ADVISORY COMMITTEE
ON
APPELLATE RULES

October 13, 2022

ADVISORY COMMITTEE ON APPELLATE RULES
Meeting of October 13, 2022
Washington, DC

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Next meeting: March 29, 2023

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TAB 1A

RULES COMMITTEES — CHAIRS AND REPORTERS

Committee on Rules of Practice and Procedure
(Standing Committee)

Chair	Reporter
Honorable John D. Bates United States District Court Washington, DC	Professor Catherine T. Struve University of Pennsylvania Law School Philadelphia, PA

Secretary to the Standing Committee

H. Thomas Byron III, Esq.
Administrative Office of the U.S. Courts
Office of the General Counsel – Rules Committee Staff
Washington, DC

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Advisory Committee on Bankruptcy Rules

Chair	Reporter
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Associate Reporter

Professor Laura B. Bartell
Wayne State University Law School
Detroit, MI

Advisory Committee on Civil Rules

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	Associate Reporter
	Professor Richard L. Marcus University of California Hastings College of the Law San Francisco, CA

Advisory Committee on Criminal Rules

Chair	Reporter
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	Professor Nancy J. King Vanderbilt University Law School Nashville, TN

Advisory Committee on Evidence Rules

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Professor Bert Huang Columbia Law School New York, NY	Honorable Leondra R. Kruger Supreme Court of California San Francisco, CA
Honorable Carl J. Nichols United States District Court Washington, DC	Honorable Elizabeth Prelogar Solicitor General (ex officio) United States Department of Justice Washington, DC
Danielle Spinelli, Esq. Wilmer Cutler Pickering Hale and Dorr LLP Washington DC	Honorable Paul J. Watford United States Court of Appeals Pasadena, CA
Honorable Richard C. Wesley United States Court of Appeals Geneseo, NY	Lisa B. Wright, Esq. Office of the Federal Public Defender Washington, DC

Liaisons

Honorable Bernice B. Donald (*Bankruptcy*) United States Court of Appeals Memphis, TN	Andrew J. Pincus, Esq. (*Standing*) Mayer Brown LLP Washington, DC

Clerk of Court Representative

Molly Dwyer, Esq.
Clerk
United States Court of Appeals
San Francisco, CA

Advisory Committee on Appellate Rules

Members	Position	District/Circuit	Start Date		End Date
Jay S. Bybee Chair	C	Ninth Circuit	Member: Chair:	2017 2020	---- 2023
Bert Huang	ACAD	New York		2022	2025
Leondra R. Kruger	JUST	California		2021	2024
Carl J. Nichols	D	District of Columbia		2021	2024
Elizabeth Prelogar (ex-officio)	DOJ	Washington, DC		----	Open
Danielle Spinelli	ESQ	Washington, DC		2017	2023
Paul J. Watford	C	Ninth Circuit		2018	2024
Richard C. Wesley	C	Second Circuit		2020	2023
Lisa B. Wright	ESQ	Assistant Federal Public Defender (Appellate) (DC)		2019	2025
Edward Hartnett Reporter	ACAD	New Jersey		2018	2023

RULES COMMITTEE LIAISON MEMBERS

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Liaison for the Advisory Committee on Bankruptcy Rules	Hon. William J. Kayatta, Jr. *(Standing)*
Liaisons for the Advisory Committee on Civil Rules	Honorable D. Brooks Smith (*Standing*) Hon. Catherine P. McEwen *(Bankruptcy)*
Liaison for the Advisory Committee on Criminal Rules	Honorable Gary Feinerman (*Standing*)
Liaisons for the Advisory Committee on Evidence Rules	Hon. Robert James Conrad, Jr. (*Criminal*) Hon. Carolyn B. Kuhl *(Standing)* Hon. M. Hannah Lauck *(Civil)*

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Senior Research Associate
(Civil)

Timothy T. Lau, Esq.
Research Associate
(Evidence)

Tim Reagan, Esq.
Senior Research Associate
(Standing)

TAB 1B

	FRAP Item	Proposal	Source	Current Status
7	16-AP-D	Rule 3(c)(1)(B) and the Merger Rule	Neal Katyal	Discussed at 11/17 meeting and a subcommittee formed Discussed at 4/18 meeting and continued review Discussed at 10/18 meeting and continued review Draft approved for submission to Standing Committee 4/19 Draft approved for publication by Standing Committee 6/19 Discussed at 10/19 meeting Final approval for submission to Standing Committee 4/20 Approved by Standing Committee 6/20 Approved by Judicial Conference 9/20 Submitted to Supreme Court 10/20 Approved by Supreme Court 4/21 Effective 12/21
7	17-AP-G	Rule 42(b)–discretionary "may" dismissal of appeal on consent of all parties	Christopher Landau	Discussed at 11/17 meeting and a subcommittee formed Discussed at 4/18 meeting and continued review Discussed at 10/18 meeting and continued review Draft approved for submission to Standing Committee 4/19 Draft approved for publication by Standing Committee 6/19 Discussed at 10/19 meeting Final approval for submission to Standing Committee 4/20 Remanded by Standing Committee 6/20 Discussed at 10/20 meeting Final approval for submission to Standing Committee 4/21 Approved by Standing Committee 6/21 Approved by Judicial Conference 9/21 Submitted to Supreme Court 10/21 Approved by Supreme Court 4/22 Effective 12/22
7	18-AP-E	Provide privacy in Railroad Retirement Act cases as in Social Security cases	Railroad Retirement Board	Discussed at 4/19 meeting and subcommittee formed Discussed at 10/19 meeting and continued review Draft approved for submission to Standing Committee 4/20 Draft approved for publication by Standing Committee 6/20 Discussed at 10/20 meeting Final approval for submission to Standing Committee 4/21 Approved by Standing Committee 6/21 Approved by Judicial Conference 9/21 Submitted to Supreme Court 10/21

	FRAP Item	Proposal	Source	Current Status
				Approved by Supreme Court 4/22 Effective 12/22
6	None assigned	Rules for Future Emergencies Rules 2 and 4	Congress (CARES Act)	Initial consideration and subcommittee formed 4/20 Discussed at 10/20 meeting Draft approved for submission to Standing Committee 4/21 Draft approved for publication by Standing Committee 6/21 Discussed at 10/21 meeting Final approval for submission to Standing Committee 3/22 Approved by Standing Committee 6/21 Approved by Judicial Conference 9/22
6	None assigned	Add Juneteenth to Rule 26	Congress	Initial consideration 3/22 Final approval for submission to Standing Committee 3/22 Approved by Standing Committee 6/21 Approved by Judicial Conference 9/22
3	18-AP-A	Rules 35 and 40 – Comprehensive review	Department of Justice	Discussed at 4/18 meeting and subcommittee formed Discussed at 10/18 meeting Discussed at 4/19 meeting Discussed at 10/19 meeting Discussed at 4/20 meeting Discussed at 10/20 meeting Draft approved for submission to Standing Committee 4/21 Remanded by Standing Committee 6/21 Draft approved for resubmission to Standing Committee 10/21 Draft approved for publication by Standing Committee 1/22 Correction approved for submission to Standing Committee 3/22 Correction approved for publication by Standing Committee 6/21
1	19-AP-E	Electronic Filing Deadlines	Hon. Michael Chagares	Discussed at 6/19 meeting of Standing Committee and joint committee formed Discussed at 10/19 meeting Discussed at 4/20 meeting Discussed at 10/20 meeting Discussed at 4/21 meeting Discussed at 10/21 meeting Discussed at 3/22 meeting

	FRAP Item	Proposal	Source	Current Status
1	19-AP-C	IFP Standards	Sai	Initial consideration 10/19 Discussed at 4/20 meeting and subcommittee formed Discussed at 10/20 meeting Discussed at 4/21 meeting Discussed at 10/21 meeting Discussed at 3/22 meeting
1	20-AP-D	IFP Forms	Sai	Initial consideration 10/20 and referred to IFP subcommittee Discussed at 4/21 meeting Discussed at 10/21 meeting Discussed at 3/22 meeting
1	20-AP-G	Amicus Briefs and Recusal	Alan Morrison	Initial consideration and referred to Amicus subcommittee 4/21 Discussed at 10/21 meeting Discussed at 3/22 meeting and removed from agenda
1	21-AP-B	IFP Forms	Sai	Initial consideration and referred to IFP subcommittee 4/21 Discussed at 10/21 meeting Discussed at 3/22 meeting
1	21-AP-C	Amicus Disclosures	Senator Whitehouse & Representative Johnson	Issue noted and subcommittee formed 10/19 Initial consideration of suggestion 4/21 Discussed at 10/21 meeting Discussed at 3/22 meeting
1	21-AP-D	Costs on Appeal	Alan Morrison	Initial consideration of suggestion and subcommittee formed 10/21 Discussed at 3/22 meeting
1	21-AP-E	Electronic Filing by Pro Se Litigants	Sai	Initial consideration of suggestion and referred to reporters 10/21 Discussed at 3/22 meeting
1	20-AP-C	Pro Se Electronic Filing	Usha Jain	Initial consideration 10/20 and tabled pending consideration by Civil Rules Committee Referred to reporters 10/21 Discussed at 3/22 meeting
1	21-AP-G	Comment on 21-AP-C	Chamber of Commerce	Initial consideration 3/22 See 21-AP-C
1	21-AP-H	Comment on 21-AP-C	Senator Whitehouse & Representative Johnson	Initial consideration 3/22 See 21-AP-C
1	22-AP-A	Comment on 21-AP-C	Senator Whitehouse &	Initial consideration 3/22 See 21-AP-C

	FRAP Item	Proposal	Source	Current Status
			Representative Johnson	
1	22-AP-B	Striking Amicus Briefs; Identifying Triggering Person	Reporters Committee for Freedom of the Press	Initial consideration 9/22
1	22-AP-C	Third-Party Litigation Funding Disclosure	Lawyers for Civil Justice	Initial consideration 9/22
0	None assigned	Review of rules regarding appendices	Committee	Discussed at 11/17 meeting and a subcommittee formed to review Discussed at 4/18 meeting and removed from agenda Will reconsider in 4/21 Discussed at 4/21 meeting and postponed until 4/24
0	19-AP-B	Decisions on Unbriefed Grounds	AAAL	Initial consideration 10/19 and subcommittee formed Discussed at 4/20 meeting and to be considered in 4/23
0	20-AP-A	Relation Forward of Notices of Appeal	Bryan Lammon	Initial consideration and subcommittee formed 4/20 Discussed at 10/20 meeting Discussed at 4/21 meeting Discussed at 10/21 meeting and removed from agenda
0	20-AP-E	Rule 3	Sai	Initial consideration 10/20 and referred to Relation Forward subcommittee Discussed at 4/21 meeting Discussed at 10/21 meeting and removed from agenda

0 recently moved from agenda or deferred to future meeting
1 pending before Advisory Committee prior to public comment
2 approved by Advisory Committee and submitted to Standing Committee for publication
3 out for public comment
4 pending before Advisory Committee after public comment
5 final approval by Advisory Committee and submitted to Standing Committee
6 approved by Standing Committee
7 approved by SCOTUS

TAB 1C

Effective (no earlier than) December 1, 2022

Current Step in REA Process:

- Adopted by Supreme Court and transmitted to Congress (Apr 2022)

REA History:

- Transmitted to Supreme Court (Oct 2021)
- Approved by Judicial Conference (Sept 2021 unless otherwise noted)
- Approved by Standing Committee (June 2021 unless otherwise noted)
- Published for public comment (Aug 2020 – Feb 2021 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 25	The proposed amendment to Rule 25 extends the privacy protections afforded in Social Security benefit cases to Railroad Retirement Act benefit cases.	
AP 42	The proposed amendment to Rule 42 clarifies the distinction between situations where dismissal is mandated by stipulation of the parties and other situations. (These proposed amendments were published Aug 2019 – Feb 2020).	
BK 3002	The proposed amendment would allow an extension of time to file proofs of claim for both domestic and foreign creditors if "the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim."	
BK 5005	The proposed changes would allow papers to be transmitted to the U.S. trustee by electronic means rather than by mail, and would eliminate the requirement that the filed statement evidencing transmittal be verified.	
BK 7004	The proposed amendments add a new Rule 7004(*i*) clarifying that service can be made under Rule 7004(b)(3) or Rule 7004(h) by position or title rather than specific name and, if the recipient is named, that the name need not be correct if service is made to the proper address and position or title.	
BK 8023	The proposed amendments conform the rule to pending amendments to Appellate Rule 42(b) that would make dismissal of an appeal mandatory upon agreement by the parties.	AP 42(b)
SBRA Rules (BK 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3017.2 (new), 3018, 3019)	The SBRA Rules would make necessary rule changes in response to the Small Business Reorganization Act of 2019. The SBRA Rules are based on Interim Bankruptcy Rules adopted by the courts as local rules in February 2020 in order to implement the SBRA which went into effect February 19, 2020.	
Official Form 101	Updates are made to lines 2 and 4 of the form to clarify how the debtor should report the names of related separate legal entities that are not filing the petition. If approved by the Standing Committee, and the Judicial Conference, the proposed change to Form 101 (published in Aug. 2021) will go into effect December 1, 2022.	

Effective (no earlier than) December 1, 2022

Current Step in REA Process:

- Adopted by Supreme Court and transmitted to Congress (Apr 2022)

REA History:

- Transmitted to Supreme Court (Oct 2021)
- Approved by Judicial Conference (Sept 2021 unless otherwise noted)
- Approved by Standing Committee (June 2021 unless otherwise noted)
- Published for public comment (Aug 2020 – Feb 2021 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
Official Forms 309E1 and 309E2	Form 309E1, line 7 and Form 309E2, line 8, are amended to clarify which deadline applies for filing complaints to deny the debtor a discharge and which applies for filing complaints seeking to except a particular debt from discharge. If approved by the Standing Committee, and the Judicial Conference, the proposed change to Forms 309E1 and 309E2 (published in Aug. 2021) will go into effect December 1, 2022.	
CV 7.1	An amendment to subdivision (a) was published for public comment in Aug 2019 – Feb 2020. As a result of comments received during the public comment period, a technical conforming amendment was made to subdivision (b). The conforming amendment to subdivision (b) was not published for public comment. The proposed amendments to (a) and (b) were approved by the Standing Committee in Jan 2021, and approved by the Judicial Conference in Mar 2021. The proposed amendment to Rule 7.1(a)(1) would require the filing of a disclosure statement by a nongovernmental corporation that seeks to intervene. This change would conform the rule to the recent amendments to FRAP 26.1 (effective Dec 2019) and Bankruptcy Rule 8012 (effective Dec 2020). The proposed amendment to Rule 7.1(a)(2) would create a new disclosure aimed at facilitating the early determination of whether diversity jurisdiction exists under 28 U.S.C. § 1332(a), or whether complete diversity is defeated by the citizenship of a nonparty individual or entity because that citizenship is attributed to a party.	AP 26.1 and BK 8012
CV Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g)	Proposed set of uniform procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g).	
CR 16	Proposed amendment addresses the lack of timing and specificity in the current rule with regard to expert witness disclosures, while maintaining reciprocal structure of the current rule.	

Effective (no earlier than) December 1, 2023

Current Step in REA Process:

- Approved by Standing Committee (June 2022 unless otherwise noted)

REA History:

- Published for public comment (Aug 2021 – Feb 2022 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 2	Proposed amendment developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	BK 9038, CV 87, and CR 62
AP 4	The proposed amendment is designed to make Rule 4 operate with Emergency Civil Rule 6(b)(2) if that rule is ever in effect by adding a reference to Civil Rule 59 in subdivision (a)(4)(A)(vi) of FRAP 4.	CV 87 (Emergency CV 6(b)(2))
AP 26	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 45, BK 9006, CV 6, CR 45, and CR 56
AP 45	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 26, BK 9006, CV 6, CR 45, and CR 56
BK 3002.1 and five new related Official Forms	The proposed rule amendment and the five related forms (410C13-1N, 410C13-1R, 410C13-10C, 410C13-10NC, and 410C13-10R) are designed to increase disclosure concerning the ongoing payment status of a debtor's mortgage and of claims secured by a debtor's home in chapter 13 case. At its March 2022 meeting, the Bankruptcy Rules Committee remanded the Rule and Forms to the Consumer and Forms Subcommittee for further consideration in light of comments received. This action will delay the effective date of the proposed changes to no earlier than December 1, 2024.	
BK 3011	Proposed new subdivision (b) would require courts to provide searchable access to unclaimed funds on local court websites.	
BK 8003 and Official Form 417A	Proposed rule and form amendments are designed to conform to amendments to FRAP 3(c) clarifying that the designation of a particular interlocutory order in a notice of appeal does not prevent the appellate court from reviewing all orders that merged into the judgment, or appealable order or degree.	AP 3
BK 9038 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, CV 87, and CR 62
BK 9006(a)(6)(A)	Technical amendment approved by Advisory Committee without publication would add Juneteenth National Independence Day to the list of legal holidays.	AP 26, AP 45, CV 6, CR 45, and CR 56

Effective (no earlier than) December 1, 2023

Current Step in REA Process:

- Approved by Standing Committee (June 2022 unless otherwise noted)

REA History:

- Published for public comment (Aug 2021 – Feb 2022 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
CV 6	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 26, AP 45, BR 9006, CR 45, and CR 56
CV 15	The proposed amendment to Rule 15(a)(1) is intended to remove the possibility for a literal reading of the existing rule to create an unintended gap. A literal reading of "A party may amend its pleading once as a matter of course within . . . 21 days after service of a responsive pleading or [pre-answer motion]" would suggest that the Rule 15(a)(1)(B) period does not commence until the service of the responsive pleading or pre-answer motion – with the unintended result that there could be a gap period (beginning on the 22nd day after service of the pleading and extending to service of the responsive pleading or pre-answer motion) within which amendment as of right is not permitted. The proposed amendment would preclude this interpretation by replacing the word "within" with "no later than."	
CV 72	The proposed amendment would replace the requirement that the magistrate judge's findings and recommendations be mailed to the parties with a requirement that a copy be served on the parties as provided in Rule 5(b).	
CV 87 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, BK 9038, and CR 62
CR 45	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 26, AP 45, BR 9006, CV 6, and CR 56
CR 56	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 26, AP 45, BR 9006, CV 6, and CR 45
CR 62 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, BK 9038, and CV 87
EV 106	The proposed amendment would allow a completing statement to be admissible over a hearsay objection and cover unrecorded oral statements.	
EV 615	The proposed amendment limits an exclusion order to the exclusion of witnesses from the courtroom. A new subdivision would provide that the court has discretion to issue further orders to "(1) prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom; and (2) prohibit excluded witnesses from accessing trial testimony." Finally, the proposed amendment clarifies that the existing provision that allows an entity-party to	

Effective (no earlier than) December 1, 2023

Current Step in REA Process:

- Approved by Standing Committee (June 2022 unless otherwise noted)

REA History:

- Published for public comment (Aug 2021 – Feb 2022 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
	designate "an officer or employee" to be exempt from exclusion is limited to one officer or employee.	
EV 702	The proposed amendment would amend Rule 702(d) to require the court to find that "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." In addition, the proposed amendment would explicitly add the preponderance of the evidence standard to Rule 702(b)–(d).	

Effective (no earlier than) December 1, 2024

Current Step in REA Process:

- Published for public comment (Aug 2022 – Feb 2023)

REA History:

- Approved for publication by Standing Committee (Jan and June 2022)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 32	Conforming proposed amendment to subdivision (g) to reflect the consolidation of Rules 35 and 40.	AP 35, 40
AP 35	The proposed amendment would transfer the contents of the rule to Rule 40 to consolidate the rules for panel rehearings and rehearings en banc together in a single rule.	AP 40
AP 40	The proposed amendments address panel rehearings and rehearings en banc together in a single rule, consolidating what had been separate provisions in Rule 35 (hearing and rehearing en banc) and Rule 40 (panel rehearing). The contents of Rule 35 would be transferred to Rule 40, which is expanded to address both panel rehearing and en banc determination.	AP 35
Appendix: Length Limits Stated in the Federal Rules of Appellate Procedure	Conforming proposed amendments would reflect the consolidation of Rules 35 and 40 and specify that the limits apply to a petition for initial hearing en banc and any response, if requested by the court.	AP 35, 40
BK 1007(b)(7) and related amendments	The proposed amendment to Rule 1007(b)(7) would require a debtor to submit the course certificate from the debtor education requirement in the Bankruptcy Code. Conforming amendments would be made to the following rules by replacing the word "statement" with "certificate": Rules 1007(c)(4), 4004(c)(1)(H), 4004(c)(4), 5009(b), 9006(b)(3) and 9006(c)(2).	
BK 7001	The proposed amendment would exempt from the list of adversary proceedings in Rule 7001, "a proceeding by an individual debtor to recover tangible personal property under § 542(a)."	
BK 8023.1 (new)	This would be a new rule on the substitution of parties modeled on FRAP 43. Neither FRAP 43 nor Fed. R. Civ. P. 25 is applicable to parties in bankruptcy appeals to the district court or bankruptcy appellate panel, and this new rule is intended to fill that gap.	
BK Restyled Rules (Parts VII-IX)	The third and final set, approximately 1/3 of current Bankruptcy Rules, restyled to provide greater clarity, consistency, and conciseness without changing practice and procedure. The first set of restyled rules (Parts I & II) were published in 2020, and the second set (Parts III-VI) were published in 2021. The full set of restyled rules is expected to go into effect no earlier than December 1, 2024.	
BK Form 410A	The proposed amendments are to Part 3 (Arrearage as of Date of the Petition) of Official Form 410A and would replace the first line (which currently asks for "Principal & Interest") with two lines, one for "Principal" and one for "Interest."	

Effective (no earlier than) December 1, 2024

Current Step in REA Process:

- Published for public comment (Aug 2022 – Feb 2023)

REA History:

- Approved for publication by Standing Committee (Jan and June 2022)

Rule	Summary of Proposal	Related or Coordinated Amendments
	The amendments would put the burden on the claim holder to identify the elements of its claim.	
CV 12	The proposed amendment would clarify that a federal statute setting a different time should govern as to the entire rule, not just to subdivision (a).	
EV 611(d)	The proposed new subdivision (d) would provide standards for the use of illustrative aids.	EV 1006
EV 613	The proposed amendment would require that, prior to the introduction of extrinsic evidence of a witness's prior inconsistent statement, the witness receive an opportunity to explain or deny the statement.	
EV 801	The proposed amendment to paragraph (d)(2) would provide that when a party stands in the shoes of a declarant or declarant's principal, hearsay statements made by the declarant or declarant's principal are admissible against the party.	
EV 804	The proposed amendment to subparagraph (b)(3)(B) would provide that when assessing whether a statement is supported by corroborating circumstances that clearly indicate its trustworthiness, the court must consider the totality of the circumstances and evidence, if any, corroborating the statement.	
EV 1006	The proposed changes would permit a properly supported summary to be admitted into evidence whether or not the underlying voluminous materials have been admitted. The proposed changes would also clarify that illustrative aids not admitted under Rule 1006 are governed by proposed new subdivision (d) of Rule 611.	EV 611

TAB 1D

Legislation That Directly or Effectively Amends the Federal Rules
117th Congress
(January 3, 2021–January 3, 2023)

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
Protect the Gig Economy Act of 2021	**H.R. 41** *Sponsor:* Biggs (R-AZ)	CV 23	**Bill Text:** https://www.congress.gov/117/bills/hr41/BILLS-117hr41ih.pdf **Summary:** Prohibits in class actions any allegation that an employee was misclassified as an independent contractor.	• 03/01/2021: Judiciary Committee referred to Courts, Intellectual Property & Internet Subcommittee • 01/04/2021: Introduced in House; referred to Judiciary Committee
Injunctive Authority Clarification Act of 2021	**H.R. 43** *Sponsor:* Biggs (R-AZ) *Cosponsor:* Rose (R-TN)	CV	**Bill Text:** https://www.congress.gov/117/bills/hr43/BILLS-117hr43ih.pdf **Summary:** Prohibits federal courts from issuing injunctive orders that bar enforcement of a federal law or policy against a nonparty unless the nonparty is represented by a party in a class action.	• 03/01/2021: Judiciary Committee referred to Courts, Intellectual Property & Internet Subcommittee • 01/04/2021: Introduced in House; referred to Judiciary Committee
Mutual Fund Litigation Reform Act	**H.R. 699** *Sponsor:* Emmer (R-MN)	CV 8 & 9	**Bill Text:** https://www.congress.gov/117/bills/hr699/BILLS-117hr699ih.pdf **Summary:** Creates a heightened pleading standard for actions alleging breach of fiduciary duty under the Investment Company Act of 1940, requiring that "all facts establishing a breach of fiduciary duty" be "state[d] with particularity."	• 03/22/2021: Judiciary Committee referred to Courts, Intellectual Property & Internet Subcommittee • 02/02/2021: Introduced in House; referred to Judiciary Committee
Providing Responsible Oversight of Trusts to Ensure Compensation and Transparency (PROTECT) Asbestos Victims Act of 2021	**S. 574** *Sponsor:* Tillis (R-NC) *Cosponsors:* Cornyn (R-TX) Grassley (R-IA)	BK	**Bill Text:** https://www.congress.gov/117/bills/s574/BILLS-117s574is.pdf **Summary:** Amends 11 U.S.C. § 524(g) "to promote the investigation of fraudulent claims against [asbestosis trusts]." Allows outside parties to demand information from administrators of such trusts regarding payment to claimants. Gives the U.S. Trustee investigative powers with respect to asbestosis trusts set up under § 524, even in the districts in North Carolina & Alabama where Bankruptcy Administrators or the federal courts currently take on U.S. Trustee functions in bankruptcy cases. May provide reason to amend BK 9035.	• 03/03/2021: Introduced in Senate; referred to Judiciary Committee

Eliminating a Quantifiably Unjust Application of the Law (EQUAL) Act of 2021	**H.R. 1693** *Sponsor:* Jeffries (D-NY) *Cosponsors:* 56 bipartisan cosponsors	CR 43	**Bill Text:** https://www.congress.gov/117/bills/hr1693/BILLS-117hr1693rfs.pdf **Summary:** Decreases penalties for certain cocaine-related crimes and allows those convicted under prior law to petition for a lower sentence. Provides that, notwithstanding CR 43, defendant not required to be present at hearing to reduce a sentence under this bill. **House Committee Report:** https://www.congress.gov/117/crpt/hrpt128/CRPT-117hrpt128.pdf	• 09/29/2021: Received in Senate; referred to Judiciary Committee • 09/28/2021: Passed in House on Yeas & Nays (361–66) • 03/09/2021: Introduced in House
Sunshine in the Courtroom Act of 2021	**S. 818** *Sponsor:* Grassley (R-IA) *Cosponsors*: Klobuchar (D-MN) Cornyn (R-TX) Durbin (D-IL) Leahy (D-VT) Blumenthal (D-CT) Markey (D-MA)	CR 53	**Bill Text:** https://www.congress.gov/117/bills/s818/BILLS-117s818is.pdf **Summary:** Allows presiding judges in district courts and courts of appeals to "permit the photographing, electronic recording, broadcasting, or televising to the public of any court proceeding over which that judge presides." Tasks Judicial Conference with promulgating guidelines. Expands statutory exception to prohibition on photography and broadcasting of criminal proceedings.	• 06/24/2021: Judiciary Committee ordered reported favorably (no amendments) • 06/24/2021: Scheduled for mark-up; letter being prepared to express opposition by the Judicial Conference and the Rules Committees • 03/18/2021: Introduced in Senate; referred to Judiciary Committee
Litigation Funding Transparency Act of 2021	**S. 840** *Sponsor:* Grassley (R-IA) *Cosponsors:* Cornyn (R-TX) Sasse (R-NE) Tillis (R-NC) **H.R. 2025** *Sponsor:* Issa (R-CA)	CV	**Bill Text:** https://www.congress.gov/117/bills/s840/BILLS-117s840is.pdf [Senate] https://www.congress.gov/117/bills/hr2025/BILLS-117hr2025ih.pdf [House] **Summary:** Requires disclosure and oversight of third-party-litigation-funding agreements in MDLs and in "any class action."	• 10/19/2021: House Judiciary Committee referred to Courts, Intellectual Property & Internet Subcommittee • 05/10/2021: Response letter sent from Judge Bates to Sen. Grassley and Rep. Issa • 05/03/2021: Letter received from Sen. Grassley and Rep. Issa • 03/18/2021: Introduced in House and Senate; referred to Judiciary Committees
Justice in Forensic Algorithms Act of 2021	**H.R. 2438** *Sponsor:* Takano (D-CA) *Cosponsor:* Evans (D-PA)	EV 702	**Bill Text:** https://www.congress.gov/117/bills/hr2438/BILLS-117hr2438ih.pdf **Summary:** Precludes trade-secret evidentiary privilege and restricts admissibility of forensic computer evidence in criminal proceedings.	• 10/19/2021: Judiciary Committee referred to Crime, Terrorism & Homeland Security Subcommittee • 04/08/2021: Introduced in House; referred to Judiciary Committee and to Science, Space &

				Technology Committee, which referred to Research & Technology Subcommittee
Juneteenth National Independence Day Act	**S. 475** *Sponsor*: Markey (D-MA) *Cosponsors:* 60 bipartisan cosponsors	AP 26; BK 9006; CV 6; CR 45	**Bill Text:** https://www.congress.gov/117/plaws/publ17/PLAW-117publ17.pdf **Summary:** Establishes Juneteenth National Independence Day (June 19) as a federal public holiday.	• 6/17/2021: Became Public Law No. 117-17
Bankruptcy Venue Reform Act of 2021	**H.R. 4193** *Sponsor*: Lofgren (D-CA) *Cosponsors:* 15 bipartisan cosponsors **S. 2827** *Sponsor:* Cornyn (R-TX) *Cosponsor:* Warren (D-MA)	BK	**Bill Text:** https://www.congress.gov/117/bills/hr4193/BILLS-117hr4193ih.pdf [House] https://www.congress.gov/117/bills/s2827/BILLS-117s2827is.pdf [Senate] **Summary:** Modifies venue requirements relating to bankruptcy proceedings. Senate version includes a provision (absent from the House version) giving "no effect" in venue determinations to certain mergers, dissolutions, spinoffs, and divisive mergers of entities. Requires rulemaking under § 2075 to allow an attorney to appear on behalf of a governmental unit and intervene without charge or meeting local rule requirements in bankruptcy cases and arising under or related to proceedings before bankruptcy courts, district courts, and BAPs.	• 09/23/2021: S. 2827 introduced in Senate; referred to Judiciary Committee • 06/28/2021: H.R. 4193 introduced in House; referred to Judiciary Committee
Nondebtor Release Prohibition Act of 2021	**S. 2497** *Sponsor*: Warren (D-MA) *Cosponsors:* Durbin (D-IL) Blumenthal (D-CT) Booker (D-NJ) Sanders (I-VT)	BK	**Bill Text:** https://www.congress.gov/117/bills/s2497/BILLS-117s2497is.pdf **Summary:** Prevents individuals who have not filed for bankruptcy from obtaining releases from lawsuits brought by private parties, states, and others in bankruptcy by: • Prohibiting court from discharging, releasing, terminating, or modifying liability of or claim or cause of action against an entity other than the debtor or estate. • Prohibiting court from permanently enjoining commencement or continuation of any action with respect to an entity other than debtor or estate.	• 07/28/2021: Introduced in Senate; referred to Judiciary Committee

Protecting Our Democracy Act	**H.R. 5314** *Sponsor:* Schiff (D-CA) *Cosponsors:* 168 Democratic cosponsors **S. 2921** *Sponsor:* Klobuchar (D-MN) *Cosponsors:* 10 Democratic-caucusing co-sponsors	CR 6; CV	**Bill Text:** https://www.congress.gov/117/bills/hr5314/BILLS-117hr5314rds.pdf [House] https://www.congress.gov/117/bills/s2921/BILLS-117s2921is.pdf [Senate] **Summary:** Amends existing rules and directs Judicial Conference to promulgate additional rules to, for example: • Preclude any interpretation of CR 6(e) to prohibit disclosure to Congress of certain grand-jury materials related to individuals pardoned by the President. • "[E]nsure the expeditious treatment of" civil actions to enforce congressional subpoenas. Requires that the new rules be transmitted within 6 months of the effective date of the bill. **Committee Report:** https://www.congress.gov/117/cprt/HPRT46236/CPRT-117HPRT46236.pdf	• 12/13/2021: H.R. 5314 received in Senate • 12/09/2021: H.R. 5314 passed in House on Yeas & Nays (220–208) • 9/30/2021: S. 2921 introduced in Senate; referred to Homeland Security & Governmental Affairs Committee • 9/21/2021: H.R. 5314 introduced in House
Congressional Subpoena Compliance and Enforcement Act	**H.R. 6079** *Sponsor:* Dean (D-PA) *Cosponsors:* Nadler (D-NY) Schiff (D-CA)	CV	**Bill Text:** https://www.congress.gov/117/bills/hr6079/BILLS-117hr6079ih.pdf **Summary:** Requires Judicial Conference to promulgate rules "to ensure the expeditious treatment of" civil actions to enforce congressional subpoenas. Requires that the new rules be transmitted within 6 months of the effective date of the bill.	• 11/26/2021: Introduced in House; referred to Judiciary Committee
Assessing Monetary Influence in the Courts of the United States (AMICUS) Act	**S. 3385** *Sponsor:* Whitehouse (D-RI) *Cosponsors:* Sanders (I-VT) Blumenthal (D-CT) Hirono (D-HI) Warren (D-MA) Lujan (D-NM)	AP 29	**Bill Text:** https://www.congress.gov/117/bills/s3385/BILLS-117s3385is.pdf **Summary:** Requires amici curiae to disclose whether counsel for a party authored the brief in whole or in part and whether a party or a party's counsel made a monetary contribution intended to fund preparation or submission of amicus brief.	• 12/14/2021: Introduced in Senate; referred to Judiciary Committee
Courtroom Video-conferencing Act of 2022	**H.R. 6472** *Sponsor:* Morelle (D-NY) *Cosponsors:* Fischbach (R-MN) Bacon (R-NE)	CR	**Bill Text:** https://www.congress.gov/117/bills/hr6472/BILLS-117hr6472ih.pdf **Summary:** Makes permanent (even in absence of emergency situations) certain CARES Act	• 01/21/2022: Introduced in House; referred to Judiciary Committee

	Tiffany (R-WI)		provisions, including allowing the chief judge of a district court to authorize teleconferencing for initial appearances, arraignments, and misdemeanor pleas or sentencing. Requires defendant's consent before proceeding via teleconferencing and ensures that defendants can utilize video or telephone conferencing to privately consult with counsel.	
Save Americans from the Fentanyl Emergency (SAFE) Act of 2022	**H.R. 6946** *Sponsor:* Pappas (D-NH) *Cosponsors:* 10 bipartisan cosponsors	CR 43	**Bill Text:** https://www.congress.gov/117/bills/hr6946/BILLS-117hr6946ih.pdf **Summary:** Decreases penalties for certain fentanyl-related crimes and allows those convicted under prior law to petition for a lower sentence. Provides that, notwithstanding CR 43, defendant not required to be present at hearing to reduce a sentence under this bill.	• 03/08/2022: Energy & Commerce Committee referred to Health Subcommittee • 03/07/2022: Introduced in House; referred to Energy & Commerce Committee and to Judiciary Committee
Bankruptcy Threshold Adjustment and Technical Corrections Act	**S. 3823** *Sponsor:* Grassley (R-IA) *Cosponsors:* Durbin (D-IL) Whitehouse (D-RI) Cornyn (R-TX)	BK 1020; BK Forms 101 & 201	**Bill Text:** https://www.congress.gov/117/plaws/publ151/PLAW-117publ151.pdf **Summary:** Retroactively reinstates for further 2 years from date of enactment the CARES Act definition of "debtor" in § 1182(1), with its $7.5 million subchapter V debt limit.	• 06/21/2022: Became Public Law No. 117-151
Government Surveillance Transparency Act of 2022	**S. 3888** *Sponsor:* Wyden (D-OR) *Cosponsors:* Daines (R-MT) Lee (R-UT) Booker (D-NJ) **H.R. 7214** *Sponsor:* Lieu (D-CA) *Cosponsor:* Davidson (R-OH)	CR 41	**Bill Text:** https://www.congress.gov/117/bills/s3888/BILLS-117s3888is.pdf [Senate] https://www.congress.gov/117/bills/hr7214/BILLS-117hr7214ih.pdf [House] **Summary:** Adds a sentence and two subdivisions of text to CR 41(f)(1)(B) regarding what the government must disclose in an inventory taken under the Rule. (See page 25 of either PDF for full text.)	• 03/24/2022: H.R. 7214 introduced in House; referred to Judiciary Committee • 03/22/2022: S. 3888 introduced in Senate; referred to Judiciary Committee
21st Century Courts Act of 2022	**S. 4010** *Sponsor:* Whitehouse (D-RI) *Cosponsors:* Blumenthal (D-CT) Hirono (D-HI) **H.R. 7426** *Sponsor:* Johnson (D-GA)	AP 29; CV; CR	**Bill Text:** https://www.congress.gov/117/bills/s4010/BILLS-117s4010is.pdf [Senate] https://www.congress.gov/117/bills/hr7426/BILLS-117hr7426ih.pdf [House] **Summary:** Requires amici curiae to disclose whether counsel for a party authored amicus brief in whole or in part and whether a party or a party's counsel made a monetary	• 04/06/2022: S. 4010 introduced in Senate; referred to Judiciary Committee • 04/06/2022: H.R. 7426 introduced in House; referred to Judiciary Committee, to Oversight & Reform Committee, and to House Administration

	Cosponsors: 8 Democratic cosponsors		contribution intended to fund preparation or submission of the brief. Also requires (within 1 year) promulgation of rules regarding procedures for the public to contest a motion to seal a judicial record.	
Supreme Court Ethics, Recusal, and Transparency Act of 2022	**H.R. 7647** *Sponsor:* Johnson (D-GA) *Cosponsors:* 60 Democratic cosponsors **S. 4188** *Sponsor:* Whitehouse (D-RI) *Cosponsors:* 12 Democratic cosponsors	AP 29; CV; CR; BK	**Bill Text:** https://www.congress.gov/117/bills/hr7647/BILLS-117hr7647ih.pdf [House] https://www.congress.gov/117/bills/s4188/BILLS-117s4188is.pdf [Senate] **Summary:** Directs rulemaking regarding party and amici disclosures in the Supreme Court. Also requires amici in any court to disclose whether counsel for a party authored amicus brief in whole or in part and whether a party or a party's counsel made a monetary contribution intended to preparation or submission of the brief. Directs rulemaking to prohibit filing or to strike an "amicus brief that would result in the disqualification of a justice, judge, or magistrate judge."	• 05/11/2022: S. 4188 introduced in Senate; referred to Judiciary Committee • 05/11/2022: House Judiciary Committee consideration & mark-up session; ordered to be reported (amended) (22–16) • 05/03/2022: H.R. 7647 introduced in House; referred to Judiciary Committee
Restoring Artistic Protection Act of 2022	**H.R. 8531** *Sponsor:* Johnson (D-GA) *Cosponsors:* Bowman (D-NY) Maloney (D-NY) Jayapal (D-WA) Thompson (D-MS) Bush (D-MO)	EV	**Bill Text:** https://www.congress.gov/117/bills/hr8531/BILLS-117hr8531ih.pdf **Summary:** Enacts new EV rule that would make inadmissible in criminal cases evidence of a defendant's creative or artistic expression unless the court finds by clear and convincing evidence that four factors are met.	• 07/27/2022: Introduced in House; referred to Judiciary Committee
Competitive Prices Act	**H.R. 8777** *Sponsor:* Porter (D-CA) *Cosponsors:* Nadler (D-NY) Cicilline (D-RI) Jaypal (D-WA) Jeffries (D-NY)	CV 8, 12(b)(6), 56	**Bill Text:** https://www.congress.gov/117/bills/hr8777/BILLS-117hr8777ih.pdf **Summary:** Abrogates *Twombly* pleading standard in antitrust actions; specifies standards necessary to state a plausible claim or demonstrate a genuine dispute of material fact. ("Consciously parallel conduct" could be enough to state a plausible claim.)	• 09/06/2022: Introduced in House; referred to Judiciary Committee
Democracy Is Strengthened by Casting Light On Spending in Elections (DISCLOSE) Act of 2022	**S. 4822** *Sponsor:* Whitehouse (D-RI) *Cosponsors:* 49 Democratic-caucusing cosponsors	CV 5.1, 24	**Bill Text:** https://www.congress.gov/117/bills/s4822/BILLS-117s4822pcs.pdf **Summary:** Requires declaratory and injunctive challenges to constitutionality or lawfulness of bill to be brought in D.D.C. and appealed	• 09/22/2022: Cloture motion failed (49–49) • 09/19/2022: Motion made to proceed in Senate; cloture motion made on motion to proceed

			to CADC; copy of complaint must be delivered to Clerk of House and Secretary of Senate; D.D.C. and CADC must expedite dispositions; action must be transferred to D.D.C. if amendment/counterclaim/cross-claim/affirmative defense/other pleading or motion challenges Act; any member of House or Senate has right to bring such an action or intervene in such an action	• 09/13/2022: Placed on Senate Legislative Calendar under General Orders • 09/12/2022: Introduced in Senate
Protect Reporters from Exploitative State Spying (PRESS) Act	**H.R. 4330** *Sponsor:* Raskin (D-MD) *Cosponsors:* Lieu (D-CA) Yarmuth (D-KY) Norton (D-DC) Blumenauer (D-OR) Eshoo (D-CA) Demings (D-FL) Scanlon (D-PA)	CV 26–37, 45; BK 7026–37, 9016; CR 16, 17	**Bill Text:** https://www.congress.gov/117/bills/hr4330/BILLS-117hr4330eh.pdf **Summary:** Imposes notice-and-hearing requirements and substantive standards for subpoenas to issue against journalists and service providers holding journalists' records; limits scope of compelled testimony or document production. **Committee Report:** https://www.congress.gov/117/crpt/hrpt354/CRPT-117hrpt354.pdf	• 09/20/2022: Received in Senate; referred to Judiciary Committee • 09/19/2022: Passed in House by voice vote • 06/07/2022: Reported as amended by Judiciary Committee • 07/01/2021: Introduced in House; referred to Judiciary Committee
Strategic Lawsuits Against Public Participation (SLAPP) Protection Act of 2022	**H.R. 8864** *Sponsor:* Raskin (D-MD) *Cosponsors:* Cohen (D-TN)	CV 12; CV 56	**Bill Text:** https://www.congress.gov/117/bills/hr8864/BILLS-117hr8864ih.pdf **Summary:** Imposes special procedures for motions to dismiss SLAPPs. Special motion for dismissal must be made within 60 days of service or removal. Stays all other proceedings except remand proceedings. Movant must put forward evidence establishing that the claim "is based on, or in response to, the party's lawful exercise of the constitutional right of petition, freedom of the press, peaceful assembly, free speech on a matter of public concern, or other expressive conduct on a matter of public concern"; respondent has burden to show statutory exception and must put forward prima facie evidence as to each element of the claim "under the standard of [CV] 56"; and then movant still has opportunity to show no genuine issue of material fact and that movant is entitled to judgment as a matter of law under CV 56. Court must expedite ruling but may extend statutory deadline for docket delays, discovery, or good cause.	• 09/15/2022: Received in House; referred to Judiciary Committee

TAB 2

TAB 2A

MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
June 7, 2022

The Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee) met in a hybrid in-person/virtual meeting in Washington, DC on June 7, 2022, with the public and certain members attending by videoconference. The following members were in attendance:

Judge John D. Bates, Chair
Elizabeth J. Cabraser, Esq.
Judge Jesse M. Furman
Robert J. Giuffra, Jr., Esq.
Judge Frank Mays Hull
Judge William J. Kayatta, Jr.
Peter D. Keisler, Esq.
Judge Carolyn B. Kuhl
Professor Troy A. McKenzie
Judge Patricia A. Millett
Hon. Lisa O. Monaco, Esq.*
Judge Gene E.K. Pratter
Kosta Stojilkovic, Esq.
Judge Jennifer G. Zipps

Professor Catherine T. Struve attended as reporter to the Standing Committee.

The following attended on behalf of the Advisory Committees:

Advisory Committee on Appellate Rules –
Judge Jay S. Bybee, Chair
Professor Edward Hartnett, Reporter

Advisory Committee on Bankruptcy Rules –
Judge Dennis R. Dow, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Laura B. Bartell,
Associate Reporter

Advisory Committee on Civil Rules –
Judge Robert M. Dow, Jr., Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus,
Associate Reporter

Advisory Committee on Criminal Rules –
Judge Raymond M. Kethledge, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King,
Associate Reporter

Advisory Committee on Evidence Rules –
Judge Patrick J. Schiltz, Chair
Professor Daniel J. Capra, Reporter

Others providing support to the Standing Committee included: Professors Daniel R. Coquillette, Bryan A. Garner, and Joseph Kimble, consultants to the Standing Committee; H. Thomas Byron III, Rules Committee Chief Counsel-Designate; Bridget Healy, Rules Committee Staff Acting Chief Counsel; Scott Myers and Allison Bruff, Rules Committee Staff Counsel; Brittany Bunting and Shelly Cox, Rules Committee Staff; Burton S. DeWitt, Law Clerk to the

* Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, represented the Department of Justice (DOJ) on behalf of Deputy Attorney General Lisa O. Monaco. Andrew Goldsmith was also present on behalf of the DOJ for a portion of the meeting.

Standing Committee; Dr. Emery G. Lee, Senior Research Associate at the FJC; and Dr. Tim Reagan, Senior Research Associate at the FJC.

OPENING BUSINESS

Judge Bates called the meeting to order and welcomed everyone. He noted that Deputy Attorney General Lisa O. Monaco would not be able to attend, but he welcomed Elizabeth Shapiro and thanked her for attending on behalf of the Department of Justice (DOJ). He thanked several members whose terms were expiring following this meeting, including Standing Committee members Judge Frank Hull, Peter Keisler, and Judge Jesse Furman. Judge Bates also thanked Judge Raymond Kethledge and Judge Dennis Dow for their service as chairs of the Criminal Rules and Bankruptcy Rules Advisory Committees respectively. He welcomed Tom Byron, who would be joining the Rules Office as Chief Counsel in July, and Allison Bruff, who had joined as counsel. Judge Bates congratulated Professor Troy McKenzie on his appointment as Dean of New York University Law School. In addition, Judge Bates thanked the members of the public who were in attendance by videoconference for their interest in the rulemaking process.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the minutes of the January 4, 2022 meeting.**

JOINT COMMITTEE BUSINESS

Emergency Rules

Judge Bates introduced this agenda item, which concerned final approval of proposed new and amended rules addressing future emergencies. Specifically, the Appellate, Bankruptcy, Civil, and Criminal Advisory Committees were requesting approval of amendments to Appellate Rules 2 and 4, as well as promulgation of new Bankruptcy Rule 9038, new Civil Rule 87, and new Criminal Rule 62.

