it governs exclusively. Ms. Spinelli noted how helpful Professor Struve's institutional memory is.

Mr. Freeman noted that there sometimes can be a bit of a jurisdictional hole where a party seeks a stay of a bankruptcy order in the district court and the district court either denies it or doesn't act on it. There's no obvious way under the Federal Rules to seek a stay directly in the court of appeals when there is no appeal pending in the court of appeals. Ms. Spinelli agreed that this is a nightmare that she's been through.

Mr. Freeman noted that the Supreme Court can grant a stay directed to a court of appeals before a cert petition has been filed, relying on 28 U.S.C. § 2101(f). But there's no analogous provision for the courts of appeals; the All Writs Act requires jurisdiction before issuing a stay. The only solution they have come up with is to file a mandamus petition to create jurisdiction in the court of appeals and then seek a stay to preserve the status quo so the court of appeals can hear an eventual appeal. Maybe this is sufficiently obscure that we don't need to deal with it. Or maybe this isn't something that the rules can deal with anyway.

Ms. Spinelli responded that the issue is broader than direct appeals. It may not be something that can be fixed by the rules, but it is worth thinking about in the future.

Subdivision 6(c)(2)(I) deals with the record on appeal. The proposed amendment adds a sentence providing that if a party has already filed a document or completed a step required to assemble the record, it need not repeat that step.

We have already discussed subdivision 6(c)(2)(J). Subdivision 6(c)(2)(K) is already in the Rule, as is subdivision 6(c)(2)(L), but it is expanded to require each party to file a representation statement. Mr. Byron noted the word "after" was deleted and asked if that was intentional. Ms. Spinelli responded that it should not be deleted.

After a short break, Judge Bybee asked if the subcommittee is confident enough of this that they are prepared to ask the Committee to refer this to the Standing Committee for publication. Ms. Spinelli said that she believed so. Judge Bybee then opened the floor for discussion on that question.

Mr. Freeman asked how a representation statement differs from an appearance in the court of appeals. Ms. Spinelli said that she didn't know, but that since Rule 12 calls for a representation statement in appeals generally, the subcommittee did not want to delete it here without knowing exactly what the courts of appeals use them for. The Reporter added that this was one of two areas (the other, dealing with the record, has already been discussed) where the bankruptcy reporters, who were otherwise very happy with this proposal, had concerns. In particular, they asked why switch from the current rule, which requires the attorney who sought permission to appeal to file the representation statement, to requiring the attorney for each party to do so.

The Reporter stated that he looked at various local circuit rules, and almost every one requires each counsel to submit a notice of appearance. Some specifically reference Rule 12 and say don't worry about Rule 12; the notice of appearance covers the Rule 12 requirement. Others don't say that, but maybe as a matter of practice it does. It appears that in the Ninth Circuit, they use the representation statement to require the appellant to provide all of the information. The reason to require both sides to file the representation statement is the unique status of direct appeals. We don't know which party is going to be asking for a direct appeal. The idea that any party might seek direct review is what's driving this whole project.

What's the big deal with asking both sides to file a representation statement? They are already filing notices of appearance. Why not simply delete the requirement of a representation statement? That would require revisiting Rule 12, and why do we want to open that up?

Judge Bybee asked if there were any other questions or comments. The Reporter stated that Bridget Healy had alerted him to a style issue in Rule 6(b)(2)(D). The style consultants suggested modest changes to proposed Rule 6(c)(2)(L), and

there is virtually identical language in Rule 6(b)(2)(D). It would seem to make sense to make the same style changes there. Ms. Spinelli agreed.

An academic member returned to the issue of whether there might be a situation where the filing fee for an appeal to a district court or bankruptcy appellate panel might be higher than the fee for an appeal to the court of appeals, and suggested using the word "excess" rather than the word "difference" in Rule 6(c)(2)(F)(ii)(II). Ms. Spinelli responded that such a change would grammatically require other changes. In addition, you've filed the appeal and need to pay the fee for the appeal to the bankruptcy appellate panel, so that there wouldn't be any circumstances in which you'd get a refund. It's simpler to just say "difference."

Professor Struve returned to the issue of representation statements. She was intrigued by them, and looked back at the Committee Note from 1993 that explained that they were adopted as a useful accompaniment to the amendment to Rule 3(c). The idea is to shed more light on who exactly is taking the appeal. For that reason, it might be worth keeping it limited to the party taking the appeal.