Professor Struve thanked all the chairs and reporters of the Advisory Committees for their extraordinary work on this project, and especially Professor Capra for leading the project. This project was in response to Congress's mandate to consider rules for emergency situations. In regard to the uniform aspects of these rules (*i.e.*, who declares an emergency, the basic definition of a rules emergency, the duration of an emergency, provisions for additional declarations, and when to terminate an emergency), most of the public comments focused on the role of the Judicial Conference in declaring a rules emergency. One commentator supported the decision to centralize emergency-declaration authority in the Judicial Conference; others criticized the decision in various ways. The Advisory Committees carefully considered this both before and after public comment. The uniform aspects remain unchanged post-public comment.

Professor Capra noted two minor disuniformities that remained within the emergency rules. Proposed Appellate Rule 2(b)(4), concerning additional declarations, was styled differently than the similar provisions in the proposed Bankruptcy, Civil, and Criminal emergency rules. And proposed Civil Rule 87(b)(1), concerning the scope of the emergency declaration, was worded differently than the similar provisions in the proposed Bankruptcy and Criminal emergency rules.

Proposed Civil Rule 87(b)(1), as published, stated that the declaration of emergency must "adopt all of the emergency rules in Rule 87(c) unless it excepts one or more of them." The proposed Bankruptcy and Criminal rules provide that a declaration of emergency must "state any restrictions on the authority granted in" the relevant subpart(s) of the emergency rule in question.

Appellate Rules 2 and 4. Turning to the point raised by Professor Capra, Professor Hartnett noted that proposed amended Rule 2(b)(4), as set out on lines 27 to 29 of page 89 of the agenda book, used the passive voice ("[a]dditional declarations may be made") instead of the active voice used by the other emergency rules ("[t]he Judicial Conference … may issue additional declarations"). He stated that the Appellate Rules Advisory Committee agreed to change the language to bring it into conformity with the other emergency rules.

A judge member focused the group's attention on proposed Appellate Rule 2(b)(5)(A) (page 90, line 36). In the event of a declared emergency, this provision would authorize the court of appeals to suspend Appellate Rules provisions "other than time limits imposed by statute and described in Rule 26(b)(1)-(2)." The member asked whether the "and" should be an "or." The rule, as drafted, could be read as foreclosing suspension of only those time limits that are both imposed by statute and described in Rule 26(b)(1) or (2). Professor Hartnett stated that the use of "and" was intentional. Current Appellate Rule 2 permits suspension (in a particular case) of Appellate Rules provisions "except as otherwise provided in Rule 26(b)," and Appellate Rules 26(b)(1) and (2) currently bar extensions of the time for filing notices of appeal, petitions for permission to appeal, and requests for review of administrative orders. The proposed Appellate emergency rule, by contrast, is intended to permit extensions of those deadlines, so long as they are set only by rule and not also by statute. Changing "and" to "or" would eliminate that feature of the proposed rule. Professor Struve noted that she is unaware of any deadline set by both statute and an Appellate Rule other than those referenced in Rule 26(b).

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed amendments to Appellate Rules 2 and 4, with the revision to proposed Appellate Rule 2(b)(4) (lines 27-29) as discussed above.**

New Bankruptcy Rule 9038. Judge Dennis Dow introduced proposed new Bankruptcy Rule 9038. The proposed new rule would authorize extensions of time in emergency situations where extensions would not otherwise be authorized. The Bankruptcy Rules Advisory Committee received only one relevant public comment, which was positive and not specific to the Bankruptcy rule. He requested the Standing Committee give its final approval to proposed new Rule 9038 as published.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved proposed new Bankruptcy Rule 9038.**

New Civil Rule 87. Judge Robert Dow introduced proposed new Civil Rule 87. The Civil Rules Advisory Committee received a handful of comments. The CARES Act Subcommittee considered these comments and determined that no changes were necessary, and the Advisory Committee agreed. The Advisory Committee made some small changes concerning bracketed

language in the committee note, but otherwise the rule looks similar to the language that came before the Standing Committee prior to publication for public comment.

Professor Cooper noted a pair of changes to the portion of the committee note shown on page 124 of the agenda book. Emergency Rule 6(b)(2)(A) authorizes a court under a declared rules emergency to "apply Rule 6(b)(1)(A) to extend" the deadlines for post-judgment motions. (Ordinarily, Civil Rule 6(b)(2) forbids a court from extending those deadlines.) Rule 6(b)(1)(A) authorizes a court, "for good cause, [to] extend the time … with or without motion or notice if the court acts, or if a request is made, before the original time *or its extension* expires." (emphasis added.) Prior to the Standing Committee meeting, a judge member had pointed out that, as published, the text of the rule, by referring to Rule 6(b)(1)(A), authorizes sequential extensions (that is, a court could grant an extension under Rule 6(b)(1)(A) and, before time expired under that extension, grant a second extension). But, the member observed, the committee note did not reflect this possibility. Professor Cooper agreed with this assessment of the committee note. The Advisory Committee therefore agreed to add language (in the first and fifth sentences of the relevant committee note paragraph) clarifying that such further extensions were possible. Separately, the Advisory Committee had decided to delete the first sentence of the next paragraph of the committee note, and to combine the remainder of that paragraph with the following paragraph to form one paragraph.

Discussion then turned to the wording of proposed Civil Rule 87(b)(1). A practitioner member noted that as he read the proposed Criminal and Bankruptcy emergency rules, if the Judicial Conference failed to specify which emergency provisions it was invoking or exempting, the default was that all the emergency provisions would go into effect. However, proposed new Civil Rule 87(b)(1)(B) by its terms worked differently: "The declaration must … adopt all the emergency rules … unless it excepts one or more of them." Under this wording, the member suggested, if the declaration did not specify which provisions it was adopting, it would be an invalid declaration. Professor Cooper stated that, originally, the relevant portion of Rule 87(b)(1) had said simply that "[t]he declaration *adopts* all the emergency rules unless it excepts one or more of them," thus setting the same default principle as the proposed Bankruptcy and Criminal rules. But in the quest for uniformity in wording across the three proposed emergency rules, the word "must" had been moved up into the initial language in Rule 87(b), which had the effect of inserting "must" into proposed Rule 87(b)(1)(B). Professor Cooper explained that (for the reasons set forth on page 111 of the agenda book) it was not possible for Civil Rule 87(b)(1)(B) to use identical wording to that in the proposed Bankruptcy and Criminal emergency rules. The Bankruptcy and Criminal provisions directed that the emergency declaration "must … state any restrictions on" the emergency authority otherwise granted by the relevant emergency rule—a formulation that would not be appropriate in the Civil rule given the indivisible nature of each particular Civil emergency rule. Professor Cooper expressed the hope that the Judicial Conference would remember to specify which courts were affected and which rules it was adopting by its emergency order. Judge Bates added that if the rule would require the Judicial Conference to make a specific declaration for Civil that need not be made for the other emergency rules, members should consider whether it would cause any problems.

Professor Struve suggested that there were actually two uniformity questions at issue—stylistic uniformity, and a deeper uniformity as to the substance. Uniformity on the substance, she

offered, could be achieved through revisions to Civil Rule 87(b)(1) (on pages 116-17)—namely, deleting the word "must" from line 10 and instead inserting it at the beginning of lines 11 and 15, and changing "adopt" at the beginning of line 12 to "adopts." Under that revised wording, if the declaration failed to specify any exceptions, it would adopt all the emergency rules in Rule 87(c)—thus achieving the same default rule as the Bankruptcy and Criminal provisions.

Professor Capra, however, stated that this proposed revision would deepen rather than alleviate the uniformity problem. He predicted that the good sense of the Judicial Conference would surmount any problem with the language of the rule as published. Professor Coquillette agreed that the Judicial Conference would know what it needed to do to declare a Civil Rules emergency. Judge Bates added that he believed the Rules Office would inform the Judicial Conference of the procedures it needed to follow to declare a Civil Rules emergency. Professor Struve expressed her confidence in the meticulousness of the Rules Office, but she questioned why the rulemakers would want to impose an additional task on the Rules Office in the event of an emergency. Making it as simple as possible for all actors to act in an emergency situation seemed desirable.

Judge Bates highlighted two goals: First, the desire for uniformity. Second, the desire to not have to ask the Judicial Conference to do something unique with respect to the Civil Rules. Judge Bates thought that Professor Struve's suggestion would accomplish the second goal, although it would offend uniformity. And, he suggested, the proposed rule as published already offended uniformity. Therefore, the question under debate was not about *creating* disuniformity but rather fixing one issue while continuing the lack of uniformity.

A practitioner member stated that she agreed with the proposed change. The change would make the rule read more clearly while also safeguarding against something being overlooked in an emergency. Professor Marcus said that the goal of the Advisory Committee was to make it as easy as possible for the Judicial Conference to declare a rules emergency, with all the emergency rules going into effect unless the Judicial Conference explicitly excluded a rule. To the extent the rule as written did not do so, it would be good to make changes to get there. A judge member agreed that the rule should not create more work for people to do in order to declare a rules emergency.

Judge Robert Dow stated that he believed Professor Struve's proposed change was friendly and therefore acceptable to the Advisory Committee. While it would add a disuniformity to the proposed new Rule 87, that disuniformity occurred in a place where the rule already was not uniform in relation to the other emergency rules. He asked the Standing Committee to grant final approval to proposed new Civil Rule 87, with the noted changes both to the committee note and to lines 10 through 15 of the rule text.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved proposed new Civil Rule 87.**

New Criminal Rule 62. Judge Kethledge introduced proposed new Criminal Rule 62. The Criminal Rules Advisory Committee received ten or so public comments, some of which were overlapping. He highlighted one change to the committee note plus two of the public comments.

First, the change to the committee note concerned a passage addressing proposed Rule 62(d)(1)'s requirement that courts provide "reasonable alternative access" to the public when conducting remote proceedings. The note as published stated that "[t]he rule creates a duty to provide the public, including victims, with 'reasonable alternative access.'" DOJ requested that the note be revised to mention the Crime Victims' Rights Act (CVRA). A pair of comments opposed this suggestion, and one of those comments requested deletion of the phrase "including victims." The latter phrase had been included to ensure that district courts did not overlook the requirements of the CVRA when holding remote proceedings, not to suggest an order of priority among observers of remote proceedings. Accordingly, the Advisory Committee revised the note as shown on page 161 of the agenda book by deleting the phrase "including victims" and by adding a sentence directing courts to "be mindful of the constitutional guarantees of public access and any applicable statutory provision, including the Crime Victims' Rights Act." This language reminds courts to consider both the First and Sixth Amendments' guarantees of public access, in addition to any statutory rights, such as the CVRA. Later in the meeting, an attorney member suggested changing "be mindful of" to "comply with," and Judge Kethledge (on behalf of the Advisory Committee) acquiesced in that change.

Second, one of the public comments concerned proposed new Rule 62(d)(2), which provides that, if "emergency conditions limit a defendant's ability to sign[,] defense counsel may sign for the defendant if the defendant consents on the record." A district judge suggested that this language be revised to allow the court to sign for the defendant as well. The Advisory Committee did not support this suggestion. There was no demonstrated need to have the court sign for the defendant when counsel would be perfectly able to do so. The Advisory Committee was particularly concerned that this would infringe upon the attorney-client relationship. And the Advisory Committee was concerned that this would allow the court to sign a request to hold felony plea or sentencing hearings remotely under proposed new Rule 62(e)(3)(B).

Third, the Advisory Committee received public comments regarding proposed new Rule 62(e)(3)(B), which addresses holding felony plea or sentencing hearings remotely. This is by far the most sensitive subject that Rule 62 addresses. A defendant's decision to plead guilty and the court's decision to send a person to prison are the most important proceedings that happen in a federal court. The Advisory Committee has an institutional perspective that remote proceedings for pleas and sentencing truly should be a last resort; holding such a proceeding remotely is always regrettable, even if it is sometimes necessary. A court does not have as much information when proceeding remotely as it would have in a face-to-face proceeding. The Advisory Committee has a strong concern that there are judges who would want to hold remote sentencing proceedings even when not necessary. These concerns underpinned Rule 62(e)(3)(B), which set as a requirement for a remote felony plea or sentencing that "the defendant, after consulting with counsel, requests in a writing signed by the defendant that the proceeding be conducted by videoconferencing." The goal of this language was to make sure the decision was unpressured and therefore truly the decision of the defendant. Comments from some judges argued, on logistical grounds, that this provision should be revised to allow the court to sign for the defendant. However, the Advisory Committee rejected those suggestions, noting that counsel for the defendant could sign the request on the defendant's behalf.

At the Advisory Committee meeting, the liaison from the Standing Committee had suggested that the committee note be revised to make clear that the requisite writing could be provided at the outset of the plea or sentencing proceeding itself. Judge Kethledge invited this member of the Standing Committee to discuss his suggestion. The member observed that Rule 62(e)(3)(B) required a "request" from the defendant, but he did not think that the rule required the request be made at any specific time. However, he suggested, it was possible to read the rule as requiring that the request be made *before* the hearing, and the note should be revised to resolve this ambiguity. He suggested (based on the challenges of arranging opportunities for counsel to confer with their clients during the pandemic) that the note say that, while it was preferable to provide the request in advance of the hearing, it could be provided at the hearing if the defendant had an opportunity to confer with counsel.

Judge Bates questioned the use of "requests" in Rule 62(e)(3)(B). If that language required that the idea of proceeding remotely must originate with the defendant, he suggested that could cause practical problems in cases where the remote option is first mentioned by the judge or the prosecutor.

A judge member stated that requiring the request in advance of the hearing could create logistical problems: a need to monitor the docket to check for the required request, and potential last-minute cancellations for lack of the required request. Also, this member suggested, the focus should be on whether the defendant freely consented to the remote proceeding, not on whether it was the defendant who had requested the remote proceeding. Later, Professor Beale stated that the Advisory Committee members recognized that requiring the request in advance of the hearing might not be efficient and could slow things down, but members felt strongly that it was important to protect the ability of the defendant to consult freely with counsel before making the decision to proceed remotely. As to the challenges presented by districts that cover large areas, Professor Beale recalled that the Advisory Committee was persuaded by a member's argument that the rules should not relax standards to accommodate infrastructure failures.

Judge Kethledge noted that the Advisory Committee was not unanimous regarding whether the request in writing must precede the proceeding, although most members of the Advisory Committee (including Judge Kethledge) thought that the request to hold the proceeding remotely must precede the plea or sentencing proceeding. The rule requires that the request be effectuated by a writing—which can only be true if the court has received the writing. Furthermore, another prerequisite for remote proceedings (including felony pleas and sentencings) is Rule 62(e)(2)(B)'s requirement that the defendant have an "opportunity to consult confidentially with counsel both before and during the proceeding." If Rule 62(e)(3)(B) permitted a request to be made midstream in a proceeding (rather than only beforehand), in such midstream instances there would have been no opportunity for consulting prior to the proceeding. Additionally, the contrast between Rules 62(e)(1) and 62(e)(2)(B) (which both require an opportunity for the defendant to consult with counsel "confidentially") and Rule 62(e)(3)(B) (which makes no mention of confidentiality) suggests that the consultation and request under Rule 62(e)(3)(B) must come before the proceeding.

The practical concern, Judge Kethledge explained, was that allowing mid-proceeding requests would open the door to exactly the type of judicial pressure that the request-in-writing

requirement was meant to prevent. During a remote proceeding, the judge could solicit from the defendant a request for the plea or sentencing to proceed remotely. A resulting request from the defendant would not be the unpressured, deliberate decision that the Advisory Committee insisted upon before the defendant gives up the very important right to an in-person proceeding. Permitting the request to occur during rather than before the hearing could greatly undermine the purpose of the writing requirement—namely, to ensure that the emergency rule permits only a narrow exception to the normal in-person requirement. The Advisory Committee was therefore opposed to such a change, which had not been requested by the DOJ and which was opposed by the defense bar.

Professor King reported that defense counsel members of the Advisory Committee had recounted pressure during the pandemic to get their clients to consent to proceed remotely. One noted that two judges in her district had expressed frustration regarding defendants who refused to proceed remotely. Another member reported that CJA members in her district themselves felt pressure to proceed remotely, and having a barrier between the court and the client was important. Another stressed the need for distance between the request in writing and the plea hearing, to give the attorney time to explain the choice to the defendant. It would not be fair to the defendant to be sent to a breakout room with everyone waiting in the main room for the defendant to come back with a "yes," after being asked to proceed remotely by the person with sentencing authority. Not a single member of the Advisory Committee was interested in advancing the proposal to revise the committee note (*i.e.*, to state that the requisite writing could be provided at the outset of the plea or sentencing).

Professor Beale added that to hold a felony plea or sentencing proceeding remotely under Rule 62(e)(3)(C), the court would need to find that "further delay … would cause serious harm to the interests of justice." This would happen only rarely, such as where the defendant faced only a very short sentence.

Judge Bates reiterated his concern that the meaning of "requests" was not entirely clear. Did it require the court to make a finding that the idea of proceeding remotely originated from the defendant and not, for example, some comment the court may have made at a prior proceeding?

Noting that the Standing Committee's membership did not include any criminal defense lawyers, a practitioner member stated that he found compelling the real-world concerns of the defense bar that were credited by the Advisory Committee and expressed by Judge Kethledge, Professor King, and Professor Beale. So he favored requiring that the request come from the defendant before the proceeding begins. But he did not think the rule as drafted was clear on this point, and he stressed the need for clarity so as to avoid future litigation.

Another attorney member agreed as to the timing question, and advocated adding the words "in advance" to reflect that. But, he argued, in the real world the idea will usually not come from the defendant, so he advocated saying "consents" instead of "requests." A judge member predicted that the term "requests" would generate litigation due to the dearth of caselaw on point; by contrast, he said, much caselaw addressed the meaning of "consent." He also suggested that promulgating a form would help to forestall litigation over what was required.

The judge member who had suggested that the committee note be revised to state that the writing could be provided at the outset of the proceeding acknowledged that judges had in the past advocated the use of remote proceedings for what the Advisory Committee had found to be insufficient reasons. He noted, however, that Rule 62 would be in effect only during an emergency—which diminished his concern over the possible misuse of remote proceedings under it. As a data point, this judge member stated he was more often rejecting requests from defendants to proceed remotely than approving them. The member clarified that his concern was not with scenarios in which the idea of holding the plea proceeding comes up midstream during another remote proceeding. Rather, the member's concern was with another possible scenario that was based on his own experiences early in the pandemic: A plea allocution is scheduled to take place remotely, but just prior to the hearing, counsel asks to go into a breakout room to speak with the defendant in order to get the not-yet-provided signature on the request to proceed remotely. The judge does not join the main hearing room until after defendant and counsel return from the breakout room. The member argued that the rule appears to permit the proceeding to go forward in this circumstance, and that this avoids the significant delay that could be entailed in scheduling a new proceeding.

Another judge member noted that defense counsel, not solely judges, may sometimes pressure a defendant to consent to a remote plea or sentencing hearing. Judges, this member suggested, should be alert to this risk. The member noted the difficulty of drafting rules to address emergencies, which may present strange circumstances.

A practitioner member said that the Standing Committee should not make changes that would not have made it through the Advisory Committee. If the Standing Committee wished to make such a change, it should consider remanding the proposal to the Advisory Committee—but that would prevent Rule 62 from proceeding in tandem with the other proposed emergency rules. Both for that procedural reason and on the substance, this member supported the position taken by the Advisory Committee. As to adding language to require that the request in writing occur "in advance," the practitioner member suggested that no such language could foreclose a judge from attempting to streamline the process. For example, a requirement of a request "in advance" could be met by making the request during a status conference in the morning, and reconvening later that day for the plea or sentencing.

A judge member emphasized that judges vary in their ability; in her circuit, there were sometimes even defects in plea colloquies. Given the critical nature of plea and sentencing proceedings, this member thought that the request needs to be in advance of the proceeding. If the request need not be made in advance, it will become routine. The rule should say "in advance," and possibly even state *how far* in advance, such as seven days. She acknowledged, however, that answering the how far question would likely require sending the rule back to the Advisory Committee, so she was not making that suggestion.

A practitioner member agreed with the proposal to insert "in advance." It is inherently important to the integrity of the criminal justice system that plea changes and sentencing hearings be done in-person. As a civil practitioner, this member periodically witnesses criminal sentencing proceedings that occur before the civil matters. The very best judges are those who take the most

care with sentencing proceedings. It gives dignity to the individuals involved in the process, including their families. This does not translate well to videoconferencing.

A judge member who had earlier stated that requiring the request in advance of the hearing could create logistical problems suggested that the rule should be clear about what it requires and that, in her view, it should permit bringing the document to the hearing itself. This member pointed out that efficiency is also important for defendants; a more cumbersome process (requiring a request in advance) may delay closure (and release) for defendants who will receive time-served sentences.

Judge Bates stated that he counted four proposed changes. First, to change "requests" to "consents." Second, to specify that the requisite writing must be signed by the defendant "in advance." Third, and contrary to the second suggestion, to revise the committee note to say that the writing could, if necessary, be provided at the outset of the proceeding. Fourth was the suggestion that the rule be clarified—a suggestion that might be addressed by the decision on the other proposed changes. Judge Bates suggested that it would be helpful to learn the sense of the committee on these proposals. He was not inclined to suggest remanding the proposal to the Advisory Committee unless the latter thought a remand was a good idea—and even then, he surmised, the Advisory Committee would want to know what the Standing Committee thought on each of these issues. Judge Kethledge said he believed the Advisory Committee would be fine with the second suggestion (inserting "in advance"). As to the first suggestion, the Advisory Committee's choice of "requests" would not foreclose situations where the idea itself came from someone other than the defendant, it simply required that the defendant come forward to trigger the remote proceeding—that is, the rule was meant to protect against situations where the decision to proceed remotely came after a discussion with the *judge*.

Professor Capra suggested that a compromise might be to insert "in advance" but also change "requests" to "consents." He urged the Standing Committee not to remand the entire proposal over this issue, and he suggested that his proposed compromise would not require republication. Professor Coquillette agreed with Professor Capra concerning the lack of need for republication.

A judge member noted that during the colloquy at the start of the hearing, the judge will make sure the defendant consents to proceeding remotely. Therefore, she recommended keeping the word "requests." The request would come in advance, and the consent would be confirmed via the colloquy at the hearing. Citing a recent example of a case in which the defendant challenged the voluntariness of his consent to proceed remotely, Judge Kethledge reiterated the importance of foreclosing the option of deciding midstream in a remote proceeding to convert the proceeding into a remote plea or sentencing proceeding.

Upon motion by a member, seconded by another: **The Standing Committee voted 10-3 to insert "before the proceeding and" in proposed new Criminal Rule 62(e)(3)(B)** on line 109 (page 154 in the agenda book). ("Before" and "proceeding" were substituted for "in advance of" and "hearing" for reasons of style and internal consistency.)

Upon motion by a member, seconded by another: **The Standing Committee voted 7-6 to change "requests" to "consents" in proposed new Criminal Rule 62(e)(3)(B) (p. 154, line 110), with conforming changes to be made to the committee note (p. 168).**

Judge Bates then invited the Standing Committee to vote on whether to give final approval to proposed new Criminal Rule 62, with the changes to Rule 62(e)(3)(B) that the Committee had just voted to make, conforming changes to the committee note (p.168), and the substitution of "comply with" for "be mindful of" in the Advisory Committee's revised note language concerning Rule 62(d)(1) (p.161).

Upon motion by a member, seconded by another: **The Standing Committee unanimously approved proposed new Criminal Rule 62.**

Judge Bates thanked the Standing Committee and the Advisory Committees, including the chairs and reporters, and specifically thanked Professor Capra and Professor Struve, for their work on all the emergency rules. He noted that the rules have now reached the Judicial Conference, and have done so particularly quickly.

Due to scheduling constraints, the Criminal Rules Advisory Committee provided its report (described infra p. 13) prior to the lunch break. After the lunch break, the Standing Committee resumed its discussion of joint committee business.

Juneteenth National Independence Day

Judge Bates introduced this agenda item, which concerned the proposal to add Juneteenth National Independence Day to the lists of specified legal holidays in Appellate Rules 26(a)(6)(A) and 45(a)(2), Bankruptcy Rule 9006(a)(6)(A), Civil Rule 6(a)(6)(A), and Criminal Rules 45(a)(6)(A) and 56(c).

A practitioner member suggested that the semi-colon in the proposed amendment to Bankruptcy Rule 9006 was a typo, and the Bankruptcy Rules Advisory Committee agreed to substitute a comma.

Professor Capra noted that the committee notes were not uniform between the rule sets. He suggested that the reporters confer after the meeting to achieve uniformity.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously gave final approval (as technical amendments) to the proposed amendments to Appellate Rules 26 and 45, Bankruptcy Rule 9006, Civil Rule 6, and Criminal Rules 45 and 56, subject to the committee notes being made uniform.**

Pro Se Electronic Filing Project

Professor Struve introduced this item. She thanked the Federal Judicial Center (FJC) for its superb research work and its report ("Federal Courts' Electronic Filing By Pro Se Litigants") which was available online. Judge Bates had asked Professor Struve to convene the reporters for

the Appellate, Bankruptcy, Civil, and Criminal Rules Advisory Committees, along with members from the FJC, to discuss suggestions relating to electronic filing by self-represented litigants, and this working group had met in December 2021 and March 2022. One issue is whether self-represented litigants have access to the court's case management / electronic case filing ("CM/ECF") system. Among the findings by the FJC is that such access varies by type of court, with the courts of appeals most willing to grant such access to self-represented litigants, the district courts less so, and the bankruptcy courts least of all. On the other hand, a number of bankruptcy courts are using an "electronic self-representation" system. This raises the question of whether the four Advisory Committees may select different approaches for differing levels of courts.

Another question is that of service on persons who receive notice through CM/ECF. When a non-CM/ECF user files a document, the clerk's office will subsequently enter it into CM/ECF; the system then sends a notice of electronic filing to parties that are CM/ECF users. Yet many courts continue to require the non-CM/ECF filer to nonetheless serve the filing on other parties, whether or not those parties are CM/ECF users.

Professor Struve noted that the working group was planning a further discussion sometime in the summer with the hope of teeing up topics for discussion by the four Advisory Committees at their fall meetings.

Dr. Reagan noted that in the civil context there are two different groups of self-represented people who file—prisoners and non-prisoners—and these groups represent significantly different concerns and challenges. Additionally, the concept of electronic filing does not necessarily mean using CM/ECF; other methods include email or electronic upload, but these methods can pose cybersecurity issues. CM/ECF is difficult even for attorneys to use, and at least one district requires attorneys to initiate cases via paper filings rather than via CM/ECF.

Electronic Filing Deadline Study

Judge Bates provided a brief introduction to this information item concerning electronic filing times in federal courts. He noted that an excerpt from the FJC's recently-completed report on this topic appeared in the agenda book starting at page 185. The report had not yet been reviewed by the subcommittee that had been formed to consider whether the time-computation rules' presumptive electronic-filing deadline of midnight should be altered.

Dr. Reagan noted that the FJC studied the frequency of filings at different times of day. While results varied from court to court, the FJC found that most filing occurred during business hours, but that a significant amount did occur outside of business hours. He noted that in the bankruptcy courts, there were a significant number of notices filed robotically overnight.

The FJC began a pilot survey of judges and attorneys, but it gathered limited data because it closed the survey due to the pandemic. Continuing the survey under current conditions would be unproductive because opinions and experiences during the pandemic would not be representative of future non-emergency practice. But the limited pilot-study data did show a distinction between the views of sole practitioners and those of big-firm lawyers. The latter were more likely to favor moving the presumptive deadline to a point earlier than midnight.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Kethledge provided the report of the Advisory Committee on Criminal Rules, which met in Washington, DC on April 28, 2022. For the sake of brevity, Judge Kethledge highlighted only the Juneteenth-related amendments to Criminal Rules 45 and 56 (pp. 11–12, supra) and one other technical amendment. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 810.

Action Item

Final Approval

Rule 16(b)(1)(C)(v). Judge Kethledge introduced the only action item, which was a proposed technical amendment (p. 814) to fix a typographical error in a cross-reference in Rule 16(b)(1)(C)(v), addressing defense disclosures. The version of the rule with the typo is set to take effect on December 1, 2022, absent contrary action by Congress.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously gave final approval to the proposed amendment to Rule 16(b)(1)(C)(v) as a technical amendment.**

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Schiltz and Professor Capra provided the report of the Advisory Committee on Evidence Rules, which met in Washington, DC on May 6, 2022. The Advisory Committee presented nine action items: three rule amendments for which it was requesting final approval and six rule amendments for which it was requesting publication for public comment. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 866.

Action Items

Final Approval

Rule 106. Judge Schiltz introduced the proposed amendment to Rule 106 shown on page 879 of the agenda book. Rule 106 is the rule of completeness. When a party introduces part of a statement at trial, and that partial statement may be misleading, another party can introduce other parts of the statement that in fairness ought to be considered. The proposed amendment would fix two problems with the existing rule.

First, suppose a prosecutor introduces part of a hearsay statement and the completing portion does not fall within a hearsay exception. There is a circuit split as to whether the completing portion can be excluded under the hearsay rules. This amendment would resolve the split by making explicit that the party that introduced the misleading statement could not object to

completion on grounds of hearsay. But the completing statement could still be excluded on other grounds.

Second, current Rule 106 only applies to "writings" and "recorded statements," not oral statements. This means that for an oral statement, the court needs to turn to the common law. Unlike other evidentiary questions, here the common law has only been partially superseded by the Federal Rules of Evidence. This is particularly problematic because completeness issues will generally arise during trial when there is no opportunity for research and briefing.

The Advisory Committee received a handful of comments, all but one of which were positive. One public comment spurred a change to the rule text. The proposal as published would have provided for the completion of "written or oral" statements, a phrase that the Advisory Committee had thought would cover the field. But as a public comment pointed out, that phrase failed to encompass statements made through conduct or through sign language. As a result, the Advisory Committee decided to delete the current rule's phrase "writing or recorded" so that the rule will refer simply to a "statement."

A judge member asked whether there would be Confrontation Clause issues if a criminal defendant introduced part of a statement and the government was allowed to introduce the completing portion over a hearsay objection. Professor Capra stated that for a Confrontation Clause issue to arise the completing portion would have to be *testimonial* hearsay, which would be quite rare. If the issue did arise, the Supreme Court in *Hemphill v. New York*, 142 S. Ct. 681, 693 (2022), left open the possibility a forfeiture might apply. The idea would be that the rule of completeness might be applicable as a common law rule incorporated into the Confrontation Clause's forfeiture doctrine. Judge Schiltz added that the proposed amendment did not purport to close off a potential Confrontation Clause objection.

Another judge member stated that the proposed amendment was helpful because a judge at trial should not have to look to the common law to resolve issues of completion.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Rule 106.**

Rule 615. Judge Schiltz introduced the proposed amendment to Rule 615. Rule 615 requires that upon motion, the judge must exclude from the courtroom witnesses who have yet to testify, unless they are excepted from exclusion by current subdivisions (a) through (d). Rule 615 is designed to prevent witnesses who have not yet been called from listening to others' testimony and tailoring their own testimony accordingly. The current rule does not speak to instances where a witness learns of others' testimony from counsel, a party, or the witness's own inquiries. Thus, in some circuits, if the court enters a Rule 615 order without spelling out any additional limits, the sole effect is to physically exclude the witness from the courtroom. But other circuits have held that a Rule 615 order automatically forbids recounting others' testimony to the witness, even when the order is silent on this point. In those circuits, a person could be held in contempt for behavior not explicitly prohibited by either rule or court order. The proposed amendment would add a new subdivision (b) stating that the court's order can cover disclosure of or access to testimony, but it must do so explicitly (thus providing fair notice).

The proposed amendment also makes explicit that when a non-natural person is a party, that entity can have only one representative at a time excepted from Rule 615 exclusion under the provision that is now Rule 615(b) and would become Rule 615(a)(2). This would put natural and non-natural persons on an even footing. Under the current rule, some courts have allowed entity parties to have two or more witnesses excepted from exclusion under Rule 615(b). The amended rule would not prevent the court from finding these additional witnesses to be essential (see current Rule 615(c)), or statutorily authorized to be present (see current Rule 615(d)).

The Advisory Committee received only a handful of public comments on the proposal, all of which were positive.

Focusing on proposed Rule 615(b)(1)'s statement that "the court may … by order … prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom," a judge member asked whether there was any consideration of specifying whom the prohibition runs against? Judge Schiltz answered that trial testimony might be disclosed by a range of people, such as an attorney, a paralegal, or even the witness's spouse. It would be tricky to delineate in the rule. Professor Capra added that it would be a case-by-case issue, and the judge would specify in the Rule 615 order who was subject to any Rule 615(b)(1) prohibition.

A practitioner member noted that in longer trials, there may be situations where a corporate party needs to change who its designated representative is. Professor Capra responded that the committee note recognizes the court's discretion to allow an entity party to swap one representative for another during the trial.

The same practitioner member echoed the judge member's previous suggestion that Rule 615(b)(1) should explicitly state who is prohibited from disclosing information to the witness. Professor Capra stated that the rule does not need to say that; rather, that is an issue that the court should address in its order. Judge Schiltz added that the judge in a particular case is in the best position to determine in that case who must not disclose trial testimony to a witness.

The practitioner member turned to a different concern, focusing on the portion of the committee note (the last paragraph on page 888) that dealt with orders "prohibiting counsel from disclosing trial testimony to a sequestered witness." The committee note acknowledged that "an order governing counsel's disclosure of trial testimony to prepare a witness raises difficult questions" of professional responsibility, assistance of counsel, and the right to confrontation in criminal cases. The member expressed concern that the proposed rule would permit such orders without setting standards or limits to govern them. The member acknowledged that this vagueness was a conscious choice, but argued that it gave the judge too much discretion. Judge Schiltz responded that such discretion already exists today under the current rule. And specifying standards for such orders in the rule would be nightmarishly complicated. Judge Bates added that all the proposed rule would do is tell judges that if they want to do anything more than exclude a witness from the courtroom, the order needs to explicitly spell that out.

Another practitioner member stated he supports the proposed rule change. The proposal gives clarity, while leaving discretion to the judge to tailor an order on a case-by-case basis.

However, he questioned whether the language in the committee note was too strong in stating that an order governing disclosure of trial testimony "raises" the listed issues. Based on suggestions from this member and the other practitioner member who had raised concerns about the passage, Professor Capra agreed to redraft the paragraph's second sentence to read: "To the extent that an order governing counsel's disclosure of trial testimony to prepare a witness raises questions of professional responsibility and effective assistance of counsel, as well as the right to confrontation in criminal cases, the court should address those questions on a case-by-case basis."

Ms. Shapiro turned the Committee's attention to the committee note's discussion (page 889) of proposed Rule 615(a)(3). She suggested that the words "to try" be removed from the note's statement that an entity party seeking to have more than one witness excepted from exclusion at one time is "free to try to show" that a witness is essential under Rule 615(a)(3). "Free to try" suggests that the showing is a difficult one, when really it is routine for courts to allow the United States to except from exclusion additional necessary witnesses such as case agents. A judge member questioned whether "is free to show" is the correct phrase. Should the note say "must show" or "may show" instead? Discussion ensued concerning the relative merits of "must," "may," "should," and "needs to." Professor Capra and Judge Schiltz agreed to revise the note to say "needs to show."

Professor Bartell suggested that a committee note reference to "parties subject to the order" (page 888) be revised to say "those" instead of "parties" (since a Rule 615(b) order can also govern nonparties). Professor Capra agreed and thanked Professor Bartell.

The Advisory Committee renewed its request for final approval of Rule 615, with the three amendments to the committee note documented above.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Rule 615.**

Rule 702. Judge Schiltz introduced this action item. Rule 702 deals with expert testimony and the proposed amendment would address two problems. The first relates to the standard the judge should apply when deciding whether to admit expert testimony. Current Rule 702 sets requirements that must be met before a witness may give expert testimony. It is clear under the caselaw and the current Rule 702 that the judge should not admit expert testimony until the judge—not the jury—finds by a preponderance of the evidence that the requirements of Rule 702 are met. However, there are a lot of decisions from numerous circuits that fail to follow that requirement, and the most common mistake is that the judge instead asks whether *a jury* could find by a preponderance of the evidence that the requirements of Rule 702 are met. As a result, very often jurors are hearing expert testimony that they should not be permitted to hear. Under a correct interpretation of current Rule 702, the proposed amendment does not change the law; it merely makes clear what the rule already says.

Second, the proposed amendment addresses the issue of overstatement, *i.e.*, where a qualified expert expresses conclusions that go beyond what a reliable application of the methods to the facts would allow. Overstatement issues typically arise with respect to forensic testimony in criminal cases. For example, the expert may say the fingerprint on the gun *was* the defendant's, or

the bullet *came from* the defendant's gun, when that level of certainty is not supported by the underlying science. For some time, the Advisory Committee has been debating and considering whether to address this issue via a rule amendment. Some members thought current Rule 702 gives attorneys all the tools they need to attack issues of overstatement, but that they were not using them. Other members thought that amending the rule would serve an educational goal and draw attention to this problem. After considerable debate, the Advisory Committee decided to amend Rule 702(d). Currently, the subdivision requires that "the expert has reliably applied the principles and methods to the facts of the case." The proposed amendment would require that "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." The hope is that this change in rule language, alongside the guidance in the committee note, will shift the emphasis and encourage judges and parties to focus on the issue of overstatement, particularly concerning forensic evidence in criminal cases.

The Advisory Committee received over 500 public comments regarding the proposed amendments to Rule 702. Additionally, about two dozen witnesses spoke on the proposal at the Advisory Committee's hearing.

Professor Capra summarized the public comments. Viewed quantitatively, they were mostly negative. There was a perceptible difference of opinion between plaintiffs' and defendants' lawyers. Many comments used identical idiosyncratic language. If commenters were copying and pasting language from others' comments, that could explain some of the volume. A number of comments evinced a misunderstanding of current law. For example, many comments said the proposed amendment would shift the burden from the opponent to the proponent—an assertion premised on the incorrect idea that the burden is now on the opponent to show that proposed expert testimony is unreliable. Such misunderstandings support the need for the proposed amendment.

Additionally, many comments criticized the published proposal's use of the "preponderance of the evidence" standard. Particularly, parties were concerned that the standard meant that judges could only rely on *admissible* evidence. However, Rule 104(a) explicitly states that the court can consider inadmissible evidence. The Advisory Committee therefore did not think that these critiques had merit. Nonetheless, because the published language had proven to be a lightning rod, the Advisory Committee chose to change the language, but not the meaning, of the proposed rule text, which (as presented to the Standing Committee) requires that the "proponent demonstrates to the court that it is more likely than not" that the Rule's requirements are met.

The phrase "to the court" in that new language responded to another set of concerns voiced in the comments—namely, *who* needed to find that the preponderance of the evidence standard was met. The proposed Rule 702 as published for public comment did not specify who—whether the judge or the jury—was tasked with making this finding. Implicitly, the judge must make the finding, as all decisions of admissibility under the Federal Rules of Evidence are made by the judge. However, because of all the uncertainty in practice as to who has to make this finding, there was significant sentiment on the Advisory Committee to specify in the rule text that it is the court that must so find. The Advisory Committee explored various ways to phrase this before landing on "if the proponent demonstrates to the court that it is more likely than not" that the checklist in Rule 702 is met.

Judge Schiltz noted a change the Advisory Committee would like to make to the committee note (page 893). At the Advisory Committee meeting, a member expressed concern that the rule could be read as requiring that the judge make detailed findings on the record that each of the requirements of Rule 702 is met, even if no party objects to the expert's testimony. To alleviate that concern, the Advisory Committee added a statement in the note that "the rule [does not] require that the court make a finding of reliability in the absence of objection." Prior to the Standing Committee meeting, a judge member had expressed concern that this statement in the note was problematic. Judge Schiltz shared this concern. On the one hand, judges typically do not rule on admissibility questions unless a party objects. But on the other hand, judges are responsible for making sure that plain error does not occur. So it was not exactly right to say that "the rule" did not require a finding. Judge Schiltz accordingly proposed to change "rule" to "amendment" so that the note would say, "Nor does the amendment require that the court make a finding." Thus revised, the note would observe that the amendment was not intended to change current practice on this issue but would avoid taking a position on what Rule 702 already does or does not require. Professor Capra agreed that it was better to skirt the topic; if one were to state in Rule 702 that "there must be an objection, but even if not, there's always plain error review," then one might also need to add that caveat to all the other rules.

A judge member stated her appreciation for the changes: although they are somewhat minor, they help clarify perennial issues.

Judge Bates noted that the language regarding the preponderance of the evidence standard ("more likely than not") comes from the Supreme Court in *Bourjaily v. United States*, 483 U.S. 171 (1987). It therefore is already the law.

A practitioner member asked why the statement "if the proponent demonstrates to the court that it is more likely than not" was written in the passive tense, as opposed to active tense language, such as "if the court finds that it is more likely than not." Judge Schiltz stated that some members of the Advisory Committee were concerned that if the rule used the word "finding," that could be read as requiring the judge to make findings on the record even in the absence of an objection. The language may be awkward, but the Advisory Committee arrived at it as consensus language after years of debate.

A judge member raised a question from a case-management perspective: whether there is any difficulty combining a Rule 702 analysis with a Daubert hearing, and in what sequence these issues would arise. Professor Capra responded that the overall hearing should be thought of as a Rule 702 hearing. Rule 702 is broader than *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), which only concerned methodology. Methodology falls under current Rule 702(c). The judge member thanked Professor Capra for his answer and emphasized the importance of educating the bar and bench about that fact. Citing *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008), *as amended* (Jan. 16, 2009), Professor Marcus observed that Rule 702 issues can come up at junctures prior to trial, such as in connection with class certification.

A judge member applauded the Advisory Committee for drafting a very helpful amendment that does exactly what the Advisory Committee said it was trying to do: not change anything, but rather make clear what the law is.

Professor Capra thanked Judge Kuhl for formulating the language in proposed amended Rule 702(d). The Advisory Committee then renewed its request for final approval of Rule 702, with the one change to the committee note documented above.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Rule 702.**

Judge Bates thanked—and members of the Standing Committee applauded – Professor Capra, Judge Schiltz, and the Advisory Committee for all their work on the proposed amendments to Rules 106, 615, and 702.

Publication for Public Comment

Judge Schiltz stated that the Advisory Committee had six proposed amendments that it was requesting approval to publish for public comment. Every few years, usually coinciding with the appointment of a new Advisory Committee chair, the Advisory Committee reviews circuit splits regarding the Federal Rules of Evidence. The Advisory Committee lets most of those splits lie, but it found that these six proposed amendments—which came as a result of that study—were worth pursuing.

Rule 611(d)—Illustrative Aids. Judge Schiltz introduced this action item. Illustrative aids are used in almost every jury trial. Nonetheless, there is a lot of confusion regarding their use, especially as to the difference between demonstrative evidence and illustrative aids; the latter are not evidence but are used to assist the jury in understanding the evidence. There also are significant procedural differences in how judges allow illustrative aids to be used, including (i) whether a party must give notice, (ii) whether the illustrative aid may go to the jury, and (iii) whether illustrative aids are part of the record. This proposed new rule, which would be Rule 611(d), was designed to clarify the distinction between illustrative aids and demonstrative evidence. The Advisory Committee is hoping that the public comments will assist it in refining the proposal. It is likely impossible to get a perfect dictionary definition of the distinction, but the Advisory Committee hoped to end up at a framework that would assist judges and lawyers in making the distinction.

The proposed new rule sets various procedural requirements for the use of illustrative aids. It would require a party to give notice prior to using an illustrative aid, which would allow the court to resolve any objections prior to the jury seeing the illustrative aid. It would prohibit jurors from using illustrative aids in their deliberations, unless the court explicitly permits it and properly instructs the jury regarding the jury's use of the illustrative aid. Finally, it would require that to the extent practicable, illustrative aids must be made part of the record. This would assist the resolution of any issues raised on appeal regarding use of an illustrative aid.

Professor Capra noted a few changes to the rule and committee note. First, Professor Kimble had pointed out that by definition notice is in advance. Therefore, the word "advance" was deleted from line 13 of the rule text (p. 1010). Second, Rule 611(d)(1)(A) sets out the balancing test the court is to use in determining whether to permit use of an illustrative aid. The provision is

intended to track Rule 403 but is tailored to the particularities of illustrative aids. In advance of the Standing Committee meeting, a judge member asked why the proposed rule in line 9 said "substantially outweighed," as opposed to just "outweighed." "Substantially outweighed" is the language in Rule 403, but the member questioned why there should be such a heavy presumption in favor of permitting use of illustrative aids. The Advisory Committee welcomes public comment on this question, and thus proposes to include the word "substantially" in brackets. Third, the same judge member had pointed out prior to the Standing Committee meeting that the committee note was incorrect in saying that illustrative aids "ordinarily are not to go to the jury room unless all parties agree" (p. 1014). Rather, he suggested "unless all parties agree" be changed to "over a party's objection." The Advisory Committee agreed to this change. Finally, Professor Capra stated that the "[s]ee" signal at the end of the carryover paragraph on page 1013 of the agenda book should be a "[c]f." signal. Rule 105 deals with evidence admitted for a limited purpose, and therefore is not directly applicable since illustrative aids are not evidence. A further change was made to the sentence immediately preceding the citation to Rule 105. Because Rule 105 does not apply, the statement that an "adverse party has a right to have the jury instructed about the limited purpose for which the illustrative aid may be used" is not correct. Rather, the adverse party "may ask to have the jury" so instructed. Professor Capra expressed agreement with this change. Later in the discussion, an academic member asked why a judge would refuse a request for such an instruction. Judge Schiltz suggested, for example, that if the judge has already given the jury many instructions on illustrative aids, she may feel that a further instruction is unnecessary. But he agreed that almost always the judge will give a limiting instruction.

Judge Bates asked about a comment in the Advisory Committee's report that it was "important to note" that the proposed rule "was not intended to regulate" PowerPoint slide presentations or other aids that counsel may use to help guide the jury in opening or closing arguments. This topic, Judge Bates noted, was a particular focus in the Advisory Committee's discussions, and he asked why it was not mentioned in the committee note. Judge Schiltz stated that the Advisory Committee was aware that likely more language would need to be added to the note, but that it wanted to receive public comments first. The debate at the Advisory Committee meeting centered around whether opening or closing slides even are illustrative aids. Participants asserted that such PowerPoints are just a summary of argument. But the rejoinder was, what if a party builds an illustrative aid into its slide presentation? Professor Capra added that the problem with adding a sentence that says that the rule does not regulate materials used during closing argument is that where an illustrative aid is built into the slide presentation, this would not be an accurate statement.

A judge member suggested that Rule 611(d)(2) should set a default rule as to whether the illustrative aid should go to the jury. As currently worded, that provision only addressed what would happen in the event of an objection. Judge Schiltz suggested setting as the default rule that it does not go to the jury. Based on this suggestion, Rule 611(d)(2) was revised to provide that "[a]n illustrative aid must not be provided to the jury during deliberations unless: (A) all parties consent; or (B) the court, for good cause, orders otherwise." Professor Capra undertook to make conforming changes to the relevant portion of the committee note.

A practitioner member stated that this proposal could turn out to be one of the most important rule changes during his time on the Standing Committee. Trials nowadays are as much

a PowerPoint show as anything else. If you are going to address the jury in opening or closing, you should be forced to share the PowerPoints in advance. Most judges require this because, otherwise, an inappropriate statement in a slide presentation could cause a serious problem. But also, slide presentations are being used in direct and cross-examination of witnesses, and with expert witnesses sometimes the entirety of the examination is guided by the slide presentation. In listing categories covered by the proposed rule, the note refers to blackboard drawings. Blackboard drawings are often created on the fly based on the answers the witness gives. There is no way to give the other party the opportunity to review such a drawing in advance. Taken literally, the member suggested, the proposed rule would basically require the judge to preview the trial testimony in advance of trial because the whole trial is being done with PowerPoints. Summing up, the member stressed the real-world importance of the proposed rule. He advised giving attention to the distinction between experts and fact witnesses. A requirement for notice would play out differently as applied to openings and closings, versus direct examination, versus cross-examination. If a lawyer must give opposing counsel the direct-examination PowerPoints in advance, opposing counsel can use those slides in preparing the cross-examination. The rulemakers should think about how that would change trials. The member advocated seeking comment from thoughtful practitioners such as members of the American College of Trial Lawyers.

Professor Capra agreed that these are important questions, and he hoped that practitioner input at the upcoming Advisory Committee meeting and hearings will provide guidance. He stated that the goal of the rule is not to touch on every issue that may come up but rather to create a framework for handling illustrative aids. How far to go into the details is still an open question. Judge Schiltz acknowledged that the proposal presents challenging issues, and observed that the Advisory Committee's upcoming fall symposium would provide helpful input. He noted that the notice requirement can be met by disclosing the illustrative aid minutes prior to presenting it to the jury. This allows the court to resolve any objections before the jury sees the aid. The same practitioner member reiterated that although opening and closing slides should be disclosed before use, he does not think that will work with illustrative aids used with witnesses. Judge Schiltz said the views of practitioner members of the Advisory Committee were the exact opposite: opening and closing slides are sacrosanct, but items to be shown to a witness can be disclosed prior to use.

Another practitioner member agreed with the description of current trial practice provided by the first practitioner member. He stated that the broader the scope of the rule, the more the word "substantially" needs to be retained. Additionally, when you use a slide presentation with a witness, you are trying to synthesize what you think the witness will say. When you use a slide presentation for opening or closing, it is in essence your argument. Disclosing that feels strategically harmful. Once the Advisory Committee receives the public comments, it will be critical to explain when the rule applies and when it does not. For example, the rule refers to using illustrative aids to help the factfinder "understand admitted evidence." Judges who think that PowerPoints are illustrative aids might bar their use in opening arguments because no evidence has yet been admitted.

The Advisory Committee requested approval to publish for public comment proposed new Rule 611(d), with the changes as noted above to both the rule and committee note.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Rule 611.**

Rule 1006. Judge Schiltz introduced this action item as a companion item to the Rule 611(d) proposal. Rule 1006 provides that a summary of voluminous records can itself be admitted as evidence if the underlying records are admissible and too voluminous to be examined in court. Many courts fail to distinguish between summaries of evidence that are themselves evidence, which are covered by Rule 1006, and summaries of evidence that are merely illustrative aids. Judges often mis-instruct juries that Rule 1006 summaries are not evidence when they are in fact evidence. And some courts have refused to allow Rule 1006 summaries when any of the underlying records have been admitted as evidence, while other courts have refused to allow Rule 1006 summaries *unless* the underlying records are also admitted into evidence, neither of which is a correct application of the rule. Rather, Rule 1006 allows parties to use these summaries in lieu of the underlying records regardless of whether any of the underlying records have been admitted in their own right.

A practitioner member stated he thought this was a good rule. He queried whether the rule should mention "electronic" summaries, but he concluded that it was probably unnecessary because that would be covered by the general term "summary." Professor Capra noted that under Rule 101(b)(6), the Rule's reference to "writings" includes electronically stored information.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Rule 1006.**

Rule 611(e)—Juror Questions. Judge Schiltz introduced this action item. This proposed new rule subdivision does not take a position on whether judges should permit jurors to ask questions. Instead, the rule sets a floor of protection that a judge must follow if the judge determines that juror questions are permissible in a given case. These protections were pulled together from a review of the caselaw regarding juror questions.

A practitioner member stated that he cannot recall ever having a jury trial where a judge permitted juror questioning. He asked whether there is a sense as to how prevalent the practice is. He noted that once this is in the rulebook, it has the potential to come in in every case, and that could transform the practice in the country. Judges who do not allow the practice may feel compelled to permit it. Judge Schiltz stated that he does not permit juror questions but another judge in his district does so in civil cases. Another district judge reported that some judges in the Northern District of Illinois permit the practice, though he does not, and it is controversial. Judge Bates reported similar variation in the District of Columbia, although he does not permit juror questions. Judge Schiltz acknowledged that having a rule in the rulebook would appear to give an imprimatur to the practice. But the practice is fairly widespread and is not going away.

A judge member stated that the practice is prevalent in her district, in part because many of the judges previously were state-court judges and Arizona allows juror questions. She did not take a position on whether to adopt the rule, but she offered some suggestions on its drafting. She

thought proposed Rule 611(e)(1) did an excellent job of covering instructions to the jurors. However, Rule 611(e)(1)(F)'s requirement of an instruction that "jurors are neutral factfinders, not advocates," gave her pause. Jurors may be confused as to how to incorporate that instruction into what they may or may not ask. She suggested that this might be explained in the committee note. Additionally, she suggested considering whether the rule should address soliciting the parties' consent to jurors asking questions. Finally, she noted that Rule 611(e)(3) uses two different verbs: the judge must *read* the question, or allow a party to *ask* the question. Professor Capra responded that "ask" is meant to reflect that one of the counsel may want to ask the question, that is, make it their own question. A judge would do nothing more than read it. Another judge member stated that though he did not permit juror questions himself, the practice was sufficiently prevalent that it made sense to have a rule on point. He pointed out a discrepancy between the rule text and note (the note said that the judge should not disclose which juror asked the question, but the rule itself did not so provide). He also questioned the read / ask distinction in Rule 611(e)(3). Responding to a suggestion by Judge Schiltz, this member agreed that this concern could be addressed by revising the provision to state, "the court must ask the question or permit one of the parties to do so." A bit later, discussion returned to the read / ask distinction, and it was suggested that "read" was a better choice than "ask" because the judge might wish to emphasize to jurors that questions should not be asked extemporaneously. Another judge member then used the term "pose," and Professor Capra agreed that "pose" was a better choice than "read" or "ask."

Professor Bartell noted that subsection (3) only mentions questions that are "asked," while other subsections distinguish "asked, rephrased, or not asked." While it seems subsection (3) is meant to apply both to questions that are asked and those that are first rephrased, it is ambiguous, and subsection (3) could be read as not applying to questions that are rephrased.

A practitioner member asked whether this rule was modeled after a particular judge's standing order, and whether such resources could be cited in the committee note to illustrate that the practice already exists. Professor Capra stated that he reviewed the caselaw and included all the requirements found in the caselaw that were appropriate to include in a rule. But he agreed that it would be useful to cite other resources, such as the Third Circuit's model civil jury instruction, in the committee note.

Another practitioner member reiterated his concern that by putting this out for public comment, the Standing Committee is in essence putting its imprimatur on this practice. This is a controversial practice, and there are a number of judges who do not allow it. This member suggested revising Rule 611(e)(1) to state that the court has discretion to refuse to allow jurors to ask questions. Professor Capra stated that this suggestion gave him pause. There may be requirements in some jurisdictions that courts must permit the practice, or there may be such requirements in the future. The Advisory Committee did not want to take a stand either way.

Judge Bates asked whether Judge Schiltz and Professor Capra would consider taking the Rule 611(e) proposal back to the Advisory Committee to consider the comments of the Standing Committee. Professor Capra stressed the value of sending proposals out for comment in one large package rather than seriatim. Judge Bates noted, however, that the Rule 611(d) and 611(e) amendments are both new subdivisions that deal with entirely different matters.

A judge member stated that although she herself is "allergic" to the practice of jurors asking questions, the practice exists and the rules should account for it. But this member expressed agreement with Judge Bates's suggestion that the Advisory Committee consider these issues further before putting the rule out for public comment.

An academic member stated that his instinct was not to delay publication. By contrast to the Bankruptcy Rules, which are frequently amended, the tradition with the Evidence Rules has always been to try to avoid constant changes and—instead—to make amendments only periodically, in a package. The comments from the Standing Committee were important, and it was possible the Advisory Committee would decide not to go forward with the proposal after public comment; but this member favored sending the proposal forward for public comment.

Another judge member stated she agreed with Judge Bates. She could not recall there ever being an appellate issue regarding juror questions, and she favored waiting for the issue to percolate before adopting a rule on the issue. Additionally, judges who do allow juror questioning are very careful already. The judge member also questioned whether the rule should distinguish between the practice in civil and criminal cases. Had the Advisory Committee received any feedback from the criminal defense bar? What about from the government? This member agreed with the prediction that if the rule were to go forward without a caveat up front, it would be a signal to judges that they should be permitting the practice. Professor Capra stated that there has been a case in every circuit so far. He added that the public defender on the Advisory Committee voted in favor of the rule.

A judge member stated that if and when the rule did go out for public comment, the Advisory Committee should ask for comment on whether the practice should be allowed, not allowed, or left to the judge's discretion. Judge Bates added that even if the Advisory Committee did not specifically ask for it, the public comments would likely state whether that commentator thought the practice should be permitted.

Another judge member suggested that the rulemakers should be open to regional variations. The practice arose in Arizona state court and was adopted in the California state courts, and then as the state judges have moved on to the federal bench, they have taken the practice with them. The practice, this member suggested, is not as rare as it might seem to those on the East coast. Another judge member pointed out that the Ninth Circuit's model jury instruction addressing juror questions is presented in a way that makes clear that the judge has the option to allow or not allow juror questions. This has the benefit of clarifying that it is discretionary while still providing guidance.

As a result of the comments and suggestions received from the Standing Committee, the Advisory Committee withdrew the request for publication for public comment.

Rule 613(b). Judge Schiltz introduced this action item as an item that would conform Rule 613(b) to the prevailing practice. At common law, prior to introduction of extrinsic evidence of a prior inconsistent statement for impeachment purposes, the witness must be given an opportunity to explain or deny the statement. By contrast, current Rule 613(b) allows this opportunity to be given at any time, whether prior or subsequent to introduction of extrinsic evidence of the

statement. However, judges tend to follow the old common law practice, and the Advisory Committee agrees with that practice as a policy matter. Most of the time, the witness will admit to making the statement, obviating the need to introduce the extrinsic evidence in the first place. The proposed amendment would still give the judge discretion in appropriate cases to allow the witness an opportunity to explain or deny the statement after introduction of extrinsic evidence, such as when the inconsistent statement is only discovered after the witness finishes testifying and has been excused.

Professor Capra noted one style change to the rule, which moves the phrase "unless the court orders otherwise" to the beginning of the rule.

A practitioner member stated that he thought this was an excellent proposal.

Professor Kimble suggested changing "may not" to "must not." The style consultants tend to prefer "must not" in most situations. Professor Capra thought this suggestion would substantively change the rule. A party may not introduce the evidence unless the court orders otherwise, but the judge could allow it. It is not a command to the judge to not admit the evidence. Judge Schiltz stated he did not feel strongly one way or another, but based on Professor Capra's objection would keep the language as "may not."

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Rule 613(b).**

Rule 801(d)(2). Judge Schiltz introduced this action item, which concerns an amendment to the hearsay exemption for statements by a party-opponent. There is a split of authority on how the rule applies to a successor in interest of a declarant. Suppose, for example, that the declarant dies after making the statement; is the statement admissible against the declarant's estate? The Advisory Committee was unanimous in thinking the answer should be yes.

A judge member highlighted the statement in the committee note that the exemption only applies to a successor in interest if the statement was made prior to the transfer of interest in the claim. The member observed that this was obvious as a matter of principle, but it was not obvious from the text of the rule itself. He suggested that this is a sufficiently important limitation that it ought to be in the rule itself. Professor Capra undertook to consider this suggestion further during the public comment period; he suggested that writing the limit explicitly into the rule text might be challenging and also that the idea might already be implicit in the rule text.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Rule 801(d)(2).**

Rule 804(b)(3). Judge Schiltz introduced the proposed amendment to Rule 804(b)(3)(B) set out on page 1029 of the agenda book. Rule 804(b)(3) provides a hearsay exception for declarations against interest. Rule 804(b)(3)(B) deals with the situation in a criminal case when a statement exposes the declarant to criminal liability. This tends to come up when a criminal

defendant wants to introduce someone else's out-of-court statement admitting to committing the crime. Rule 804(b)(3)(B) requires that defendant to provide "corroborating circumstances that clearly indicate [the] trustworthiness" of the statement. The circuits are split concerning the meaning of "corroborating circumstances." Some circuits have said the court may only consider the guarantees of trustworthiness inherent in the statement itself. Other circuits allow the judge to additionally consider other evidence of trustworthiness, even if extrinsic to the statement. The proposed amendment would direct judges to consider all the evidence, both that inherent in the statement itself and any evidence independent of the statement.

A judge member noted that the rule only talks about corroborating evidence, not conflicting evidence, while the note speaks both to corroborating and conflicting evidence. Judge Schiltz stated that he made this point at the Advisory Committee meeting, but the response was that mentioning conflicting evidence in the text of Rule 804(b)(3) would necessitate a similar amendment to the corresponding language in Rule 807(a)(1). Professor Capra stated that courts applying Rule 807 do consider conflicting evidence, even though the rule text only says "corroborating." It is better to keep the two rules consistent than to have people wondering why Rule 804(b)(3) mentions conflicting evidence while Rule 807 does not. The judge member observed that one way to resolve the problem would be to make a similar amendment to Rule 807. Judge Bates noted that this could be considered during the public comment period.

A practitioner member asked why, in line 25, it says "the totality of the circumstances," but in the next line it does not say *the* "evidence." Should the word "the" be added on line 26? Professor Capra undertook to review this with the style consultants during the public comment period.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Rule 804(b)(3).**

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Bybee and Professor Hartnett provided the report of the Advisory Committee on Appellate Rules, which met in San Diego on March 30, 2022. The Advisory Committee presented an action item and briefly discussed one information item. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 199.

Action Item

Publication for Public Comment

Amendments to Appendix of Length Limits. Judge Bybee introduced this action item. The Standing Committee had already approved for publication for public comment proposed amendments to Rules 35 and 40 regarding petitions for panel rehearing and hearing and rehearing en banc, as well as conforming amendments to Rule 32 and the Appendix of Length Limits (Appendix). Subsequent to that approval, the Advisory Committee noticed an additional change that needed to be made in the Appendix. Namely, the third bullet point in the introductory portion

of the Appendix refers to Rule 35, but the proposed amendments to Rules 35 and 40 would transfer the contents of Rule 35 to Rule 40. As the amendment to the Appendix has not yet been published for public comment, the Advisory Committee would like to delete this reference to Rule 35 in the Appendix and to include that change along with the other changes approved in January for publication for public comment.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to the Appendix of Length Limits.**

Information Items

Amicus Curiae Disclosures. Professor Hartnett introduced the information item concerning potential amendments to Rule 29's amicus curiae disclosure requirements. The Advisory Committee was seeking feedback from the Standing Committee regarding four questions. Due to time constraints, Professor Hartnett chose to ask just two of the questions at the meeting. The first question asked concerned the relationship between a party and an amicus. The Advisory Committee was trying to get a sense of whether disclosure of non-earmarked contributions by a party to an amicus should be disclosed, and, if so, at what percentage. The competing views ranged from those who say these should not be disclosed at all because a contributor does not control what an amicus says, to those who say significant contributors (*i.e.*, at least 25 or 30 percent of the amicus's revenue) have such a significant influence over an amicus that the court and the public should know about it. Second, regarding the relationship between an amicus and a non-party, the Advisory Committee sought feedback on whether an amended rule should retain the exception to disclosure for contributions by members of the amicus that are earmarked for a particular amicus brief. A point in support of retaining the exception was that an amicus speaks for its members, and therefore these contributions need not be disclosed. Points against retaining the exception were that there is a big difference between being a general contributor to an amicus and giving money for the purpose of preparing a specific brief, and it is easy to evade disclosure requirements by first becoming a member of the amicus and then giving money to fund a particular brief.

Judge Bates stated these are important questions and ones that the Standing Committee should focus on. He encouraged members to share any comments with Professor Hartnett and Judge Bybee after the meeting.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Dennis Dow, Professor Gibson, and Professor Bartell provided the report of the Advisory Committee on Bankruptcy Rules, which last met via videoconference on March 31, 2022. The Advisory Committee presented eleven action items: seven for final approval, and four for publication for public comment. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 250.

Action Items

Final Approval

Restyled Rules for the 3000-6000 Series. Judge Dow introduced this action item, which presented for final approval the restyled Rules in the 3000 to 6000 series. The Standing Committee already gave final approval for the 1000 and 2000 series. The Advisory Committee received extensive public comments from the National Bankruptcy Conference on these rules, in addition to a few other public comments. Some of these comments led to changes. Professor Bartell noted that the Advisory Committee was not asking to send these rules to the Judicial Conference quite yet; rather, like the 1000 and 2000 series, they should be held until the remainder of the restyling project is completed.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed restyled Rules for the 3000-6000 series.**

Rule 3011. Judge Dow introduced this action item, which would add a subsection to Rule 3011 to require clerks to provide searchable access on each bankruptcy court's website to information about funds deposited under Section 347 of the Bankruptcy Code. This is part of a nationwide effort to reduce the amount of unclaimed funds. He noted that the Advisory Committee received one public comment, which led it to substitute the phrase "information about funds in a specific case" for the phrase "information in the data base for a specific case."

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Rule 3011.**

Rule 8003. Judge Dow introduced this action item to conform the rule to recent amendments to Appellate Rule 3. No public comments were received on this proposed rule amendment.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Rule 8003.**

Official Form 101. Judge Dow introduced this action item. Questions 2 and 4 of the individual debtor petition form, which concern other names used by the debtor over the past 8 years, would be amended to clarify that the only business names that should be reported are those the debtor actually used in conducting business, not the names of separate legal entities in which the debtor merely had an interest. This change would avoid confusion and make this form consistent with other petition forms. The Advisory Committee received one public comment; it made no changes based on this comment.

Judge Bates clarified for the Standing Committee that in contrast to some other forms, Official Bankruptcy forms must be approved by the Judicial Conference through the Rules Enabling Act process.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Form 101.**

Official Forms 309E1 and 309E2. Judge Dow introduced this action item regarding forms that are used to give notice to creditors after a bankruptcy filing. The Advisory Committee improved the formatting and edited the language of these forms in order to clarify the applicability of relevant deadlines. The Advisory Committee did not receive any comments, and its only post-publication change was to insert a couple of commas.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed amendments to Forms 309E1 and 309E2.**

Official Form 417A. Judge Dow introduced this action item. This form amendment is to conform the form to the amendments to Rule 8003. There were no public comments on this proposed form amendment.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Form 417A.**

Publication for Public Comment

Restyled Rules for the 7000-9000 Series. Judge Dow introduced this action item, which sought approval to publish for public comment the next portion of the proposed restyled rules. The Advisory Committee applied the same approach to these rules as it did when restyling the first six series.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed restyled Rules for the 7000 to 9000 series.**

Rule 1007(b)(7). Judge Dow introduced this action item. Under the current rule, debtors are required to complete an approved debtor education course and file a "statement" on an official form evidencing completion of that course before they can get a discharge in bankruptcy. As revised, the rule would instead require filing the certificate of completion from the course provider, as that is the best evidence of compliance. The amendment would also remove the requirement that those who are exempt must file a form noting their exemption. This requirement is redundant, as in order to get an exemption, the debtor would have to file a motion, and the docket will therefore already contain an order approving the exemption.

The Advisory Committee also sought approval to publish conforming amendments changing "statement" to "certificate" in another subsection of Rule 1007 and in Rules 4004, 5009, and 9006.

A judge member noted, and the Advisory Committee agreed to remedy, a typo on page 666, line 14 of the agenda book ("if" should be "is").

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Rule 1007(b)(7) and conforming amendments to Rules 1007(c)(4), 4004, 5009, and 9006.**

New Rule 8023.1. Judge Dow introduced this action item, which concerned a proposed new rule dealing with substitution of parties. While Civil Rule 25 (Substitution of Parties) applies to adversary proceedings, the Part VIII rules (which govern appeals in bankruptcy cases) do not currently mention substitution. Proposed new Rule 8023.1 is based on, and is virtually identical in language to, Appellate Rule 43.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed new Rule 8023.1.**

Official Form 410A. Judge Dow introduced this action item to amend the attachment to the proof-of-claim form that a creditor with a mortgage claim must file. The amendment revises Part 3 of the attachment (regarding the calculation of the amount of arrearage at the time the bankruptcy proceeding is filed) to break out principal and interest separately.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Official Form 410A.**

Information Items

Judge Dow briefly noted that the Bankruptcy Threshold Adjustment and Technical Correction Act had not yet been enacted by Congress, but if and when it were to be enacted, the Advisory Committee would seek final approval of technical amendments to a couple of forms and would ask the Administrative Office to repost an interim version of Rule 1020 for adoption by bankruptcy courts as a local rule. He also mentioned, but did not discuss at length, three other information items in the agenda book.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Robert Dow, Professor Cooper, and Professor Marcus provided the report of the Advisory Committee on Civil Rules, which last met in San Diego on March 29, 2022. The Advisory Committee presented two action items and five information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 722.

Action Items

Final Approval

Rule 15(a)(1). Judge Dow introduced this action item, a proposed amendment to Rule 15(a)(1) for which the Advisory Committee was requesting final approval. The proposed amendment would replace the word "within" with the phrase "no later than." This change clarifies that where a pleading is one to which a responsive pleading is required, the time to amend the pleading as of right continues to run until 21 days after the earlier of the events delineated in Rule 15(a)(1)(B). The Advisory Committee received a few comments, but it made no changes based on these comments. In the committee note, it deleted one sentence that had been published in brackets and that appeared unnecessary.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Rule 15(a)(1).**

Rule 72(b)(1). Judge Dow introduced this action item, which presented for final approval a proposed amendment to Rule 72(b)(1) (concerning a recommended disposition by a magistrate judge). The proposed amendment would bring the rule into conformity with the prevailing practice of district clerks with respect to service of the recommended disposition. Most parties have CM/ECF access, so the current rule's requirement of mailing the magistrate judge's recommendations is unnecessary. The amendment permits service of the recommended disposition by any means provided in Rule 5(b). The Advisory Committee received very few public comments. In the committee note, it deleted as unnecessary one sentence that had been published in brackets.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Rule 72(b)(1).**

Information Items

Rule 12(a)(4). Judge Dow introduced this information item, which concerned a proposed amendment to Rule 12(a)(4) that was initially suggested by the DOJ and had been published for comment in August 2020. The Advisory Committee received only a handful of public comments, but two major comments were negative. Rule 12(a)(4) sets a presumptive 14-day time limit for filing a responsive pleading after denial of a motion to dismiss. This means that the DOJ only has 14 days after denial of a motion to dismiss on immunity grounds in which to decide whether to appeal the immunity issue; but courts frequently grant it an extension. The proposed amendment would have flipped the presumption, giving the DOJ 60 days as opposed to 14 unless the court shortened the time. The Advisory Committee considered a number of options, including a compromise time between 14 and 60 days, as well as providing the longer 60-day period only for cases involving an immunity defense.

The DOJ was unable to collect quantitative data as to how often it sought and received extensions. As a result, and based on the comments received and the views of both the Standing

and Advisory Committees members, the Advisory Committee voted not to proceed further with the proposed amendment to Rule 12(a)(4).

Judge Bates clarified that because the proposed amendment had not emerged from the Advisory Committee, this was not an action item, and therefore no vote of the Standing Committee was required.

Rule 9(b). Judge Dow introduced this information item, which concerned a proposal to amend the second sentence of Rule 9(b) in light of the Supreme Court's interpretation of that provision in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). The Advisory Committee had appointed a subcommittee to study the proposal. However, the subcommittee found that there were not many cases coming up that indicated a problem. Moreover, a number of Advisory Committee members thought *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Iqbal* were working pretty well in their cases. Therefore, the Advisory Committee chose not to proceed further.

Rule 41. Judge Dow noted this project, which was prompted by a suggestion from Judge Furman to study Rule 41(a)(1)(A). The initial question is whether that provision authorizes voluntary dismissal only of an entire action, or whether it also authorizes voluntary dismissal as to fewer than all parties or claims. The Advisory Committee appointed a subcommittee, which will study this issue and probably also Rule 41 more generally.

Discovery Subcommittee. Judge Dow provided an update on the Discovery Subcommittee, which is focused primarily on privilege log issues. The subcommittee met with bar groups and attended a two-day conference. There seems to be some common ground between the plaintiff and defense bar for procedures for privilege logs. There may be some forthcoming proposals to amend Rules 16 and 26 to deal with these procedural issues, particularly to encourage parties to hash out privilege-log issues early on.

The Discovery Subcommittee has paused its research into sealing issues pending an Administrative Office study of filing under seal.

MDL Subcommittee. Judge Dow introduced this information item. About fifty percent of federal civil cases are part of an MDL. The subcommittee's thinking continues to evolve as it receives input from the bench, the bar, and academics. About a year ago, the subcommittee was looking at the possibility of proposing a new Rule 23.3 (addressing judicial appointment and oversight of leadership counsel). The subcommittee then shifted and thought about revising Rules 16 and 26 to set prompts concerning issues that MDL judges ought to think about. Now, the subcommittee has begun to consider a sketch of a proposed Rule 16.1, which would contain a list of topics on which parties in an MDL could be directed to confer. Flexibility is critical, and any rule will just offer the judge tools to use in appropriate instances.

At a March 2022 conference at Emory Law School, the subcommittee heard from experienced transferee judges that lawyers can do a great service to the transferee judge by explaining their views of the case early on. The judge could then decide which of the prompts in the proposed rule fits the case. The rule would list issues on which the judge could require the lawyers to give their input.

The subcommittee has been focusing closely on the importance of an initial census. The initial census is key because it can tell the judge and parties who has the cases and what kinds of cases there are, and can help the judge make decisions on leadership counsel.

The subcommittee will work over the summer on the sketch of Rule 16.1 so as to tee up the question of whether or not to advance it. Judge Dow expressed a hope that the subcommittee would complete its work in the coming year.

Jury Trials. Judge Bates highlighted the portion of the Advisory Committee's report (pages 751–72) concerning the procedures for demanding a jury trial. Though the Advisory Committee has deferred consideration of this issue for the moment, Judge Bates suggested that it may be important to deal with it at some point. Judge Dow and Professor Cooper explained that Congress enacted legislation directing the FJC to study what factors contribute to a higher incidence of jury trials in jurisdictions that have more of them. Dr. Lee has launched that study, and predicts that he will have a short report on the topic ready for the Advisory Committee's fall agenda book.

OTHER COMMITTEE BUSINESS

Adequacy of the Privacy Rules Prescribed Under the E-Government Act of 2002. Professor Struve presented this item, which concerned a report required under the E-Government Act of 2002. She thanked all the Advisory Committee chairs and reporters, Judge Bates, and the Rules Office staff for their work on this report. The privacy rules, which impose certain redaction requirements, took effect in 2007. The idea of the report is to evaluate the adequacy of these rules to protect privacy and security. The report does so in three ways: it discusses amendments (relevant to the privacy rules) that have been adopted since 2011 (the date of the last report); it notes privacy-adjacent items that are pending on the rules committees' dockets; and it discusses other privacy-related concerns discussed since 2011 that did not give rise to rule amendments because the rules committees determined that rule amendments were not the way to address those concerns. A new report to Congress will be prepared every two years going forward.

Professor Struve noted that the Standing Committee was asked to approve the proposed Report on the Adequacy of the Privacy Rules Prescribed Under the E-Government Act of 2002, and to recommend that the Judicial Conference forward the report to Congress.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously voted to approve the proposed Report on the Adequacy of the Privacy Rules Prescribed Under the E-Government Act of 2002 and to recommend that the Judicial Conference forward the report to Congress.**

Legislative Report. The Rules Law Clerk delivered a legislative report. The chart in the agenda book at page 1051 summarized legislation currently pending before Congress, as well as the Juneteenth National Independence Day Act, which passed and was signed into law by President Biden in 2021.

Judiciary Strategic Planning. Judge Bates addressed the Judiciary Strategic Planning item, which appeared in the agenda book at page 1061. The Judicial Conference requires the Standing Committee to submit a report on its strategic initiatives. He asked the Standing Committee for approval to submit the report.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the Judiciary Strategic Planning report for submission to the Judicial Conference.**

CONCLUDING REMARKS

Before adjourning the meeting, Judge Bates thanked the Standing Committee members and other attendees for their attention and insights. The Standing Committee will next meet on January 4, 2023. The location of the meeting had not yet been confirmed. Judge Bates expressed the hope that the meeting would take place somewhere warm.

TAB 2B

Agenda E-19 (Summary)
Rules
September 2022

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

The Committee on Rules of Practice and Procedure recommends that the Judicial Conference:

1. Approve the proposed amendments to Appellate Rules 2, 4, 26, and 45, as set forth in Appendix A, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law..... pp. 4-6

2. a. Approve the proposed amendments to Bankruptcy Rules 3011, 8003, and 9006, and proposed new Bankruptcy Rule 9038, as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and

   b. Approve, effective December 1, 2022, the proposed amendments to Bankruptcy Official Forms 101, 309E1, and 309E2, and effective December 1, 2023, the proposed amendment to Bankruptcy Official Form 417A, as set forth in Appendix B, for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date..... pp. 7-10

3. Approve the proposed amendments to Civil Rules 6, 15, and 72, and proposed new Civil Rule 87, as set forth in Appendix C, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law..... pp. 14-17

4. Approve the proposed amendments to Criminal Rules 16, 45, and 56, and proposed new Criminal Rule 62, as set forth in Appendix D, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law..... pp. 18-21

5. Approve the proposed amendments to Evidence Rules 106, 615, and 702, as set forth in Appendix E, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law..... pp. 22-24

6. Approve the proposed 2022 Report of the Judicial Conference of the United States on the Adequacy of Privacy Rules Prescribed Under the E-Government Act of 2002, as set forth in Appendix F, and ask the Administrative Office Director to transmit it to Congress in accordance with the law ..... pp. 28-29

The remainder of the report is submitted for the record and includes the following for the information of the Judicial Conference:

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on June 7, 2022. All members participated.

Representing the advisory committees were Judge Jay S. Bybee, Chair, and Professor Edward Hartnett, Reporter, Advisory Committee on Appellate Rules; Judge Dennis Dow, Chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura B. Bartell, Associate Reporter, Advisory Committee on Bankruptcy Rules; Judge Robert M. Dow, Jr., Chair, Professor Edward H. Cooper, Reporter, and Professor Richard L. Marcus, Associate Reporter, Advisory Committee on Civil Rules; Judge Raymond M. Kethledge, Chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, Advisory Committee on Criminal Rules; and Judge Patrick J. Schiltz, Chair, and Professor Daniel J. Capra, Reporter, Advisory Committee on Evidence Rules.

Also participating in the meeting were Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; Allison Bruff, Bridget Healy, and Scott Myers, Rules Committee Staff Counsel; Burton S. DeWitt, Law Clerk to the Standing Committee; Dr. Tim Reagan and Dr. Emery Lee, Senior Research Associates, Federal Judicial Center (FJC); and Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, and Andrew Goldsmith, National Coordinator of Criminal Discovery Initiatives,

representing the Department of Justice (DOJ) on behalf of Deputy Attorney General Lisa O. Monaco.

In addition to its general business, including a review of the status of pending rule amendments in different stages of the Rules Enabling Act process and pending legislation affecting the rules, the Standing Committee received and responded to reports from the five advisory committees. Among other things, the advisory committee reports discussed two items that affect multiple rule sets: (1) recommendations from the Appellate, Bankruptcy, Civil, and Criminal Rules Committees for final approval of rules addressing future emergencies; and (2) recommended technical amendments to those four rule sets addressing Juneteenth National Independence Day.

The Committee also received an update on two items of coordinated work among the Appellate, Bankruptcy, Civil, and Criminal Rules Committees: (1) consideration of suggestions to allow electronic filing by pro se litigants; and (2) consideration of suggestions to change the presumptive deadline for electronic filing. Finally, the Committee approved the proposed 2022 Report on the Adequacy of the Privacy Rules Prescribed Under the E-Government Act of 2002, was briefed on the judiciary's ongoing response to the COVID-19 pandemic, and approved a draft report regarding judiciary strategic planning.

PROPOSED EMERGENCY RULES

The proposals recommended for the Judicial Conference's approval include a package of rules for use in emergency situations that substantially impair the courts' ability to function in compliance with the existing rules of procedure. These rules were developed in response to Congress's directive in the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") that rules be considered, under the Rules Enabling Act, to address future emergencies. The set of proposed amendments and new rules developed in response to this charge includes an

amendment to Appellate Rule 2 (and a related amendment to Appellate Rule 4); new Bankruptcy Rule 9038; new Civil Rule 87; and new Criminal Rule 62. The proposed amendments and new rules were published for public comment in August 2021.

Although there are some differences in the four proposed emergency rules – the Appellate rule is much more flexible, and the Bankruptcy, Civil, and Criminal rules provide for different types of rule deviations in a declared emergency – they share some overarching, uniform features. Each rule places the authority to declare a rules emergency solely in the hands of the Judicial Conference. Each rule uses the same basic definition of a "rules emergency" – namely, when "extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its functions in compliance with these rules." The Bankruptcy, Civil, and Criminal rules take a roughly similar approach to the content of the emergency declaration, setting ground rules to make clear the scope of the declaration. Each emergency rule limits the duration of the declaration; provides for additional declarations; and accords the Judicial Conference discretion to terminate an emergency declaration before the declaration's stated termination date. The Bankruptcy, Civil, and Criminal rules each address what will happen when a proceeding that has been conducted under an emergency rule continues after the emergency has terminated, though each rule does so with provision(s) tailored to take account of the different contexts and subject matters addressed by the respective emergency provisions.

To the extent that public comments touched on uniform aspects of the emergency rules, those comments focused on the role of the Judicial Conference. Some commentators criticized the decision to place in the hands of the Judicial Conference the authority to declare or terminate a rules emergency, though another commentator specifically supported the decision to centralize authority in the Judicial Conference. One commentator argued that there should be a backup

plan in case the emergency prevents the Judicial Conference from acting. The Advisory Committees reviewed these comments and uniformly concluded that the Judicial Conference was fully capable of responding to rules emergencies, and that the uniform approach of the Judicial Conference was preferable to other approaches involving more decisionmakers. Accordingly, the Advisory Committees voted to retain, as published, the substance of all of the uniform features of the set of proposed emergency rules. A few post-publication changes to the Appellate Rule's text, the Civil Rule's text and note, and the Criminal Rule's text and note are discussed below in connection with the recommendations of the respective Advisory Committees.

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules recommended for final approval proposed amendments to Appellate Rules 2, 4, 26, and 45.

Rule 2 (Suspension of Rules)

The proposed amendment to Appellate Rule 2 is part of the set of proposed rules, mentioned above, that resulted from the CARES Act directive that rules be considered to address future emergencies. The proposal adds a new subdivision (b) to Appellate Rule 2. Existing Rule 2, which would become Rule 2(a), empowers the courts of appeals to suspend the provisions in the Appellate Rules "in a particular case," except "as otherwise provided in Rule 26(b)." (Rule 26(b) provides that "the court may not extend the time to file: (1) a notice of appeal (except as authorized in Rule 4) or a petition for permission to appeal; or (2) a notice of appeal from or a [petition to review an order of a federal administrative body], unless specifically authorized by law.") New Rule 2(b) would come into operation when the Judicial Conference declares an Appellate Rules emergency and would empower the court of appeals to "suspend in

all or part of that circuit any provision of these rules, other than time limits imposed by statute and described in Rule 26(b)(1)-(2)."

In the event of a Judicial Conference declaration of an Appellate Rules emergency, a court of appeals' authority under Rule 2(b) would be broader in two ways than a court of appeals' everyday authority under Rule 2(a). First, the suspension power under Rule 2(b) reaches beyond a particular case. Second, the Rule 2(b) suspension power reaches time limits to appeal or petition for review, so long as those time limits are established only by rule. (Rule 2(b) does not purport to empower the court to suspend time limits to appeal or petition for review set by statute.)

Rule 4 (Appeal as of Right—When Taken)

The proposed amendment to Appellate Rule 4 is designed to make Appellate Rule 4 operate smoothly with Emergency Civil Rule 6(b)(2) (discussed below) if that Emergency Civil Rule is ever in effect, while not making any change to the operation of Appellate Rule 4 at any other time.

It does this by replacing the phrase "no later than 28 days after the judgment is entered" in Rule 4(a)(4)(A)(vi) with the phrase "within the time allowed for filing a motion under Rule 59." When Emergency Civil Rule 6(b)(2) is not in effect, this amendment makes no change at all. But if Emergency Civil Rule 6(b)(2) is ever in effect, a district court might extend the time to file a motion under Rule 59. If that happens, the amendment to Appellate Rule 4(a)(4)(A)(vi) would allow Appellate Rule 4 to properly take that extension into account.

Rule 26 (Computing and Extending Time) and Rule 45 (Clerk's Duties)

In response to the enactment of the Juneteenth National Independence Day Act (Juneteenth Act), Pub. L. No. 117-17 (2021), the Advisory Committee made technical amendments to Rules 26(a)(6)(A) and 45(a)(2) to insert "Juneteenth National Independence

Day" immediately following "Memorial Day" in the Rules' lists of legal holidays. Because of the technical and conforming nature of the amendments, the Advisory Committee recommended final approval without publication.

The Standing Committee unanimously approved the Advisory Committee's recommendations, after making a stylistic change to Appellate Rule 2(b)(4) to conform that Rule's language to the language used in the other Emergency Rules.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Appellate Rules 2, 4, 26, and 45, as set forth in Appendix A, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rules Approved for Publication and Comment

The Advisory Committee on Appellate Rules submitted proposed amendments to the Appendix of Length Limits Stated in the Federal Rules of Appellate Procedure with a recommendation that they be published for public comment in August 2022. The proposed amendments to the Appendix would conform with proposed amendments to Rules 35 and 40, which were approved for publication for public comment. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Information Items

The Advisory Committee met on March 30, 2022. In addition to the matters noted above, the Advisory Committee discussed whether to propose an amendment to Rule 39 clarifying the process for challenging the allocation of costs on appeal and whether to propose amending Form 4 to simplify the disclosures required in connection with a request for in forma pauperis status. It referred to a subcommittee a new suggestion that Rule 29 be amended to require identification of any amicus or counsel whose involvement triggered the striking of an amicus brief. The Advisory Committee also continued its discussion of whether to propose amendments to Rule 29

with respect to disclosures concerning the relationship between an amicus and either parties or nonparties.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules and Forms Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules recommended for final approval the following proposals: Restyled Bankruptcy Rules for the 3000-6000 series; amendments to Bankruptcy Rules 3011, 8003, and 9006; new Bankruptcy Rule 9038; and amendments to Official Forms 101, 309E1, 309E2, and 417A. The Advisory Committee also recommended all of the foregoing for transmission to the Judicial Conference other than the restyled rules; the latter will be held for later transmission once all the bankruptcy rules have been restyled.

Restyled Rules Parts III, IV, V, and VI (the 3000-6000 series of Bankruptcy Rules)

The National Bankruptcy Conference submitted extensive comments on the restyled rules, and several others submitted comments as well. After discussion with the style consultants and consideration by the Restyling Subcommittee, the Advisory Committee incorporated some of those suggested changes into the revised rules and rejected others. (Some of the rejected suggestions were previously considered in connection with the 1000-2000 series of restyled rules, and the Advisory Committee adhered to its prior conclusions about those suggestions as noted at pages 10-11 in the Standing Committee's September 2021 report to the Judicial Conference.)

The Advisory Committee recommended final approval for this second set of restyled rules, but, as with the first set, suggested that the Standing Committee not submit the rules to the Judicial Conference until all remaining parts of the Bankruptcy Rules have been restyled, published, and given final approval, so that all restyled rules can go into effect at the same time.

Rule 3011 (Unclaimed Funds in Chapter 7 Liquidation, Chapter 12 Family Farmer's Debt Adjustment, and Chapter 13 Individual's Debt Adjustment Cases)

The proposed amendment, which was suggested by the Committee on the Administration of the Bankruptcy System, redesignates the existing text of Rule 3011 as subdivision (a) and adds a new subdivision (b) requiring the clerk of court to provide searchable access on the court's website to information about funds deposited pursuant to § 347 of the Bankruptcy Code (Unclaimed Property). There was one comment on the proposed amendment, and the language of subdivision (b) was restyled and modified to reflect the comment. The Advisory Committee recommended final approval as amended.

Rule 8003 (Appeal as of Right – How Taken; Docketing the Appeal)

The proposed amendments to Rule 8003 conform to amendments recently made to Federal Rule of Appellate Procedure 3, which stress the simplicity of the Rule's requirements for the contents of the notice of appeal and which disapprove some courts' "expressio unius est exclusio alterius" approach to interpreting a notice of appeal. No comments were submitted, and the Advisory Committee gave its final approval to the rule as published.

Rule 9006 (Computing and Extending Time; Time for Motion Papers)

In response to the enactment of the Juneteenth Act, the Advisory Committee proposed a technical amendment to Rule 9006(a)(6)(A) to include Juneteenth National Independence Day in the list of legal public holidays in the rule. The Advisory Committee recommended final approval without publication because this is a technical and conforming amendment.

Rule 9038 (Bankruptcy Rules Emergency)

New Rule 9038 is part of the package of proposed emergency rules drafted in response to the CARES Act directive. Subdivisions (a) and (b) of the rule are similar to the Appellate, Civil, and Criminal Emergency Rules in the way they define a rules emergency, provide authority to

the Judicial Conference to declare such an emergency, and prescribe the content and duration of a declaration.

Rule 9038(c) expands existing Bankruptcy Rule 9006(b), which authorizes an individual bankruptcy judge to enlarge time periods for cause. Although many courts relied on Rule 9006(b) to grant extensions of time during the COVID-19 pandemic, the rule does not fully meet the needs of an emergency situation. First, it has some exceptions—time limits that cannot be expanded. Also, it arguably does not authorize an extension order applicable to all cases in a district. Rule 9038 is intended to fill in these gaps for situations in which the Judicial Conference declares a rules emergency. The chief bankruptcy judge can grant a district-wide extension for any time periods specified in the rules, and individual judges can do the same in specific cases. There were no negative comments addressing Rule 9038, and the Advisory Committee recommended final approval as published.

Official Form 101 (Voluntary Petition for Individuals Filing for Bankruptcy)

The amendments to Questions 2 and 4 in Part 1 of Form 101 clarify how and where to report business names used by the debtor. These changes clarify that the only names to be listed are names that were used by the debtor personally in conducting business, not names used by other legal entities. The changes also bring Form 101 into conformity with the approach taken in Forms 105, 201, and 205 in involuntary bankruptcy cases and in non-individual cases. A suggestion unrelated to the proposed change was rejected, and the Advisory Committee recommended final approval as published.[1]

[1] The version of Official Form 101 in Appendix B includes an unrelated technical conforming change to line 13 which went into effect on June 21, 2022, after the Standing Committee's meeting. The change was approved by the Advisory Committee on Bankruptcy Rules pursuant to its authority to make such changes subject to subsequent approval by the Standing Committee and notice to the Judicial Conference. It conforms the form to the Bankruptcy Threshold Adjustment and Technical Corrections Act (the "BTATC" Act), Pub. L. No. 117-151, which went into effect on the same date. The Standing Committee will review the BTATC Act changes to Official Form 101 and another form at its January 2023 meeting, and will update the Judicial Conference on the changes in its report of that meeting.

Official Forms 309E1 (Notice of Chapter 11 Bankruptcy Case (For Individuals or Joint Debtors)) and 309E2 (Notice of Chapter 11 Bankruptcy Case (For Individuals or Joint Debtors under Subchapter V))

The amendments clarify the deadline for objecting to a debtor's discharge and distinguish it from the deadline to object to discharging a particular debt. There were no comments, and the Advisory Committee recommended final approval as published with minor changes to punctuation.

Official Form 417A (Notice of Appeal and Statement of Election)

The amendments conform the form to proposed changes to Rule 8003. No comments were submitted, and the Advisory Committee recommended final approval with a proposed effective date of December 1, 2023, to coincide with the Rule 8003 amendment.

The Standing Committee unanimously approved the Advisory Committee's recommendations.

Recommendation: That the Judicial Conference:

a. Approve the proposed amendments to Bankruptcy Rules 3011, 8003, and 9006, and proposed new Bankruptcy Rule 9038, as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and

b. Approve, effective December 1, 2022, the proposed amendments to Bankruptcy Official Forms 101, 309E1, and 309E2, and effective December 1, 2023, the proposed amendment to Bankruptcy Official Form 417A, as set forth in Appendix B, for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date.