Ms. Spinelli was initially attracted to the idea, noting that the appellant is the appellant, regardless of who seeks leave for the direct appeal. The Reporter asked what's the harm in asking everybody to do it, since almost everybody is going to be filing a notice of appearance anyway. Professor Struve thought that there might be cases where there are a lot of parties but few appellants and that this would impose a paperwork requirement, perhaps even on people who haven't retained counsel; she added that perhaps that's not realistic. Ms. Spinelli noted that she initially thought about just deleting this requirement because she has never done it and doesn't understand the point. But given that it's a rule in all appeals, this doesn't seem to be the place to start deleting it; it's fine to limit it to the appellant.

A judge member stated that he has no idea what utility this might have to the clerk, making him loath to change something and running unintended consequences. Ms. Spinelli agreed, noting that in every other situation, it is just the appellant who has to file, so let's keep it limited to the appellant.

In attempting to revise the proposal in this way, however, the Committee struggled. One possibility was to say the attorney who filed the notice of appeal, but there is no notice of appeal filed in the court of appeals. Another was to say the attorney who filed the petition, but that could be the appellee. Another was to say the attorney who filed the notice of appeal in the bankruptcy court, but there may be multiple notices of appeal and sometimes it's necessary to work out who's across the "v." from whom; it may scramble some things and may be more ambiguous as to who's responsible for filing.

Judge Bybee suggested leaving it as drafted even though it is a little over inclusive. Ms. Spinelli agreed that that made sense, noting that there is no way to

really make it align with Rule 12. Professor Struve concluded that this approach makes sense and thanked the Committee for considering the issue.

Judge Bybee invited any further comments. The Reporter noted that we had accommodated virtually everything suggested by the style consultants. Professor Struve said that she admires the work done on this rule. Judge Bybee thanked the subcommittee, particularly Ms. Spinelli for taking the laboring oar.

The Committee agreed, without opposition, to approve the proposed rule as amended at this meeting, with the Committee Note revised to conform to those changes.

C. Amicus Briefs—Rule 29 (21-AP-C; 21-AP-G; 21-AP-H; 22-AP-A)

Judge Bybee presented the report of the amicus disclosure subcommittee. (Agenda book page 163). He noted that we have been working on this for several years, and received very good feedback from the Standing Committee at its January 2023 meeting. The subcommittee met to consider that feedback.

There are three issues to discuss.

The first is a new issue. The Supreme Court has recently changed its rules to no longer require consent before filing an amicus brief. The subcommittee thinks it makes sense for the appellate rules to conform in this regard to the Supreme Court rules.

The second issue involves disclosure of the relationship between a party and an amicus. Working draft Rule 29(b) has four requirements, two of which are in the existing rule. The working draft adds a requirement to disclose whether a party, counsel, or any combination of parties and counsel has contributed 25% or more of the gross annual revenue of an amicus curiae during the 12-month period before the brief was filed. The Standing Committee discussed other approaches, such as banding, but found the 25% level to be reasonable. It expressed some concern about the administrative feasibility of a 12-month lookback period, but the subcommittee is concerned that a prior calendar year approach would open too big a loophole.

The third issue involves disclosure of the relationship between a nonparty and an amicus. The current rule calls for the disclosure of earmarked contributions by any person other than the amicus, its members, or its counsel. The Standing Committee expressed great doubt about expanding disclosure of the relationship between a nonparty and an amicus. The subcommittee offers two alternatives for discussion. Alternative beta is the same as the existing rule, with some modest tightening. Alternative alpha does two things: it removes the exemption for member contributions, and it requires disclosure only of earmarked contributions that exceed

$1000. This alternative closes the member loophole, but by creating a de minimis exception, enables crowd sourcing.

A judge member stated that we have been round and round on this, and this is a reasonable alternative. It will draw attention and fire. Where it ends up is another matter.

A liaison member noted that the phrasing of 26(b)—"party, counsel, or any combination of parties and counsel"—leaves open the possibility that this may include people on opposite sides of the case. This may not be a big issue, but it may be a glitch worth thinking about. There isn't an obvious solution. In response to a question by Judge Bybee, the liaison member stated that pro bono briefs are treated as a contribution by counsel and therefore don't have to be disclosed.