Rules and Forms Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules submitted the proposed restyled Bankruptcy Rules for the 7000-9000 Series; proposed amendments to Rules 1007, 4004, 5009, and 9006; proposed new Rule 8023.1; and a proposed amendment to Official Form 410A with a

recommendation that they be published for public comment in August 2022. The Standing Committee unanimously approved the Advisory Committee's recommendations.

Restyled Rules Parts VII, VIII, and IX

The Advisory Committee sought approval for publication of Restyled Rules Parts VII, VIII, and IX (the 7000-9000 series Bankruptcy Rules). This is the third and final set of restyled rules recommended for publication.

Rule 1007(b)(7) (Lists, Schedules, Statements, and Other Documents; Time Limits) and conforming amendments to Rules 1007(c)(4), 4004(c)(1)(H), 4004(c)(4), 5009(b), 9006(b)(3), and 9006(c)(2)

The amendments to Rule 1007(b)(7) would eliminate the requirement that the debtor file a "statement" on Official Form 423 upon completion of an approved debtor education course, and instead require filing the certificate of completion provided by the approved course provider. The six other rules would be amended to replace references to a "statement" required by Rule 1007(b)(7) with references to a "certificate."

Rule 8023.1 (Substitution of Parties)

Proposed new Rule 8023.1, addressing the substitution of parties, is modeled on Appellate Rule 43, and would be applicable to parties in bankruptcy appeals to the district court or bankruptcy appellate panel.

Official Form 410A (Mortgage Proof of Claim Attachment)

Amendments are made to Part 3 (Arrearage as of Date of the Petition) of the form, replacing the first line (which currently asks for "Principal & Interest") with two lines, one for "Principal" and one for "Interest." Because under 11 U.S.C. § 1322(e) the amount necessary to cure a default is "determined in accordance with the underlying agreement and applicable nonbankruptcy law," it may be necessary for a debtor who is curing arrearages to know which portion of the total arrearages is principal and which is interest.

Information Items

The Advisory Committee met on March 31, 2022. In addition to the recommendations discussed above, the Advisory Committee considered (among other matters) a proposed amendment to Rule 3002.1 (Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence) and five related forms that were published for comment. It also considered a suggestion from the Court Administration and Case Management (CACM) Committee concerning electronic signatures.

Rule 3002.1

The proposed amendments to Rule 3002.1 were designed to encourage a greater degree of compliance with the rule and to provide a new midcase assessment of the mortgage claim's status in order to give a chapter 13 debtor an opportunity to cure any postpetition defaults that may have occurred.

Twenty-seven comments were submitted on the proposed amendments. Some of the comments were lengthy and detailed; others briefly stated an opinion in support of or opposition to the amendments. The comments generally fell into three categories: (1) comments opposing the amendments, or at least the midcase review, submitted by some chapter 13 trustees; (2) comments favoring the amendments, submitted by some consumer debtor attorneys; and (3) comments favoring the amendments but giving suggestions for improvement, submitted by trustees, debtors, judges, and an association of mortgage lenders.

The Consumer Subcommittee concluded that there is a need for amendments to Rule 3002.1, and that there is authority to promulgate them. The Advisory Committee agreed. The Consumer Subcommittee was sympathetic, however, with the desire expressed in several comments for simplification, and it has begun to sketch out revisions. It hopes to present a revised draft to the Advisory Committee at the fall meeting. The Forms Subcommittee will

await decisions about Rule 3002.1 before considering any changes to the proposed implementing forms.

Electronic Signatures

The Advisory Committee has been considering a suggestion by the CACM Committee regarding the use of electronic signatures in bankruptcy cases by individuals who do not have a CM/ECF account. At the fall 2021 meeting, the Technology Subcommittee presented for discussion a draft amendment to Rule 5005(a)(2)(C) that would have permitted a person other than the electronic filer of a document to authorize the person's signature on an electronically filed document. The discussion raised several questions and concerns. Among the issues raised were how the proposed rule would apply to documents, such as stipulations, that are filed by one attorney but bear the signature of other attorneys; how it would apply if a CM/ECF account includes several subaccounts; and whether there is really a perception among attorneys that the retention of wet signatures presents a problem that needs solving.

After the fall 2021 meeting, the Advisory Committee's Reporter followed up with the bankruptcy judge who had raised the issue of electronic signatures with the CACM Committee, and learned that this judge is working on a possible local rule for his district modeled on a state-court rule that allows for electronic signatures rather than requiring the retention of wet signatures. In its suggestion, the CACM Committee had questioned whether the lack of a provision in Rule 5005 addressing electronic signatures of individuals without CM/ECF accounts may make courts "hesitant to make such a change without clarification in the rules that use of electronic signature products is sufficient for evidentiary purposes." The Technology Subcommittee concluded that current Rule 5005 does not address the issue of the use of electronic signatures by individuals who are not registered users of CM/ECF and that it therefore does not preclude local rulemaking on the subject. The Bankruptcy Court for the District of

Nebraska already has such a rule (L.B.R. 9011-1). The Technology Subcommittee concluded that a period of experience under local rules allowing the use of e-signature products would help inform any later decision to promulgate a national rule. Electronic signature technology will also likely develop and improve in the interim. The Advisory Committee agreed with the Technology Subcommittee's recommendation and voted not to take further action on the suggestion.

FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules recommended for final approval proposed amendments to Civil Rules 6, 15, and 72, and new Civil Rule 87.

Rule 6 (Computing and Extending Time; Time for Motion Papers)

In response to the enactment of the Juneteenth Act, the Advisory Committee made a technical amendment to Rule 6(a)(6)(A) to include the Juneteenth National Independence Day in the list of legal public holidays in the rule. The Advisory Committee recommended final approval without publication because this is a technical and conforming amendment.

Rule 15 (Amended and Supplemental Pleadings)

The amendment to Rule 15(a)(1) would substitute "no later than" for "within" to measure the time allowed to amend a pleading once as a matter of course. Paragraph (a)(1) currently provides, in part, that "[a] party may amend its pleading once as a matter of course *within* (A) 21 days after serving it or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier" (emphasis added).

A literal reading of the existing rule could suggest that the Rule 15(a)(1)(B) period does not commence until the service of the responsive pleading or pre-answer motion, creating an

unintended gap period (prior to service of the responsive pleading or pre-answer motion) during which amendment as of right is not permitted. The proposed amendment is intended to remove that possibility by replacing "within" with "no later than."

After public comment, the Advisory Committee made no changes to the proposed amendment to Rule 15(a)(1) as published. The Advisory Committee made one change to the committee note after publication, deleting an unnecessary sentence that was published in brackets. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 72 (Magistrate Judges: Pretrial Order)

Rule 72(b)(1) directs that the clerk "mail" a copy of a magistrate judge's recommended disposition. This requirement is out of step with recent amendments to the rules that recognize service by electronic means. The proposed amendment to Rule 72(b)(1) would replace the requirement that the magistrate judge's findings and recommendations be mailed to the parties with a requirement that a copy be served on the parties as provided in Rule 5(b).

After public comment, the Advisory Committee made no changes to the proposed amendment to Rule 72(b)(1) as published. The Advisory Committee made one change to the committee note, deleting an unnecessary sentence that was published in brackets. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 87 (Civil Rules Emergency)

Proposed Civil Rule 87 is part of the package of proposed emergency rules drafted in response to the CARES Act directive. Subdivisions (a) and (b) of Rule 87 contain uniform provisions shared by the Appellate, Bankruptcy, and Criminal Emergency Rules. The uniform provisions address (1) who declares an emergency; (2) the definition of a rules emergency; (3) limitations in the declaration; and (4) early termination of declarations.

In form, Civil Rule 87(b)(1) diverges from the Bankruptcy and Criminal Rules with regard to the Judicial Conference declaration of a rules emergency; but in function, Rule 87(b)(1) takes a similar approach to those other rules. While the Bankruptcy and Criminal Rules provide that the declaration must "state any restrictions on the authority granted in" their emergency provisions, Rule 87(b)(1)(B) provides that the declaration "adopts all the emergency rules in Rule 87(c) unless it excepts one or more of them." The character of the different emergency rules provisions accounts for the difference. Rule 87 authorizes Emergency Rules 4(e), (h)(1), (i), (j)(2), and for serving a minor or incompetent person (referred to as "Emergency Rules 4"), each of which allows the court to order service of process by a means reasonably calculated to give notice. Rule 87 also authorizes Emergency Rule 6(b)(2), which displaces the prohibition on the extension of the deadlines for making post-judgment motions and instead permits extension of such deadlines. The Advisory Committee determined that, while it makes sense for the Judicial Conference to have the flexibility to decide not to adopt a particular Civil Emergency Rule when declaring a rules emergency, it would not make sense to invite other, undefined, "restrictions" on the Civil Emergency Rules. Accordingly, the Advisory Committee's proposed language in Civil Rule 87(b)(1)(B) stated that the Judicial Conference's emergency declaration "must … adopt all the emergency rules in Rule 87(c) unless it excepts one or more of them." (The inclusion of the word "must" was the result of a stylistic decision concerning the location of "must" within Rule 87(b)(1).)

At the Standing Committee's June 2022 meeting, a member suggested that it would be preferable to create a clear default rule that would provide for the adoption of all the Civil Emergency Rules in the event that a Judicial Conference declaration failed to specify whether it was adopting all or some of those rules. Accordingly, the Standing Committee voted to relocate the word "must" to Civil Rules 87(b)(1)(A) and (C), so that Civil Rule 87(b)(1)(B) provides

simply that the declaration "adopts all the emergency rules in Rule 87(c) unless it excepts one or more of them." The resulting Rule will operate roughly the same way as the Bankruptcy and Criminal Emergency Rules – that is, a Judicial Conference declaration of a rules emergency will put into effect all of the authorities granted in the relevant emergency provisions, unless the Judicial Conference specifies otherwise.

After public comment, the Advisory Committee deleted from the committee note two unnecessary sentences that had been published in brackets, and augmented the committee note's discussion of considerations that pertain to service by an alternative means under Emergency Rules 4(e), (h)(1), (i), and (j)(2). Based on suggestions by a member of the Standing Committee, the committee note was further revised at the Standing Committee meeting to reflect the possibility of multiple extensions under Emergency Rule 6(b)(2) and to delete one sentence that had suggested that the court ensure that the parties understand the effect of a Rule 6(b)(2) extension on the time to appeal.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Civil Rules 6, 15, and 72, and proposed new Civil Rule 87, as set forth in Appendix C, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Information Items

The Advisory Committee met on March 29, 2022. In addition to the matters discussed above, the Advisory Committee considered various information items, including a possible rule on multidistrict litigation (MDL). The Advisory Committee's MDL Subcommittee is considering amendments to Rules 16(b) or Rule 26(f), or a new Rule 16.1, to address the court's role in managing the MDL pretrial process. The drafts developed for initial discussion would simply focus the court and parties' attention on relevant issues without greater direction or detail.

The MDL Subcommittee has collected extensive comments from interested bar groups on some possible approaches.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules recommended for final approval proposed amendments to Criminal Rules 16, 45, and 56, and new Criminal Rule 62.

Rule 16 (Discovery and Inspection)

The proposed amendment to Rule 16, the principal rule that governs discovery in criminal cases, would correct a typographical error in the Rule 16 amendments that are currently pending before Congress. Those amendments, expected to take effect on December 1, 2022, revise both the provisions governing expert witness disclosures by the government – contained in Rule 16(a)(1)(G) – and the provisions governing expert witness disclosures by the defense – contained in Rule 16(b)(1)(C). Subject to exceptions, both Rule 16(a)(1)(G)(v) and Rule 16(b)(1)(C)(v) require the disclosure to be signed by the expert witness. One exception applies if, under another subdivision of the rule (concerning reports of examinations and tests), the disclosing party has previously provided the required information in a report signed by the witness. This exception cross-references the subdivision concerning reports of examinations and tests.

In Rule 16(a)(1), the relevant subdivision is Rule 16(a)(1)(F), and Rule 16(a)(1)(G)(v) duly cross-references that subdivision (applying the exception if the government "has previously provided under (F) a report, signed by the witness, that contains" the required information). In Rule 16(b)(1), the relevant subdivision is Rule 16(b)(1)(B); however, Rule 16(b)(1)(C)(v) as reported to Congress cross-references not "(B)" (as it should) but "(F)" (applying the exception if the defendant "has previously provided under (F) a report, signed by the witness, that contains"

the required information). The proposed amendment would correct Rule 16(b)(1)(C)(v)'s cross-reference from (F) to (B). The Advisory Committee recommended this proposal for approval without publication because it is a technical amendment. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 45 (Computing and Extending Time) and Rule 56 (When Court is Open)

In response to the enactment of the Juneteenth Act, the Advisory Committee made technical amendments to Rules 45 and 56 to include Juneteenth National Independence Day in the list of legal public holidays in those rules. The Advisory Committee recommended final approval without publication because these are technical and conforming amendments. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 62 (Criminal Rules Emergency)

New Rule 62 is part of the package of proposed emergency rules drafted in response to Congress's directive in the CARES Act. Subdivisions (a) and (b) of Rule 62 contain uniform provisions shared by the Appellate, Bankruptcy, and Civil Emergency Rules. The uniform provisions address (1) who declares an emergency; (2) the definition of a rules emergency; (3) limitations in the declaration; and (4) early termination of declarations. Under the uniform provisions, the Judicial Conference has the sole authority to declare a rules emergency, which is defined as when "extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its functions in compliance with" the relevant set of rules.

Rule 62 includes an additional requirement not present in the Appellate, Bankruptcy, or Civil Emergency Rules. That provision is (a)(2), which – for Criminal Rules emergencies – requires a determination that "no feasible alternative measures would sufficiently address the impairment within a reasonable time." This provision ensures that the emergency provisions in

subdivisions (d) and (e) of Rule 62 would be invoked only as a last resort, and reflects the importance of the rights protected by the Criminal Rules that would be affected in a rules emergency.

Subdivision (c) of Rule 62 addresses the effect of the termination of a rules emergency declaration. For proceedings that have been conducted under a declaration of emergency but that are not yet completed when the declaration terminates, the rule permits completion of the proceeding as if the declaration had not terminated if (1) resuming compliance with the ordinary rules would not be feasible or would work an injustice and (2) the defendant consents. This provision recognizes the need for some flexibility during the transition period at the end of an emergency declaration, while also recognizing the importance of returning promptly to compliance with the non-emergency rules.

Subdivisions (d) and (e) of Rule 62 address the court's authority to depart from the Criminal Rules once a Criminal Rules emergency is declared. These subdivisions would allow specified departures from the existing rules with respect to public access, a defendant's signature or consent, the number of alternate jurors, the time for acting under Rule 35, and the use of videoconferencing or teleconferencing in certain proceedings.

Paragraph (d)(1) specifically addresses the court's obligation to provide reasonable alternative access to public proceedings during a rules emergency if the emergency substantially impairs the public's in-person attendance. Following the public comment period, the Advisory Committee considered several submissions commenting on the reference to "victims" in the committee note discussing (d)(1). The Advisory Committee revised the committee note to direct courts' attention to the constitutional guarantees of public access and any applicable statutory provision, including the Crime Victims' Rights Act, 18 U.S.C. § 3771. The Standing Committee

made a minor wording change to this portion of the committee note (directing courts to "comply with" rather than merely "be mindful of" the applicable constitutional and statutory provisions).

As published, subparagraph (e)(3)(B) provided that a court may use videoconferencing for a felony plea or sentencing proceeding if, among other requirements, "the defendant, after consulting with counsel, requests in a writing signed by the defendant that the proceeding be conducted by videoconferencing." Public comments raised practical concerns about the requirement of an advance writing by the defendant requesting the use of videoconferencing. The Advisory Committee considered these comments as they pertained to the "request" language and the timing of the request, and ultimately elected to retain the language as published.

The Standing Committee made three changes relating to Rule 62(e)(3)(B). First, the Standing Committee voted (10 to 3) to insert "before the proceeding and" in subparagraph (e)(3)(B) to clarify the temporal requirement. Second, the Standing Committee voted (7 to 6) to substitute "consent" for "request" in subparagraph (e)(3)(B). The net result of these two changes is to require that the defendant, "before the proceeding and after consulting with counsel, consents in a writing signed by the defendant that the proceeding be conducted by videoconferencing." Third, the Standing Committee authorized the Advisory Committee Chair and Reporters to draft conforming changes to the committee note. After these deliberations, the Standing Committee voted unanimously to recommend final approval of new Criminal Rule 62.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Criminal Rules 16, 45, and 56, and proposed new Criminal Rule 62, as set forth in Appendix D, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Information Items

The Advisory Committee on Criminal Rules met on April 28, 2022. In addition to the matters discussed above, the Advisory Committee considered several information items,

including proposals to amend Rule 49.1 to address a concern about the committee note's language regarding public access to certain financial affidavits and to amend Rule 17 to address the scope of and procedure for subpoenas.

FEDERAL RULES OF EVIDENCE

Rules Recommended for Approval and Transmission

The Advisory Committee on Evidence Rules recommended for final approval proposed amendments to Evidence Rules 106, 615, and 702.

Rule 106 (Remainder of or Related Writings or Recorded Statements)

The proposed amendment to Rule 106 – the rule of completeness – would allow any completing statement to be admitted over a hearsay objection and would cover all statements, whether or not recorded. The overriding goal of the amendment is to treat all questions of completeness in a single rule. That is particularly important because completeness questions often arise at trial, and so it is important for the parties and the court to be able to refer to a single rule to govern admissibility. The amendment is intended to displace the common law, just as the common law has been displaced by all of the other Federal Rules of Evidence.

The Advisory Committee received only a few public comments on the proposed changes to Rule 106. As published, the amendment would have inserted the words "written or oral" before "statement" so as to address the rule's applicability to unrecorded oral statements. After public comment, the Advisory Committee deleted the phrase "written or oral" to make clear that Rule 106 applies to all statements, including statements – such as those made through conduct or through sign language – that are neither written nor oral.

Rule 615 (Excluding Witnesses)

The proposed amendments to Rule 615 would limit an exclusion order under the existing rule (which would be re-numbered Rule 615(a)) to exclusion of witnesses from the courtroom,

and would add a new subdivision (b) that would provide that the court has discretion to issue further orders to "(1) prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom; and (2) prohibit excluded witnesses from accessing trial testimony." Under the proposed amendments, if a court wants to do more than exclude witnesses from the courtroom, the court must so order. In addition, the proposed amendments would clarify that the existing provision that allows an entity-party to designate "an officer or employee" to be exempt from exclusion is limited to one officer or employee. The rationale is that the exemption is intended to put entities on par with individual parties, who cannot be excluded under Rule 615. Allowing the entity more than one exemption is inconsistent with that rationale. In response to public comments, the Advisory Committee made two minor changes to the committee note (replacing the word "agent" with the word "representative" and deleting a case citation). The Standing Committee, in turn, revised three sentences in the committee note (including the sentence addressing orders governing counsel's disclosure of testimony for witness preparation).

Rule 702 (Testimony by Expert Witnesses)

The proposed amendments to Rule 702's first paragraph and to Rule 702(d) are the product of Advisory Committee work dating back to 2016. As amended, Rule 702(d) would require the proponent to demonstrate to the court that "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." This language would more clearly empower the court to pass judgment on the conclusion that the expert has drawn from the methodology. In addition, the proposed amendments as published would have required that "the proponent has demonstrated by a preponderance of the evidence" that the requirements in Rule 702(a) – (d) have been met. This language was designed to reject the view of some courts that the reliability requirements set forth in Rule 702(b) and (d) – that the expert has relied on sufficient facts or data and has reliably applied a reliable methodology to the facts – are

questions of weight and not admissibility, and more broadly that expert testimony is presumed to be admissible. With this language, the Advisory Committee sought to explicitly weave the Rule 104(a) standard into the text of Rule 702.

More than 500 comments were received on the proposed amendments to Rule 702. In addition, a number of comments were received at a public hearing. Many of the comments opposed the amendment, and the opposition was especially directed toward the phrase "preponderance of the evidence." Another suggestion in the public comment was that the rule should clarify that it is the court and not the jury that must decide whether it is more likely than not that the reliability requirements of the rule have been met. The Advisory Committee carefully considered the public comments and determined to replace "the proponent has demonstrated by a preponderance of the evidence" with "the proponent demonstrates to the court that it is more likely than not" that the reliability requirements are met. The Advisory Committee also made a number of changes to the committee note, and the Standing Committee, in its turn, made one minor edit to the committee note.

After making the changes, noted above, to the committee notes for Rules 615 and 702, the Standing Committee unanimously approved the proposed amendments to Rules 106, 615, and 702.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Evidence Rules 106, 615, and 702, as set forth in Appendix E, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rules Approved for Publication and Comment

The Advisory Committee on Evidence Rules submitted proposed amendments to Rules 611, 613, 801, 804, and 1006 with a recommendation that they be published for public comment in August 2022. The Standing Committee unanimously approved for publication for

public comment the proposed new Rule 611(d) and the proposed amendments to Rules 613, 801, 804, and 1006, but did not approve for publication proposed new Rule 611(e). The Advisory Committee will further consider the proposed new Rule 611(e) in the light of the Standing Committee's discussion.

Rule 611(d) (Illustrative Aids)

The proposed amendment would amend Rule 611 ("Mode and Order of Examining Witnesses and Presenting Evidence") by adding a new Rule 611(d) to regulate the use of illustrative aids at trial. The distinction between "demonstrative evidence" (admitted into evidence and used substantively to prove disputed issues at trial) and "illustrative aids" (not admitted into evidence but used solely to assist the jury in understanding the evidence) is sometimes a difficult one to draw and is a point of confusion in the courts. The proposed amendment would set forth uniform standards to regulate the use of illustrative aids, and in doing so, would clarify the distinction between illustrative aids and demonstrative evidence. In addition, because illustrative aids are not evidence and adverse parties do not receive pretrial discovery of such aids, the proposed amendment would require notice and an opportunity to object before an illustrative aid is used, unless the court for good cause orders otherwise.

Rule 611(e) (Juror Questions for Witnesses)

Proposed new Rule 611(e) was not approved for publication. That proposed rule would set forth a single set of safeguards that should be applied if the trial court decides to allow jurors to submit questions for witnesses. The proposed new Rule 611(e) requires the court to instruct jurors, among other things, that if they wish to ask a question, they must submit it in writing; that they are not to draw inferences if their question is rephrased or does not get asked; and that they must maintain their neutrality. The proposed rule also provides that the court must consult with counsel when jurors submit questions, and that counsel must be allowed to object to such

questions outside the jury's hearing. The committee note to proposed Rule 611(e) emphasizes that the rule is agnostic about whether a court decides to permit jurors to submit questions. During the Standing Committee meeting, members expressed differing views concerning this proposal, and the Advisory Committee has been asked to develop the proposal further in the light of that discussion.

Rule 613 (Witness's Prior Statement)

Current Rule 613(b) rejects the "prior presentation" requirement from the common law that before a witness could be impeached with extrinsic evidence of a prior inconsistent statement, the adverse party was required to give the witness an opportunity to explain or deny the statement. The current rule provides that extrinsic evidence of the inconsistent statement is admissible so long as the witness is given an opportunity to explain or deny the statement at some point in the trial. The proposed amendment to Rule 613(b) would require a prior opportunity to explain or deny the statement, with the court having discretion to allow a later opportunity. This would bring the rule into alignment with what the Advisory Committee believes to be the practice of most trial judges.

Rule 801(d)(2) (An Opposing Party's Statement)

Current Rule 801(d)(2) provides a hearsay exemption for statements of a party opponent. Courts are split about the applicability of this exemption in the following situation: a declarant makes a statement that would have been admissible against him as a party-opponent, but he is not the party-opponent because his claim or potential liability has been transferred to another (either by agreement or by operation of law), and it is the transferee that is the party-opponent.

The proposed amendment to Rule 801(d)(2) would provide that such a statement is admissible against the successor-in-interest. The Advisory Committee reasoned that

admissibility is fair when the successor-in-interest is standing in the shoes of the declarant because the declarant is in substance the party-opponent.

Rule 804 (Hearsay Exceptions; Declarant Unavailable)

Current Rule 804(b)(3) provides a hearsay exception for declarations against interest. In a criminal case in which a declaration against penal interest is offered, the rule requires that the proponent provide "corroborating circumstances that clearly indicate [the] trustworthiness" of the statement. There is a dispute in the courts about the meaning of the "corroborating circumstances" requirement. The proposed amendment to Rule 804(b)(3) would parallel the language in Rule 807 and require the court to consider the presence or absence of corroborating evidence in determining whether "corroborating circumstances" exist.

Rule 1006 (Summaries to Prove Content)

The proposed amendment to Rule 1006 would provide greater guidance to the courts on the admissibility and proper use of summary evidence under Rule 1006. The proposed amendment to Rule 1006 fits together with proposed new Rule 611(d) on illustrative aids. Rule 1006 provides that a summary can be admitted as evidence if the underlying records are admissible and too voluminous to be conveniently examined in court. Courts are in dispute about a number of issues regarding admissibility of summaries of evidence under Rule 1006, and some courts do not properly distinguish between summaries of evidence under Rule 1006 (which are themselves admitted into evidence) and summaries that are illustrative aids (which are not evidence at all). The proposed amendment to Rule 1006 would clarify that a summary is admissible whether or not the underlying evidence has been admitted, and would provide a cross-reference to Rule 611(d) on illustrative aids.

Information Items

The Advisory Committee on Evidence Rules met on May 6, 2022. The Advisory Committee discussed the matters listed above.

PROPOSED 2022 REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON THE ADEQUACY OF PRIVACY RULES PRESCRIBED UNDER THE E-GOVERNMENT ACT OF 2002

The E-Government Act of 2002 directed that rules be promulgated, under the Rules Enabling Act, "to protect privacy and security concerns relating to electronic filing of documents and the public availability … of documents filed electronically." Pub. L. No. 107-347, § 205(c)(3)(A)(i). Pursuant to this mandate, the "privacy rules" – Appellate Rule 25(a)(5), Bankruptcy Rule 9037, Civil Rule 5.2, and Criminal Rule 49.1 – took effect on December 1, 2007. Section 205(c)(3)(C) of the E-Government Act directs that, every two years, "the Judicial Conference shall submit to Congress a report on the adequacy of [the privacy rules] to protect privacy and security." Pursuant to that directive, the Judicial Conference submitted reports to Congress in 2009 and 2011. The Committee recommends that the Judicial Conference approve this third report (the "2022 Report"), which covers the period from 2011 to date. Future reports will be submitted beginning in 2024 and every two years thereafter.

The 2022 Report discusses rule and form amendments relevant to privacy issues that were adopted since the 2011 report. There have been changes to then-Bankruptcy Forms 9 and 21 in 2012; Appellate Form 4 in 2013 and 2018; Bankruptcy Rule 9037 in 2019; and Appellate Rule 25(a)(5) (this amendment is on track to take effect on December 1, 2022, absent contrary action by Congress). In addition, privacy concerns also shaped the content of Rule 2 in the new set of Supplemental Rules for Social Security Actions Under 42 U.S.C. § 405(g) (which is on track to take effect on December 1, 2022, absent contrary action by Congress).

The 2022 Report also discusses privacy-related topics currently pending on the Rules Committees' dockets, and deliberations in which the Rules Committees considered but rejected additional privacy-related rule amendments.

> **Recommendation:** That the Judicial Conference approve the proposed 2022 Report of the Judicial Conference of the United States on the Adequacy of Privacy Rules Prescribed Under the E-Government Act of 2002, as set forth in Appendix F, and ask the Administrative Office Director to transmit it to Congress in accordance with the law.

JUDICIARY STRATEGIC PLANNING

The Committee was asked to consider the Executive Committee's request for a report on the strategic initiatives that the Standing Committee is pursuing to implement the *Strategic Plan for the Federal Judiciary*. The Committee's views were communicated to Chief Judge Scott Coogler, judiciary planning coordinator.

Respectfully submitted,

John D. Bates, Chair

Elizabeth J. Cabraser	Troy A. McKenzie
Jesse M. Furman	Patricia Ann Millett
Robert J. Giuffra, Jr.	Lisa O. Monaco
Frank Mays Hull	Gene E.K. Pratter
William J. Kayatta, Jr.	Kosta Stojilkovic
Peter D. Keisler	Jennifer G. Zipps
Carolyn B. Kuhl	

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TAB 3

Minutes of the Spring 2022 Meeting of the

Advisory Committee on the Appellate Rules

March 30, 2022

San Diego, California

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 30, 2022, at 9:00 a.m. PDT.

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

Also present in person were: 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); Brittany Bunting, Administrative Analyst, RCS; Burton DeWitt, Rules Law Clerk, RCS; Professor Edward A. Hartnett, Reporter, Advisory Committee on the Appellate Rules; and Professor Catherine T. Struve, Reporter, Standing Committee on the Rules of Practice and Procedure.

Judge John D. Bates, Chair, Standing Committee on the Rules of Practice and Procedure; Professor Daniel R. Coquillette, Consultant, Standing Committee on the Rules of Practice and Procedure; Daniel J. Capra, Reporter, Advisory Committee on Evidence Rules; Marie Leary, Counsel, Federal Judicial Center; and S. Scott Myers, Counsel, RCS attended via Teams.

I. Introduction

Judge Bybee opened the meeting and welcomed everyone. He expressed appreciation both to those who were in person and those who were participating remotely, voicing hope that we would be able to see them in person in the future. He invited those participating in the meeting to introduce themselves and thanked members of the public for attending.

Burton DeWitt, the Rules Law Clerk, discussed the legislative tracker (Agenda book page 26), and added that a new version of the Amicus Act had been introduced.

One significant change in the latest version is that it no longer has a threshold of three amicus briefs to trigger its coverage.

II. Report on Meeting of the Standing Committee

Judge Bybee called attention to the draft minutes of the January Standing Committee meeting and the report of the Standing Committee to the Judicial Conference. (Agenda book page 34).

III. Approval of the Minutes

The Reporter noted two typos in the draft minutes of the October 7, 2021, Advisory Committee meeting. (Agenda book page 90). With those corrected, the minutes were approved.

IV. Discussion of Matters for Final Approval

CARES Act. Judge Bybee presented the report of the CARES Act subcommittee. (Agenda book page 101). This large-scale project, undertaken across advisory committees in response to the enactment by Congress of the CARES Act, resulted in proposed amendments to Rule 2 and Rule 4. These proposed amendments were published for public comment.

We received six comments. Two were supportive. The others did not lead the subcommittee to recommend any changes to the Rules as published.

A comment submitted by the Chief Deputy Clerk for the Tenth Circuit raised issues that the subcommittee had previously identified. The subcommittee was pleased that this thoughtful comment did not reveal issues that had been overlooked.

Judge Bybee invited discussion. Professor Struve stated that the Civil Rules Committee had approved Emergency Civil Rule 87, with some minor changes to the Committee Note and the deletion of some bracketed language.

A motion to approve the proposed amendments to Rule 2 and Rule 4, and to recommend that the Standing Committee give final approval to them, was approved without opposition.

Juneteenth. The Reporter presented a report concerning Juneteenth. (Agenda book page 123). A new law, effective June of 2021, created a new federal holiday, Juneteenth National Independence Day, June 19. Rule 26 should be amended to reflect this new holiday. There is no need for public notice and comment.

A motion to approve the proposed amendment to Rule 26, and to recommend that the Standing Committee give final approval to that amendment, was approved without opposition.

V. Discussion of Matter Approved for Public Comment

Rules 35 and 40. Judge Bybee presented an update concerning the proposed amendments to Rules 35 and 40. He explained that these proposed amendments would consolidate the provisions dealing with panel rehearing and rehearing en banc, eliminate duplication, and transfer the provisions of Rule 35 to Rule 40. He stated that the Standing Committee had accepted these amendments with minor changes, and thanked Professor Sachs for his work on this project.

The Reporter added that the Standing Committee had approved these proposed amendments for publication and public comment, including conforming amendments to Rule 32(g) and the Appendix of Length Limits. But after this approval, Professor Struve discovered that an additional conforming amendment should be made to the third bullet point in the Appendix of Length Limits to delete Rule 35. (Agenda book page 130).

Because the Standing Committee has already approved the rest of the proposed amendments for publication, and publication will not take place until August of 2022, this correction can be made prior to publication.

The Advisory Committee approved, without opposition, recommending that the Standing Committee publish this change as part of the publication of the proposed amendments.

VI. Discussion of Matters Before Subcommittees

A. Amicus Disclosures

Danielle Spinelli presented the report of the amicus subcommittee. (Agenda book page 158). She noted that the Committee had discussed this issue at length at the last two meetings. The AMICUS Act has been reintroduced in Congress, with some changes from the prior version.

She explained that current Rule 29(a)(4)(E) requires disclosure whether:

(i) a party's counsel authored the brief in whole or in part;

(ii) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and

(iii) a person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person.

There are concerns about this Rule and its Supreme Court counterpart. One concern is that it is too easy to evade the purpose of the disclosure rule by funneling money to an amicus indirectly, without earmarking the money for a particular brief. Another concern is that the current disclosure rule doesn't adequately reveal who is paying for an amicus brief. Some critics worry that the rule allows anonymous advocacy without disclosure of who is behind the brief. Prior detailed discussions at the last two meeting have sought to elicit the thoughts of the full Committee on these issues.

The new memo in the agenda book is shorter than the prior memos. It sets out language to facilitate discussion and to obtain more guidance from the full Committee. The language in the report is not a recommendation by the subcommittee. Ms. Spinelli invited the Reporter and other members of the subcommittee to jump in as she turned to a discussion of the language in the agenda book.

She first noted that the language separates disclosure of the relationship between the amicus and a party from disclosure of the relationship between the amicus and a nonparty. The current rule does not draw this distinction. But the purpose of disclosure in each situation—and the potential concerns in each situation—are different. The comment to the existing rule describes the purpose of the rule as to parties as not allowing a party effectively to have another brief. That isn't a concern with nonparties.

The Reporter directed the Committee's attention to 29(c)(3) of the discussion draft, which would call for disclosure of whether a party is a member of the amicus, and invited discussion.

A judge member asked whether there is any evidence or empirical data to suggest that there is a real problem. Ms. Spinelli responded that the current agenda book does not include everything from prior agenda books. The proponents of the AMICUS Act point to anecdotal evidence in the Supreme Court, including underlying connections between a party and an amicus and between amici that were not disclosed. Correspondence with the Clerk of the Supreme Court with some anecdotal evidence was also included in prior agenda books. There is a legitimate concern about evasion.

A different judge member said that knowing that a party is merely a member of an amicus is not helpful on its own. There is a good reason to compel disclosure if

the information is valuable, but not if it isn't useful. Unlike the draft language in 29(c)(4) and (5), the draft language in (c)(3) should be deleted.

An academic member agreed that (c)(3)—the provision that would call for disclosure of whether a party is a member of the amicus—should be deleted. Knowing that someone is a member doesn't tell us much about their influence on an amicus. For example, knowing that someone is a member of the Sierra Club tells us little about their influence. But disclosure does impose substantial costs, hurting unpopular groups and chilling speech.

And what counts as a problem? People disagree. We know what the Cato Institute says; do we need to know who funds it? The threshold for disclosure should be very high. There are two interests furthered by disclosure: knowing whether a party has control over an amicus and knowing whether an amicus is speaking for itself. Cato would blow its credibility if it filed any brief that came with a $20 bill attached, simply providing a fee for service. Even if someone donates lots of money to Cato, the brief is still from the organization. Not only (c)(3), but also (c)(5)—which would require disclosure of contributions above a 10% level—should be deleted.

Ms. Spinelli suggested that if a disclosure would not be helpful to judges, it shouldn't be required. Judge Bybee wondered whether there might be disclosures that could aid judges in making ethical decisions. A judge member pointed out that at this point we are focused on the relationship between a party and an amicus, and a judge would already know who the parties are.

There did not appear to be support for (c)(3). Discussion then turned to (c)(4).

Ms. Spinelli stated that (c)(4) is drafted to address the ability to evade disclosure requirements that are limited to earmarked contributions. As currently drafted for discussion purposes, it is quite different than the 3% threshold of the AMICUS Act. Instead, this draft focuses on the ability of a party to control the amicus, and therefore refers to a 50% or greater ownership or control. In response to a question from Judge Bybee, an academic member explained that the draft focuses on voting power. Who is the amicus owned by? Whose orders must it follow? Who can tell the amicus what to file? If less than 50%, the person might have lots of influence, but it is the amicus speaking for itself.

In response to another question by Judge Bybee, Danielle Spinelli noted that the discussion draft covers the situation where two or more parties collectively control an amicus.

A judge member stated that (c)(4) by itself is unobjectionable but is less valuable than (c)(5). It is important to follow the money. Stopping with (c)(4) would not be enough. There is a need for something like (c)(5). That provides a better sense of how independent the amicus is from a party.

Judge Bybee asked what (c)(4) is designed to accomplish. Disqualify an amicus? Discourage an amicus?

Danielle Spinelli explained that the draft, like the current rule, is only about disclosure. A party can write part of the brief of an amicus so long as that is disclosed. Because such a disclosure would lead a court to give an amicus brief less weight, it's not likely to be filed. No one submits a brief with a disclosure like that, but the rule operates to discourage it rather than forbid it.

The Reporter noted that the subcommittee had looked without success for a specific number in other bodies of law that are concerned about control. From what the subcommittee has found so far, those other bodies of law use standards rather than fixed numbers to take account of situations where one person owns (say) 40% and no one else has more than 2%.

An academic member spoke against (c)(5). There is a difference between voting control and making contributions. When a party makes contributions to an amicus, the amicus is still speaking on its own behalf, not simply providing a fee for service. The party may be funding other organizations and making contributions because the party agrees with those organizations. If there is to be a provision like (c)(5), the percentage should be something like 50%. If it's anything lower than that, so that 50% to 90% is coming from other sources, the amicus may be pleased to receive the contribution, but is not simply acting as a cat's paw.

The academic member added that the discussion draft adds "or intended as compensation for" to (c)(2), and that a lawyer's duty of candor deals with a wink-wink, nudge-nudge contribution. If the contribution is simply a regular contribution, for example, by an airline to an airline trade association, disclosure may lead to the trade association not filing; as a matter of its internal politics, the trade association may not want to tell members what other members have contributed. Given the *AFP* case, we should be mindful that the Supreme Court may not endorse (c)(5), even at the 10% level. The contribution may be made because of the views that the amicus already has, and the value of such a disclosure does not outweigh the chilling effect.

A judge member said that, with regard to parties, he wants to know if a party made a substantial contribution. He is not worried about the First Amendment here. While 10% is too low, 50% is too high. The question is to what extent is the entity independent.

Mr. Byron suggested that it might be useful to think about what kinds of connections between a party and an amicus might be useful for judges to know. He doesn't know the universe of possible connections.

Ms. Spinelli stated that the Committee rejected the idea of using a standard at the last meeting, concluding that we need a rule that is clear and easy to apply, even though it will be under-inclusive.

Judge Bybee invited suggestions for other percentages. A judge suggested 25%, noting that's substantial: I would want to know that in deciding the weight to give the brief. The judge added that 33% would be fine, too. Judge Bybee noted that a group might have only 4 members.

Mr. Byron suggested aligning (c)(4) with (c)(5), questioning whether there is a meaningful difference between the two that would call for different percentages.

An academic member stated that he had similar concerns with (c)(4) and (c)(5). Actual voting control is quite different from substantial influence. Even with substantial influence, the brief really is coming from the organization and not the party. And others may control an organization even if a party gives lots of money. If others own 75%, they control whether a brief is filed or not. Such disclosure is more intrusive and less informative. It is harder to justify a particular number for (c)(5).

Another judge found himself extraordinarily ambivalent. In his experience, it's not common to have lots of amici in the courts of appeals. In some cases, both sides recruit as many as they can, including groups of law professors formed just for the particular appeal. He is skeptical of the value; the focus is on the Supreme Court. The focus of the proposed legislation is informing the public, not just the court. Whose voices are speaking? There is something to be said for that. An industry association can be expected to take sides. Level of ownership may not be enough. A 25% contribution is pretty significant; the executive director of the amicus may not want to tick off that contributor. It's legitimate to know that. The devil is in the details. A percentage is better than a reasonable person standard.

The question is whether it is worth it. He sees it strongly on the party side, going back to the original idea of evading page limits. There might be constitutional problems with 10%. Maybe 25%?

Judge Bybee asked if the discussion had provided enough guidance for the subcommittee. Ms. Spinelli stated that her understanding was that (c)(3) should be dropped, and the rest of (c) refined. She added that the question remains whether the game is worth the candle.

A judge member noted that the project is not for naught, and it can inform the Supreme Court.

A liaison judge raised questions about "control" in (c)(4). That's too hard to define; take it out and leave the simple "ownership." She is totally ambivalent; there

isn't a problem. She assumes that amici are not independent and that there is coordination.

In response to a question, Ms. Spinelli stated that the 10% figure was drawn from the corporate disclosure rule but just as a place to begin discussion; there is no real substantive relationship between the two.

Judge Bates observed that if "control" were eliminated then the provision would not apply to organizations such as trade associations that don't have owners.

A judge member suggested focusing on voting rights. An academic member suggested focusing on legal control. At the 50% level of control, a party can create a house amicus, not a real amicus.

After a short break, the Committee turned to 29(d) of the discussion draft.

Ms. Spinelli began by noting that 29(d) deals with disclosure of the relationship between an amicus and a nonparty. The discussion draft of 29(d)(1), like the discussion draft 29(c)(1), would extend the existing disclosure of earmarked contributions to those that are intended as compensation for an amicus brief. The existing rule reaches earmarked contributions by nonparties but excludes members of the amicus from this disclosure requirement. One question is whether this member exclusion should be retained, as the discussion draft does.

The Reporter added that one advantage of placing disclosures regarding parties in 29(c) and disclosures regarding nonparties in 29(d) is that it makes clear that the membership exclusion does not apply to parties. A party who makes earmarked contributions must disclose those contributions, even if the party is also a member of the amicus.

Ms. Spinelli posed the question: focusing solely on nonparties, should the rule require that members of the amicus who make earmarked contributions be disclosed?

A lawyer member noted the Supreme Court case where a crowd-funded amicus brief was rejected because of small dollar earmarked anonymous contributions. An exception for members of an amicus opens the opportunity of evasion by turning contributors into members.

An academic member said that the worry is about an external mouthpiece. An organization speaks for its members; they are the people that Cato represents. An organization can go to its members, or vice versa. If done in house, it really is the organization speaking to the court. The exception for members should stay in.

Ms. Spinelli posed another question: what is the interest in requiring an amicus to disclose who paid for the brief if the person was not a party? The existing

rule does require such disclosure. Is there a sufficient interest in having that information that it outweighs the concerns, including constitutional concerns, with requiring disclosure? The interests and concerns are not the same for parties and nonparties.

Everything revolves around this issue of whether to meaningfully expand nonparty disclosure. Yes: the court should know who is advocating before it. No: amici are advocating on behalf of themselves, and we don't typically require disclosure of members in light of First Amendment concerns.

A judge stated that he is not a fan of (d)(2) or (d)(3) in the discussion draft. But he would remove the exception for members from (d)(1). If there is a specific funder, he'd want to know who it is. He doesn't see a First Amendment problem where funds earmarked for a particular brief are at issue. Judges are entitled to know.

An academic member asked what do you do with an organization that hits up members for individual projects? Disclose that Joe Schmo responded to the call for contributions for this brief? If it's an outside funder, there is a need to disclose. But if there is a membership appeal to file the brief and the rule requires disclosure of all members who responded, even if it doesn't violate the First Amendment, people will be reluctant to file briefs because they won't want to have to say who they asked in this membership appeal.

Mr. Byron noted that if the concern is that non-members could evade the rule by becoming members, he is less worried about that than about the chilling effect.

A judge stated that he is not too worried about a Red Cross amicus brief. Perhaps some measurement of the amount is needed. A disclosure that 100 people each gave $1000 is meaningless.

A different judge responded that there is a lot of power in crowdfunding, and it will be more common. Yet another judge asked what others thought about a 50% threshold for nonparty disclosure.

One judge responded that he wants to know whose voice is carrying the day; who is the specific person I'm listening to? The issue of crowdfunding is not necessarily implicated by the member issue. Ms. Spinelli agreed that crowdfunding presents a different issue.

An academic member asked how much difference in interest there is likely to be between the amicus and the funder? How much will anyone learn from a disclosure that Bob Barker funded a brief for PETA? In some instances, disclosure might be useful. But not in the mine run of cases. And disclosure may be very significant to donors. Consider a hot button issue in which FAIR is involved. The court knows what

the organization is and what it is saying. The risk of being bamboozled is quite low. If disclosure isn't crucial, don't require it.

A judge responded that the concern is with someone paying for *this* brief, not supporting the organization broadly.

The academic member replied that this depends on the details of how an organization does its fundraising, project by project or more generally. Compare this to a stranger showing up with a bag of cash.

Ms. Spinelli invited other judges to speak; perhaps some threshold would be appropriate?

One judge stated that while he understood the competing view, he was more inclined to the view expressed by the academic member. Disclosures would not do a lot of work for him, and he would worry about the collateral consequences.

Another judge member noted that there are two different motivating rationales involved. The first is that a membership exception allows for easy evasion: become a member. There may not be a practical solution for that. The second is that an amicus might be a mouthpiece for an undisclosed person. Based on the amicus briefs I get, I have a similar perspective as the judge who just spoke. Yet another issue, one that may be too difficult to deal with, is the concern that an individual might find multiple amicus briefs.

A judge suggested requiring disclosure if a person or entity funded more than one amicus brief (or more than *x* number of amicus briefs). An academic member stated that one difficulty with such an approach is that the disclosure comes from the amicus, and no one amicus may know this information.

Ms. Spinelli stated that more thought needs to be given to (d)(1) and suggested moving the discussion to (d)(2) and (d)(3). These are essentially similar to (c)(4) and (c)(5). Discussion draft (d)(2), like (c)(4), uses a 50% threshold. But (d)(2) uses a 40% threshold compared to the 10% threshold in (c)(5).

Two committee members have already said no to (d)(2) and (d)(3). These provisions go toward an issue that another committee member raised: getting a better understanding of who is behind the briefs and whether someone is single handedly creating what looks like a broad array of amicus briefs, but without earmarking contributions.