Judge Bates asked if the issue would be solved by referring to a "party, its counsel, or any combination of parties and their counsel"? The liaison member said no because there might be a trade association that has five significant members, one of which is on one side and one on the other in a case. The Reporter wondered whether that's a problem that needs to be worried about; presumably such a disclosure would enhance the credibility of the amicus. The liaison member responded maybe not, but the current perception is that disclosure is bad and people don't like to do it. Maybe it's not an overwhelming obstacle, but a speed bump.

A lawyer member asked for a fifteen-second summary of what the problem is. Judge Bybee called on the Reporter who provided some background on the proposed Amicus Act and the referral by the Supreme Court. Judge Bybee noted that the concern has not so much been on recusal issues, but on what may be useful for judges to know about who is behind a brief, particularly a party. A judge member added that there is a concern about the inequity of effectively letting a party generate four briefs while his adversary has one. A liaison member emphasized the difference between parties and nonparties; where a party has substantial control, that's worth flagging either because of extra pages or manufactured support. It makes sense to have some standard there; the question is coming up with the right standard. That's very different than where we are dealing with nonparties.

A different lawyer member said that the examples of problems pointed to by the drafters of the Amicus Act mostly involved nonparties, leading this member to favor more nonparty disclosure. A judge member added that while there does not seem to be much evidence of a problem involving parties, disclosures about party relationships are a lot less problematic. Questions about nonparty relationships open up lots of other concerns.

Judge Bybee stated that the Committee had spent quite a bit of time trying to craft a rule about nonparties. The general, but not universal, sense has been that it

was not as productive. And we certainly got the view from the Standing Committee that the rule should not go that far.

Mr. Freeman noted that the working draft eliminates the exemption that the government has from these disclosures and suggested that it be restored. A liaison member noted that it could be added to 29(e). The Reporter noted that the subcommittee had considered this and didn't expect it to be a problem for the national government or state governments, but if there was a problem in some offbeat little town, we'd want to know about it. Mr. Freeman noted that the existing rule did not exempt little towns. An academic member added that there might also be various kinds of private-public partnerships. The Reporter asked if the Committee is completely confident that no state AG would ever allow a party to draft a brief in whole or in part.

In response to a question by Judge Bybee, Mr. Freeman stated that while there are borderline questions about what counts as an agency of the United States, there is a lot of substantive content on the question with regard to state action. A lawyer member noted that disclosure by the government is not a burden and this deals with the rare case.

Judge Bates asked if the subcommittee decided not to exempt the state government. Some but not all members of the subcommittee recalled that it had, on the theory that it can't hurt because there is no burden and on the off chance something weird happens, you sure would want to know about it.

A liaison member predicted that the states would see this as a sort of sovereignty question and view it as quite provocative. Mr. Freeman agreed. While he is most interested in the United States and can file a template footnote if needed, it seems unnecessary and likely to provoke. The liaison member predicted that all the states would be pretty upset.

The Committee settled on restoring the exemption by adding it to the beginning of 29(e). (Agenda book page 170, line 45).

Judge Bates asked about the use of the adjective "considerable" in working draft Rule 29(a)(2). Are we asking anyone to make that assessment? Is it wise to ask anyone to make the assessment that a brief is of considerable help. The Reporter stated that he believed that this was taken from the Supreme Court rule.

A liaison member suggested that "when warranted" or "when justified" would be a better header than "when helpful."

Mr. Freeman worried whether the phrase "relevant matter not already brought to its attention by the parties" might invite amici to submit arguments that had been forfeited or waived by the parties. This is more of an issue in the courts of appeals

than in the Supreme Court, from which this provision was drawn. Judge Bybee responded that as far as he was concerned, a waived argument would not be relevant.

A lawyer member observed that if all these disclosures are required, the footnote will become very long. Perhaps the rule could state that if no disclosures are required, that is all that needs to be said. A judge member suggested adding "if applicable" to 29(e). Ms. Spinelli responded that there is value in having to actually say, "No party wrote this brief." She wouldn't want to add "if applicable." The lawyer member agreed because the result might be that there is no footnote and people will wonder whether the requirement was overlooked. The judge member agreed that made sense.

The Rules law clerk asked whether the requirement in 29(c) for a party or counsel who knows that an amicus has failed to make a required disclosure to do so applies to disclosures about adverse parties. Judge Bybee noted that it would be in the interest of an adverse party to do so. The Rules law clerk asked about exempting the United States from this requirement, noting that the exemption as currently framed extends to this provision as well. Mr. Freeman suggested changing the government's exemption so that it would be exempt from 29(b) and (d), but not from (c). Mr. Byron noted that there may not be a problem here because the United States could voluntarily disclose.

Judge Bybee raised a concern about what counts as government knowledge: The IRS might know something that the DOJ does not. Mr. Freeman stated that he is troubled by the knowledge point. Mr. Byron suggested that if the government is going to be exempt from (b) and (d) but not (c), it might make sense to switch (c) and (d).

Ms. Spinelli stated that she is a bit concerned about making a general requirement that applies to all parties and counsel. The purpose was to put an obligation on the specific person who needs to be disclosed to do so if the amicus does not. She would narrow the provision to make clear that we are talking about the party or counsel whose relationship to the amicus is required to be disclosed.

To make this clear, the phrase "a party or counsel" in line 98 could be changed to "the party or counsel." With this change, there is no need to swap (c) and (d).

Judge Bates asked whether the phrase "except as provided in 29(e)(2) and (3)" made sense given the extensive deletions in the rest of 29(e). The Reporter responded that he had the same question last night even though he had typed this up, but it's just the way the redline works. It's hard to see, but there is still a small surviving part of (e)(2) so that the exception still makes sense.

The Committee took a lunch break from 12:15 until approximately 12:45.

The Committee then turned to alternative drafts dealing with the relationship between an amicus and a nonparty. (Agenda book page 171). The alpha version is a little more aggressive than the existing provision; the beta version is very similar to the current rule with some tweaks.

A liaison member asked the committee to consider two situations. In the first, a group is putting together its 2024 budget and plans to file two or three amicus briefs supporting patent protection. So it puts $150,000 in the budget and, based on the number of members, adds $5000 to everybody's dues. In the second, a group is mostly a lobbying or communication organization that doesn't plan to file amicus briefs. But all of a sudden, the Supreme Court grants cert in a critical patent case that is very important to its members. So it has to pass the hat. One group has to disclose, and one doesn't. That's the problem, especially since the perception is that disclosure is not positive.

Mr. Freeman asked if it was clear that disclosure wouldn't be required in the first situation. The liaison member had understood the rule to refer to a particular brief in a case rather than some hypothetical brief that was contemplated. Otherwise, all members would be disclosed all the time, which would be a lengthy footnote for many organizations. Others agreed with the narrower reading.

A lawyer member asked how much a fancy brief costs and how much has to be put in the hat. The liaison member stated that there's a wide range. Law firms sometimes do them at low cost as a business development opportunity; a medium may be in the $35,000 to $75,000 range. How much gets put in the hat really depends on the organization.

The Reporter asked if the concern would be met by a higher dollar threshold. The liaison member said no. A person can become a member the day after. It's like campaign finance: it's really, really hard to draft ironclad rules.

The Rules law clerk asked about contributions in kind. Judge Bybee said that neither version seems to be directed to services in kind.

A liaison member said that this will affect behavior because people will decline to contribute to avoid disclosure. Ms. Spinellli noted that the current rule requires disclosure by nonmembers, even of $1, so it already has that potential effect on behavior. The difference is that the alpha version extends disclosure to members as well, while raising the threshold to $1000.

Mr. Freeman stated that it will deter briefs in the pass the hat category. A liaison member stated that a consortium of contributors usually consists of two or three in his experience, maybe five or six, and that he was not aware of crowd-sourced briefs. A lawyer member added that the Supreme Court bounced a crowd-sourced brief where people had given $50 anonymously.

A judge member stated that he favored the alpha version but suggested that the $1000 threshold is too low. That doesn't give the judge much information. But a much more substantial contribution, $10,000 or $25,000 perhaps, would be more material to weighing the brief. Judge Bybee added that one challenge for any amount would be that it wouldn't be indexed.

Ms. Spinelli joked that the result of such a rule would be that firms would be writing briefs for just under $25,000. A lawyer member suggested that it's about how many people have to get together to pay for the brief; if the number is small enough, it brings into question whether it is really the view of the amicus. This distinguishes the budgeted situation. Judge Bybee added that this is also the problem with amici that are formed with indistinct names and purposes.

A liaison member suggested treating the crowd sourcing issue separately. An academic member raised the possibility of a percentage threshold rather than a dollar threshold. The Reporter suggested borrowing the same 25% from the earlier provision. Ms. Spinelli noted that one problem with a percentage is that you may not know the cost of a brief until after it is filed. She suggested disaggregating the threshold question from the member exemption question.