A lawyer member said that the interest goes beyond knowing. Cases where these entanglements have come to light gives the appearance of judges tolerating it and being hoodwinked. It erodes faith and trust in the judiciary.

Mr. Byron asked whether the disqualification rules require recusal based on anything that could be captured by these disclosures. Are there unidentified conflicts of interest? Ms. Spinelli stated that the subcommittee had not thought about that take on the issue.

An academic member stated that it's not clear what the disqualification rules require. If a judge owns stock in a company and that company submits an amicus brief does that require disqualification? If the company took out an ad in the New York Times it wouldn't require disqualification. There is some interest in informing the court, but submitting a brief is not a proper occasion for the public to get information it would like to know. Disclosure would not be required before an Op-Ed. How can one get at coordination without a much broader disclosure rule? Something perfectly legitimate—funding 18 animal rights cases—may look nefarious in hindsight. How can this be done without unnecessary disclosures?

Judge Bybee asked where this left us on (d)(2) and (d)(3). Ms. Spinelli stated that no one was really advocating for them. She suggested adding judges to the subcommittee.

Judge Bybee said that the discussion draft was useful so the Committee had something to shoot at. He thought the suggestion of adding judges was a good one and added three judges to the subcommittee. [This suggestion was reconsidered later to avoid the risk of a subcommittee that constituted a quorum of the full Committee.]

The Reporter stated that one point raised in the subcommittee report had not been discussed. One less intrusive way to deal with some of the concerns might be *caveat lector*: perhaps courts should be skeptical of amicus briefs that do not provide enough information to warrant trust.

B. Amicus Briefs and Recusal—FRAP 29 (20-AP-G)

Danielle Spinelli presented the report of the amicus subcommittee regarding a suggestion made by Dean Morrison. (Agenda book page 205). She explained that Rule 29(a)(2) permits a court to prohibit an amicus brief or strike it if the brief would result in a judge's disqualification. It is not clear what the standards for recusal based on an amicus brief are. Dean Morrison suggests that guidelines be developed. The subcommittee does not think that this is within the purview of this Committee.

Judge Bybee asked the Clerk of Court representative if she ever sees this. She replied that it happens occasionally, mostly at the en banc stage.

A liaison member stated that the test of recusal regarding an amicus is multifactored. The Code of Conduct Committee struggles with it. There are no bright lines. It is wise for this Committee to avoid.

A judge member noted that there was also a separate proposal submitted about this issue. The Reporter described that proposal, which was submitted after the agenda book had been prepared. The Reporters Committee for Freedom of the Press suggests that when a court prohibits or strikes an amicus brief under Rule 29(a)(2) that the court identify the amicus or counsel that would cause disqualification.

Judge Bybee noted that such identification might make it possible to reverse engineer to determine the judge who would be disqualified. A liaison member stated that this was for the Code of Conduct Committee; there is no requirement that judges give reasons when recusing. A judge member stated that the proposal doesn't call on anyone to state the reason for the recusal. It doesn't call for the identification of the judge, just the reason for the rejection. Someone invests time and resources into an amicus brief, and the court strikes the brief because of 1 of 500 lawyers at a firm. This proposal doesn't step on the Code of Conduct Committee. The liaison member replied that it is a backdoor way to get reasons for recusal articulated.

Mr. Byron asked if a judge's recusal list is public. Ms. Dwyer said no. The Code of Conduct Committee is considering more transparent ways, but that may take years. The annual financial statement will be more available. Mr. Byron said that will go a long way to deal with this issue. Presumably counsel know about family relationships.

Judge Bybee referred this new proposal to the amicus subcommittee, noting that a suggestion had been made to add judges to that subcommittee.

Judge Bates cautioned that before the subcommittee meets, its size should be considered. [As noted earlier, for this reason, Judge Bybee reconsidered the expansion of the subcommittee.]

C. Costs on Appeal—Rule 39 (21-AP-D)

Judge Nichols presented the report of the subcommittee on costs on appeal. (Agenda book page 213). He began by noting the basic operation of Rule 39(a), which provides the default rule for allocating costs on appeal. Rule 39(d) deals with costs that are taxed in the court of appeals; Rule 39(e) deals with costs taxed in the district court. Rule 39(e)(3) provides that the premium paid for a bond to preserve rights pending appeal is taxable in the district court because it arises out of activity in the district court. The bond is approved in the district court in order to get a stay of the district court judgment pending appeal.

In *Hotels.com*, discussed at page 215 of the agenda book, the Supreme Court held that a district court cannot reallocate the costs under Rule 39. The Court relied on both the text of the Rule and the idea that the court of appeals should decide who really prevailed on appeal. The Court also noted that the current rules could be clearer.

The subcommittee investigated how big a deal this is. After polling the circuit clerks, it seems that disputes about costs on appeal do not arise often. But the costs for a bond can be quite high. If a plaintiff obtains a $100 million judgment, and a defendant pays $1 million for a bond to stay enforcement of that judgment and prevails on appeal, the plaintiff doesn't want to pay that million dollars.

Three points of background. First, the mandate of the court of appeals is not delayed for the taxation of costs. Second, the bill of costs for costs taxable in the district court is filed in the district court. Third, by the time a bill of costs is filed in the district court, the time to seek rehearing in the court of appeals is long gone.

A judge noted that a plaintiff can see this coming and do something about it.

Judge Nichols agreed but noted that the Supreme Court said that the mechanism to do so can be clearer. And the worry is that a prevailing plaintiff in the district court may not know how much the premium was; nothing requires disclosure. For that reason, the subcommittee recommends a joint amendment.

First the Appellate Rules would make clearer that a party can file a motion seeking reallocation of the costs. But what if the party doesn't really know what the costs were? It's anomalous to ask the court of appeals to reallocate the costs without knowing what the costs are.

For that reason, the second step would be an amendment to Civil Rule 62. That Rule currently requires the district court to approve the bond and could be amended to also require disclosure of the costs of the bond. That way, when the district court approves the bond, everyone knows the premium that the prevailing party in the district court might eat if the judgment is reversed—so the loser in the court of appeals can seek reallocation of costs.

The subcommittee considered providing for a motion in the court of appeals to reallocate costs after the bill of costs is filed in the district court. But at that point the mandate has already issued.

The subcommittee's approach makes clear what is already true, but in a context where parties know. This requires only a modest edit to Appellate Rule 39(a) to make express what is currently true. Its proposal is contingent on an amendment to Civil Rule 62 that increases transparency.

The Reporter added that the plan would be to hold the Appellate Rule amendment until we see what the Civil Rules Committee thinks.

A judge member asked if the court of appeals could allocate the cost of the premium in some way other than 50/50. Judge Nichols responded that a court of

appeals could allocate the cost between the parties anywhere from 0 to 100 percent. Or it could direct the district court to deal with the allocation issue.

A judge member asked why there was a need to coordinate with Civil. Judge Nichols responded that while we could amend Appellate Rule 39(a) without any change to the Civil Rules, there is no immediate problem, no need to rush, so no harm with dealing with both together. Mr. Byron added that sophisticated litigants negotiate when the district court is considering approval of the bond, but some plaintiffs may not recognize the risk. A coordinated effort is a good goal that can avoid surprising outcomes.

A judge member stated that Judge Nichols had done a great job and seconded his views. It should be usual for counsel to talk to each other. The issue doesn't arise often, but there is some case law that sends the issue back to the district court. This is a simple practical fix that depends on a fix to the Civil Rules. Two or three motions a year isn't much, but it can be a lot of dough. There is no urgency.

An academic member stated that the subcommittee had done a terrific job. It's a good idea even if Civil doesn't act. Judge Nichols said that he didn't disagree.

Judge Nichols then turned to the last part of the subcommittee memo. (Agenda book page 219). The proposal we have been discussing assumes that it is lawful to tax the premium for a bond as a cost at all. The Solicitor General sent an email last night suggesting that this is a difficult question; the Solicitor General appears to take a different view than that of the Seventh Circuit and Wright & Miller. A footnote in *Hotels.com* notes but does not consider the argument that a Rule cannot shift costs other than those authorized by 28 U.S.C. § 1920. This is a very difficult substantive question; we can do these amendments without taking a position on the underlying question. The Solicitor General is not suggesting that we take up this issue right now. It is not crystal clear that the Seventh Circuit is right. If the Committee decided to eliminate (e)(3), the issue is irrelevant. Or we can stay with the current plan and do nothing more regarding the question of authorization.

Professor Struve raised a question about timing. Perhaps a party should be able to seek this relief until the mandate has issued. Judge Nichols responded that the subcommittee set the same 14-day deadline for a motion to reallocate costs as the existing rule uses for a party to file a bill of costs in the court of appeals.

An academic member asked about the relationship between these two 14-day rules. Judge Nichols stated that (d)(1) addresses costs that are taxed in the court of appeals; that bill of costs has to be filed within 14 days after entry of judgment in the court of appeals. Here, we are talking about costs that are taxable in the district court under (e). The academic member suggested that perhaps the new provision belonged in (e). Judge Nichols stated that not a lot of thought had been given to the placement question.

The Reporter stated that Rule 39(a) governs the allocation of all costs, both those taxed in the district court and in the court of appeals. Judge Nichols observed that the court of appeals could set a different allocation for different costs, particularly a different allocation for the premium for a bond than for other costs.

A judge member suggested a separate provision.

The Reporter stated that Rule 39(a) deals with allocation, while (d) and (e) deal with calculation. Mr. Byron suggested framing the provision more broadly because, as the issue is more in the public eye, more might come to light, so we shouldn't say that they are off the table.

The academic member thought that the explanation of the distinction between allocation and calculation made sense. He suggested that the deadline for a motion for reallocation be filed either 28 days after judgment or 14 days after the bill of costs is filed under (d)(1), whichever is later. That way, a party knows whatever is on the table.

Judge Nichols asked whether the Committee agreed that we should not take up the underlying question of the authority to tax the costs of a bond at all. A judge member agreed, and no one disagreed.

Judge Nichols said that the subcommittee would resume its work, including dealing with the issue of placement of the new provision.

The Committee then took a break for lunch.

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

After Judge Bybee thanked the Rules staff for putting together a lovely lunch, Lisa Wright provided the report of the IFP subcommittee. (Agenda book page 223). She explained that the subcommittee has been looking into IFP status and Form 4, particularly ways to make Form 4 less intrusive.

The underlying statute, 28 U.S.C. § 1915, had been interpreted to permit a barebones affidavit, but subsequent forms called for more detail. As amended by the Prison Litigation Reform Act, the statute now authorizes IFP status for a "person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor," switching midsentence from "person," to "such prisoner," and back to "person."

This is not just an issue for the Appellate Rules; the Supreme Court Rules incorporate Form 4 of the Appellate Rules. The district courts, on the other hand, use AO Forms. The CJA-23 used in criminal cases is simpler than Form 4.

Sai made suggestions to multiple committees regarding the standards for IFP status and the forms used. Civil decided not to pursue uniform standards. Criminal expressed some interest, particularly regarding habeas cases. This Committee has been most active because Form 4 is promulgated under the Rules Enabling Act. It is not clear that the Rules Enabling Act can be used to establish standards for IFP status. The subcommittee has focused on Form 4.

The existing Form 4 is extremely detailed, asking for items such as laundry and dry-cleaning expenses. Lisa Fitzgerald from the Ninth Circuit Clerk's Office sent around a request for information to counterparts in other circuits and got a great response. It appears that IFP status is rarely denied by courts of appeals because of insufficient indigency. It is denied far more often for frivolity. That's a reason to make the required statement of reasons more prominent on the form. Most cases aren't close; the forms have lots of zeros. There is no uniform standard. The forms are more detailed than needed. Perhaps something like CJA-23, or something in between the existing Form 4 and CJA-23. One circuit noted that it sometimes looks at whether particular expenses, such as entertainment, are excessive.

The subcommittee considered some threshold questions that if the applicant answered yes, the rest of the form would not need to be completed. But by making the rest of the form simple enough, there was no need for this. The draft form (Agenda book page 226) asks questions about means-tested programs (keyed to federal poverty guidelines) and does not seek spousal information. Sai's points are generally well taken.

There is a question whether asking, as the draft form does, "What are your total assets?" is sufficient to comply with the statute. Perhaps some big-ticket items should be broken out.

In response to a question from Judge Bybee, Ms. Wright stated that the subcommittee tried to come up with a form that provided the information that courts actually use without being so intrusive.

An academic member stated that this was great, and he was glad to see less detail. He wondered why information about the household was not sought. He also suggested a more aggressive view of rulemaking authority under 2072 to formalize standards that are informally applied so people know what they are.

Ms. Wright responded that the idea was to focus on the individual applicant and not assume that other money in the household is available. Sai is particularly concerned about questions about a spouse and the idea that one spouse has to fund litigation by the other. The public assistance questions get at the notice issue.

In response to a question by Judge Bybee, Ms. Dwyer stated that she has never seen a close case; it's rare for the form to show anything. Staff attorneys provide recommendations to panels; judges get the underlying forms only if they ask.

Mr. Byron asked if there are forms better than Form 4 that are currently used. Ms. Wright stated that lots of courts do use Form 4. Ms. Dwyer added that the draft is like the Ninth Circuit form and would help. Form 4 is available to the public and is unnecessarily revealing.

Professor Struve said that she really liked the idea of the first three questions but noted that Medicaid is called by different names in different states.

Judge Bybee said that the plan from here was to ask the clerks again and consult with the Supreme Court. Ms. Wright stated that an old agenda book indicated that a prior Clerk of the Supreme Court, General Suter, wanted more details in the form. Perhaps the pendulum has swung.

Judge Bybee asked if there was any effect on the Civil Rules. Professor Struve responded that no coordination with the Civil Rules Committee was required, but Supreme Court Rule 39 incorporates Appellate Form 4.

The Reporter asked whether the Committee thought it was generally a good idea. He clarified that after circling back to the Circuit Clerks, it would be necessary to check with the Supreme Court Clerk before moving forward. Ms. Dwyer added that the senior staff attorneys would be the appropriate people to consult.

Judge Bybee confirmed that all of the subcommittee chairs have enough information from the Committee.

VII. Discussion of Matters Before Joint Subcommittees

The Reporter stated that he had nothing new to report regarding (1) the joint subcommittee considering the midnight deadline for electronic filing, and (2) the joint subcommittee considering the final judgment rule in consolidated actions. (Agenda book page 230).

The Reporter did have an update on the project regarding electronic filing by pro se litigants that is currently being addressed by the reporters acting jointly. The Federal Judicial Center provided the reporters with a draft report that is not yet ready for publication but will eventually be published. The draft report makes several important distinctions:

1) case initiation compared to subsequent filings;

2) filing via ECF compared to other kinds of electronic submission;

3) submissions by prisoners compared to others;

4) distinctions among appeals, civil cases, criminal cases, and bankruptcy cases.

The FJC survey reveals that some courts of appeals generally permit pro se litigants to use ECF, and all do at least sometimes. In general, courts that have allowed ECF filing find that the reality is better than their fears.

There is a question whether the matter of electronic submission is best handled by rules or something else, such as CACM, shared templates, and shared software.

Another issue is the requirement of service on those who are using ECF. Since the submissions by a non-ECF filer are placed on ECF by the clerk's office, an ECF user gets served via ECF. Is there a need for other service?

In response to a question about the distinction between case initiation and subsequent filings, the Reporter noted a concern with making it too easy to file new cases. Professor Struve noted that even with lawyers there are problems with electronic case initiation and if the process is begun but not completed, there can be a docket number with no case, making it look like a sealed case is in the system.

Professor Struve alerted the Committee to an issue that may require coordination with the Bankruptcy Rules Committee. In some cases, appeals can go directly from a bankruptcy court to a court of appeals. The Bankruptcy Rules Committee is looking to make clear that when such an appeal is certified as permitted under 28 U.S.C. § 158(d)(2) any party may ask the court of appeals to authorize the appeal. That approach does not fit neatly with Appellate Rule 5. A lawyer member said that she does lots of bankruptcy appeals and that while the idea sounds weird at first blush, it is not a terrible idea.

VIII. Discussion of Recent Suggestions

The Reporter noted that three comments have been received regarding amicus disclosures. (21-AP-G; 21-AP-H; 22-AP-A). Because there has not yet been a proposal published for public comment, these comments have been docketed as new suggestions. The amicus subcommittee treated these comments as intended, and they were referred to that subcommittee.

In addition, another new suggestion was received after the publication of the agenda book. (22-AP-B). This new suggestion came up earlier in the meeting in connection with the discussion of amicus briefs and disqualification; the suggestion is that when an amicus brief is not allowed to be filed or is struck under Rule 29, the court identify each amicus or counsel that would cause the disqualification.

IX. Review of Impact and Effectiveness of Recent Rule Changes

The Reporter stated that Judge Chagares had added this as a regular item on the agenda. For this meeting, the agenda book contains a table of amendments to the Appellate Rules that have taken effect since 2018. (Agenda book page 236). The Committee did not raise any particular concerns.

X. New Business

The Reporter stated that Professor Sachs had suggested that the Committee be alerted to the recent Supreme Court decision, *Cameron v. EMW Women's Surgical Center*. In that opinion, the Supreme Court observed that there is no Appellate Rule dealing with intervention on appeal. Professor Struve noted that the Committee had looked into this issue in 2020 but did not move forward; it may be time to think about it again. Other members agreed. Judge Bybee asked Professor Struve to circulate the material from that prior consideration.

XI. Adjournment

Judge Bybee thanked the participants, both in person and on camera, and acknowledged how valuable everyone's time is. But gaps and ambiguities in the Rules can impose litigation costs on parties. If we can save these costs on the American people, we've done our job.

The next meeting will be held on October 13, 2022, in Washington D.C. Judge Bybee hopes to see everyone there.

The Committee adjourned at approximately 2:10 p.m.

TAB 4

TAB 4A

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett

Re: FRAP 35/40 (18-AP-A)

Date: September 15, 2022

The proposed amendments to Rules 35 and 40 were published for public comment in August of 2022. The comment period is open until February 16, 2023.

To date, we have received only two comments. One comment states:

> The petition for rehearing en banc should not have a provision stating such rehearings are disfavored. That is not justice. Petitions for rehearing should be freely granted when something unjust appears in the record.

The other comment states:

> FRAP RULE 35 It is too much like legislative discretion to let a court of appeals en banc to choose not to act. There should be no discretion. Every petition for en banc review should have a merits decision because only en banc courts can overturn panels and the U.S. Supreme Court is closed 99% of time to petitioners. Courts and their panels and en banc should not close themselves because this violates the First Amendment right to petition for a redress of grievances, the 5th Amendment right to fundamental fairness (which includes the right to a merits decision), and Article III, which guarantees that courts will exist, not close themselves and refuse to exist. These problems of courts closing themselves and abusing litigants appear all across the United States and the rules need to be much harder to avoid. The rules must guarantee that courts will exist and be open and fair, not act closed and abusive. I attach a draft of my petition for certiorari in 4 cases where courts closed themselves and acted abusively. These are meant to illustrate the problem.

Because these were the only comments received, the subcommittee did not meet.

TAB 4B

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE[1]

Rule 32. Form of Briefs, Appendices, and Other Papers

* * * * *

(g) Certificate of Compliance.

(1) **Briefs and Papers That Require a Certificate.** A brief submitted under Rules 28.1(e)(2), 29(b)(4), or 32(a)(7)(B)—and a paper submitted under Rules 5(c)(1), 21(d)(1), 27(d)(2)(A), 27(d)(2)(C), ~~35(b)(2)(A),~~ or ~~40(b)(1)~~ 40(d)(3)(A)—must include a certificate by the attorney, or an unrepresented party, that the document complies with the type-volume limitation. The person preparing the certificate may rely

[1] New material is underlined in red; matter to be omitted is lined through.

on the word or line count of the word-processing system used to prepare the document. The certificate must state the number of words—or the number of lines of monospaced type—in the document.

(2) **Acceptable Form.** Form 6 in the Appendix of Forms meets the requirements for a certificate of compliance.

Committee Note

Changes to subdivision (g) reflect the consolidation of Rules 35 and 40.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE[1]

Rule 35. ~~**En Banc Determination**~~
(Transferred to Rule 40)

~~**(a) When Hearing or Rehearing En Banc May Be Ordered.** A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:~~

~~(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or~~

~~(2) the proceeding involves a question of exceptional importance.~~

[1] New material is underlined in red; matter to be omitted is lined through.

~~**(b) Petition for Hearing or Rehearing En Banc.** A party may petition for a hearing or rehearing en banc.~~

~~(1) The petition must begin with a statement that either:~~

~~(A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or~~

~~(B) the proceeding involves one or more questions of~~

~~exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.~~

~~(2) Except by the court's permission:~~

~~(A) a petition for an en banc hearing or rehearing produced using a computer must not exceed 3,900 words; and~~

~~(B) a handwritten or typewritten petition for an en banc hearing or rehearing must not exceed 15 pages.~~

~~(3) For purposes of the limits in Rule 35(b)(2), if a party files both a petition for panel rehearing and a petition for rehearing en banc, they are considered a single document even if they are filed separately, unless separate filing is required by local rule.~~

~~**(c) Time for Petition for Hearing or Rehearing En Banc.** A petition that an appeal be heard initially en banc must be filed by the date when the appellee's brief is due. A petition for a rehearing en banc must be~~

~~filed within the time prescribed by Rule 40 for filing a petition for rehearing.~~

~~**(d) Number of Copies.** The number of copies to be filed must be prescribed by local rule and may be altered by order in a particular case.~~

~~**(e) Response.** No response may be filed to a petition for an en banc consideration unless the court orders a response. The length limits in Rule 35(b)(2) apply to a response.~~

~~**(f) Call for a Vote.** A vote need not be taken to determine whether the case will be heard or reheard en banc unless a judge calls for a vote.~~

Committee Note

For the convenience of parties and counsel, the amendment addresses panel rehearing and rehearing en banc together in a single rule, consolidating what had been separate, overlapping, and duplicative provisions of Rule 35 (hearing and rehearing en banc) and Rule 40 (panel rehearing). The contents of Rule 35 are transferred to

Rule 40, which is expanded to address both panel rehearing and en banc determination.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE[1]

Rule 40. ~~Petition for~~ Panel Rehearing~~;~~ En Banc Determination

(a) ~~Time to File; Contents; Response; Action by the Court if Granted.~~ A Party's Options. A party may seek rehearing of a decision through a petition for panel rehearing, a petition for rehearing en banc, or both. Unless a local rule provides otherwise, a party seeking both forms of rehearing must file the petitions as a single document. Panel rehearing is the ordinary means of reconsidering a panel decision; rehearing en banc is not favored.

~~(1) **Time.** Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days~~

[1] New material is underlined in red; matter to be omitted is lined through.

~~after entry of judgment. But in a civil case, unless an order shortens or extends the time, the petition may be filed by any party within 45 days after entry of judgment if one of the parties is:~~

~~(A) the United States;~~

~~(B) a United States agency;~~

~~(C) a United States officer or employee sued in an official capacity; or~~

~~(D) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf including all instances in which the United States represents that person when the court~~

~~of appeals' judgment is entered or files the petition for that person.~~

~~(2) **Contents.** The petition must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition. Oral argument is not permitted.~~

~~(3) **Response.** Unless the court requests, no response to a petition for panel rehearing is permitted. Ordinarily, rehearing will not be granted in the absence of such a request. If a response is requested, the requirements of Rule 40(b) apply to the response.~~

~~(4) **Action by the Court.** If a petition for panel rehearing is granted, the court may do any of the following:~~

~~(A) make a final disposition of the case without reargument;~~

~~(B) restore the case to the calendar for reargument or resubmission; or~~

~~(C) issue any other appropriate order.~~

(b) ~~**Form of Petition; Length.**~~ **Content of a Petition.** ~~The petition must comply in form with Rule 32. Copies must be served and filed as Rule 31 prescribes. Except by the court's permission:~~

(1) ~~a petition for panel rehearing produced using a computer must not exceed 3,900 words; and~~ **Petition for Panel Rehearing.** A petition for panel rehearing must:

(A) state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended; and

(B) argue in support of the petition.

(2) ~~a handwritten or typewritten petition for panel rehearing must not exceed 15 pages.~~ **Petition for Rehearing En Banc.** A petition for rehearing en banc must begin with a statement that:

(A) the panel decision conflicts with a decision of the court to which the petition is addressed (with citation to the conflicting case or cases) and the full court's consideration is therefore necessary to secure or maintain uniformity of the court's decisions;

(B) the panel decision conflicts with a decision of the United States Supreme Court (with citation to the conflicting case or cases);

(C) the panel decision conflicts with an authoritative decision of another

United States court of appeals (with citation to the conflicting case or cases); or

(D) the proceeding involves one or more questions of exceptional importance, each concisely stated.

(c) When Rehearing En Banc May Be Ordered. On their own or in response to a party's petition, a majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be reheard en banc. Unless a judge calls for a vote, a vote need not be taken to determine whether the case will be so reheard. Rehearing en banc is not favored and ordinarily will be allowed only if one of the criteria in Rule 40(b)(2)(A)-(D) is met.

(d) Time to File; Form; Length; Response; Oral Argument.

(1) **Time.** Unless the time is shortened or extended by order or local rule, any petition for panel rehearing or rehearing en banc must be filed within 14 days after judgment is entered—or, if the panel later amends its decision (on rehearing or otherwise), within 14 days after the amended decision is entered. But in a civil case, unless an order shortens or extends the time, the petition may be filed by any party within 45 days after entry of judgment or of an amended decision if one of the parties is:

(A) the United States;

(B) a United States agency;

(C) a United States officer or employee sued in an official capacity; or

(D) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf—including all instances in which the United States represents that person when the court of appeals' judgment is entered or files that person's petition.

(2) **Form of the Petition.** The petition must comply in form with Rule 32.

Copies must be filed and served as Rule 31 prescribes, except that the number of filed copies may be prescribed by local rule or altered by order in a particular case.

(3) **Length.** Unless the court or a local rule allows otherwise, the petition (or a single document containing a petition for panel rehearing and a petition for rehearing en banc) must not exceed:

(A) 3,900 words if produced using a computer; or

(B) 15 pages if handwritten or typewritten.

(4) **Response.** Unless the court so requests, no response to the petition is permitted. Ordinarily, the petition

will not be granted without such a request. If a response is requested, the requirements of Rule 40(d)(2)-(3) apply to the response.

(5) **Oral Argument.** Oral argument on whether to grant the petition is not permitted.

(e) If a Petition is Granted. If a petition for panel rehearing or rehearing en banc is granted, the court may:

(1) dispose of the case without further briefing or argument;

(2) order additional briefing or argument; or

(3) issue any other appropriate order.

(f) Panel's Authority After a Petition for Rehearing En Banc. The filing of a petition for rehearing en banc does not limit the

panel's authority to take action described in Rule 40(e).

(g) Initial Hearing En Banc. On its own or in response to a party's petition, a court may hear an appeal or other proceeding initially en banc. A party's petition must be filed no later than the date when its principal brief is due. The provisions of Rule 40(b)(2), (c), and (d)(2)-(5) apply to an initial hearing en banc. But initial hearing en banc is not favored and ordinarily will not be ordered.

Committee Note

For the convenience of parties and counsel, the amendment addresses panel rehearing and rehearing en banc together in a single rule, consolidating what had been separate, overlapping, and duplicative provisions of Rule 35 (hearing and rehearing en banc) and Rule 40 (panel rehearing). The contents of Rule 35 are transferred to Rule 40, which is expanded to address both panel rehearing and en banc determination.

Subdivision (a). The amendment makes clear that parties may seek panel rehearing, rehearing en banc, or both. It emphasizes that rehearing en banc is not favored and that

rehearing by the panel is the ordinary means of reconsidering a panel decision. This description of panel rehearing is by no means designed to encourage petitions for panel rehearing or to suggest that they should in any way be routine, but merely to stress the extraordinary nature of rehearing en banc. Furthermore, the amendment's discussion of rehearing petitions is not intended to diminish the court's existing power to order rehearing sua sponte, without any petition having been filed. The amendment also preserves a party's ability to seek both forms of rehearing, requiring that both petitions be filed as a single document, but preserving the court's power (previously found in Rule 35(b)(3)) to provide otherwise by local rule.

Subdivision (b). Panel rehearing and rehearing en banc are designed to deal with different circumstances. The amendment clarifies the distinction by contrasting the required content of a petition for panel rehearing (preserved from Rule 40(a)(2)) with that of a petition for rehearing en banc (preserved from Rule 35(b)(1)).

Subdivision (c). The amendment preserves the existing criteria and voting protocols for ordering rehearing en banc, including that no vote need be taken unless a judge calls for a vote (previously found in Rule 35(a) and (f)).

Subdivision (d). The amendment establishes uniform time, form, and length requirements for petitions for panel rehearing and rehearing en banc, as well as uniform provisions for responses to the petition and oral argument.

Time. The amended Rule 40(d)(1) preserves the existing time limit, after the initial entry of judgment, for filing a petition for panel rehearing (previously found in Rule 40(a)(1)) or a petition for rehearing en banc (previously found in Rule 35(c)). It adds new language extending the

same time limit to a petition filed after a panel amends its decision, on rehearing or otherwise.

Form of the Petition. The amended Rule 40(d)(2) preserves the existing form, service, and filing requirements for a petition for panel rehearing (previously found in Rule 40(b)), and it extends these same requirements to a petition for rehearing en banc. The amended rule also preserves the court's existing power (previously found in Rule 35(d)) to determine the required number of copies of a petition for rehearing en banc by local rule or by order in a particular case, and it extends this power to petitions for panel rehearing.

Length. The amended Rule 40(d)(3) preserves the existing length requirements for a petition for panel rehearing (previously found in Rule 40(b)) and for a petition for rehearing en banc (previously found in Rule 35(b)(2)). It also preserves the court's power (previously found in Rule 35(b)(3)) to provide by local rule for other length limits on combined petitions filed as a single document, and it extends this authority to petitions generally.

Response. The amended Rule 40(d)(4) preserves the existing requirements for a response to a petition for panel rehearing (previously found in Rule 40(a)(3)) or to a petition for rehearing en banc (previously found in Rule 35(e)). Unsolicited responses to rehearing petitions remain prohibited, and the length and form requirements for petitions and responses remain identical. The amended rule also extends to rehearing en banc the existing statement (previously found in Rule 40(a)(3)) that a petition for panel rehearing will ordinarily not be granted without a request for a response. The use of the word "ordinarily" recognizes that there may be circumstances where the need for rehearing is sufficiently clear to the court that no response is needed. But

before granting rehearing without requesting a response, the court should consider that a response might raise points relevant to whether rehearing is warranted or appropriate that could otherwise be overlooked. For example, a responding party may point out that an argument raised in a rehearing petition had been waived or forfeited, or it might point to other relevant aspects of the record that had not previously been brought specifically to the court's attention.

Oral argument. The amended Rule 40(d)(5) extends to rehearing en banc the existing prohibition (previously found in Rule 40(a)(2)) on oral argument on whether to grant a petition for panel rehearing.

Subdivision (e). The amendment clarifies the existing provisions empowering a court to act after granting a petition for panel rehearing (previously found in Rule 40(a)(4)), extending these provisions to rehearing en banc as well. The amended language alerts counsel that, if a petition is granted, the court might call for additional briefing or argument, or it might decide the case without additional briefing or argument. *Cf.* Supreme Court Rule 16.1 (advising counsel that an order disposing of a petition for certiorari "may be a summary disposition on the merits").

Subdivision (f). The amendment adds a new provision concerning the authority of a panel to act while a petition for rehearing en banc is pending.

Sometimes, a panel may conclude that it can fix the problem identified in a petition for rehearing en banc by, for example, amending its decision. The amendment makes clear that the panel is free to do so, and that the filing of a petition for rehearing en banc does not limit the panel's authority.

A party, however, may not agree that the panel's action has fixed the problem, or a party may think that the panel has created a new problem. If the panel amends its decision while a petition for rehearing en banc is pending, the en banc petition remains pending until its disposition by the court, and the amended Rule 40(d)(1) specifies the time during which a new rehearing petition may be filed from the amended decision. In some cases, however, there may be reasons not to allow further delay. In such cases, the court might shorten the time for filing a new petition under the amended Rule 40(d)(1), or it might shorten the time for issuance of the mandate or might order the immediate issuance of the mandate under Rule 41. In addition, in some cases, it may be clear that any additional petition for panel rehearing would be futile and would serve only to delay the proceedings. In such cases, the court might use Rule 2 to suspend the ability to file a new petition for panel rehearing. Before doing so, however, the court ought to consider the difficulty of predicting what a party filing a new petition might say.

Subdivision (g). The amended Rule 40 largely preserves the existing requirements concerning the rarely invoked initial hearing en banc (previously found in Rule 35). The time for filing a petition for initial hearing en banc (previously found in Rule 35(c)) is shortened, for an appellant, to the time for filing its principal brief. The other requirements and voting protocols, which were identical as to hearing and rehearing en banc, are incorporated by reference. The amendment adds new language to remind parties that initial hearing en banc is not favored and ordinarily will not be ordered.

Appendix:
Length Limits Stated in the
Federal Rules of Appellate Procedure

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

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

* * * * *

	Rule	Document type	Word limit	Page limit	Line limit

* * * * *

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

TAB 5

TAB 5A

To: Advisory Committee

From: Amicus Subcommittee

Re: Amicus Disclosures (21-AP-C; 21-AP-G; 21-AP-H; 22-AP-A)

Date: September 15, 2022

This subcommittee has been considering for some time whether to recommend that Rule 29 be amended to require additional disclosures by amici curiae. Prior subcommittee memos from March 12, 2021, September 8, 2021, and February 25, 2022, discussing the relevant considerations in greater detail, along with selected attachments to those memos, are included in the agenda book after this memo.

Based on the helpful discussion at the spring 2022 meeting of the full Advisory Committee and on further consideration by the subcommittee, this memo sets out revised working draft language for possible amendments for discussion by the full Advisory Committee. The subcommittee emphasizes that it is not yet proposing that any amendment be published for public comment, much less adopted. As before, this is simply a working draft to help guide the full Advisory Committee's consideration.

Based on the discussion at the spring 2022 meeting, it appeared to the subcommittee that there is greater interest in potential amendments relating to the disclosure of ownership, control, or non-earmarked contributions to an amicus by a *party* than in potential amendments relating to such disclosures by a *non-party*. For that reason, the working draft language in this memo focuses primarily on party disclosures and does not include provisions relating to disclosure of ownership, control, or non-earmarked contributions to an amicus by a non-party. However, since the full Advisory Committee did not clearly reject the concept of requiring such disclosures by non-parties, the subcommittee invites further discussion of that question.

In addition, based on the discussion at the spring 2022 meeting, it appeared to the subcommittee that there was little interest in a provision requiring parties to disclose whether they are members of amici, so that provision has been omitted from the working draft language in this memo.

The subcommittee also considered other ideas that are not contained in the working draft.

It considered requiring disclosure of the date of formation of all amici and whether they were created for purposes of this or related litigation. But it decided that the benefit of such disclosure was not worth the burden.

It also considered setting a minimum dollar amount, rather than a minimum percentage of total contributions, to trigger disclosure of non-earmarked contributions by parties. But it concluded that amici come in so many different shapes and sizes that percentages were more appropriate.

The working draft does contain one new idea: if a party is aware that an amicus has failed to make a required disclosure regarding the relationship between that party and an amicus, the party must make the required disclosure.

The current version of Rule 29(a)(4)(E) provides that an amicus curiae—other than the United States, a federal officer or agency, or a State—must include in its brief "a statement that indicates whether":

(i) a party's counsel authored the brief in whole or in part;

(ii) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and

(iii) a person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person.

For ease of reference, the working draft language below is set out as new, separate paragraphs of Rule 29, rather than as a complex set of romanette items (and bulleted subitems) under Rule 29(a)(4)(E). Depending on the nature of any amendments that the Advisory Committee proposes, replacing current Rule 29(a)(4)(E) with such separate paragraphs may be warranted.

Rule 29. Brief of an Amicus Curiae

* * * * *

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

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

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

(3) whether a party or its counsel has (or two or more parties or their counsel collectively have) a majority ownership interest in or majority control of a legal entity submitting the brief as an amicus curiae; and

(4) whether a party or its counsel has (or two or more parties or their counsel collectively have) contributed 25% or more of the gross annual revenue of an amicus curiae during the twelve-month period preceding the filing of the amicus brief. Amounts unrelated to the amicus curiae's amicus activities that were received in the form of investments or in commercial transactions in the ordinary course of business may be disregarded.

Discussion notes:

Should the percentage be higher or lower than 25%? Some have argued for a 50% threshold.

Should the lookback period be the current or immediately prior calendar year rather than the twelve-months preceding filing? Current or immediately prior calendar year might be easier to administer, but perhaps not for amici using a different fiscal year. Is one or the other easier to evade?

(d) **Identification; Disclosure by Party.** Any disclosure required by paragraph (c) must identify the name of the party or counsel. If a party is aware that an amicus has failed to make a disclosure about the relationship between the amicus and that party required by paragraph (c), the party must do so.

(e) **Disclosures of Relationship Between the Amicus and a Nonparty**.

Unless the amicus curiae is one listed in the first sentence of Rule 29(a)(2), an amicus brief must identify any person—other than the amicus or its counsel—who contributed or pledged to contribute more than $1000 intended to fund (or intended as compensation for) drafting, preparing, or submitting the brief.

Discussion notes:

This working draft requires disclosure of earmarked contributions by nonparty members of an amicus. The current rule exempts contributions by the members of an amicus organization from disclosure. An exception for members allows easy evasion: a contributor can simply become a member. In its First Amendment cases, the Supreme Court has treated members and contributors interchangeably. On the other hand, revealing contributions by members may make disclosure turn on the details of an organization's internal fundraising practices.

This working draft also sets a dollar threshold for disclosure of earmarked contributions by nonparties. Should there be a higher dollar threshold for disclosure of earmarked contributions by members compared to nonmembers?

This working draft does not have a provision parallel to (c)(3) or (4) for nonparties. Should it? Whether a contribution is made by a party or by a nonparty, there is an interest in the court knowing who is speaking to help properly weigh the message in the amicus brief. But limiting disclosure of contributions to those that are earmarked for that brief is an important aspect of narrow tailoring.

And there are additional interests where contributions by parties are involved that do not apply to nonparties: 1) preventing parties from evading limits on the length of briefs, and 2) not misleading a court into thinking that an amicus is more independent of a party than it truly is.

TAB 5B

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: AMICUS Act Subcommittee

Re: AMICUS Act and Potential Amendments to Rule 29

Date: March 12, 2021

This memorandum reports on the work of the AMICUS Act Subcommittee and offers some thoughts and recommendations regarding potential amendments to the amicus disclosure requirements of Rule 29.

By way of background, in May 2019, Sen. Sheldon Whitehouse introduced S. 1411, the Assessing Monetary Influence in the Courts of the United States Act, or the AMICUS Act (attached as Exhibit A). An identical bill, H.R. 3993 (sponsored by Rep. Henry Johnson), was introduced in the House. As discussed in more detail below, the AMICUS Act was prompted by concerns that the funding of amicus briefs and of the organizations that file them was not being disclosed adequately to the courts or the public. The Act would have required organizations that file three or more amicus briefs per year in the courts of appeals or the Supreme Court to register publicly and to disclose the sources of significant monetary contributions they received. Sen. Whitehouse and Rep. Johnson also exchanged correspondence with Scott Harris, the Clerk of the Supreme Court, inquiring about the Court's enforcement of Supreme Court Rule 37.6, which requires amici to disclose certain monetary contributions made in connection with the preparation and submission of amicus briefs, and requesting comment on the AMICUS Act.

During our October 2019 meeting, a subcommittee was appointed to monitor the AMICUS Act and, in the event it appeared to be moving forward, to examine the issues it raised more closely, and to make a recommendation to the full Committee regarding any further action that might be appropriate. In September 2020, Mr. Harris wrote to the Committee on Rules of Practice and Procedure, attaching his correspondence with Sen. Whitehouse and Rep. Johnson. He noted that Rule 29 included disclosure requirements similar to those of Supreme Court Rule 37.6, and that the Committee might wish to consider whether to amend Rule 29, which would in turn "provide helpful guidance" on whether Supreme Court Rule 37.6 should be amended. Letter from Scott S. Harris to Hon. David G. Campbell and Hon. John D. Bates (Sept. 18, 2020) (attached as Exhibit B).

The AMICUS Act as introduced in 2019 ultimately died in committee and did not receive a vote during the last session of Congress. On February 23, 2021, however, Sen. Whitehouse and Rep. Johnson wrote to Judge Bates to request that the Committee on Rules of Practice and Procedure establish a working group "to address the problem of inadequate funding disclosure requirements for organizations

that file *amicus curiae* briefs in the federal courts" and amending Rule 29. Letter from Sen. Sheldon Whitehouse and Rep. Henry C. Johnson, Jr. to Hon. John D. Bates (Feb. 23, 2021) (the "2021 Whitehouse Letter") (attached as Exhibit C). On March 1, 2021, Judge Bates responded that the issue had been referred to the Advisory Committee on Appellate Rules, which had already established a subcommittee to consider it.

The Subcommittee met to discuss the 2021 Whitehouse Letter, the AMICUS Act, and the issues they raise. As discussed in more detail below, the Subcommittee believes these issues are important and deserve further study. Some of the solutions proposed by the AMICUS Act may fall outside this Committee's remit. The Subcommittee does, however, believe that the Committee should consider certain amendments to Rule 29's disclosure requirements. While we are not yet making any specific recommendations, we offer some potential language for the Committee's consideration. We also think it would be helpful for the full Committee to discuss whether more extensive amendments should be considered and for the Subcommittee to conduct additional research and analysis on that question, informed by the Committee's initial views, before the Committee's October 2021 meeting.

Rule 29's Current Disclosure Requirements

Rule 29(a)(4)(E) currently provides that an amicus curiae other than the United States, a federal officer or agency, or a State must include in its brief "a statement that indicates whether":

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

This provision was adopted in 2010 and was modeled on Supreme Court Rule 37.6.[1] The Committee Note explains its purpose as follows:

> The disclosure requirement . . . serves to deter counsel from using an amicus brief to circumvent page limits on the parties' briefs . . . . It also

[1] That rule provides in relevant part: "[A] brief filed under this Rule shall indicate whether counsel for a party authored the brief in whole or in part and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and shall identify every person other than the *amicus curiae*, its members, or its counsel, who made such a monetary contribution."

may help judges to assess whether the amicus itself considers the issue important enough to sustain the cost and effort of filing an amicus brief.

Concerns Regarding The Current Disclosure Regime

The 2021 Whitehouse Letter describes several concerns regarding disclosure of funding of amicus briefs and related issues that drove the introduction of the AMICUS Act and the current request that the Committee revisit the disclosure requirements of Rule 29. We offer a summary below, but the full letter (again, attached as Exhibit C) describes the issues in much more detail, as does an article by Sen. Whitehouse, *Dark Money and U.S. Courts: The Problem and Solutions*, 57 Harv. J. Leg. 273, 293 (2020) (attached as Exhibit D).[2] These concerns largely fall into three categories.

1. *Parties can still fund amicus briefs.* The letter argues that the disclosure requirements of Rule 29 and its Supreme Court analogue are too narrowly drawn to achieve their intended goal of preventing parties to a case from circumventing the length restrictions on party briefs by funding amicus briefs instead. As written, the letter argues, the rule still allows parties to fund amicus briefs through undisclosed monetary contributions to the amicus organization. 2021 Whitehouse Letter at 1–2. For example, the letter argues that because Rule 29 requires disclosure only of monetary contributions "intended to fund preparing or submitting" an amicus brief, parties can still effectively fund amicus briefs by making contributions to the amicus organization that are not specifically earmarked for a particular amicus brief. *Id.* at 3–4. The letter even suggests that the rules could be construed "so narrowly as to only encompass the costs of formatting, printing, and delivering the specific brief." *Id.* at 3. Because money is fungible, the letter contends, these disclosure requirements are easily evaded. *Id.*

The letter offers as an example *Google LLC v. Oracle America Inc.* (No. 18-956), a pending Supreme Court copyright case, citing reports by Bloomberg that both Oracle and Google had made undisclosed contributions to organizations that filed amicus briefs on their respective sides of the case. According to Sen. Whitehouse and Rep. Johnson, the Internet Accountability Project had received between $25,000 and $99,999 from Oracle in 2019, without disclosing that in its brief in support of Oracle—presumably because the funds were not specifically earmarked for the brief. *Id.* at 3.

2. *Donors may anonymously fund a party and/or multiple amici.* The letter also notes that "many high-profile, politically charged cases are financed directly by ideological foundations," which "also exploit the courts' lenient *amicus*

[2] Notably, the letter discusses Supreme Court practice almost exclusively, although it presumes that the same concerns can arise in the courts of appeals because of the similarity of the Appellate Rules' amicus disclosure provisions.

funding disclosure rules to anonymously fund armadas of *amicus* briefs." *Id.* at 4. The letter asserts, for example, that in *Friedrich v. California Teachers Ass'n*, 136 S. Ct. 1083 (2016) (mem.) and *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), which challenged mandatory union agency shop fees as unconstitutional, a private foundation provided funds both to the plaintiffs and to several different organizations that filed amicus briefs supporting the plaintiffs, without any disclosure to the Court. 2021 Whitehouse Letter at 4.

Relatedly, the letter notes that Rule 29 expressly exempts amici from disclosing funding by their members, creating "the possibility that parties to litigation can secretly fund *amicus* briefs in support of their position by funneling money to organizations of which they are members." *Id.* at 6. The letter offers the example of the U.S. Chamber of Commerce, which is funded by its members and which files amicus briefs without disclosing the members' identities or participation in funding a brief. *Id.*

3. *Inequitable enforcement of disclosure requirements*. In one recent case in the Supreme Court, an amicus brief was "crowdfunded" through small donations from a large number of donors. Because some of the donors chose anonymity via the GoFundMe service, the brief was unable to comply with the Court's rules for disclosing contributors, and the brief's authors were obliged to return the anonymous donations. *Id.* at 7. Sen. Whitehouse and Rep. Johnson cite this example to suggest that the existing disclosure rules disadvantage ordinary citizens as compared to "the large and anonymous corporate funders of sophisticated repeat-players." *Id.*

In general, the letter argues that the current disclosure regime has thus enabled "a massive, anonymous judicial lobbying program" that "systematically favors well-heeled insiders over the average citizen." *Id.* at 6. The letter concludes by noting that while "it would be salutary for the judicial branch to address these issues on its own," "a legislative solution" like the AMICUS Act "may be in order to ensure much-needed transparency around judicial lobbying, and to put all *amicus* funders on an equal playing field." *Id.* at 8.

The AMICUS Act

The AMICUS Act, as introduced in 2019, has several components worth noting.

Covered Amici. The Act does not apply to all amici, but only to any "covered amicus," defined to mean "any person . . . that files not fewer than 3 total amicus briefs in any calendar year in the Supreme Court of the United States and the courts of appeals of the United States." S. 1411, § 2(a) (proposing new 28 U.S.C. § 1660(a)).

Disclosure. The Act would require any covered amicus who files an amicus brief in the Supreme Court or courts of appeals to "list in the amicus brief the name

of any person who—(A) contributed to the preparation or submission of the amicus brief; (B) contributed not less than 3 percent of the gross annual revenue of the covered amicus for the previous calendar year if the covered amicus is not an individual; or (C) contributed more than $100,000 to the covered amicus in the previous year." S. 1411, § 2(a) (proposing new 28 U.S.C. § 1660(b)(1)). It makes an exception for "amounts received by a covered amicus … in commercial transactions in the ordinary course of any trade or business conducted by the covered amicus or in the form of investments (other than investments by the principal shareholder in a limited liability corporation) in an organization if the amounts are unrelated to the amicus filing activities of the covered amicus." *Id.* (proposing new 28 U.S.C. § 1660(b)(2)).

Registration. The Act would require each covered amicus to register yearly with the Administrative Office of the U.S. Courts. S. 1411, § 2(a) (proposing new 28 U.S.C. § 1660(c)). The registration would include the name of the covered amicus; "a general description of [its] business or activities"; the name of any person who made a contribution subject to disclosure; "a statement of the general issue areas in which the [amicus] expects to engage in amicus activities"; and "to the extent practicable, specific issues that have, as of the date of the registration, already been addressed or are likely to be addressed in [those] amicus activities." *Id.* (proposing new 28 U.S.C. § 1660(c)(2)). The Comptroller General is to conduct an annual audit to ensure compliance with the registration requirements, and the registrations are to be maintained indefinitely and made available to the public on the Administrative Office's website. *Id.* (proposing new 28 U.S.C. § 1660(d)-(e)).

Prohibition on Gifts. The Act would prohibit covered amici from making any gift or providing any travel, other than reimbursement for travel for an appearance at an accredited law school, to any court of appeals judge or Supreme Court Justice. S. 1411, § 2(a) (proposing new 28 U.S.C. § 1660(f)).

Civil Fines. Covered amici who "knowingly fail[] to comply with any provision" of the Act "shall, upon proof of such knowing violation by a preponderance of the evidence, be subject to a civil fine of not more than $200,000." S. 1411, § 2(a) (proposing new 28 U.S.C. § 1660(g)(1)).

Analysis and Recommendations

As noted above, Sen. Whitehouse's letter addresses several potential concerns. First, parties may enjoy more influence over amicus briefs than the current disclosure regime reveals. One of the major goals of the existing disclosure provisions in Rule 29 is to prevent parties from evading the length requirements imposed on their briefs. If those provisions are not accomplishing their ends, they may need to be revised.

Another concern raised in the letter is the difficulty faced by anonymous small-dollar donors under a "crowdfunding" regime. Here there are important interests on each side. While small anonymous donations may pose little danger to the integrity of the court system, permitting them may also undermine efforts to regulate the involvement of parties.

Finally, the most fundamental concern expressed in the letter and underlying the AMICUS Act is that the current disclosure rules allow deep-pocketed persons or organizations to wield outsize influence anonymously through amicus briefs. Under the current regime, the letter suggests, neither the courts nor the public may know who is supporting the position a particular amicus brief urges a court to adopt. As discussed above, a single individual or foundation could potentially fund multiple amicus briefs nominally submitted on behalf of different organizations. This could create the impression that the position endorsed by the amicus briefs enjoys wider support than it actually does.

The AMICUS Act essentially treats the filing of amicus briefs as akin to lobbying, and its registration and disclosure regime appears to be inspired by the regime that covers lobbyists. Indeed, Sen. Whitehouse and Rep. Johnson's letter refers to repeat-player amicus organizations as engaged in "judicial lobbying." 2021 Whitehouse Letter at 6; *see also* Whitehouse, *Dark Money and U.S. Courts*, 57 Harv. J. Leg. 273, 293 (2020) (comparing "dark money" funded amicus briefs to lobbying and urging transparency).

There are obvious differences between lobbying activity subject to registration requirements under current law and amicus briefs. In particular, amicus briefs are filed publicly; lobbying activity, by definition, consists of non-public attempts to influence the legislative or executive branch. *See* 2 U.S.C. § 1602(8)(B) (excluding communications "distributed and made available to the public" or "submitted for inclusion in the public record of a hearing" from the definition of "lobbying contact"). The arguments made by amici can be rebutted by the parties.

More generally, the right to participate anonymously in the public square is one recognized as protected by the Constitution. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995). When a vaguely named organization publishes a leaflet or newspaper advertisement, the public usually does not know who is behind it, and under First Amendment doctrine it has no right to know. Of course, an amicus brief is neither a leaflet nor a newspaper advertisement, and courts may restrict amicus briefs in ways that the government may not regulate ordinary expression. Yet similar First Amendment concerns may be implicated by the forced disclosure of an organization's members or supporters as a condition for the organization's ability to petition the government for a redress of grievances. *See NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449 (1958).

Nonetheless, the current rules do require disclosure of some funding of amicus briefs by non-parties, and it is worth considering what purpose those disclosure requirements are intended to serve, whether they in fact do so, and whether more expansive disclosure requirements could benefit the courts and the public without infringing on constitutional rights. The extent to which amicus briefs are controlled by, or represent the views of, undisclosed persons or entities, and the steps that might be appropriate to further greater transparency, are important and complex issues that deserve further investigation and consideration by the Subcommittee and the full Committee. Because much of the concern around this issue appears to be driven by practice in the Supreme Court, it may also be appropriate for the Subcommittee or Committee to consult with the Clerk of the Supreme Court regarding this issue before making any final recommendation.

That said, in order to move forward, the Subcommittee has begun to consider potential amendments to the Rules, and offers some initial thoughts on potential amendments below. In considering such amendments, the Subcommittee's current view is that the Committee should focus in the first instance on disclosure requirements for parties who file amicus briefs. The other steps proposed in the AMICUS Act, such as the establishment of a registration scheme for repeat-party amicus filers, prohibitions on gifts, and fines for non-compliance, are either not within the Committee's purview or less obviously so than disclosure requirements for briefs. *See* 28 U.S.C. § 2072(b) (rules of procedure may not abridge, enlarge, or modify any substantive right).

Below we identify certain amendments to existing Rule 29(a)(4)(E) that the Committee may want to consider. We do not yet recommend any specific language, but offer these thoughts as a starting point for discussion.

1. *Who must make disclosures.* The AMICUS Act applies only to repeat filers—persons or organizations that file three or more amicus briefs in the Supreme Court and/or courts of appeals in a calendar year. That is consistent with the Act's focus on deep-pocketed special-interest groups and its implicit analogy to lobbying. Because rules of procedure typically apply evenhandedly to all participants in litigation, however, the Subcommittee's initial view—subject to further discussion—is that amendments to Rule 29's disclosure regime should apply to all amici, not just to repeat filers.

2. *The meaning of "preparing or submitting."* The 2021 Whitehouse Letter suggests that Rule 29(a)(4)(E)'s requirement that amici disclose persons who "contributed money that was intended to fund preparing or submitting the brief" could be read narrowly to encompass only money used for printing and filing the brief. We do not believe that the Rule was ever intended to be so narrow, or that amici typically interpret it so narrowly. Nonetheless, the point could potentially be clarified

by changing the rule to cover contributions of "money that was intended to fund *drafting*, preparing, or submitting the brief," or similar language.

3. *Parties' ability to evade the rule by making non-earmarked contributions.* The letter contends that parties can easily evade Rule 29(a)(4)(E) via contributions to amicus organizations not specifically earmarked for a particular amicus brief, given the fungibility of money. Since the consideration that originally motivated the adoption of Rule 29(a)(4)(E) was preventing parties from circumventing the limitations on the length of party briefs, a party's funding or control of an amicus seems particularly relevant. One possibility would be to adopt a disclosure rule specific to parties, requiring the amicus to indicate whether a party or a party's counsel has an ownership interest in the amicus curiae above a certain threshold (say, the 10% threshold used for Rule 26.1(a) disclosure statements), or whether it contributed some amount of the amicus curiae's gross annual revenue above a certain threshold during the twelve-month period preceding the filing of the amicus brief.

4. *Parties' ability to evade the rule by contributing to amici of which they are members.* The letter also suggests that parties can evade disclosure by contributing to organizations of which they are members. We believe that a specific requirement of disclosure of funding by parties should trump a general rule allowing amici not to disclose contributions by members. If clarification is needed, however, the rule could be amended to provide for a statement whether any "person—other than the amicus curiae, its counsel, or its members *who are not parties or counsel to parties to the case*—contributed money that was intended to fund preparing or submitting the brief" and identifying each such person.

5. *Small donations by non-members of an amicus.* We are not currently suggesting any changes to address the situation of the "GoFundMe" brief discussed in Sen. Whitehouse and Rep. Johnson's letter—that is, a brief funded by many small donations from people who are not members of the amicus. The current rule requires disclosure of the identity of such donors, and it is not obvious that the requirement imposes an undue burden on the amici in question.

With the amendments suggested above, the Rule might require, for example, that an amicus curiae other than the United States, a federal officer or agency, or a State must include in its brief "a statement that indicates whether":

(i) a party's counsel authored the brief in whole or in part;

(ii) a party or a party's counsel contributed money that was intended to fund drafting, preparing, or submitting the brief; ~~and~~

(iii) a party or a party's counsel has a [10%] or greater ownership interest in the amicus curiae or the amicus curiae's direct or

indirect parent, or contributed [10%] or more of the gross annual revenue of the amicus curiae or the amicus curiae's direct or indirect parent during the twelve-month period preceding the filing of the amicus brief, not including amounts received in commercial transactions in the ordinary course of the business of the amicus curiae or its direct or indirect parent or in the form of investments (other than investments by the principal shareholder in a limited liability corporation), if such amounts are unrelated to the amicus curiae's amicus activities; and

(~~iii~~iv) a person—other than the amicus curiae, its counsel, or its members who are not parties or counsel to parties to the case~~, or its counsel~~—contributed money that was intended to fund drafting, preparing, or submitting the brief and, if so, identifies each such person.

6. *Other entities' ability to evade the rule.* Just as parties can potentially evade the rule by making contributions not specifically earmarked for a particular brief or by becoming a member of an amicus organization, so can influential nonparties, as amici are only required to identify persons other than their members or counsel who "contributed money intended to fund preparing or submitting" the specific brief at issue. This issue raises more complex questions, however, and we have not proposed any language to address it, although we believe it deserves further consideration.

It would be possible to adopt a rule, similar to the proposed Rule 29(a)(4)(E)(iii) above, requiring an amicus to disclose any person or entity that holds a 10% or greater ownership interest in the amicus or that contributed more than 10% of the amicus's gross annual revenue for the previous year. Such a rule might well have salutary effects, in that it could reveal the existence of orchestrated amicus campaigns funded by a single person or entity (who might be funding a party to the litigation as well). It would thus, at least to some extent, make the courts and the public aware of who is speaking through the amicus briefs filed in a case, and would lessen the likelihood of mistaking an organized campaign funded by one or a few donors for widespread agreement.

On the other hand, as discussed above, such a rule—especially to the extent it would require disclosure of an organization's membership—could potentially raise concerns regarding freedom of association. *Cf. Patterson*, 357 U.S. 449. Sen. Whitehouse and Rep. Johnson's letter seeks to distinguish *Patterson*, which struck down an Alabama law that would have compelled disclosure of the identity of the NAACP's members, on the ground that the corporate members of an organization like the Chamber of Commerce "face no serious threat of reprisal for the public expression

of their views." 2021 Whitehouse Letter at 6. Nonetheless, the Subcommittee believes that this issue and its implications should be given further consideration.

We look forward to discussing this set of issues with the full Committee.

TAB 5C

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: AMICUS Act Subcommittee

Re: AMICUS Act and Potential Amendments to Rule 29

Date: September 8, 2021

At the April 2021 meeting of the Advisory Committee, the subcommittee presented a memorandum with background and initial thoughts about the AMICUS Act and the concerns underlying it (the "April 2021 Memo"), noting that while some matters addressed by that Act are outside the purview of the Advisory Committee, issues relating to disclosure requirements for filers of amicus briefs called for further study and consideration by the Advisory Committee. See April 2021 Agenda Book 133.

The subcommittee has met and considered these issues in some depth. In addition, since the last meeting of the Advisory Committee, the Supreme Court decided *Americans for Prosperity Foundation v. Bonta*, No. 19-251 (July 1, 2021), which held California's requirements for disclosure of contributors to charitable organizations facially unconstitutional. While the subcommittee is not at this point proposing any particular amendments to the Rules' current amicus disclosure provisions, it has drafted language to help guide the Committee's consideration of these issues.

Rule 29's Current Disclosure Requirements

Rule 29(a)(4)(E) currently provides that an amicus curiae—other than the United States, a federal officer or agency, or a State—must include in its brief "a statement that indicates whether":

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

These provisions, modeled on Supreme Court Rule 37.6, were added in 2010. The Committee Note explains that the disclosure requirement "serves to deter counsel from using an amicus brief to circumvent page limits on the parties' briefs" and "also

may help judges to assess whether the amicus itself considers the issue important enough to sustain the cost and effort of filing an amicus brief."

Concerns Regarding the Current Disclosure Regime

The concerns that drove the introduction of the AMICUS Act and that the subcommittee has been asked to consider are set out in a February 23, 2021 letter from Senator Sheldon Whitehouse to Judge Bates (the "2021 Whitehouse Letter," attached as Exhibit C to the April 2021 Memo, agenda book at 153), which asked that the Committee on Rules of Practice and Procedure establish a working group "to address the problem of inadequate funding disclosure requirements for organizations that file amicus curiae briefs in the federal courts." They are also discussed at length in the April 2021 Memo.

The overarching concern expressed in the letter and embodied in the AMICUS Act is that the current disclosure requirements in Rule 29 are sufficiently weak and easily evaded that they have enabled "a massive, anonymous judicial lobbying program," undertaken through amicus briefs paid for by undisclosed persons or entities, that "systematically favors well-heeled insiders over the average citizen." 2021 Whitehouse Letter at 6.

As discussed in more detail in the April 2021 Memo, the letter makes the following specific points about the current disclosure rules (reorganized here, for clarity, to track the provisions of Rule 29):

1. *<u>Parties</u> could evade Rule 29's disclosure requirements and fund amicus briefs without disclosing it.*

- Rule 29(a)(4)(E)(ii) requires an amicus to disclose whether "a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief."

- The letter suggests that rule is too narrowly drawn because, money being fungible, it still allows parties to fund amicus briefs through monetary contributions to the amicus organization that are not specifically earmarked "to fund preparing or submitting" a particular amicus brief.

- In fact, the letter suggests that the "preparing or submitting" language could be construed "so narrowly as to only encompass the costs of formatting, printing, and delivering the specific brief."

- Moreover, because Rule 29(a)(4)(E)(iii) exempts "members" of an amicus from disclosing contributions they make to fund the preparation or

submission of an amicus brief, the letter suggests that parties who are members of an amicus organization can contribute to an amicus brief without disclosing it.

2. ***<u>Non-parties</u> who are not named amici could evade Rule 29's disclosure requirements and fund amicus briefs without disclosing it.***

- Rule 29(a)(4)(E)(iii) requires amici to disclose whether "a person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief and, if so, identif[y] each such person."

- Like the corresponding rule for parties in clause (ii), this rule requires disclosure only of contributions by non-parties "intended to fund preparing or submitting" the amicus brief. The letter suggests that it therefore still allows non-parties to fund amicus briefs anonymously through monetary contributions to the amicus organization that are not specifically earmarked "to fund preparing or submitting" a particular brief.

- Moreover, the rule expressly exempts from disclosure contributions by members of an amicus organization.

- As a result of these potential loopholes, the letter suggests that a single deep-pocketed person or entity could anonymously fund multiple amicus briefs (and potentially a party brief as well) in a single case, creating the misleading impression of widespread or grassroots support for a position that in reality lacks such support.

The letter concludes by noting that while "it would be salutary for the judicial branch to address these issues on its own," "a legislative solution" like the AMICUS Act "may be in order to ensure much-needed transparency around judicial lobbying, and to put all *amicus* funders on an equal playing field." 2021 Whitehouse Letter at 8.

The AMICUS Act

The AMICUS Act (as introduced in 2019 and attached as Exhibit A to the April 2021 Memo, agenda book at 144) is discussed in more detail in the April 2021 Memo. The provisions most directly relevant here are the following:

> *Covered Amici*. The Act does not apply to all amici, but only to any "covered amicus," defined to mean "any person . . . that files not fewer than 3 total amicus briefs in any calendar year in the Supreme

Court of the United States and the courts of appeals of the United States." S. 1411, §2(a) (proposing new 28 U.S.C. §1660(a)).

Disclosure. The Act would require any covered amicus who files an amicus brief in the Supreme Court or courts of appeals to "list in the amicus brief the name of any person who—(A) contributed to the preparation or submission of the amicus brief; (B) contributed not less than 3 percent of the gross annual revenue of the covered amicus for the previous calendar year if the covered amicus is not an individual; or (C) contributed more than $100,000 to the covered amicus in the previous year." S. 1411, §2(a) (proposing new 28 U.S.C. §1660(b)(1)). It makes an exception for "amounts received by a covered amicus . . . in commercial transactions in the ordinary course of any trade or business conducted by the covered amicus or in the form of investments (other than investments by the principal shareholder in a limited liability corporation) in an organization if the amounts are unrelated to the amicus filing activities of the covered amicus." *Id.* (proposing new 28 U.S.C. §1660(b)(2)).[1]

Constitutional Concerns Associated with Disclosure

Since the last meeting of the Advisory Committee, the Supreme Court decided *Americans for Prosperity Foundation v. Bonta*, No. 19-251 (July 1, 2021), which held California's charitable disclosure requirement to be facially unconstitutional. California had required charities that solicit contributions in California to disclose the identities of their major donors (donors who have contributed more than $5,000 or more than 2% of an organization's total contributions in a year) to the Attorney General.

To evaluate the constitutionality of the California disclosure requirement, the Court applied "exacting scrutiny," meaning that "there must be a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *See* Slip op. at 7 (cleaned up) (opinion of Roberts, C.J.).[2] "While exacting

[1] The AMICUS Act also contains registration requirements for covered amici, a prohibition on covered amici making gifts to court of appeals judges or Supreme Court justices, and civil fines for violations. These requirements are discussed in the April 2021 Memo. Because the consensus of the subcommittee is that only disclosure requirements are within our purview, this memo does not address those parts of the AMICUS Act.

[2] Of the six justices in the majority, three—Roberts, Kavanaugh, and Barrett—would have held that exacting scrutiny, rather than strict scrutiny, applies to all First Amendment challenges to compelled disclosure. Justice Thomas would have held that strict scrutiny applied, and Justices Alito and Gorsuch declined to decide because, in their view, California's law failed under either test. The dissenters addressed the California law under the exacting scrutiny standard and would have held it met that standard.

scrutiny does not require that disclosure regimes be the least restrictive means of achieving their ends, it does require that they be narrowly tailored to the government's asserted interest." *Id.* at 9 (opinion of the Court). Moreover, the Court concluded that the narrow tailoring requirement is not limited to "laws that impose severe burdens," but is designed to minimize any unnecessary burden. *Id.* at 11.

The Court then found that California's disclosure regime did not satisfy the narrow tailoring requirement. *Id.* at 12. It accepted that "California has an important interest in preventing wrongdoing by charitable organizations." *Id.* But it found "a dramatic mismatch" between that interest and the state's disclosure requirements. *Id.* at 13. While California required every charity to disclose the names, addresses, and total contributions of their top donors, ranging from a few people to hundreds, it rarely if ever used this information to investigate or combat fraud. *Id.* Moreover, the state "had not even considered alternatives to the current disclosure requirement" that might be less burdensome. *Id.* at 14. The Court rejected arguments that the disclosure was not in fact particularly burdensome, finding that the disclosure requirement created "an unnecessary risk of chilling," "indiscriminately sweeping up the information of *every* major donor with reason to remain anonymous." *Id.* at 17.

Potential Amendments to Rule 29

The subcommittee believes that the Rules should *not* establish a different disclosure regime for entities that file three or more amicus briefs per year (as the AMICUS Act would do). Rule 29's current disclosure requirements apply to all parties and amici, and any amendments to Rule 29 should likewise apply to all parties and amici.

On the other hand, the subcommittee is far from certain whether the disclosure requirements regarding the relationship between a party and an amicus should be the same as those regarding the relationship between a non-party and an amicus. Both the interests supporting required disclosure and the burdens counseling against required disclosure may be different. As a result, both the policy analysis and the constitutional analysis may be different. The subcommittee has not reached even a tentative conclusion on this question; the subcommittee would particularly welcome discussion of this issue by the full Advisory Committee. This memo presents identical language addressed to both situations to facilitate the Committee's discussion of this important question, not to suggest its resolution.

1. *Amendments related to disclosure of party funding of amicus briefs*

The subcommittee tends to think that it would be appropriate to make some amendments to the rule regarding disclosure of party funding of amicus briefs to ensure that the rule's purpose, as identified in the Committee Note—preventing

parties from evading the page limits by funding amicus briefs to support their position—is served.

Here is proposed language to guide discussion. For ease of exposition, a clean text is shown with noteworthy additions shown in red. A full redline follows this memo. Notes regarding the text and issues to be discussed are enclosed in brackets and shown in blue.

Rule 29. Brief of an Amicus Curiae

* * *

(4) **Contents and Form**. An amicus brief . . . must include the following:

* * *

(E) unless the amicus curiae is one listed in the first sentence of Rule 29(a)(2) [the cross reference excuses the United States, its officer and agencies, as well as the States from these requirements], a statement that:

(i) indicates whether a party or its counsel—

- authored the brief in whole or in part;

- contributed money intended to fund drafting, preparing, or submitting the brief;

[The word "drafting" is added to the existing requirement to respond to the concern that the "preparing or submitting" language could be construed "so narrowly as to only encompass the costs of formatting, printing, and delivering the specific brief." The subcommittee believes this addition serves to clarify what is generally if not universally understood and is not controversial.]

- has a 10% or greater ownership interest in the amicus curiae, or 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, not including amounts unrelated to the amicus curiae's amicus activities that were received in the form of investments or in commercial transactions in the ordinary course of the business of the amicus curiae; or

[This would be wholly new. The idea is to create a relatively easy to administer rule to address the concern that a party could

influence amicus briefs through ownership or contributions to the amicus organization that are not earmarked for the "preparation or submission" of a particular brief. Such a rule has the advantage of clarity regarding what must be disclosed, making it easier to comply with and administer, but because the 10% threshold is necessarily somewhat arbitrary, the fit between means and end is imprecise.

The language is based in part on the disclosure provisions of the AMICUS Act, with some differences.

- The AMICUS Act requires disclosure if a person "contributed not less than 3 percent of the gross annual revenue of the covered amicus for the previous calendar year if the covered amicus is not an individual; or … contributed more than $100,000 to the covered amicus in the previous year." Any such threshold figure or percentage is necessarily somewhat arbitrary, and the lower the figure or percentage the greater the burden of disclosure becomes. Current Rule 26.1, which governs corporate disclosure statements, uses 10%, and the subcommittee has borrowed that benchmark for discussion purposes.

- The AMICUS Act refers to the "previous calendar year"; the proposed language above changes that to "the twelve-month period immediately preceding the filing of the amicus brief." Focusing on the previous calendar year may miss important contributions, the ones most proximate to the amicus filing. While compiling the information based on the immediately prior twelve months may be slightly more burdensome than compiling information based on the previous calendar year, the burden is not likely to be great if the requirement is limited to parties.

- The exception for "amounts received in commercial transactions in the ordinary course of business" and for investments is also taken from the AMICUS Act, but the Act carves out of the exception "investments by the principal shareholder in a limited liability corporation," which must be disclosed. Since the subcommittee's proposed language above already requires disclosure of ownership interests in amici, the subcommittee did not think it was necessary to include that carve-out.]

● directly or indirectly, possesses a sufficient ownership interest in, or has made sufficient contributions to, the amicus curiae that a reasonable person would, under the circumstances, attribute to the party or its counsel a significant influence over the amicus curiae with respect to the filing or content of the brief; and

[This would be wholly new. The idea is to create a standard to address the concern that a party could influence amicus briefs through ownership or contributions to the amicus organization that are not earmarked for the "preparation or submission" of a particular brief. Compared to a rule (like the one immediately above) that would set a specific threshold percentage above which a contribution must be disclosed, such a standard would be less clear and more difficult to administer but would arguably provide a tighter fit between means and ends.

The subcommittee decided to include both the rule and the standard for the full Committee's consideration. The Committee might choose one over the other. It might choose to include both, with one serving as a backstop for the other, although this might create the risk that the percentage rule could be viewed as a safe harbor. (Or, the Committee might choose to include neither if it concludes that the goal of broadening disclosure of party contributions to amicus briefs is not worth the complexity.)]

(ii) identifies any person—except for the amicus, its counsel, and its members who are not parties or counsel to parties—who contributed money intended to fund drafting, preparing, or submitting the brief.

[The current Rule does not specifically address the relationship between the provision requiring a party (or its counsel) to disclose contributions to an amicus brief and this provision, which requires all persons to disclose such contributions but exempts members of amici curiae (as well as amici and their counsel). This amendment would make clear that a party (or its counsel) must disclose contributions to an amicus brief even if the party or counsel is a member of the amicus. It would also add the word "drafting" for the same reason that word is added above in clause (i).]

2. *Amendments related to disclosure of non-party funding of amicus briefs*

Rule 29's current disclosure regime treats monetary contributions to amici by parties identically to monetary contributions to amici by non-parties. Amici are required to disclose the identity of any person, whether a party or not (other than the amicus itself, its counsel, or its members) who "contributed money that was intended to fund preparing or submitting the brief." That said, as discussed above, the subcommittee thinks that expanding the disclosure requirements regarding non-parties presents more difficult issues than expanding the disclosure requirements regarding parties.

Accordingly, the subcommittee has drafted language amending current Rule 29(a)(4)(E)(iii), which governs disclosure of contributions by non-parties, that parallels the language above concerning disclosure of contributions by parties. That language follows. The blue, bracketed notes do not repeat the points made above regarding the same language in the context of disclosure of party contributions (although those points remain applicable), but instead focus on some of the differences between disclosure of party contributors and non-party contributors. The hope is that seeing the language laid out like this helps the Committee to decide whether the two situations should be treated the same way.

If the Committee ultimately concludes that the two situations should be handled the same way—or even if the Committee concludes that the two situations should not be handled the same way, but still decides to expand disclosure of non-party contributions beyond what is contained in Rule 29(a)(4)(E)(ii) above—the amended language for non-parties would be integrated into amended Rule 29(a)(4)(E)(ii) above.

Rule 29. Brief of an Amicus Curiae

* * *

(4) **Contents and Form**. An amicus brief . . . must include the following:

* * *

(E) unless the amicus curiae is one listed in the first sentence of Rule 29(a)(2), a statement that:

* * *

(iii) identifies any person—except for the amicus, its counsel[, and its members who are not parties or counsel to parties]—who:

- contributed money intended to fund drafting, preparing, or submitting the brief; or

- has a 10% or greater ownership interest in the amicus curiae, or 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, not including amounts unrelated to the amicus curiae's amicus activities that are received in the form of investments or in commercial transactions in the ordinary course of the business of the amicus curiae; or

[This would be wholly new. As with the identical language above for party contributions, the idea is to create a rule to address the concern that a non-party could evade the current disclosure requirements and influence amicus briefs through ownership in or contributions to the amicus organization that are not earmarked for the "preparation or submission" of a particular brief.

A concern is that expanding the requirements regarding disclosure of non-party contributions in this way would impose a substantially greater burden on amici than a similar expansion of the requirement to disclose contributions by parties. That's because an amicus would *always* have to disclose major owners or contributors, not merely in the presumably unusual situation where a party is a major owner or contributor.

The subcommittee has discussed whether the exemption for members of the amicus in the current rule should be eliminated, on the ground that the distinction between a member and a contributor may be artificial in many situations. (Accordingly, it appears in brackets above.) However, that would involve not just tightening the current disclosure requirements regarding non-parties to ensure they are not evaded, but making a significant change to the existing disclosure regime, which does treat members differently. And it would further aggravate the burden on amici.]

- directly or indirectly, possesses a sufficient ownership interest in, or has made sufficient contributions to, the amicus curiae that a reasonable person would, under the circumstances, attribute to

the party or its counsel a significant influence over the amicus curiae with respect to the filing or content of the brief.

[This would be wholly new. As with the identical language above for party contributions, the idea is to create a standard to address the concern that a non-party could evade the current disclosure requirements and influence amicus briefs through ownership or contributions to the amicus organization that are not earmarked for the "preparation or submission" of a particular brief.

Again, expanding the disclosure requirements regarding non-parties in this way would impose a substantially greater burden on amici than expanding the disclosure requirements regarding parties. That's because an amicus would *always* have to disclose major owners or contributors, not merely in the presumably unusual situation where a party is a major owner or contributor.]

Constitutional Considerations Regarding These Possible Amendments

As discussed above, in *Americans for Prosperity Foundation*, the Supreme Court held unconstitutional a California law requiring charities that solicited in California to disclose their major contributors. While that decision is relevant to the analysis here, there are at least four significant differences between the possible amendments to Rule 29 discussed above and the California statute involved in *Americans for Prosperity Foundation*.

First, Rule 29 applies only to those seeking to influence a court by submitting an amicus brief, while the California statute applied broadly to charities soliciting funds in California. There can be little doubt that more disclosure requirements can be imposed on those who file briefs with a court than on charitable organizations generally.

Second, both Rule 29 and the Supreme Court Rules already require both parties and non-parties who make contributions "intended to fund the preparation or submission" of an amicus brief to have their identities publicly disclosed in the brief. Presumably the Court viewed those requirements as constitutional when it imposed them.

Third, disclosures required by Rule 29 appear in a publicly available brief, while the disclosures mandated by California law were supposed to be treated confidentially. The Court observed that "disclosure requirements can chill association even if there is no disclosure to the general public," and "while assurances of confidentiality may reduce the burden of disclosure to the State, they do not eliminate it." Slip op. at 16-17 (cleaned up).

Fourth, a 10% ownership or contribution threshold is higher than the 2% threshold involved (at least in some cases) in the California statute and will often be higher than the $5000 threshold in the California statute.

Any proposed amendments to FRAP 29 would have to be based on careful identification of the governmental interest being served and be narrowly tailored to serve that interest. The governmental interest in allowing amicus briefs in the first place is to help a court decide cases properly. (The term, after all, is amicus curiae, not amicus partis.) What are the interests in disclosure by amici?

Relationship between amicus and party. According to the 2010 Committee Note, the disclosure of whether a party's counsel authored the brief and whether a party or a party's counsel contributed money to fund the brief "serves to deter counsel from using an amicus brief to circumvent page limits on the parties' briefs." While page limits might seem pedestrian, the idea that each party has a certain limited opportunity to makes its arguments and should not be able to exceed those limits by subterfuge is important to the fair functioning of an adversary system. More broadly, one could view this requirement as designed to prevent the court (and the public) from being misled into thinking that an amicus is independent of a party when it is not.

It might be thought that the only thing that matters is the persuasiveness of the arguments in an amicus brief. But the identity of the amicus and its interest in the case can also be important in evaluating those arguments. Indeed, Rule 29(a)(4)(D) already requires these disclosures as well. And sometimes a court will explicitly rely on the identity of an amicus. *See, e.g.*, *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1486 (2021) (stating that the dissent "suggests that the best way to help aliens is to rule against the alien before us" but "unsurprisingly neither Mr. Niz-Chavez nor any of the immigration policy advocates who have filed amicus briefs in this Court share that assessment") (cleaned up).

The problem with existing Rule 29 is that a party may have considerable influence over an amicus without authoring the brief or contributing money earmarked for the brief. If an amicus is a corporation, it must already disclose any parent corporation and any publicly held corporation that owns 10% or more of its stock. Rule 29(a)(4)(A) (incorporating the requirements of Rule 26.1.) But if a party that is a privately held corporation has an ownership interest in the amicus—and there are privately held corporations with billions in revenue—no similar disclosure is currently required. Or suppose a party has no ownership interest in the amicus—perhaps because the amicus is a nonprofit—but a party is its primary contributor, donating money that is used for the amicus's operations generally but not earmarked for the particular brief at issue. Existing Rule 29 does not require disclosure of that relationship.

A rule that required disclosure of ownership or contributions by a party at the 10% level would impose some burden on amici. It would take some time and effort to make the determination, although if the disclosure is limited to parties, the burden would be quite limited. That is, an amicus would not have to ascertain each one of its 10% owners or contributors, but only whether a party passed that threshold. Some might decline to submit an amicus brief to avoid disclosure. In some cases, that might be a good thing, if the amicus realized that its relationship with the party would lead a court to discount its arguments. In other cases, if the amicus concluded that confidentiality was more important than filing the brief, the burden on the amicus would be greater.

It is difficult to be confident that 10% is the right threshold to closely match the government purpose. The lower the threshold, the greater the burden. And the lower the threshold, the greater the risk of requiring disclosure of owners and contributors with no substantial influence over the amicus. For current purposes, the 10% threshold is borrowed from the corporate disclosure requirement of Rule 26.1 (for comparison, the AMICUS Act threshold is 3%).

Using a standard rather than a rule to set the disclosure requirement arguably makes the requirement a closer fit with the purpose. By setting the standard at the ownership interest or contribution level at which a reasonable person would attribute to the party or its counsel a significant influence over the amicus curiae, the fit between means and end is quite close. But because a standard would require an exercise of judgment rather than a mechanical calculation, it would be considerably more burdensome for amici and their counsel, who would have to determine for themselves what the "reasonable person" standard would be. Such a malleable standard could also potentially lead to different amici interpreting the standard in very different ways, leading some amici to disclose much and others little, and thus making the disclosures less useful for the court.

As discussed above, because there are benefits and detriments associated with either a rule or a standard, the subcommittee has drafted potential language for each.

Relationship between amicus and nonparty. According to the 2010 Committee Note, the disclosure of whether a nonparty—other than the amicus itself, its members, or its counsel—contributed money to fund the brief "may help judges to assess whether the amicus itself considers the issue important enough to sustain the cost and effort of filing an amicus brief." So understood, the government interest is in ascertaining whether the amicus is truly committed to speaking for itself or is instead simply willing to serve as a paid mouthpiece for someone else.

Alternatively, the government's interest in disclosure might be viewed as a broad interest in transparency, permitting the court—and the public—to know who is truly speaking in each amicus brief, so that, for example, it is possible to spot whether someone is funding multiple amici, thereby creating the illusion of broad

support for a position. Just as a party may have considerable influence over an amicus without contributing money earmarked for the brief, so too might a nonparty.

Again, some might think that the only thing that matters is the persuasiveness of the arguments in an amicus brief. But just as the identity of an amicus may matter, so too may the number of amici. In *American for Prosperity* itself, the Court highlighted both:

> The gravity of the privacy concerns in this context is further underscored by the filings of hundreds of organizations as amici curiae in support of the petitioners. Far from representing uniquely sensitive causes, these organizations span the ideological spectrum, and indeed the full range of human endeavors: from the American Civil Liberties Union to the Proposition 8 Legal Defense Fund; from the Council on American-Islamic Relations to the Zionist Organization of America; from Feeding America—Eastern Wisconsin to PBS Reno. The deterrent effect feared by these organizations is real and pervasive, even if their concerns are not shared by every single charity operating or raising funds in California.[3]

A rule that required disclosure of ownership or contributions by a nonparty at the 10% level would impose more of a burden on amici than one limited to parties. That's because an amicus would have to ascertain each one of its 10% owners or contributors, not only whether a party passed that threshold. Under such a rule, each one of the hundreds of amici who submitted briefs in *Americans for Prosperity* arguing against the constitutionality of California's disclosure requirement would have to determine whether any of its owners or contributors passed the threshold and, if so, either disclose them or decline to file. And rather than worrying that the government might not live up to its assurance of confidentiality, each amicus would know that its disclosure would be publicly available as part of its brief. On the other hand, the burden imposed would be less than the burden involved in *Americans for Prosperity* because fewer amici would have owners or contributors who meet that threshold than would meet the $5000 (or, in some cases, 2%) threshold, and because it would apply only to those seeking to file amicus briefs.

For the same reasons, a standard set at the ownership interest or contribution level at which a reasonable person would attribute to a person a significant influence

[3] Slip op. at 17-18. And at oral argument, Justice Barrett asked, "So we're at 250 organizations who filed briefs in support of the Petitioners here, arguing that the disclosure mandate would harm their rights. Is that enough for a facial challenge? I gather your position is no. So I'm wondering how many would it take?"

over the amicus curiae would also be more burdensome that the same standard limited to parties.

If the government interest in disclosure of the relationship between an amicus and a nonparty is to determine whether the amicus is truly committed to speaking for itself or is instead simply willing to serve as a paid mouthpiece for someone else, an expansion of the disclosure requirements might be justified as an anti-evasion measure. That is, to protect against the possibility that an amicus might be influenced by a major nonparty contributor who does not earmark the contribution for the brief, disclosure of the contribution might be warranted.

But if one is trying to distinguish between an amicus who is truly committed to speaking for itself and one who is simply willing to serve as a paid mouthpiece for someone else, it is necessary to figure out what it means for an amicus to speak for itself. An amicus with members speaks for those members, or put somewhat differently, members of an amicus speak through that amicus. So understood, there may be no need to require disclosure of major contributions by members because when speaking for its members, an amicus is speaking for itself. (Presumably that is at least part of the reason that the current Rule does not require disclosure of contributions by members.)

The current Rule treats contributions by non-members differently. But some might think that an amicus speaks for its contributors and that its contributors speak through the amicus. From this perspective, any distinction between member contributors and nonmember contributors is artificial. *Americans for Prosperity* involved contributors. It relied on *NAACP v. Patterson*, 357 U. S. 449 (1958), which involved members, and *Shelton v. Tucker*, 364 U. S. 479 (1960), which involved members and contributors.

If this is right, then the current Rule regarding the relationship between an amicus and a non-party may be the best approach. If a person is a member of an amicus or a general contributor to an amicus, a court can reasonably believe that the amicus is speaking for itself (including its members and contributors). But if a person is not willing to become a member of the amicus and makes a contribution that is ear-marked for an amicus brief, a court may have reason to question whether the views expressed in that amicus brief are as aligned with the declared identity and statement of interest of the amicus as would otherwise appear.

On the other hand, if the government's interest in disclosure is viewed more broadly than articulated in the 2010 Committee Note, then broadening the disclosure requirement regarding the relationship between an amicus and a nonparty might be more appropriate. If the governmental interest is a broad interest in transparency, permitting the court and the public to know who is behind each amicus and be able to spot whether someone is funding multiple amici, thereby creating the illusion of

broad support for a position, then the existing disclosure Rule might be viewed as inadequate to serve that interest.

Under the dissent's view in *Americans for Prosperity*, a broad disclosure requirement with exceptions for those who fear some harm would be sufficient, but the majority rejected any requirement of showing such a burden before evaluating for narrow tailoring. A less restrictive alternative might simply be a reminder to the courts to be careful when counting the number of amici on a side, to not assume that amici are acting independently of each other, and to be aware when reviewing the statement of identity of the amicus and its interest in the case that the court has no way of knowing the extent to which the filing and content of that brief has been influenced by an unidentified owner or donor if such influence was accomplished by means other than through direct funding of that particular brief.

* * *

There is another governmental interest in amicus disclosures: informing the recusal decisions of judges. The subcommittee has not yet addressed the suggestion that standards for recusal based on amicus filings be developed.

TAB 5D

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Amicus Subcommittee

Re: Amicus Disclosures (21-AP-C; 21-AP-G; 21-AP-H; 22-AP-A)

Date: February 25, 2022

The subcommittee has been considering whether to recommend that Rule 29 be amended to require additional disclosures by amici curiae. Rather than repeat the discussion from the subcommittee's last report, that report is included after this memo.

We have received three comments on this project, two from Senator Whitehouse and Representative Johnson, and one from the United States Chamber of Commerce. Because no proposal has yet been published for public comment, these comments have been docketed as new suggestions. (21-AP-G; 21-AP-H; 22-AP-A). The subcommittee considered these comments, and they are also included after this memo.

As with the subcommittee's last report, this report includes draft language to help guide the discussion by the Advisory Committee. The subcommittee did not then—and is not now—recommending that this draft language be proposed for publication for public comment, much less recommending that it be adopted. Instead, the point of providing draft language is to focus the Advisory Committee's consideration of these issues.

The key questions that the subcommittee believes should be discussed are highlighted after the relevant provisions of the draft. For each provision, the subcommittee urges the Advisory Committee to consider the purpose served by requiring such disclosure, the burden imposed by such disclosure, and whether there are less burdensome ways to serve that purpose. The discussion after each provision focuses on the benefit to the court of disclosure. In addition, disclosure also serves the public interest in knowing who is seeking to influence the court.

Rule 29(a)(4)(E) currently provides that an amicus curiae—other than the United States, a federal officer or agency, or a State—must include in its brief "a statement that indicates whether":

(i) a party's counsel authored the brief in whole or in part;

(ii) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and

(iii) a person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person.

For ease of reference, the draft language below is set out as new, separate subdivisions of Rule 29, rather than as a complex set of romanette items (and bulleted subitems) under Rule 29(a)(4)(E).

Rule 29. Brief of an Amicus Curiae

* * *

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(5) whether a party or its counsel has (or two or more parties or their counsel collectively have) contributed 10% or more of the gross annual revenue of the amicus curiae during the twelve-month period preceding the filing of the amicus brief. Amounts unrelated to the amicus curiae's amicus activities that were received in the form of investments or in commercial transactions in the ordinary course of business may be disregarded.

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

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

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

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

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

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

(d) **Disclosures of Relationship Between the Amicus and a Nonparty**.

Unless the amicus curiae is one listed in the first sentence of Rule 29(a)(2), an amicus brief must include the following disclosures:

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

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

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

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

The current rule is easily evaded so long as the nonparty making the earmarked contribution is willing to become a member of the amicus. The distinction between a member and a contributor might be viewed as artificial, depending on the structure of the amicus. Expanding the disclosure requirement so that earmarked contributions by members must be revealed would block this easy evasion.

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

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

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

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

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

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

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

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

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

(3) whether any person has contributed 40% or more of the gross annual revenue of the amicus curiae during the twelve-month period preceding the filing of the amicus brief. Amounts unrelated to the amicus curiae's amicus activities that were received in the form of investments or in commercial transactions in the ordinary course of business may be disregarded.

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

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

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

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

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

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

Any required disclosure must identify the person.

TAB 5E

Supreme Court of the United States
Office of the Clerk
Washington, D.C. 20543-0001

Scott S. Harris
Clerk of the Court

202-479-3014
Fax 202-479-3033

September 18, 2020

The Honorable David G. Campbell
Chair, Judicial Conference Committee on
Rules of Practice and Procedure
401 West Washington Street, Suite 623
Phoenix, Arizona 85003

The Honorable John D. Bates
333 Constitution Avenue, N.W.
Washington, D.C. 20001

Dear Judge Campbell and Judge Bates:

The Supreme Court has received correspondence from Senator Sheldon Whitehouse and Representative Hank Johnson concerning disclosure requirements for those filing *amicus curiae* briefs in the Supreme Court and in the federal courts of appeals. The correspondence focuses upon Supreme Court Rule 37.6, which includes a requirement that an *amicus* disclose the identity of any person who made a contribution to fund the submission of the brief.

Federal Rule of Appellate Procedure 29(a)(4)(e) includes a similar requirement for *amicus* briefs in the courts of appeals. In light of the similarity of the two rules, the Committee on Rules of Practice and Procedure may wish to consider whether an amendment to Rule 29 is in order. The Committee's consideration would provide helpful guidance on whether an amendment to Supreme Court Rule 37.6 would be appropriate.

For your information, I am enclosing the correspondence with Senator Whitehouse and Representative Johnson. Please do not hesitate to contact me with any questions or if you need any additional information.

Very truly yours,

Scott S. Harris

Congress of the United States
Washington, DC 20510

February 23, 2021

Honorable John D. Bates
Chair, Judicial Conference Committee on Rules of Practice and Procedure
333 Constitution Avenue, N.W., Room 4114
Washington, DC 20001

Re: Funding Disclosure Requirements for *Amicus Curiae* Briefs

Dear Judge Bates,

We write you to request that the Committee on Rules of Practice and Procedure consider the establishment of a working group to address the problem of inadequate funding disclosure requirements for organizations that file *amicus curiae* briefs in the federal courts, which implicates Federal Rule of Appellate Procedure (FRAP) 29(a)(4)(e). This letter follows previous correspondence with Hon. Scott Harris, Clerk of the Supreme Court, regarding the Supreme Court's parallel Rule 37.6. We understand that Mr. Harris recently brought this correspondence to your attention, suggesting that the Committee on Rules of Practice and Procedure may wish to consider whether an amendment to Rule 29 is in order in light of our concerns.

I. Overview

FRAP 29—modeled after the Supreme Court Rule 37.6—provides that an *amicus* filer must include a statement in their brief whether "a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief," and whether "a person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person" (emphasis added).[1] Mr. Harris explained in our correspondence that this rule "strikes a balance." "By requiring the disclosure of those who make a monetary contribution specifically intended for a particular *amicus* brief," Mr. Harris explained, "the rule provides information about funding directly aimed at advocating specific positions" in court. "At the same time," he continued, "it recognizes that requiring broader disclosure of an organization's membership information or general donor lists could well infringe upon the associational rights of the organization . . . ."

[1] Similarly, Supreme Court Rule 37.6 provides that "a brief filed under this Rule shall indicate whether counsel for a party authored the brief in whole or in part and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and shall identify every person or entity, other than the amicus curiae, its members, or its counsel, who made such a monetary contribution to the preparation or submission of the brief."