Mr. Freeman suggested that there are different purposes in play. If the purpose is to make sure that a brief is really on behalf of the organization rather than one or two members, then some test for concentration is appropriate. If we are just trying to inform the public who paid for the brief, then everybody above $1000 is in.

Judge Bybee suggested that a high enough dollar threshold gets at both: who is in control and represented, and who may be pushing this brief. Mr. Freeman asked if 50 members each contributed $1000 would we be comfortable with knowing that it is a bona fide brief on behalf of the organization and not need to know the names of the 50 people. Ms. Spinelli suggested that, based on her experience, you would want the number to be closer to $10,000 to be helpful. Firms sometimes do briefs for pretty nominal fees.

Judge Bybee stated that the discussion has been helpful, but it probably makes sense to send it back to the subcommittee for further thinking and discussion.

The Committee then turned to (b)(4) and the issues of the 25% and 12 month look back. A judge member said that a time period set by the date a brief is due is good because it is not within the filer's control. Another judge member agreed that this is the best look back period. It's not that hard to administer because there aren't many contributors at the 25% level. A liaison member agreed as well.

A lawyer member noted that we are supposed to be tightening the rules and we are considering going from zero to $10,000. Judge Bybee noted that we would pick up members. Perhaps there should be a different threshold for members and

nonmembers. A liaison member noted a presumption that those in the organization are affiliated with the organization and are different from strangers. A lawyer member responded that this was true unless they just joined for that purpose. A different lawyer member asked whether the value of such disclosure depends on people knowing who a particular funder is. And if this is designed for known funders, they are more sophisticated about evading the rules. So is the game worth the candle? A different lawyer member suggested that it would deter briefs that aren't what they appear to be.

A liaison member said that amicus briefs in the courts of appeals almost always come from organizations that are well known.

Mr. Freeman added one issue for the subcommittee to consider: the possibility of a rule that addresses amicus briefs at other stages of the case, particularly on stay applications.

Judge Bybee concluded that we had a very productive discussion to take back to the subcommittee.

V. Discussion of Pending or Deferred Matters

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

Judge Bybee introduced the topic of third-party litigation funding. (Agenda book page 175). He does not think that there is anything for this Committee to do at this point. He noted that the Civil Rules Committee is looking at this issue and we are tagging along for now. As he sees it, this is sort of an information item. He invited others to speak on the issue, but no one did.

B. Decisions on Unbriefed Grounds (19-AP-B)

Judge Bybee introduced the topic of decisions on unbriefed grounds. (Agenda book page 190). There is a suggestion that we should prescribe rules governing when courts decide cases on unbriefed grounds. The question is whether we need a subcommittee to consider this.

The Reporter added some background. When this matter was before the Committee before, the consensus was that this was not appropriate for rulemaking, but that it was appropriate for the then-chair of the Committee to send a letter to the chief judges of the circuits alerting them to the issue. But the Committee also decided to revisit the issue at this time. That's why it is back. Current members of the Committee might think it inappropriate for rulemaking, or might think that we should have a subcommittee look into whether it is appropriate for rule making. In response to a question by Mr. Freeman, the Reporter stated that he did not think that the suggestion was prompted by the Supreme Court decision about the importance of

party presentation, but instead was prompted by the views of the members of the American Academy of Appellate Lawyers. Judge Chagares attended one of their meetings and saw everyone raise a hand in response to the question whether a decision on an unbriefed ground had ever happened to them.

Judge Bybee said that he thinks it is very hard to write a rule about this. When a panel perceives an issue that hasn't been briefed, it usually calls for additional briefing, unless the issue is obvious like the parties not being diverse. He is sure that if you asked district judges if the court of appeals ever addressed issues that had not been before the district court they would say yes, because he has watched arguments in the Supreme Court and wondered, "When did that become an issue? It wasn't in the case when I wrote the opinion in the court of appeals." He invited discussion.

A judge member said that he would not continue discussion on this issue. If parties miss something, jurisdictional or otherwise, that a court feels duty bound to consider, the parties may get annoyed, but it's their fault. That's not always what's going on, but it's not an insubstantial part.

A lawyer member stated that he can't think of a time it happened, although there are shades of grey. Sure, if you take an informal poll at the AAAL meeting you will get lots of people to say yes. But if you followed up to get more detail, you would find a whole lot less. And what would be the authority or enforcement mechanism?

Judge Bybee said that it feels like a best practices suggestion. Mr. Freeman added that panel rehearing is available and that, at least in the outer ranges, there is binding legal authority. *United States v. Sineneng-Smith* [2020] is the most recent significant case. Judge Bybee noted that, in the middle range that calls for a judgment call whether something is an elaboration or fuller exploration of something that was presented, it is very difficult to reduce it to a rule. It was tabled three years ago.

A judge member, stating that three years is long enough, moved to remove the item from the agenda. The motion carried without opposition.

VI. Discussion of Recent Suggestions

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

The Reporter presented a suggestion by Senator Ron Wyden that the judiciary should be doing more to protect Social Security numbers from appearing in court filings. (Agenda book page 197). This is primarily a matter for the Bankruptcy Rules Committee and that Committee is giving the matter close attention. The Appellate Rules piggyback on other rules governing privacy protections. Appellate Rule 25(a)(5) was just amended to extend to Railroad Retirement Act cases the privacy protections provided in Social Security cases. Seeing nothing for this Committee to do here, the Reporter, with some discomfort, recommended removing the item from the agenda.

Mr. Byron suggested instead that the matter be tabled until the Bankruptcy Rules Committee considers the question. If they act, that might prompt rulemaking by other committees. Judge Bybee decided, without objection, to simply keep the item on the agenda.

B. Bar Admission (22-AP-F)

The Reporter presented a suggestion that Rule 46 be amended to permit all persons to practice law, absent a compelling reason for restriction. (Agenda book page 201). The Reporter suggested removing the item from the agenda. A motion to remove the item from the agenda was approved unanimously.

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

The Reporter presented two suggestions that the Committee consider adding a rule governing intervention on appeal. (Agenda book page 205). About a dozen years ago, the Committee explored the issue and decided not to take any action. In the spring of 2022, Professor Stephen Sachs noted that the Supreme Court had recently pointed out that there is no appellate rule on this question, and he suggested we should look into it. Professor Judith Resnik has also informed us of an amicus brief that she submitted in a pending Supreme Court case urging the Court not to use the case as a vehicle for creating rules governing intervention on appeal but to leave that to the rule making process. That case was listed and then removed from the argument calendar, but the Solicitor General's motion for divided argument has been granted. The case may become moot. If the Court decides the case, its decision will be relevant to anything this Committee does; if the case is dismissed as moot, the issue doesn't go away. The Committee may think that there is value in exploring the issue to see whether what was found inappropriate a dozen years ago is appropriate now. Judge Bybee invited discussion.

A liaison member noted that the issue arises a lot, particularly with changes in administration in the states and the federal government. Some guidance could be really useful. Mr. Freeman agreed.

Judge Bybee appointed a subcommittee consisting of Mr. Freeman, Professor Huang, and Justice Kruger.

D. Consent to Amicus Briefs (23-AP-A, 23-AP-B)

The Reporter presented two suggestions that the Committee follow the Supreme Court's lead in permitting the filing of amicus briefs without requiring the consent of the parties or the permission of the Court. The amicus disclosure subcommittee has already incorporated this idea into the working draft. The formal action is probably to refer these to the same subcommittee. Judge Bybee did so.

E. Resetting Time to Appeal in Bankruptcy Cases

The Reporter presented a suggestion from the Bankruptcy Rules Committee to amend Appellate Rule 6 to deal with resetting the time to appeal. (Agenda book page 217). The question involves the interaction of the Appellate Rules, the Civil Rules, and the Bankruptcy Rules. Under Appellate Rule 4, certain post judgment motions reset the time to appeal. The time to make such motions under the Civil Rules is 28 days. But the time to make similar motions under the Bankruptcy Rules is 14 days. Appellate Rule 6(a) tells us that when there is an appeal from a district court exercising original jurisdiction in a bankruptcy case, just use the Civil Rules. But applied literally, this would mean that the relevant time frame is 28 days, rather than the 14 days called for by the Bankruptcy Rules.