In practice, however, this "balance"—between the public's interest in transparency and organizations' associational rights—is badly off-kilter. Thanks to these rules' narrow requirements that *amici* disclose only such funding "that was intended to fund preparing or submitting the brief," *amici* rarely if ever disclose the sources of their funding. This is apparently permissible under the rules so long as the funding was not specifically earmarked to fund "preparing or submitting the brief." In other words, the rules permit an *amicus* group not to disclose even large donations earmarked generally to fund its *amicus* practice; in fact, the rules could plausibly be construed so narrowly as to only encompass the costs of formatting, printing, and delivering the specific brief in the specific case at issue. The rules thus fail to account for the reality that "money is fungible," *Holder v. Humanitarian Law Project*, 561 U.S. 1, 32 (2010), creating a loophole that allows an *amicus* filer, in practice, to never disclose its funders, even if those funders include a party-in-interest to the case. As we detail here, sophisticated parties, *amicus* groups, and their wealthy funders have successfully exploited this loophole to exert anonymous influence on our courts. As a result, opposing parties, the public, and courts themselves are left in the dark about who is seeking to influence judicial decision-making, compromising judicial independence and the public perception thereof.

II. The Current *Amicus* Disclosure Rules Do Not Achieve Their Intended Goals.

Amicus briefs—written by non-parties to a case for the purpose of providing information, expertise, insight, or advocacy—have increased in both volume and influence in the past decade. During the Supreme Court's 2014 term, *amici* submitted 781 amicus briefs,[2] an increase of over 800% from the 1950s and a 95% increase from 1995. From 2008 to 2013, the Supreme Court cited *amicus* briefs 606 times in 417 opinions. Supreme Court opinions also often adopt language and arguments from *amicus* briefs.[3] That increase in the volume of *amicus* filings—and the concomitant rise in high-dollar investment in *amicus* participation—reflect a growing recognition among those who seek to shape the law through the courts that the federal courts are susceptible to their influence.

The Supreme Court adopted its *amicus* funding disclosure rule in 1997 "in an effort to stop parties in a case from surreptitiously 'buying' what amounts to a second or supplemental merits brief, disguised as an amicus brief, to get around word limits."[4] Likewise, the parallel rule of federal appellate procedure—expressly modeled after the Supreme Court Rule—"serves to deter counsel from using an amicus brief to circumvent page limits on the parties' briefs."[5] In 2018, the Supreme Court's public information office explained that "the Clerk's Office interprets [the Rule] to preclude an amicus from filing a brief if contributors are anonymous."[6]

It is difficult to reconcile the Court's interpretation of these rules as precluding an *amicus* from filing a brief if contributors are anonymous with the Court's practice of routinely accepting

[2] Anthony J. Franze & R. Reeves Anderson, *Record Breaking Term for Amicus Curiae in Supreme Court Reflects New Norm*, NAT'L L.J. (Aug. 19, 2015).
[3] Paul M. Collins, Jr. & Lisa A. Solowiej, *Interest Group Participation, Competition, and Conflict in the U.S. Supreme Court*, 32 LAW & SOC. INQUIRY 955, 961 (2007).
[4] *Supreme Court Rule Puts a Crimp in Crowd-Funded Amicus Briefs*, LAW.COM (Dec. 10, 2018), https://www.yahoo.com/now/supreme-court-rule-puts-crimp-075351473.html?guccounter=1.
[5] Committee notes on the 2010 Amendment to the Federal Rules of Appellate Procedure.
[6] *Id.*

amicus curiae briefs from special-interest groups that fail to disclose their donors. To the extent the rules were devised to preclude *amici* from filing "supplemental merits briefs" on behalf of parties, or if their financial backers are anonymous, they are not achieving those goals. A review of *amicus* practice before the Supreme Court illustrates how parties to litigation—as well as large donors who fund and develop "impact litigation" with the goal of shaping law and public policy through the courts—use *amicus* briefs to get around page limits on the parties' briefs, advance boundary-pushing arguments on behalf of the donors' long-term interests, and do so under a cloak of anonymity. This can take any of several forms.

a. Parties Directly Funding *Amici*

The narrow demands of Rule 37.6 and FRAP 29—requiring disclosure of only those donations that were given "to fund preparing or submitting the brief"—allow parties to litigation to do precisely what the rules were intended to prevent, i.e., surreptitiously buy what amounts to a supplemental merits brief, disguised as an *amicus* brief. One recent high-profile Supreme Court case illustrates this problem. In *Google LLC. v. Oracle America Inc.* (No. 18-956), the Internet Accountability Project (IAP)—a 501(c)(4) "social welfare" organization that does not disclose its funders—filed an *amicus* brief supporting Oracle's position, telling the Court that it wanted to "ensure that Google respects the copyrights of Oracle and other innovators." *Bloomberg* subsequently reported that Oracle had itself donated between $25,000 and $99,999 to IAP in 2019 as "just one part of an aggressive, and sometimes secretive, battle Oracle has been waging against its biggest rivals," including Google.[7] The report further documented donations from Google to at least ten groups that filed briefs in support of its position.

The Court's *amicus* funding disclosure rule did not require that any of these donations—assuming they were not specifically earmarked for the "preparation or submission of the brief"—be disclosed to the Court. And indeed, the majority of these party-funded *amici* did not disclose that they had been funded by a party to the case.[8] IAP, for example, misleadingly (yet compliantly) attested that "none of the parties or their counsel, nor any other person or entity other than amicus or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief." Nevertheless, at least four of these *amicus* filers—but not IAP—voluntarily reported the financial support they had received from one of the parties in the case, in the words of one *amicus*, "[i]n an abundance of caution and for the sake of transparency."[9] These voluntary disclosures suggest that some attorneys believe their ethical obligations required

[7] Naomi Nix and Joe Light, *Oracle Reveals Funding of Dark Money Group Fighting Big Tech*, BLOOMBERG (Feb. 25, 2020), https://www.bloomberg.com/news/articles/2020-02-25/oracle-reveals-it-s-funding-dark-money-group-fighting-big-tech.

[8] *See*, e.g., *Google LLC. v. Oracle America Inc.* (No. 18-956), Brief of Internet Accountability Project, at n.1

[9] *See* Brief of *Amicus Curiae* Electronic Frontier Foundation in Support of Petitioner; *see also* Brief of *Amici Curiae* Python Software Foundation et al. fn. 1 ("Counsel for amici curiae was previously engaged to advise Google in connection with this matter earlier in its history, and represents Google in other matters[.]"); Brief of *Amici Curiae* Center for Democracy and Technology et al. fn. I ("Counsel for amici curiae was previously engaged to advise Google in connection with this matter earlier in its history, and represents Google in other matters, but Google has had no involvement with the preparation of this brief."); Brief of *Amici Curiae* Computer and Communication Industry Association and Internet Association et al. fn. 2 ("Google is a CCIA member, and Oracle and Sun Microsystems were formerly members of CCIA, but none of these parties took any part in the preparation of this brief . . . Google is a member of IA. As noted above, Google took no part in the preparation of this brief.").

a greater degree of disclosure than the Supreme Court requires. Plenty of others, however, have been content to conceal these suspicious financial arrangements, which the Court's Rule permits.

b. Donors Funding *Amici* and Litigants in the Same Case, and Donors Anonymously Orchestrating *Amicus* "Projects"

In recent years, thanks to the work of investigative reporters, we have seen how many high-profile, politically charged cases are financed directly by ideological foundations. Often, the same foundations that fund the litigation also exploit the courts' lenient *amicus* funding disclosure rules to anonymously fund armadas of *amicus* briefs that support their preferred outcomes. For example, in the orchestrated challenge to union agency shop fees first initiated in *Friedrichs v. California Teachers Association*, 136 S. Ct. 1083 (2016), one organization, the Lynde and Harry Bradley Foundation—a conservative foundation that has long sought to weaken labor rights, including by financing impact litigation—bankrolled not only the nonprofit law firm bringing the case, but also eleven different organizations that filed *amicus curiae* briefs supporting the plaintiffs.[10] Surely if the disclosure Rule were operating to its intended effect, the Court would have required disclosure of that funding. Yet none of those *amicus* filers disclosed the Bradley Foundation (or any other source) as a source of its funding for the brief under Rule 37.6, and none of those briefs was rejected by the Court for lack of such disclosure.

The Bradley Foundation's coordinated, undisclosed funding of the litigants and *amici* in *Friedrichs* was not a one-off. In *Janus v. AFSCME*, the follow-up to *Friedrichs*, investigative reporters found that the Bradley Foundation again funded both groups representing the plaintiffs, as well as 12 groups that filed *amicus* briefs.[11] Similarly, the two groups representing the *Janus* plaintiffs, plus 13 *amicus* filers, all received funding from an organization named Donors Trust (or its sister organization Donors Capital Fund), a so-called "donor advised fund" that has been described as "the dark-money ATM of the right."[12] None of this common funding was disclosed to the Court. Thus, the current disclosure rules permit wealthy donors like the Bradley Foundation to finance litigants and law firms to bring ideologically motivated cases while simultaneously funding upwards of a dozen *amicus* briefs supporting those cases, circumventing Court limits on the parties' briefs and creating the false impression of broad popular support for the donors' preferred position.

In an *amicus* brief in *Seila Law LLC v. Consumer Financial Protection Bureau* (No. 19-7), Senators documented how thirteen *amici* aligned with Petitioner received financial support from the same entities that fund the Federalist Society.[13] That brief also detailed how the Federalist Society had long promoted the "unitary executive" legal theory advanced by Petitioner and ultimately adopted by the Court—a theory that redounds to the financial benefit of Federalist Society funders. The Center for Media and Democracy subsequently found that "16 right-wing foundations," including the Bradley Foundation and Donors Trust, "have donated a total of

[10] *See* Brief for Senators Sheldon Whitehouse and Richard Blumenthal as Amici Curiae in Support of Respondents, *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018), at 16-17.
[11] Mary Bottari, *Behind* Janus*: Documents Reveal Decade-Long Plot to Kill Public-Sector Unions*, IN THESE TIMES (Feb. 22, 2018), https://inthesetimes.com/features/janus_supreme_court_unions_investigation.html.
[12] *Id*.
[13] Brief of *Amici Curiae* U.S. Senators Sheldon Whitehouse, Richard Blumenthal, and Mazie Hirono, Appendix A.

nearly $69 million to 11 groups that filed amicus briefs in favor of scrapping the CFPB."[14] None of this information was required to be disclosed to the Court under its current Rule.

Recently published documents reveal how influential donors like the Bradley Foundation use tax-exempt money to coordinate *amicus* "projects" to influence court results through legal networks such as the Federalist Society, as presumably occurred in *Seila Law*. In 2015, a representative of the Bradley Foundation emailed Leonard Leo, then Executive Vice President of the Federalist Society, to ask if there was "a 501(c)(3) nonprofit to which Bradley could direct any support of the two Supreme Court *amicus* projects other than Donors Trust," the identity-laundering "donor-advised fund" described above.[15] Leo replied: "Yes, Judicial Education Project could take and allocate." In turn, Judicial Education Project—a 501(c)(3) tax-exempt organization that does not disclose its donors—submitted a grant proposal to Bradley seeking $200,000 to coordinate and develop *amicus* briefs in two politically charged (yet completely unrelated) cases: the aforementioned *Friedrichs*, and *King v. Burwell*, 576 U.S. 988 (2015), a challenge to the Affordable Care Act. The Bradley Foundation estimated that "each of the two *amicus*-brief efforts costs approximately $250,000, for a total of $500,000," and the Bradley staff recommended a $150,000 grant to JEP to support this work. The Bradley staffer explained the strategy behind this investment as follows:

> At this highest of legal levels, it is often very important to orchestrate high-caliber amicus efforts that showcase respected high-profile parties who are represented by the very best lawyers with strong ties to the Court. Such is the case here, with *King* and *Friedrichs*, even given Bradley's previous philanthropic investments in the actual, underlying legal actions.[16]

In the *King* and *Friedrichs* cases, none of the *amici* supporting the Bradley-funded litigants' positions disclosed their Bradley Foundation funding, or any of their funding sources for that matter, pursuant to Rule 37.6. While this nondisclosure arguably violated the Rule, it also arguably did not, if one interprets the Rule narrowly to require disclosure of only such funds intended to cover the costs of formatting, printing, and delivering the briefs. In any event, this example illustrates why a broader and more demanding disclosure rule is necessary.

c. Member-funded *Amici* Who Do Not Disclose Their Members

The *amicus* funding disclosure regime's transparency aims are also undercut by its own terms, which specifically exempt from disclosure any contributions by an *amicus*-filer's members. See FRAP 29(a)(4)(E)(iii) ("An amicus brief . . . must include . . . a statement that indicates whether a person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief."). This again

[14] Alex Kotch, *Conservative Foundations Finance Push to Kill the CFPB,* THE CENTER FOR MEDIA AND DEMOCRACY (Feb. 13, 2020).
[15] Lisa Graves, *Snapshot of Secret Funding of Amicus Briefs Tied to Leonard Leo–Federalist Society Leader, Promoter of Amy Barrett*, TRUE NORTH RESEARCH (Oct. 9, 2020), https://truenorthresearch.org/2020/10/snapshot-of-secret-funding-of-amicus-briefs-tied-to-leonard-leo-federalist-society-leader-promoter-amy-coney-barrett/.
[16] *Id*. (emphasis added).

leaves open the possibility that parties to litigation can secretly fund *amicus* briefs in support of their position by funneling money to organizations of which they are members.

For example, the U.S. Chamber of Commerce—by far the Court's most prolific *amicus* filer[17]—routinely submits influential *amicus* briefs in Supreme Court litigation. The Chamber has complied with Supreme Court Rule 37.6 by affirming that "no person other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission."[18] However, the Chamber does not disclose its members to the public,[19] so there is no way to know who is influencing the positions the Chamber takes in litigation. As a result, its disclosure is effectively meaningless, and the deep-pocketed corporate contributors to the Chamber's *amicus* activity can enjoy, in complete anonymity, the fruits of its unparalleled Supreme Court win rate—9-1 in cases in which it participated last term. The Chamber makes similar disclosures in briefs it files in the circuit courts.[20]

We are sensitive to claims that required disclosure of membership lists may implicate associational and/or speech rights, such as those at issue in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), in which the Supreme Court refused to allow compelled disclosure of the identities of NAACP members who faced significant threats to their physical safety during the civil rights era. But granting sweeping anonymity protections to *all* member organizations, including business networks like the U.S. Chamber of Commerce whose corporate members face no serious threat of reprisal for the public expression of their views, simply does not follow. Indeed, "applying *NAACP v. Alabama*'s holding in a formally symmetrical manner to the relatively powerful . . . without regard to context may undermine rather than affirm the values underlying that decision."[21]

d. The *Amicus* Funding Disclosure Regime Creates Absurd Results, Unfairly Favoring Sophisticated Repeat-Players.

As we have documented here, wealthy and sophisticated repeat players have exploited the Supreme Court's ineffective *amicus* funding disclosure regime to develop what amounts to a massive, anonymous judicial lobbying program. They similarly exploit the lower appellate courts' Rule, where orchestrated *amicus* projects are arguably even more influential.

One rare example of the Supreme Court actually *enforcing* its Rule 37.6 illustrates the absurd results created by this regime, demonstrating how it systematically favors well-heeled insiders over the average citizen who wishes to make his or her voice heard. In 2018, the

[17] Adam Feldman, *The Most Effective Friends of the Court*, EMPIRICAL SCOTUS (May 11, 2016), https://empiricalscotus.com/2016/05/11/the-most-effective-friends-of-the-court/.
[18] *See, e.g.*, Brief for the Chamber of Commerce of the United States as Amicus Curiae, *Epic Systems v. Lewis*, 138 S.Ct. 1612 (2018), at n.1 (emphasis added).
[19] Dan Dudis, *Why the US Chamber of Commerce is fighting transparency*, THE HILL (April 6. 2016), https://thehill.com/blogs/pundits-blog/finance/275301-why-the-us-chamber-of-commerce-is-fighting-transparency.
[20] *See, e.g.*, Brief Amicus Curiae of the Chamber of Commerce of the United States of America, *Crossroads Grassroots Policy Strategies v. Federal Elections Commission*, Case No. 18-5261, D.C. Circuit (filed on Mar. 18, 2019) at n.1, https://www.fec.gov/resources/cms-content/documents/cgps_185261_uscc_amicus.pdf.
[21] Dale E. Ho, NAACP v. Alabama and False Symmetry in the Disclosure Debate, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 405 (2012).

Supreme Court rejected an *amicus* submission made by the U.S. Alcohol Policy Alliance for its failure to comply with Rule 37.6, because its brief failed to disclose the names of each of the group's donors, many of whom had contributed to the brief through the small-dollar "crowdfunding" website GoFundMe.[22] As a result, *amicus* was forced to return donations from individuals who wished to remain anonymous, and re-file its brief, disclosing the names of individuals who had supported the GoFundMe campaign. Donations to the brief ranged from $25-$500.

The Court's disparate treatment of the crowdfunded, small-dollar-backed brief filed by the U.S. Alcohol Policy Alliance and the wealthy, repeat-player *amici* who routinely file anonymously funded briefs is troubling, and telling. It reflects an elemental tension in a democracy between two classes of citizens. One is an influencer class that occupies itself with favor-seeking from government, and therefore desires rules of engagement that make government more and more amenable to its influence. The second class is the general population, which has an abiding institutional interest in a government with the capacity to resist that special-interest influence. This is a centuries-old tension.[23] When courts establish and apply rules designed to promote transparency and integrity, they should not overlook this latter abiding interest.

Ironically, the Court's application of its own Rule is what has posed the most significant threat to associational and speech interests. By applying Rule 37.6 to require small donor disclosure for an *amicus* brief funded through GoFundMe, the Court directly chilled the ability of individuals to band together on an *ad hoc* basis to support a legal position of importance to them.[24] A rule that forces disclosure of these donors, but not the large and anonymous corporate funders of sophisticated repeat-players like the United States Chamber of Commerce, does not "strike[] a balance" at all.[25]

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[22] Tony Mauro, *Supreme Court Rule Crimps Crowd-Funded Amicus Briefs*, THE NATIONAL LAW JOURNAL (Dec. 10, 2018).

[23] *See* Theodore Roosevelt, *New Nationalism Speech* (1910) ("[T]he United States must effectively control the mighty commercial forces [.] . . . The absence of an effective state, and especially, national, restraint upon unfair money-getting has tended to create a small class of enormously wealthy and economically powerful men, whose chief object is to hold and increase their power."); DAVID HUME, PHILOSOPHICAL WORKS OF DAVID HUME 290 (1854) ("Where the riches are in a few hands, these must enjoy all the power and will readily conspire to lay the whole burden on the poor, and oppress them still farther, to the discouragement of all industry."); Andrew Jackson, 1832 Veto Message Regarding the Bank of the United States (July 10, 1832) (transcript available in the Yale Law School library) ("It is to be regretted that the rich and powerful too often bend the acts of government to their selfish purpose ... to make the richer and the potent more powerful, the humble members of society ... have neither the time nor the means of securing like favors to themselves, have a right to complain of the injustice of the Government."); NICCOLO MACHIAVELLI, THE PRINCE IX (1532) ("[O]ne cannot by fair dealing, and without injury to others, satisfy the nobles, but you can satisfy the people, for their object is more righteous than that of the nobles, the latter wishing to oppress, whilst the former only desire not to be oppressed.").

[24] *See* Letter from Sen. Sheldon Whitehouse to C.J. John Roberts and Scott S. Harris, Clerk, U.S. Supreme Court (Jan. 4, 2019); *see also* Tony Mauro, *Supreme Court Rule Crimps Crowd-Funded Amicus Briefs*, THE NATIONAL LAW JOURNAL (Dec. 10, 2018).

[25] Letter from Scott S. Harris, Clerk, U.S. Supreme Court, to Sen. Sheldon Whitehouse (Feb. 27, 2019).

III. Recommendations

As noted in our correspondence with Mr. Harris, we believe a legislative solution may be in order to ensure much-needed transparency around judicial lobbying, and to put all *amicus* funders on an equal playing field. While we disagree with Mr. Harris's suggestion that legislation along these lines would improperly "intrude into areas historically left to the Court" or implicate separation-of-powers concerns, we agree it would be salutary for the judicial branch to address these issues on its own.

There are better ways to structure a disclosure rule to achieve the public interest in transparency while protecting the associational interests of those who risk real danger of physical harm or other demonstrable injury as a result of funding organizations that file *amicus* briefs. Our AMICUS (Assessing Monetary Influence in the Courts of the United States) Act, for example, would require funding disclosure by only repeat *amicus* filers—defined as those who file three or more *amicus* briefs in the Supreme Court or the federal courts of appeals during a calendar year. The bill also narrowly targets only high-dollar funders of *amicus* filers, requiring disclosure of only those who contributed three percent or more of the *amicus* group's gross annual revenue, or over $100,000. We have attached a copy of the bill text and offer it merely as one possible approach the judiciary might take to adopting a rule that strikes a better balance between these competing interests.

We appreciate the Committee's attention to this issue and hope it will take these concerns seriously. It should not fall to members of Congress and investigative journalists to scrutinize court dockets and IRS forms to expose conflicts of interest that, left hidden, could undermine the legitimacy of the judiciary's work. More than ever before, the judiciary should be vigilant about this threat, as political actors seeking to shape American law and public policy increasingly turn to the courts to achieve those goals, through multi-million dollar judicial confirmation campaigns, sophisticated *amicus* "projects," and the like. As Justice Scalia wrote: "Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which, thanks to the Supreme Court, campaigns anonymously . . . and even exercises the direct democracy of initiative and referendum hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave."[26] We fully agree.

Sincerely,

Sheldon Whitehouse
United States Senator

Henry C. "Hank" Johnson, Jr.
Member of Congress

[26] *Doe v. Reed*, 561 U.S. 186 (2010) (Scalia, J., concurring).

TAB 5F

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Subcommittee on Costs on Appeal

Re: Costs on Appeal (21-AP-D)

Date: September 9, 2022

This subcommittee was created to explore if any amendments to Federal Rule of Appellate Procedure 39 might be appropriate in light of the Supreme Court's decision in *City of San Antonio v. Hotels.com*, 141 S. Ct. 1628 (2021). There, the Court held that Rule 39 does not permit a district court to alter a court of appeals' allocation of the costs listed in subdivision (e) of that Rule. The Court also observed that "the current Rules and the relevant statutes could specify more clearly the procedure that such a party should follow to bring their arguments to the court of appeals." *Id*. at 1638.

Rule 39 provides:

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

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

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

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

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

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

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

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

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

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

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

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

(1) the preparation and transmission of the record;

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

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

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

At the spring 2022 meeting of the Advisory Committee, the subcommittee recommended creation of a clearer procedure for a party to raise arguments to the court of appeals about the proper allocation of costs. Although the subcommittee initially recommended that this change be made only if Civil Rule 62 were also amended to require at least disclosure (and perhaps district court approval) of the premium paid, discussion at the Advisory Committee meeting seemed to reach a consensus that while such coordinated amendments would produce the most value, amendments to the Appellate Rule 39 would be valuable even if Civil Rule 62 were not amended.

The subcommittee recommended that Rule 39 be amended to clearly empower a party to seek review in the court of appeals of that court's allocation of costs generally. It also noted a potential argument that existing Rule 39(e)(3) is inconsistent with 28 U.S.C. § 1920, but it did not recommend repealing Rule 39(e)(3). That provision has been a part of the Federal Rules of Appellate Procedure for more than fifty years.

The full Advisory Committee agreed, but it had two concerns that it left for the subcommittee to address. First, the Advisory Committee had concerns about the

placement of the new provision in Rule 39. One suggestion was that perhaps it should be its own separate subdivision rather than simply added to Rule 39(a). Second, the Advisory Committee had concerns about how much time a party should have to file a motion asking the court of appeals to reconsider its allocation of costs.

The subcommittee concluded that a separate subdivision is warranted, and it decided to place it as a new subdivision (b). Placing the new subdivision immediately after the subdivision that governs the assessment of costs serves to clarify that the motions contemplated by the new subdivision are designed to seek reconsideration of what the court of appeal has done under subdivision (a). That it, such a motion is not aimed at asking the court of appeals to recalculate particular items of costs, but rather to reconsider which party should bear the costs and, if split, in what proportion.

This connection is reinforced by using the term "assessment"—the same term used in subdivision (a). The new subdivision also points forward to the separate provisions dealing with taxation of costs in the court of appeals and in the district court, codifying the holding of *Hotels.com*.

The subcommittee also concluded that the appropriate time limit for a motion to reconsider the assessment of costs is 14 days after entry of judgment. Yes, this may require a party to file such a motion before a bill of costs is filed in either the court of appeals or the district court. But waiting until a bill of costs is filed in the district court could involve considerable delay, and the costs taxable in the court of appeals are usually both small and easy to predict. Moreover, setting the deadline in this way further underscores that the point of such a motion is not to review the calculation of taxable costs, but to reconsider the assessment of costs as between the parties in the first place.

Here is the text of the subcommittee's recommendation:

Rule 39. Costs

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

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

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

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

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

(b) Where Applicable; Reconsideration. The assessment of costs under paragraph (a) applies to costs taxable in the court of appeals under paragraph (e) and to costs taxable in district court under paragraph (f). A party may seek reconsideration of the assessment of costs under paragraph (a) by filing a motion in the court of appeals within 14 days after the entry of judgment.

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

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

(e)~~(d)~~ Costs on Appeal Taxable in the Court of Appeals; ~~Bill of Costs:~~ Objections; Insertion in Mandate.

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

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

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

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

(1) the preparation and transmission of the record;

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

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

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

TAB 5G

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: IFP Subcommittee

Re: Possible Simplification of Appellate Form 4

Date: September 15, 2022

This subcommittee has been considering a suggestion submitted by Sai to establish more consistent criteria for granting IFP status and to revise Appellate Form 4 to be less intrusive. It focused its attention on the one aspect of the issue that is clearly within the purview of the Committee, Form 4. Form 4 is a form adopted through the Rules Enabling Act, not a form created by the Administrative Office.

At the Spring 2022 meeting, the subcommittee reported that it had informally gathered some information about IFP practice in the courts of appeals. Based on that information, it appears that IFP status is rarely denied because the applicant has too much wealth or income. Instead, denials are more commonly based on the absence of a non-frivolous issue on appeal. Thinking that Form 4 could be substantially simplified while still providing the courts of appeals with enough detail to decide whether to grant IFP status, the subcommittee presented a draft of a revised Form 4 for the Advisory Committee's consideration and discussion.

Since then, the subcommittee solicited reactions to the draft Form 4 from senior staff attorneys in the circuits. The subcommittee met to consider those reactions and make appropriate changes to the draft Form 4.

- The affidavit now refers to "filing" fees rather than "docket" fees, both to make it more understandable and to match the final paragraph.

- The affidavit now uses the term "relief" rather than "redress" to make it more understandable.

- The explanation of the need to present a non-frivolous issue on appeal no longer is limited to a "legal" issue because the issue on appeal might be a factual issue.

- The three questions about receipt of government aid programs available only to those who are poor are condensed into a single question. Some commenters wondered why these questions were listed first. The subcommittee thinks that a person eligible for these programs almost certainly qualifies for IFP status, so that asking this first can make processing of IFP applications more efficient.

- The question about monthly income from other sources is clarified and some examples provided.

- The word "medicine" as an example of a necessary expense is expanded to medical care.

- The open-ended question inviting "anything else that you think affects your ability to pay" is changed to "anything else that you think explains your inability to pay" for clarity and simplicity.

The subcommittee believes that most of the comments were supportive of the overall thrust of the project. One comment might be read to prefer more detail in order to catch someone with luxury expenses trying to get IFP status. The subcommittee believes that the benefits of simplification outweigh that risk, especially since anyone with luxury expenses would have to draw on reportable income or assets to fund those expenses.

There were also some comments suggesting that the form distinguish between liquid and illiquid assets. The subcommittee thinks that this adds a complication that is unnecessary for most people applying for IFP status. In addition, most people with substantial illiquid assets will have enough liquid assets to pay the filing fees. In an unusual case (say, a person with little income and scant liquid assets who lives in an inherited house) there is space on the form to explain the inability to pay the filing fees.

Some comments also asked about spousal finances. One of the major critiques of the existing Form is that it is unnecessarily intrusive to ask about spousal income and assets when that income and assets may not be available to the party seeking IFP status. At least at this point, the subcommittee thinks it better to not ask about spousal finances than to ask IFP applicants to state whether or not spousal resources are available and answer accordingly.

At this point, the subcommittee is not recommending that the Advisory Committee seek publication and public comment on this draft. After discussion by the Advisory Committee, the next step would be to confer with the Clerk of the Supreme Court, because Supreme Court Rule 39.1 calls for the use of Appellate Form 4 by applicants for IFP status in the Supreme Court.

As noted in earlier reports, in evaluating this draft, the Advisory Committee should bear in mind the governing statute. The statute, as amended by the Prison Litigation Reform Act, makes little sense. It provides, in relevant part, that:

> any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a

> person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor.

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

The attached draft Form 4 does require that applicants for IFP status state their total assets. It does not, however, require applicants to separately state each asset.

TAB 5H

UNITED STATES DISTRICT COURT

for the

<_____> DISTRICT OF <_____>

<Name(s) of plaintiff(s)>,	)	
	)	
Plaintiff(s)	)	
	)	
v.	)	
	)	Case No. <Number>
<Name(s) of defendant(s)>,	)	
	)	
Defendant(s)	)	
	)	

AFFIDAVIT ACCOMPANYING MOTION
FOR PERMISSION TO APPEAL IN FORMA PAUPERIS

Affidavit in Support of Motion

I swear or affirm under penalty of perjury that, because of my poverty, I cannot prepay the filing fees of my appeal or post a bond for them. I believe I am entitled to relief. I swear or affirm under penalty of perjury under United States laws that my answers on this form are true and correct. (28 U.S.C. § 1746; 18 U.S.C. § 1621.)

Signed: _____ Date _____

The court may grant a motion to proceed in forma pauperis if you show that you cannot pay the filing fees and you have a non-frivolous issue on appeal. Please state your issues on appeal. (Attach additional pages if necessary.)

My issues on appeal are:

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

No matter how you answered the questions above, if you are a prisoner seeking to appeal a judgment in a civil action or proceeding, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

If there is anything else that you think explains your inability to pay the filing fees, please feel free to explain below. (Attach additional pages if necessary.)

TAB 6

TAB 6A

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett

Re: Electronic Filing by Unrepresented Parties (21-AP-E; 20-AP-C)

Date: September 16, 2022

There have been a number of suggestions submitted both to this Advisory Committee and to other Advisory Committees to make it easier for unrepresented parties to file electronically. A working group that includes the reporters for the relevant Advisory Committee study was formed to consider this topic, and a study has been completed by the Federal Judicial Center (FJC). A memorandum from Professor Cathie Struve on behalf of the working group follows, along with an excerpt from the FJC report.

Rather than repeat the content of that memo and report, I simply highlight a couple of items that this Advisory Committee might want to focus on.

First, it appears that the courts of appeals are more receptive to electronic filing by unrepresented parties than are trial courts. This might be because there are typically far fewer filings in a case in the court of appeals. It might also be because the problems involved with unrepresented parties opening cases when filing case-initiating documents is obviated in the courts of appeals: the filing of case-initiating documents in the courts of appeals—even when done by lawyers—does not open a case in CM/ECF. Instead, court staff opens the case.

Whatever the reason, perhaps the Appellate Rules could take the lead in shifting the default in the rules. Instead of prohibiting electronic filing by unrepresented parties absent permission by court order or local rule, Rule 25(a)(2)(B) could permit electronic filing by unrepresented parties absent a court order or local rule prohibiting such filing, perhaps with a good cause requirement. On the other hand, it might be thought unnecessary to make any such change, since courts of appeals are broadly using the authority in the existing rules to allow electronic filing by unrepresented parties.

Second, electronic filers need not serve a physical copy of papers on other electronic filers nor provide proof of service. *See* Rule 25(c) and (d). That's because service is done electronically by CM/ECF. But those who do not file electronically may well have to serve physical copies of papers even on electronic filers, even though the clerk's office will scan submissions and place them on CM/ECF, thereby triggering electronic service on electronic filers. The Advisory Committee might consider lifting this burden from paper filers.

TAB 6B

MEMORANDUM

DATE: August 24, 2022

TO: Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules

FROM: Catherine T. Struve

RE: Project on electronic filing by pro se litigants

Under the national electronic-filing rules that took effect in 2018, self-represented litigants presumptively must file non-electronically, but they can file electronically if authorized to do so by court order or local rule. In late 2021, in response to a number of proposals submitted to the advisory committees, a cross-committee working group was formed to study whether developments since 2018[1] provide a reason to alter the rules' approach to e-filing by self-represented litigants. This working group includes the reporters for the Appellate, Bankruptcy, Civil, and Criminal Rules advisory committees as well as attorneys from the Rules Committee Support Office and researchers from the Federal Judicial Center (FJC). The working group has convened via Zoom for three discussions. The December 2021 discussion centered on potential research questions for a projected study by the FJC. By March 2022, Tim Reagan, Carly Giffin, and Roy Germano of the FJC had conducted the study and had circulated to the working group a draft of their report. The working group's March 2022 discussion focused on the study's findings. The final version of the report became available in May 2022,[2] and the working group met in August 2022 for further discussion of the study's findings.

This memo sketches possible topics that the advisory committees might discuss in light of the FJC's findings.[3] Part I.A of the memo provides a brief overview of the current rules on

1 For a review of current practices in the state courts, see National Center for State Courts, Self-Represented Efiling: Surveying the Accessible Implementations 3 (2022) (reporting that self-represented state-court litigants "often enjoy the same ability to efile as attorneys in the trial courts that offer electronic filing"), available at https://www.ncsc.org/__data/assets/pdf_file/0022/76432/SRL-efiling.pdf. An appendix to the study provides links to relevant e-filing programs by state. See id. Appendix A.

2 See Tim Reagan et al., Federal Courts' Electronic Filing by Pro Se Litigants (FJC 2022), available at https://www.fjc.gov/content/368499/federal-courts-electronic-filing-pro-se-litigants ("FJC Study").

3 The suggestions gathered in this memo reflect insights contributed by many working-group members. Those members have a variety of views on the issues discussed here, and the suggestions in the memo may not be endorsed by all working-group members. My goal here is to collect possible issues for discussion rather than to report a consensus view of the working group.

electronic filing and on service, while Part I.B summarizes pending proposals to amend the rules with respect to electronic filing by self-represented litigants. Part II outlines possible questions for discussion by the advisory committees as to both filing and service.

I. The current rules, and proposals to amend them

In Part I.A., I briefly summarize the current rules on self-represented electronic filing and on service. Part I.B synopsizes pending proposals to amend the electronic-filing rules.

A. The current rules

Under the rules as amended in 2018, pro se litigants can file electronically only if permitted to do so by court order or local rule. The Civil, Bankruptcy, and Appellate Rules contemplate that courts can require electronic filing by a pro se litigant, so long as they do so by order, or via a local rule that includes reasonable exceptions. The Criminal Rule does not permit a court to require pro se litigants to file electronically; the Committee Note observes that incarcerated defendants will typically lack the opportunity to file (and receive notices) electronically. As to service, requirements for separate service of a filing hinge on whether the filing was made via the court's case management / electronic case filing (CM/ECF) system or otherwise.

1. Filing

As amended in 2018, Civil Rule 5(d)(3) currently reads:

> (3) Electronic Filing and Signing.
>
> > (A) By a Represented Person--Generally Required; Exceptions. A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.
> >
> > (B) **By an Unrepresented Person--When Allowed or Required. A person not represented by an attorney:**
> >
> > > **(i) may file electronically only if allowed by court order or by local rule; and**
> > >
> > > **(ii) may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.**
> >
> > (C) Signing. A filing made through a person's electronic-

> filing account and authorized by that person, together with that person's name on a signature block, constitutes the person's signature.
>
> (D) Same as a Written Paper. A paper filed electronically is a written paper for purposes of these rules.

(Emphasis added.) Substantively similar electronic-filing provisions appear in Appellate Rules 25(a)(2)(B) and Bankruptcy Rules 5005(a)(2) and 8011(a)(2)(B).

The 2018 Committee Note to Civil Rule 5(d) states in part:

> Filings by a person proceeding without an attorney are treated separately. It is not yet possible to rely on an assumption that pro se litigants are generally able to seize the advantages of electronic filing. Encounters with the court's system may prove overwhelming to some. Attempts to work within the system may generate substantial burdens on a pro se party, on other parties, and on the court. Rather than mandate electronic filing, filing by pro se litigants is left for governing by local rules or court order. Efficiently handled electronic filing works to the advantage of all parties and the court. Many courts now allow electronic filing by pro se litigants with the court's permission. Such approaches may expand with growing experience in the courts, along with the greater availability of the systems required for electronic filing and the increasing familiarity of most people with electronic communication. Room is also left for a court to require electronic filing by a pro se litigant by court order or by local rule. Care should be taken to ensure that an order to file electronically does not impede access to the court, and reasonable exceptions must be included in a local rule that requires electronic filing by a pro se litigant. In the beginning, this authority is likely to be exercised only to support special programs, such as one requiring e-filing in collateral proceedings by state prisoners.

A similar passage appears (without the last sentence in the quote above) in the Committee Note to Bankruptcy Rule 5005(a)(2); the Committee Note to Appellate Rule 25(a)(2)(B) briefly observes that that provision parallels the approach taken in Civil Rule 5.

Criminal Rule 49(b)(3) provides:

> (3) Means Used by Represented and Unrepresented Parties.
>
> (A) Represented Party. A party represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

> **(B) Unrepresented Party. A party not represented by an attorney must file nonelectronically, unless allowed to file electronically by court order or local rule.**

(Emphasis added.) The 2018 Committee Note to Criminal Rule 49(b)(3)(B) explains:

> Subsection (b)(3)(B) requires unrepresented parties to file nonelectronically, unless allowed to file electronically by court order or local rule. This language differs from that of the amended Civil Rule, which provides that an unrepresented party may be "required" to file electronically by a court order or local rule that allows reasonable exceptions. A different approach to electronic filing by unrepresented parties is needed in criminal cases, where electronic filing by pro se prisoners presents significant challenges. Pro se parties filing papers under the criminal rules generally lack the means to e-file or receive electronic confirmations, yet must be provided access to the courts under the Constitution.

2. Service

The Appellate, Bankruptcy, Civil, and Criminal Rules require that litigants serve their filings[4] on all other parties to the litigation. But because notice through CM/ECF constitutes a method of service, the rules effectively exempt CM/ECF filers from separately serving their papers on persons that are registered users of CM/ECF. By contrast, the rules can be read to require non-CM/ECF filers to serve their papers on all other parties, even persons that are CM/ECF users.

A review of Civil Rule 5 illustrates the general approach.[5] Civil Rule 5(a)(1) sets the general requirement that litigation papers "must be served on every party."[6] Civil Rule 5(b)(2)(E) provides that one way to serve a paper is by "sending it to a registered user by filing it with the court's electronic-filing system."[7] Civil Rule 5(d)(1)(B) requires a certificate of service for every filing, except that "[n]o certificate of service is required when a paper is served by

4 The rules provide separately for the service of case-initiating filings. See, e.g., Civil Rule 4 (addressing service of summons and complaint). The discussion here focuses on filings subsequent to the initiation of a case.

5 Bankruptcy Rule 7005 expressly applies Civil Rule 5 to adversary proceedings in a bankruptcy. The footnotes that follow cite provisions in Appellate Rule 25, Bankruptcy Rule 8011 (concerning appeals in bankruptcy cases), and Criminal Rule 49 that are similar to those in Civil Rule 5.

6 See also Appellate Rule 25(b) ("Unless a rule requires service by the clerk, a party must, at or before the time of filing a paper, serve a copy on the other parties to the appeal or review."); Bankruptcy Rule 8011(b) ("Unless a rule requires service by the clerk, a party must, at or before the time of the filing of a document, serve it on the other parties to the appeal."); Criminal Rule 49(a)(1) ("Each of the following must be served on every party: any written motion (other than one to be heard ex parte), written notice, designation of the record on appeal, or similar paper.").

7 See also Appellate Rule 25(c)(2)(A); Criminal Rule 49(a)(3)(A).

filing it with the court's electronic-filing system."[8]

In a case where all parties are represented by counsel,[9] these provisions combine to exempt the litigants from any requirement that they separately serve other litigants; their filings via CM/ECF automatically effect service on all parties. In a case that involves one or more self-represented litigants, however, the situation is more complicated. Service on a self-represented litigant can only be made via CM/ECF if the self-represented litigant is a registered user of CM/ECF – which, as noted in Part I.A.1, occurs only if the litigant receives permission (to use CM/ECF) by court order or local rule.

As for service by a self-represented litigant on a registered user of CM/ECF, one might argue – as a policy matter – that separate service is just as unnecessary as it is when the filer is a registered user of CM/ECF. Because clerk's offices routinely scan paper filings and upload them into CM/ECF, registered users will receive a CM/ECF-generated notice of electronic filing each time a paper filing is uploaded into CM/ECF in one of their cases. However, a number of courts appear to interpret the current rules to require that a person filing by means other than CM/ECF must separately serve the filing, even when the recipient of the filing is a registered user of CM/ECF.[10]

It should be noted that, in its research, the FJC found at least one clerk's office that took a different view of Civil Rule 5(b)(2)(E). Under this office's interpretation, Civil Rule 5(b)(2)(E) exempts paper filers from serving registered users of CM/ECF. The argument is that when a filer submits a filing to the court by a means other than CM/ECF and the court staff then dockets the filing in CM/ECF, the filer has "sen[t the filing] to a registered user by filing it with the court's electronic-filing system" because the filing is eventually uploaded (by the clerk's office) into the court's electronic-filing system. A counter-argument,[11] though, might be that such an argument proves too much: All filings, no matter how submitted, are eventually uploaded into the CM/ECF system, and thus if that interpretation were correct, the drafters of Rule 5(b)(2)(E) could have

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8 See also Appellate Rule 25(d)(1); Criminal Rule 49(b)(1).

9 Civil Rule 5(b)(1) presumptively requires that service on a represented party "must be made on the attorney." See also Appellate Rule 25(b); Criminal Rule 49(a)(2). And Civil Rule 5(d)(3)(A)'s presumptive requirement that "[a] person represented by an attorney must file electronically" guarantees, in practice, that any attorney appearing as counsel of record will be a registered user of CM/ECF. See also Appellate Rule 25(a)(2)(B)(i); Criminal Rule 49(b)(3)(A).

10 See, e.g., Pro Se Handbook for Civil Suits, U.S. District Court, Northern District of Texas, § 6 ("If you and the opposing side are both ECF users, the ECF system will complete the service for you, and a Certificate of Service is not required. If either of you is not an ECF user, or if you learn that service sent through ECF did not reach the person, you must serve the document by other means …."), available at https://www.txnd.uscourts.gov/sites/default/files/documents/handbook.pdf; Electronic Submission For Pro Se Filers, U.S. District Court, Western District of Texas ("Service of pleadings filed in the drop box must be performed by the filing party."), available at https://www.txwd.uscourts.gov/filing-without-an-attorney/electronic-filing-for-pro-se/ .

11 Other possible counter-arguments exist. For example, some rules expressly distinguish between "service by the clerk" and service by "a party." See Appellate Rule 25(b); Bankruptcy Rule 8011(b).

saved eight or nine words by deleting "with the court's electronic-filing system" and instead saying simply, "sending the filing to a registered user by filing it."

B. Current proposals

Pending before the advisory committees are a number of proposals to amend one or more of the electronic filing rules so as to adopt a national rule permitting pro se litigants to file electronically. I will highlight in this section the two most detailed proposals.[12] Sai proposes adoption of nationwide presumptive permission for pro se litigants to file electronically.[13] John Hawkinson, by contrast, proposes that if the requirement of permission by court order or local rule is retained, then the national rules[14] could be amended to address the standard for granting permission.

Sai initially submitted Sai's proposal as a response to the package that became the 2018 electronic filing amendments. Sai has re-submitted the proposal, which includes the following elements:[15]

> 1. Remove the presumptive prohibition on pro se use of CM/ECF, and instead grant presumptive access. This includes CM/ECF access for case initiation filings.
>
> 2. Treat pro se status as a rebuttably presumed good cause for nonelectronic filing.
>
> > a. For pro se prisoners, this is treated as an irrebutable presumption, in the spirit of the FRCrP Committee's notes and for conformity across all the rules.
>
> 3. Require courts to allow pro se CM/ECF access on par with attorney filers, prohibiting any restriction merely for being pro se or a non-attorney, and prohibiting registration fees.
>
> 4. Permit *individualized* prohibitions on CM/ECF access for good cause, e.g. for vexatious litigants, and (in the notes) construe pre-enactment vexatious designation as such a prohibition.

John Hawkinson proposes that Civil Rule 5 be amended to address local court bans on pro se electronic filing, and perhaps to address the standard for granting leave to file

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12 Other suggestions also support a national rule allowing pro se electronic filing and offer policy reasons to adopt such a rule. See, e.g., infra note 40 (citing one such suggestion).
13 I focus here on Sai's suggestion No. 21-CV-J, submitted to the Civil Rules Committee.
14 Mr. Hawkinson's suggestion focuses on Civil Rule 5. See Suggestion No. 20-CV-EE.
15 This is an excerpt from Sai's 2017 proposal.

electronically:

> I recently became aware that some districts by standing order unconditionally bar non-attorney pro se litigants from even seeking electronic filing privileges and routinely deny their motions, a sharp contrast from the prevailing practice nationwide. N.D. Ga. Standing Order 19-01 ¶5; LR App.H I(A)(2), III(A). See Perdum v. Wells Fargo Home Mortg., No. 17-cv-972-SCJ-JCF, ECF No. 61 (N.D. Ga., April 12, 2018) (collecting cases). See also Oliver v. Cnty. of Chatham, 2017 U.S. Dist. LEXIS 90362, No. 4:17-cv-101-WTM-BKE (S.D. Ga., June 13, 2017).
>
> The Committee might recommend language in Rule 5 discouraging such blanket bans, and perhaps even that leave should be freely given (such courts have found a "good cause" standard is not met, although it is unclear why. Oliver at *1). It seems an easier lift than removing the motion requirement, and goes to administrative fairness.