The Bankruptcy Rules Committee looked into all kinds of ways to amend the Bankruptcy Rules to fix the problem and didn't see a good way to do so. It considered asking this Committee to amend Appellate Rule 4(a)(4)(A), but that rule is already so complicated that making it even more complicated, particularly to add something that applies only to bankruptcy cases, didn't make a lot of sense. So they are suggesting amending Appellate Rule 6(a)—which deals with appeals from district courts exercising original jurisdiction in a bankruptcy case—to direct that the reference in Appellate Rule 4(a)(4)(A) to the time allowed by the Civil Rules be read as a reference to the time as shortened for some types of motions, by the Bankruptcy Rules.

The Reporter noted that if the Committee had not approved the other amendments to Rule 6, this proposal could simply be referred to the bankruptcy appeals subcommittee. But since those amendments were approved earlier in this meeting, if the Committee is sufficiently comfortable with this amendment, it could simply be folded into the other amendments to Rule 6 approved earlier.

Ms. Spinelli stated that she was comfortable with folding it in, but wondered why it referred to the time allowed by the Civil Rules as shortened by the Bankruptcy Rules rather than simply the time allowed by the Bankruptcy Rules. Professor Struve responded that not all of them are shortened. Both Ms. Spinelli and the Reporter thought that a direct reference to the Bankruptcy Rules would work, but worried that if Professor Struve is putting in language and they aren't seeing why, then there is a good reason that they are not seeing. Professor Struve, in turn, expressed concern with not having the Bankruptcy Rules reporters on the line. Ms. Spinelli does not want to wrongly suggest that the Civil Rules govern; she has seen people make that mistake.

A liaison member suggested simply listing the particular motions in the rule. Is that too cumbersome? A lawyer member suggested that the relationship among the three sets of rules is a great vexing problem and suggested being more explicit. A

judge member said that adding something to the language in the agenda book seems right, but he was not in a position to vote on the right language sitting here today.

Ms. Spinelli suggested that this part go back to the bankruptcy appeals subcommittee to come up with something.

Judge Bates observed that the changes approved earlier in the meeting are going to be before the Standing Committee in June, but that these additional changes would lag behind and we try to avoid doing that. A vote by email is appropriate if the issue is simple enough and narrow enough that the committee feels that it gets a full airing.

The matter was referred to the subcommittee with the hope that it can unanimously come up with a fix that could be approved by the full Committee by email and folded into the rest of the proposal in time to go to the Standing Committee this June.

VII. Joint Committee Business—Self-Represented Litigants

Professor Struve provided an update on the project about e-filing by self-represented litigants. (Agenda book page 224). Tim Reagan led the research underlying the memo in the agenda book.

One main question under investigation is whether there continues to be any reason to require that someone who files on paper must serve other parties via traditional means—as opposed to relying on service by CM/ECF once the papers are scanned into the system. Based on the information gathered so far, documents always get entered into CM/ECF and are therefore available. A question arose about sealed filings, and the answer is that access is the same whether the filing is done by a lawyer or a self-represented party. The remaining loose end is what happens if there is more than one self-represented party not on CM/ECF: how do you know whether someone else needs traditional service? The people we spoke to in six different districts were nonplussed. It's just quite rare for there to be two pro se litigants in the same case who aren't co-parties who are closely coordinating. But the working group might explore ways to draft for this problem.

Those who allow CM/ECF access are fans, praising its benefits. It's a net gain for clerk's offices because they save on processing paper filings and serving court orders in paper form. Some districts offer an alternative, such as submission by email or upload apart from CM/ECF. Most did not see any particular implementation problems, but one was more equivocal. Courts that have adopted electronic noticing love it because it saves them from mailing court orders and the debates about whether litigants received them.

Professor Struve invited Committee members to submit suggestions for any questions that should be asked of the folks in the districts.

VIII. Review of Impact and Effectiveness of Recent Rule Changes

Judge Bybee directed the Committee's attention to a table of recent amendments to the Appellate Rules. (Agenda book page 135). He called for any comments or concerns about these recent amendments. The Committee did not raise any particular concerns.

IX. New Business

Judge Bybee asked if anyone had anything else to raise for the Committee. No one did.

X. Adjournment

Judge Bybee announced that the next meeting will be held on October 19, 2023, in Washington, DC.

He thanked everyone, noting that a lot of people with a lot of important things to do have put in a lot of time. Courts can impose enormous transaction costs on people. The work of this Committee is to try to reduce those transaction costs. If we have reduced transaction costs and saved litigants and courts from misunderstanding, our time has been very, very well spent.

The Committee adjourned at approximately 3:15 p.m.