II. Possible discussion topics

This section sketches some topics that the advisory committees might consider at their fall meetings. In II.A, I outline some issues about electronic filing, and in II.B, I sketch questions about service.

A. Electronic filing

On the topic of electronic filing, there are questions both about access to the CM/ECF system and about other electronic methods for submitting filings to the court. There are also questions about whether the best way forward is through rule amendments or whether other measures could increase self-represented litigants' electronic access.

Shifting the rules' default position. As noted in Part I.A.1, the current rules permit, but do not require, the courts to provide self-represented litigants with access to CM/ECF. A court can provide such access either by local rule or by order in a case. Should the rules be amended to provide the opposite default rule – namely, that self-represented litigants may[16] use CM/ECF unless the court otherwise provides (by local rule or order in a case)? In assessing this question, it seems important to consider the current practices in the various types of court. Qualitatively, the FJC study reports that "[m]any courts are leery of letting pro se litigants use CM/ECF, but those that have done so reported fewer problems than expected."[17]

16 None of the pending proposals suggests that self-represented litigants should be *required* to use CM/ECF.

17 FJC Study, supra note 2, at 7.

Quantitatively, the study found that, among the courts of appeals, five circuits[18] presumptively permit CM/ECF access for non-incarcerated self-represented litigants,[19] seven circuits allow it with permission in an individual case, and one circuit has a rule against such access (but has made exceptions in some instances).[20] The FJC Study used two techniques to ascertain what district courts are doing on this question: Researchers (in a separate 2019-2022 study) reviewed the local rules for all 94 districts,[21] and researchers in the FJC Study conducted interviews with personnel in 39 district clerks' offices.[22] The researchers report that, based on the local rules, at least[23] 9.6% of districts "permit nonprisoner pro se litigants to register as CM/ECF users without advance permission" (in existing cases, though typically not to file complaints);[24] 55% of districts "state that nonprisoner pro se litigants are permitted to use CM/ECF to file in their existing cases with individual permission"; 15% state "that pro se litigants may not use CM/ECF"; and 19% fail to "specify one way or the other whether pro se litigants can use CM/ECF."[25] Further along the spectrum, the study found that it is "very unusual for pro se debtors to receive CM/ECF" access in the bankruptcy courts.[26]

A proposed rule amendment that flatly required courts to provide self-represented litigants with access to CM/ECF would confront opposition from stakeholders, given that most courts do not offer blanket permission for CM/ECF use by self-represented litigants and some courts bar such use altogether. A proposal to shift the presumption (that is, to presumptively permit rather than to presumptively disallow CM/ECF access for self-represented litigants)

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18 The five-circuit figure excludes the Ninth Circuit, see FJC Study at 7 nn. 3 & 4. But the FJC Study reports, based on its interview(s) with court staff, that "[i]n fact, the [Ninth Circuit] encourages pro se use of CM/ECF." FJC Study at 13; see also Ninth Circuit Rule 25-5(a).

19 In the interests of simplicity, this discussion of e-filing access focuses on non-incarcerated self-represented litigants. Access policies for incarcerated self-represented litigants present distinct issues.

20 See FJC Study, supra note 2, at 6-7.

21 See id. at 4.

22 See id.

23 Given the timing of the FJC's local-rules study, it may not fully capture courts' adoption of more permissive practices specifically during COVID. For instance, "[e]ffective May 1, 2020, and until further notice," the Northern District of California granted blanket permission for self-represented litigants to register for CM/ECF in existing cases. See https://cand.uscourts.gov/cases-e-filing/cm-ecf/setting-up-my-account/e-filing-self-registration-instructions-for-pro-se-litigants/ . This district is not listed as one that has a local rule granting blanket permission. See FJC Study at 7 n.7.

24 The districts with local provisions providing blanket permission include three that have a large volume of cases involving pro se litigants (the Northern District of Texas, the Northern District of California, see supra note 23, and the Northern District of Illinois) as well as districts with a more moderate volume of such cases (the Western District of Washington, the Western District of Missouri, the District of Kansas, and the Southern District of Illinois) and districts with a smaller volume of such cases (the Western District of Wisconsin, the District of Nebraska, and the District of Vermont). See https://www.uscourts.gov/news/2021/02/11/just-facts-trends-pro-se-civil-litigation-2000-2019#figures_map (showing volume of pro se civil cases filed 2000-2019, by district).

25 FJC Study at 7.

26 Id. at 8.

would allow courts to continue their current practices. Under such a shifted presumption, a court wishing to limit or disallow CM/ECF access for self-represented litigants would have to do so by local rule or court order; this would impose on courts the costs of taking such action, but it might also nudge some courts to reconsider their current reluctance to permit such access.

However, participants in the working group discussions have asked whether it would make sense to adopt a default rule that is out of step with the practices of most courts. If not, that might raise the possibility that the case for switching the default rule is stronger with respect to the courts of appeals, where the practice has already moved farthest in the direction of presumptive access to CM/ECF.[27] On the other hand, the fact that the courts of appeals are already moving to increase access without being required to do so by the national rules might be taken, instead, as a reason that a national rule change is not necessary.

Proscribing outright bans. The FJC study found a number of district courts[28] – and, at least nominally, one court of appeals[29] – that do not permit any self-represented litigants to access CM/ECF. As noted in Part I.A, the current rules permit outright bans, in the sense that the rules permit, but do not require, the courts to grant access by local rule or by order in a case. Mr. Hawkinson proposes that the rules be revised to "discourag[e] such blanket bans, and perhaps even [to provide] that leave should be freely given."[30]

Treating case-initiating filings differently. A number of courts are more restrictive with respect to case-initiating filings. The FJC Study notes courts that permit self-represented litigants access to CM/ECF but only for filings after case initiation,[31] as well as a few districts that are similarly restrictive even as to attorneys' filings.[32] Thus, although one proponent of increased CM/ECF access argues that case-initiating access is important,[33] it seems likely that increasing

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27 Participants have suggested that the appellate courts' relative willingness to provide CM/ECF access to self-represented litigants may be connected to the relative simplicity of the dockets on appeal (compared with the dockets in the district courts and bankruptcy courts).

28 The FJC Study observes that "[t]he rules for fourteen district courts state that pro se litigants may not use CM/ECF." Id. at 7. In addition to the 14 districts noted in that passage, the study found three other districts that appear to take the same position. See id. at 16 (noting that despite local provisions nominally permitting access by permission, "[i]n fact, pro se litigants are never granted CM/ECF filing privileges" in the District of Idaho); id. at 27 (reporting that in the Southern District of Georgia, "[p]ro se litigants may not file using CM/ECF"); id. at 43 (reporting that in the District of Utah, "[p]ro se parties may not use CM/ECF.").

29 "The electronic filing guide for [the Sixth Circuit] states that the court does not permit pro se litigants to use CM/ECF, … but some pro se litigants have been granted electronic filing privileges as exceptions to the rule." FJC Study at 7. See id. at 12 ("Pro se litigants have occasionally been granted individual exceptions to this proscription. The court is exploring more expansive permission for pro se electronic filing.").

30 See Hawkinson suggestion, supra note 14.

31 See, e.g., FJC Study at 7 ("Pro se plaintiffs seldom can use CM/ECF to file their complaints.").

32 See id. at 23-24 (discussing Western District of Arkansas); id. at 43 (discussing District of Utah).

33 See Sai's proposal, supra note 13, at 24 (arguing that inability to initiate a case via electronic filing

CM/ECF access for case-initiating filings could meet with particular resistance. A prime concern, here, is the difficulty that can ensue if a person uses CM/ECF to mistakenly create a new record with a new case number.[34] However, as a matter of court practice, an intermediate possibility may exist: a number of courts permit attorneys to file complaints via CM/ECF without opening a new case file; the filing goes into a shell case, and the clerk's office then (if appropriate) opens the new case file and transfers the filing into it.[35]

Treating incarcerated self-represented litigants differently. It is not uncommon for local provisions on self-represented filing to distinguish between incarcerated and non-incarcerated self-represented litigants. As the FJC Study found:

> Prisoners cannot use CM/ECF, because they do not have sufficient access to the internet. Some courts have arrangements with some prisons, generally state rather than federal prisons, for electronic submission of prisoner filings. In some arrangements, electronic submission is mandatory and prisoners are not permitted to file on paper.
>
> Typically, a prisoner presents a filing to the prison librarian, who scans it and emails it to the court. Some prisons accept electronic notices on behalf of the prisoners, and then convert them to paper documents. Many prisons do not, so prisoners must be served with other parties' filings and court filings by regular mail.[36]

In considering possible rule changes, it will be important to consider how to take account of the specific issues arising in carceral settings.[37]

Encouraging alternative means of electronic access. One topic of discussion is whether courts could provide self-represented litigants with benefits akin to those of CM/ECF through electronic-submission avenues that do not carry CM/ECF's projected disadvantages.[38] The FJC

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could impede a litigant's ability to timely file a case or to obtain time sensitive interim relief).

34 See FJC Study at 6.

35 See id.

36 Id. at 8.

37 Among the potential complicating factors for incarcerated litigants' access to courts is the fact that they may be moved among different facilities during the pendency of a case. And even if a particular institution provides an opportunity to *file* documents electronically, it may not similarly facilitate receiving and retrieving notices and documents electronically.

38 During prior discussions of CM/ECF access for self-represented litigants, participants cited – as possible downsides of such access – litigants' lack of competence to use CM/ECF; the burden on clerk's offices of training litigants to use CM/ECF and of addressing filing errors; inappropriate filings; inappropriate docketing practices (wrong event or wrong case) and sharing of credentials. See, e.g., Minutes of April 2017 Meeting of Bankruptcy Rules Committee; Minutes of April 2016 Meeting of Civil Rules Committee; Minutes of April 2015 Meeting of Civil Rules Committee; Minutes of March 2015 Criminal Rules Committee Meeting. Compare FJC Study at 7 (stating that courts that have allowed self-

Study observes that "[s]ome courts … accept submissions by email" and "[a] few accept submissions by electronic drop box, a web portal that allows a user to upload a PDF," but that "[m]any to most courts do not accept such electronic submissions."[39]

An avenue for electronic submission of filings to the court would offer self-represented litigants a number of the advantages offered by CM/ECF access. Litigants would avoid the costs and logistical challenges[40] of printing and mailing the papers filed with the court, and their filings would reach the court more quickly than if they were filed by mail. Advantages would also accrue to court personnel who would spend less time scanning paper filings. And court personnel and litigants who have visual impairments could benefit because files submitted electronically may be more likely to be accessible to those with visual impairments than files created by scanning paper filings.[41]

A perhaps unsettled question is whether an alternative electronic-submission system would automatically offer self-represented litigants the benefit of a later filing deadline. Under the time-computation rules, those using "electronic filing" presumptively may file up to midnight in the court's time zone, whereas those using "other means" of filing must file before the scheduled closing of the clerk's office.[42] If submission via email to a court-provided email address or via upload to a court's electronic drop box were regarded as "electronic filing," then the users of such systems could benefit from that extended filing time. However, it is not entirely certain that all courts would take this view; accordingly, it seems useful for a court adopting such a submission system to clarify by local rule the time-of-day deadline for such electronic submissions.[43]

It should be noted that provision of an alternative method for electronic *submission to the court* will not by itself offer self-represented litigants all of the advantages of CM/ECF participation. Two of those advantages merit separate discussion: electronic noticing, and avoiding the need for separate service on registered CM/ECF users. The CM/ECF system automatically provides registered users with electronic notice (and a free download) of any filings in their cases. A number of courts separately provide self-represented litigants who are

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represented litigants to use CM/ECF "reported fewer problems than expected").

39 FJC Study at 9.

40 Logistical challenges include those faced by filers outside the country, those with a disability, and those who have health concerns about visiting public spaces during the pandemic. See Sai's proposal, supra note 13, at 27; comment of Dr. Usha Jain, Nos. 20-AP-C & 20-CV-J.

41 See infra note 47.

42 See Bankruptcy Rule 9006(a)(4); Civil Rule 6(a)(4); Criminal Rule 45(a)(4). Appellate Rule 26(a)(4) includes a few more tailored approaches for particular filing scenarios, but adopts the same basic idea that electronic filers get the latest deadline – midnight in the relevant time zone.

This feature of the time-computation rules is currently under study. See generally Tim Reagan et al., Electronic Filing Times in Federal Courts (FJC 2022), available at https://www.fjc.gov/content/365889/electronic-filing-times-federal-courts .

43 The time-computation rules permit courts to specify a different time of day via local rule or order in a case. See the rules cited supra note 42.

not users of CM/ECF with the opportunity to register to receive electronic notice of filings in their case.[44] Such an electronic-notice mechanism seems to be an important component of a program to provide self-represented litigants with access equivalent to that furnished by CM/ECF – both because it provides an avenue for notice that may be more timely and effective than service by mail[45] and because the notice recipient receives an opportunity to download an electronic copy of the relevant filing.[46] Among other advantages, such an electronic copy may increase accessibility for readers with visual disabilities, because this electronic copy will likely be more amenable to use by text-to-speech programs than a copy made by scanning a paper received in the mail.[47] On the other hand, it makes sense that the courts providing an electronic-noticing program typically make it optional, not mandatory – because some self-represented litigants could not navigate the electronic-notice-and-download tasks and, for those litigants, hard copies sent by mail are the better option.

As noted in Part I.A.2, because notice through CM/ECF constitutes a method of service, the rules effectively exempt CM/ECF filers from separately serving their papers on persons that are registered users of CM/ECF. To qualify for this exemption the litigant must "send[the paper] to a registered user by filing it with the court's electronic-filing system." For the reasons noted in Part I.A.2, a court might conclude that submission via an alternative means of electronic access (email or upload to a court portal) does not fit within this description. In that view, electronic submission to the court outside of CM/ECF might not exempt a self-represented litigant from the duty to separately serve all other parties (even those that are registered users of CM/ECF). This issue could be addressed by adopting a local rule exempting non-CM/ECF users from separately serving registered CM/ECF users,[48] or by revising the national rules concerning service. I turn to the latter possibility in Part II.B.

Non-rule-based avenues for change. A recurring question during the working group's discussions has been whether the rules themselves are an impediment to increasing access for

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44 See FJC Study at 11. See also, e.g., U.S. District Court, S.D.N.Y., Pro Se (Nonprisoner) Consent & Registration Form to Receive Documents Electronically, available at https://www.nysd.uscourts.gov/sites/default/files/pdf/proseconsentecfnotice-final.pdf .

45 Sai has pointed out that the ability to receive electronic notice of filings is particularly important for litigants who are traveling or who have a disability. See Sai's proposal, supra note 13, at 24-25.

46 See FJC Study at 11 ("CM/ECF electronic notice gives an attorney or a pro se litigant one free look at the filing. If the recipient of the notice does not print or download the document during the one free look, then the recipient will have to pay Pacer fees to look at it again.").

47 As Sai points out, a text-to-speech program cannot read a scanned PDF unless the scanned PDF is first processed using optical character recognition ("OCR") technology; and the resulting OCR-processed file may contain errors that would not be present in the same document if it were in native PDF format. See Sai's proposal, supra note 13, at 28.

48 Local rules, of course, must be "consistent with" the national rules. Civil Rule 83(a)(1); see also Appellate Rule 47(a)(1); Bankruptcy Rule 9029(a)(1); Criminal Rule 57(a)(1). For the reasons discussed in Part I.A.2, perhaps the national service rules might be viewed as ambiguous on the question of what counts as "sending … to a registered user by filing … with the court's electronic-filing system." If so, then a local rule could be viewed as clarifying that ambiguity.

self-represented litigants. With the possible exception of the service issue (discussed in Part II.B), the access issues noted in this memo could be addressed by a court entirely through local provisions, consistent with the current national Rules. A court could offer self-represented litigants access to CM/ECF. Or it could offer self-represented litigants a non-CM/ECF option to email or upload documents plus an option to register to receive electronic notices of others' filings in the case. While the current rules do not nudge the courts in this direction, neither do they impede a court from pursuing this direction if it wishes to do so.

Thus, some participants have asked whether the proposals to increase electronic-filing access are best addressed by measures other than a rule amendment. A helpful approach might be to provide resources and training that could address underlying reasons for reluctance to expand electronic access for self-represented litigants. Resources might include, for example, training modules that could be provided to self-represented litigants on the use of CM/ECF, and anti-malware technology that could be provided to courts to screen electronic files submitted via email or upload. Such matters lie outside the province of the rules committees, but it could be useful for the rules committees to consider making a recommendation that other federal-judiciary actors study these matters – for example, the Judicial Conference Committee on Court Administration and Case Management and perhaps the Judicial Conference Committee on Information Technology, in coordination with any existing working group that is addressing issues facing self-represented litigants.

The need for broad consultation. The public suggestions proposing greater access for self-represented litigants have raised important points about the experience of those who represent themselves in federal court. Further insights on the experience of pro se litigants might be gained by consulting lawyers with experience assisting pro se litigants in federal court.[49] It is likewise important to gain perspective from clerks' office personnel. The interviews conducted by the FJC provide a head start on that task; as proposals are developed, it could also be useful to solicit views from organizations such as the National Conference of Bankruptcy Clerks, the Federal Court Clerks Association, the Administrative Office's Bankruptcy and District Clerk Advisory Groups, and the circuit clerks.

B. Service on registered CM/ECF users

Part I.A.2 observed that because notice through CM/ECF constitutes a method of service, the rules effectively exempt CM/ECF filers from separately serving their papers on persons that are registered users of CM/ECF. By contrast, the rules can be read to require non-CM/ECF filers to serve their papers on all other parties, even persons that are CM/ECF users. It would be useful for the advisory committees to consider whether this difference in treatment is desirable.

Requiring self-represented litigants to make separate service on registered CM/ECF users may impose an unnecessary task. Each filing a self-represented litigant makes by a means other

49 A potential resource, in this regard, is the Federal Courts working group of the Self-Represented Litigation Network, see https://www.srln.org/taxonomy/term/677.

than CM/ECF will eventually be uploaded by the clerk's office into CM/ECF, and at that point all registered CM/ECF users in the case will receive a notice of electronic filing and an opportunity to download the document. As a practical matter, though there may be a lag between the submission of the document and the time when the court clerk uploads it into CM/ECF, it seems plausible to surmise that the document will ordinarily become available to the judge no sooner than it becomes available to registered users via the notice of electronic filing.

The hardship imposed by that additional task (serving registered CM/ECF users) will depend on the circumstances of the case and the litigant. For some litigants, effecting separate service might not be onerous; this would be true if the self-represented litigant is thoroughly conversant with email and has been able to obtain all other litigants' consent to email service. But for self-represented litigants who lack reliable access[50] to or proficiency with email – or who have not been able to obtain their opponent's consent to email service – the separate-service requirement means making additional hard copies of the paper in question and delivering them by non-electronic means. And regardless of the alternate service method (email or paper), the rules require a certificate of service, which is an additional technical requirement that might trip up a self-represented litigant.

Presumably for these reasons, some courts have adopted local provisions eliminating the requirement of separate service on registered users of CM/ECF.[51] A question for the advisory committees is whether it would be useful to amend the national rules to adopt that approach. Such an amendment would provide a national imprimatur for the existing local rules, and would also change the practice in districts that currently require separate service even on registered CM/ECF users. Because some districts have already adopted this practice, there is a reservoir of experience on which the committees could draw in determining whether the practice has any downsides.[52]

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50 For instance, many incarcerated litigants likely lack reliable access to email.

51 See, e.g., D. Ariz. E.C.F. Admin. Policies & Procedures Manual II.D.3 ("A non-registered filing party who files document(s) with the Clerk's Office for scanning and entry to ECF must serve paper copies on all non-registered parties to the case. There will be some delay in the scanning, electronic filing and subsequent electronic noticing to registered users. If time is an issue, non-registered filers should consider paper service of the document(s) to all parties."); S.D.N.Y. Electronic Case Filing Rule 9.2 ("Attorneys and pro se parties who are not Filing or Receiving Users must be served with a paper copy of any electronically filed pleading or other document. Service of such paper copy must be made according to the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure and the Local Rules. Such paper service must be documented by electronically filing proof of service. Where the Clerk scans and electronically files pleadings and documents on behalf of a pro se party, the associated NEF constitutes service.").

52 Personnel in those courts could tell us, for example, how non-CM/ECF users discern which other litigants are and are not registered CM/ECF users. Litigants who file via CM/ECF receive a system-generated notice of electronic filing that says who is being automatically served and who is not. Paper filers will not receive the notice of electronic filing (unless, perhaps, they are registered for electronic noticing). Such filers might instead draw inferences from a party's status as counseled or self-represented, or from the contact information listed on the docket sheet; or they might ask the clerk's office.

If the advisory committees are inclined to consider such amendments, questions about implementation arise. For example, should the exemption extend only to service on registered CM/ECF users, or should it also encompass service on non-CM/ECF users who have registered with the court to receive notices of electronic filing in the case? And, of course, there are drafting questions. As to the latter, I sketch below – purely for purposes of illustration – one possible way to accomplish this type of amendment; but there may well be better ways to implement the idea. The sketch below illustrates a possible amendment to Civil Rule 5:

Rule 5. Serving and Filing Pleadings and Other Papers

* * *

(b) Service: How Made.

(1) Serving an Attorney. If a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party.

(2) Service <u>on non-users of electronic-filing [and electronic-noticing] system[s]</u> ~~in General~~. A paper is served under this rule <u>on [one who has not registered for the court's electronic-filing system] [one who has not registered for either the court's electronic-filing system or a court-provided electronic-noticing system]</u> by:

(A) handing it to the person;

(B) leaving it:

(i) at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or

(ii) if the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there;

(C) mailing it to the person's last known address--in which event service is complete upon mailing;

(D) leaving it with the court clerk if the person has no known address;

(E) ~~sending it to a registered user by filing it with the court's electronic-filing system or~~ sending it by ~~other~~ electronic means that the person consented to in writing--in ~~either of~~ which event~~s~~ service is complete upon ~~filing or~~ sending, but is not effective if the filer or sender learns that it did not reach the person to be served; or

(F) delivering it by any other means that the person consented to in writing--in which event service is complete when the person making service delivers it to the agency designated to make delivery.

(3) ~~Using Court Facilities. [Abrogated (Apr. 26, 2018, eff. Dec. 1, 2018.)]~~ **Service on users of the court's electronic-filing [or electronic-noticing] system**. A paper is served under this rule on a registered user of [either] the court's electronic-filing system [or a court-provided electronic-noticing system] by filing it, in which event service is complete upon filing, but is not effective if the filer learns that it did not reach the person to be served.

* * *

(d) Filing.

(1) Required Filings; Certificate of Service.

* * *

(B) Certificate of Service. No certificate of service is required when a paper is served ~~by filing it with the court's electronic-filing system~~ under subdivision (b)(3). When a paper that is required to be served is served by other means:

(i) if the paper is filed, a certificate of service must be filed with it or within a reasonable time after service; and

(ii) if the paper is not filed, a certificate of service need not be filed unless filing is required by court order or by local rule.

* * *

III. Conclusion

The FJC Study has given the advisory committees an invaluable factual basis on which to consider whether amendments to the national rules might usefully address questions of electronic filing, and questions of service, by self-represented litigants. As noted in Part II, an additional question is whether the rulemaking committees might recommend that other groups within the federal judiciary consider fostering increased access through means other than rule amendments. I look forward to learning from the advisory committees' discussion of those possibilities.

TAB 6C

Federal Courts'

Electronic Filing by Pro Se Litigants

Federal Judicial Center
2022

This Federal Judicial Center publication was undertaken in furtherance of the Center's statutory mission to conduct and stimulate research and development for the improvement of judicial administration. While the Center regards the content as responsible and valuable, this publication does not reflect policy or recommendations of the Board of the Federal Judicial Center.

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FEDERAL COURTS' ELECTRONIC FILING BY PRO SE LITIGANTS

Tim Reagan, Carly Giffin, and Roy Germano
Federal Judicial Center 2022

We learned from several dozen federal clerks of court and members of their staffs that pro se litigants[1] are sometimes able to file electronically using the federal courts' Case Management/Electronic Case Files (CM/ECF) system, but many courts are hesitant to allow pro se filing in CM/ECF. Prisoners have limited access to the internet at most, so it is seldom feasible for them to use CM/ECF.

Many courts accept filings from pro se litigants, including prisoners, by electronic submission: email, PDF upload, or online form. Like paper submissions, the electronic submissions are docketed as electronic filings by the court's staff. Concerns about malware and cost are among the reasons that courts have not embraced more extensively electronic submission alternatives to CM/ECF.

We conducted this research at the request of the federal rules committees' working group on pro se electronic filing. The most salient rules-related lessons of this research are (1) perhaps paper filers should not be required to serve their filings on parties already receiving electronic service; and (2) because electronic filing is sometimes understood to mean filing using CM/ECF and sometimes understood to mean submitting filings electronically, such as by email, perhaps the rules should clarify their references to electronic filing.

Contents

1. We use the expression "pro se," but we recognize the growing trend to use less jargony expressions, such as "self represented," "unrepresented," "not represented," "uncounseled," "lawyerless," "without an attorney," and "without counsel." The legal community has not yet settled on a preferred alternative to "pro se," and we have declined to weigh in.

Method

Important Distinctions

We kept four distinctions in mind:

1. *Case Initiation.* There is a big difference between using CM/ECF to file in an existing case and using CM/ECF to initiate a case. The former is much more available to pro se litigants than the latter.
2. *Electronic Submission.* There is a difference between electronically submitting something to the court—by email, electronic drop box, or preparation software—and actually using CM/ECF to file it. Submissions are converted into filings by the court's staff after a quality control review.
3. *Prisoners.* Prisoners do not have unrestricted access to the internet, so their ability even to submit things electronically depends upon procedures developed by the prisons.
4. *Case Types.* Appeals, civil cases, criminal cases, and bankruptcy cases present different pro se electronic filing challenges and opportunities.

Interview Questions

There are 190 clerks of court. This includes one for each of the ninety-four district courts and the thirteen courts of appeals. There are only ninety bankruptcy courts, because there is one bankruptcy court for both districts in Arkansas and three territorial districts have bankruptcy divisions, not separate bankruptcy courts. There seven districts with district court clerks who also oversee the districts' bankruptcy courts. We contacted seventy-nine clerks of court, and all but one agreed to participate in this study. We found a loosely structured interview to be an effective method. We spoke with the clerks or other knowledgeable members of their staffs.

Following are the topics that we discussed.

1. *Permitted.* Are pro se litigants permitted to file electronically?
2. *Prisoners.* Are prisoners ever able to submit filings electronically?
3. *Other Filers.* In bankruptcy cases, to what extent can parties appearing without attorneys, such as pro se creditors, use CM/ECF?
4. *Procedures.* What are the procedures that pro se litigants follow to become electronic filers?
5. *Initiating Cases.* Can pro se litigants initiate cases electronically? In some courts, even attorneys do not open cases in CM/ECF directly; they may submit initial documents to the court electronically, but it is the court that actually opens the case and assigns it a case number.

6. *Criminal Cases.* Are criminal cases opened electronically by the U.S. Attorney's office, or are they opened with the submission of a paper indictment or other charging document? Are criminal defendants ever able to file electronically? Few criminal defendants are pro se, they are typically detained, and they usually have assigned stand-by counsel who help them with filing and service.
7. *Service.* Are paper filers required to provide paper service to parties who are receiving electronic service? Paper filings are docketed electronically by the court, so electronic service on other parties occurs as a matter of course. But some courts require separate service.
8. *Email and Fax.* Does the court ever accept filings by email, fax, or electronic drop box?
9. *Signatures.* When the court receives electronic submissions, as by email or fax, what are the court's requirements for signatures?
10. *Drop Box.* Does the court have a physical drop box? Where is it located? When is it available? Physical drop boxes often were removed when the court began using electronic filing, and they often came back because of the COVID-19 pandemic.
11. *Time Stamp.* How do things submitted to a drop box get a time stamp?

Court Selection

From December 2021 through March 2022, we interviewed clerks' offices for five of the thirteen courts of appeals, thirty-nine of the ninety-four district courts, and forty of the ninety-three bankruptcy courts and divisions.

From 2019 through 2022, we studied filing times of day for another project.[2] From a review of court rules for the filing-time project, we were able to classify courts into those that (1) generally permit the use of CM/ECF by pro se litigants, (2) permit pro se use of CM/ECF with permission, (3) forbid pro se use of CM/ECF, and (4) do not clearly state one way or the other whether pro se litigants can seek permission to use CM/ECF.

Among the courts of appeals, five generally permit pro se use of CM/ECF, seven permit it with permission, and one forbids it. We selected one court at random from each group, and we also interviewed the courts of appeals for two unusual circuits: the Ninth, because of its unusual size and complexity, and the Federal, because of its unusual jurisdiction.

There are ten districts that do not have separate bankruptcy clerks of court, including the three territorial courts without separate bankruptcy courts. We interviewed the clerks' offices for four selected at random. In addition, we interviewed the clerks' offices for the two other districts that explicitly authorize pro se use of CM/ECF in the district court, one generally (the District of Vermont) and one with permission (the District of Columbia).

2. Tim Reagan, Carly Giffin, Jessica Snowden, George Cort, Jana Laks, Roy Germano, Marie Leary, Saroja Koneru, Jasmine Elmasry, Nafeesah Attah, Rachel Palmer, Annmarie Khairalla, and Danielle Rich, Electronic Filing Times in Federal Courts (Federal Judicial Center 2022), www.fjc.gov/content/365889/electronic-filing-times-federal-courts.

We interviewed thirty-three district courts where the same clerk does not oversee both district court and bankruptcy cases. We interviewed eighteen selected at random. We interviewed five additional district courts so that we would have interviewed all seven that generally permit nonprisoner pro se use of CM/ECF in civil cases, including one that requires pro se use of CM/ECF unless the judge grants an exception (the Northern District of Texas). We interviewed an additional district court that we initially but erroneously thought generally permitted nonprisoner pro se use of CM/ECF. We interviewed one additional district court so that we would have interviewed four of the fourteen that do not clearly state one way or the other whether pro se use of CM/ECF is permitted. We selected to interview at random two of the thirteen district courts that forbid pro se use of CM/ECF, but one court declined to participate. We interviewed another two with rules forbidding pro se use of CM/ECF, because in the filing-time project we observed pro se use of CM/ECF in 2018.

We interviewed the Eastern District of Washington, because its rules state that pro se electronic filing is possible for prisoners. It turns out to be electronic submission rather than use of CM/ECF. We interviewed the Southern District of Alabama, because its rules state that pro se use of CM/ECF can be ordered. The judges wanted this option, but they have never used it. We decided to interview the District of Arizona, because it is often regarded as a model court with respect to judicial policy initiatives. And we interviewed two district courts because their rules provide for a time-of-day deadline before midnight, a feature relevant to the filing-time project.

We interviewed thirty-four bankruptcy courts where the same clerk does not oversee both district court and bankruptcy cases. We interviewed twenty-one selected at random. We interviewed seven additional bankruptcy courts so that we would have interviewed all eight with rules stating that they permit pro se use of CM/ECF with permission. We interviewed one of the remaining six bankruptcy courts, out of eight total, with rules explicitly forbidding pro se use of CM/ECF.

We interviewed another five bankruptcy courts that use the "electronic self-representation" (eSR) module for electronic submission of bankruptcy petitions. These were not selected precisely at random, because we learned about some using eSR after we made the selections.

Observations

Electronic Filing by Attorneys

Electronic presentation to the court of a document to be included in the case file is faster than regular mail and faster than personal delivery, if the filer has the necessary electronic equipment. Electronic filing has been an option in federal courts for about two decades.

There has long been a distinction between submission of a document to the court and filing it. In the days of paper filing, if a document was obviously suitable for filing, a counter clerk would stamp copies "filed" and add the document to the appropriate case file. Otherwise, the counter clerk would stamp

copies something like "received," and the court would later determine whether it would be included in the case file. A document presented to the court but not immediately accepted for filing was frequently referred to as "lodged" with the court.

With CM/ECF, there is an important distinction between using CM/ECF to immediately add a document to a case file, true e-filing, and otherwise submitting a document to the court, which then perhaps uses CM/ECF to add the document to the case file. The court may do this with a document it receives electronically or with a document it receives on paper.

In most district courts, an attorney opens a civil case directly by filing a complaint in CM/ECF, thereby immediately creating a new case record with a new case number. Attorneys are sometimes interrupted, and they sometimes make mistakes. Failed attempts to create new cases used to result in skipped case numbers. Because skipped case numbers look like sealed cases, courts now typically reuse case numbers for cases that were never fully opened.

In some courts, attorneys may use CM/ECF to file complaints, but they do not create new cases that way. The complaint may be filed in a shell case, and then deputy clerks transfer the new filing to a new case record. A few courts still receive complaints on paper, even from attorneys who will use CM/ECF for later filings in existing cases.

Procedures for filing a bankruptcy petition are similar to procedures for filing a civil complaint.

Criminal cases are typically opened by paper indictment, information, or complaint, which deputy clerks file into new cases. Even if the court accepts filings for new criminal cases electronically, it is typically the court and not the U.S. attorney's office that opens the case in CM/ECF.

In the courts of appeals, it is always members of the court staff who open the cases. When a notice of appeal is filed in a district court, and the filing fee paid to the district court, the staff of the district court electronically transmits the most relevant parts of the record to the court of appeals, and the staff of the court of appeals opens a new case, assigning it a case number. Agency appeals and mandamus actions—original cases in the courts of appeals—can be opened using CM/ECF, but attorneys do not open the cases directly. Similar to how some district courts accept new complaints in shell cases, CM/ECF is used in the courts of appeals to submit an original action electronically, but it is court staff that actually make the new case's electronic record live with a case number.

Once a case is opened, attorneys generally are required to use CM/ECF to file.

Pro Se Filing in the Courts of Appeals

Filing in the courts of appeals is less complicated than filing in the district and bankruptcy courts. It is mostly briefs, with the occasional motion practice. The typical case has an appellant brief, an appellee brief, maybe a reply brief, and a decision. According to their local rules and administrative procedures, five

courts of appeals generally permit pro se litigants to register as CM/ECF users[3] and seven allow them to do so with individual permission.[4] The electronic filing guide for one court states that the court does not permit pro se litigants to use CM/ECF,[5] but some pro se litigants have been granted electronic filing privileges as exceptions to the rule.

Nonprisoner Civil Cases

Based on a review of all local rules,[6] the rules for somewhat more than half of the district courts state that nonprisoner pro se litigants are permitted to use CM/ECF to file in their existing cases with individual permission (55%). At least nine courts permit nonprisoner pro se litigants to register as CM/ECF users without advance permission (9.6%),[7] but they usually can file only in their existing cases. Pro se plaintiffs seldom can use CM/ECF to file their complaints. The rules for fourteen district courts state that pro se litigants may not use CM/ECF (15%).[8] The rules for the other district courts do not specify one way or the other whether pro se litigants can use CM/ECF (19%).

To use CM/ECF, the filer must have an email address and be able to create PDFs. Typically it is the presiding judge who considers pro se requests to use CM/ECF, which typically are presented by formal motion. In some courts, the approval decision is made by the clerk's office, and a less formal application is required. Courts generally avoid giving electronic filing privileges to vexatious litigants.

Many courts are leery of letting pro se litigants use CM/ECF, but those that have done so reported fewer problems than expected. Electronic filing saves court time that otherwise would be spent scanning documents.

Pro se litigants sometimes have mental health issues that might result in filings that depart from customary practice. Even without mental health issues, they sometimes make errors using CM/ECF. Attorneys make errors sometimes as well. But attorney errors are somewhat easier to correct than pro se

3. The courts of appeals for the First, Third, Eighth, Eleventh, and Federal Circuits.

4. The courts of appeals for the District of Columbia, Second, Fourth, Fifth, Seventh, Ninth, and Tenth Circuits.

5. The court of appeals for the Sixth Circuit.

6. A review for another project of all of the courts' local rules and all of the courts' office hours was conducted by Tim Reagan, Carly Giffin, Jessica Snowden, Saroja Koneru, Jasmine Elmasry, Nafeesah Attah, Rachel Palmer, Annmarie Khairalla, and Danielle Rich.

7. The district courts for the Northern District of Illinois, the Southern District of Illinois, the District of Kansas, the Western District of Missouri, the District of Nebraska, the Northern District of Texas (where nonprisoner pro se litigants are typically required to use CM/ECF), the District of Vermont, the Western District of Washington, and the Western District of Wisconsin.

8. The district courts for the Middle District of Alabama, the Northern District of Alabama, the District of Alaska, the Northern District of Georgia, the Northern District of Mississippi, the Southern District of Mississippi, the District of Montana, the District of New Jersey, the Eastern District of North Carolina, the Western District of North Carolina, the District of North Dakota, the Western District of Oklahoma, the Eastern District of Virginia, the District of Wyoming.

errors, because the court does not owe attorneys the same level of forgiveness that it owes pro se litigants. Also, because attorneys are familiar with the rules, their mistakes do not arise from substantial misunderstandings about procedures.

Courts that have transitioned to the Next Generation of CM/ECF (NextGen) do not give litigants CM/ECF filing privileges directly. A litigant first registers with Pacer (the federal courts' Public Access to Court Electronic Records). Then the court links the Pacer account to CM/ECF filing privileges in the court. Typically the court limits the filing privileges to the pro se litigants' existing cases.

Electronic Filing in Civil Cases by Prisoners

Prisoners cannot use CM/ECF, because they do not have sufficient access to the internet. Some courts have arrangements with some prisons, generally state rather than federal prisons, for electronic submission of prisoner filings. In some arrangements, electronic submission is mandatory and prisoners are not permitted to file on paper.

Typically, a prisoner presents a filing to the prison librarian, who scans it and emails it to the court. Some prisons accept electronic notices on behalf of the prisoners, and then convert them to paper documents. Many prisons do not, so prisoners must be served with other parties' filings and court filings by regular mail.

Courts that have adopted electronic communications with prisoners reported a reduction in controversies over the reliability of prison mail.

Some courts currently require, or used to require, prisons to send to the court in batches the original documents that were scanned and submitted electronically for the prisoners. That provides the court with originals in case there is a problem with the scans, and it provides the court with wet signatures.[9]

Criminal Cases

It is theoretically possible for a pro se criminal defendant who is not detained to obtain CM/ECF filing privileges in some district courts. But criminal defendants are often detained. Very few are pro se. Even those that are pro se typically have appointed standby counsel, and one of the things that standby counsel does is assist the defendants with filing.

Pro Se Electronic Filing in Bankruptcy Cases

It is very unusual for pro se debtors to receive CM/ECF privileges.

Several courts offer eSR, which is now easily available to courts using NextGen CM/ECF. This "electronic self-representation" module allows the

9. A wet signature is an original signature made with a writing device (generally with temporarily wet ink) on physical paper. *See generally* Molly T. Johnson, Bankruptcy Court Rules and Procedures Regarding Electronic Signatures of Persons Other than Filing Attorneys (Federal Judicial Center 2013), www.fjc.gov/content/317113/bankruptcy-court-rules-and-procedures-regarding-electronic-signatures-persons-other.

debtor to prepare a bankruptcy petition package on the court's website, including the petition itself, statements, schedules, and the creditor matrix. The package is electronically submitted to the court, and the debtor must provide payment and signature pages separately, either by regular mail or by a visit to the court.

One of eSR's advantages for the court is that the petitions generated with eSR are structurally whole. The petitions are legible, because they are not handwritten. The debtor benefits from eSR's helping the debtor to create the petition in addition to the obvious benefits of avoiding the inconvenience of travel to the court or the delay of regular mail. Some courts are concerned, however, that eSR may make filing a petition too easy, because the debtor receives no advice on whether bankruptcy is the right way to go. Also, eSR does not really provide electronic self-representation, because actual representation would extend beyond the filing of a petition. Subsequent filings cannot be submitted with eSR. Still, some bankruptcies are "one and done," in that the debtor does not file anything after the initial petition package, which includes the petition itself and the necessary schedules and statements.

Many bankruptcy courts allow pro se creditors to register with CM/ECF as limited filers. Alternatively, most courts allow pro se creditors to use the courts' electronic proof of claim (ePOC) portals. CM/ECF filing privileges are more likely to be granted to and used by large businesses that are frequent filers.

Electronic Submission

Forms of electronic submission other than filing in CM/ECF offer many of the benefits of true electronic filing without requiring a pro se litigant to master CM/ECF. Arrangements with prisons for electronic submissions by prisoners are an example. Some courts otherwise accept submissions by email. A few accept submissions by electronic drop box, a web portal that allows a user to upload a PDF. Many to most courts do not accept such electronic submissions.

Electronic submission saves the court the time required to scan paper documents, and it relieves courts of the sometimes physically difficult mail they can get from prisons. Electronic submissions often do require staff time to organize or even sift through PDFs to convert submissions to proper filings. And there are security concerns when the court gets electronic submissions directly from pro se litigants. The court does not have to scan a paper document into an electronic one, but it may need to scan the email for malware.

Although the Administrative Office has developed eSR for bankruptcy petitions, it does not appear to have developed a module for courts to receive other electronic submissions, and costly security requirements have dissuaded some courts from developing their own. Several courts reported that they developed their own electronic drop boxes, typically called the Electronic Document Submission System (EDSS). Courts are also looking at Box.com as an option.

Most courts do not generally accept filings by email or fax, and fax is now a seldom-used method of submission anyway. Many courts have accepted

emergency filings by email with individual special arrangements. During the COVID-19 pandemic, some courts became more lenient with email filings, and some of those courts have become less lenient again as the pandemic eased.

Considering our sampling scheme, we can estimate how many courts have accepted electronic submissions by prisoner or nonprisoner pro se litigants for filing, one way or another, at least occasionally, and perhaps because of the COVID-19 pandemic: 69% of the courts of appeals, 80% of the courts where the same clerk oversees both district court and bankruptcy cases, 50% of the other district courts, and 78% of the other bankruptcy courts.

Physical Drop Boxes

Many courts stopped using drop boxes with the advent of electronic filing. Some began to use them again during the COVID-19 pandemic, when many intake counters closed or reduced their hours.[10] Drop boxes also facilitated social distancing by relieving a filer of a visit to the counter. Some courts that established drop boxes during the pandemic have continued to use them, and some have not.

In a few courts, the drop box is available at all hours, typically because it is outside the building, but in at least one location because the building never closes. Much more commonly, the drop box is available only for a short time before the clerk's office opens and for a short time after it closes, because it is only available during the building's open hours. Although it is typical for a time stamp to be at the drop box, some drop boxes do not have time stamps. If the drop box does not have a time stamp, documents retrieved in the morning typically are dated as received the day before.

Many courts are concerned about the security threat posed by a drop box, especially if it were to be accessible from outside the building's security. Use of drop boxes that do exist appears to be light.

Filing Fees

In many courts, filing fees can be paid electronically using Pay.gov.

Interestingly, many courts no longer accept cash, and those that do often cannot make change. It is sometimes more expensive to maintain bank accounts and transport cash to the bank than the court receives in cash fees.

Bankruptcy courts generally do not accept payment by personal check, debit card, or credit card for bankruptcy petition filing fees. Cashier's check, money order, and sometimes cash are accepted. Some bankruptcy courts accept payments via Pay.gov, but that requires special arrangements with Pay.gov to block credit card and debit card options.

10. Court hours are given in this report for each court in the study based on research done in 2019, before the COVID-19 pandemic.

Signatures

Electronic signatures are a part of using CM/ECF. Documents submitted electronically some other way will not have wet signatures, but they may have images of original signatures.

The bankruptcy courts are much more concerned about original signatures than the district courts and the courts of appeals are. Filings in the district courts and the courts of appeals do not generally have the same immediate impact on the filer and others, aside from an obligation to respond, as the filing of a bankruptcy petition does. In the district courts and the courts of appeals, an impact on others generally requires court action.

During the COVID-19 pandemic, some courts accepted images of original signatures without requiring wet signatures as an emergency measure.

If a wet signature is required, it must be submitted within a certain number of days after an electronic submission. That is generally the requirement for use of eSR. In the district courts, filers are sometimes required only to maintain original wet signatures for a period of time in case they are needed.

Electronic Notice and Service

Some courts permit pro se litigants to register for electronic notice of other parties' filings without having CM/ECF filing privileges. CM/ECF electronic notice gives an attorney or a pro se litigant one free look at the filing. If the recipient of the notice does not print or download the document during the one free look, then the recipient will have to pay Pacer fees to look at it again. If a party is represented by more than one attorney, each attorney may get his or her own one free look.

In the bankruptcy courts, pro se debtors can register for the Bankruptcy Noticing Center's debtor electronic bankruptcy noticing (DeBN).

Some courts do not require paper filers to separately serve other parties who already are receiving electronic notice. In some courts, there still is a separate service requirement on paper, but it may not be enforced. Rules are rules, except when they are not rules. But when rules are not rules, when are rules rules? In some courts, separate service is required, and certificates of service are carefully examined to make sure they reflect service on all parties.

Information About Individual Courts

The following narratives present what we learned from each of the seventy-eight clerks' offices participating in this study (a sample size of 41%).

Courts of Appeals

The Court of Appeals for the First Circuit

This court was selected for this study at random from among the courts of appeals.

The United States Court of Appeals for the First Circuit has six judgeships. The clerk's office in Boston is open from 8:30 to 5:00. 1st Cir. I.O.P. ¶ I.B.

Electronic filing is governed by the court's Rule 25.0. Nonprisoner pro se litigants are permitted to register as filers in CM/ECF. *Id.* R. 25.0(c). "Unless otherwise required by statute, rule, or court order, filing must be completed by midnight in the time zone of the circuit clerk's office in Boston to be considered timely filed that day." *Id.* R. 25.0(d)(3).

Pro se litigants can use CM/ECF without advance permission, but only the clerk's office actually opens cases. Direct appeals begin with the submission of records by the district courts or the Bankruptcy Appellate Panel (BAP) following notices of appeal; the staff in the court of appeals uses those submissions to open cases and assign case numbers. In direct appeals, the filing fee is paid to the district court or to the BAP. Electronic filers can submit initial documents using CM/ECF in petitions for review of agency decisions, mandamus actions, and applications to file successive habeas corpus petitions. The clerk's office uses the electronic submissions to open the cases.

Except on rare occasions, the court does not accept submissions from filers by email or fax. Because of office closures during the COVID-19 pandemic, it established a drop box, which is available when the building is open, a few hours longer than regular court hours. There is a time stamp available at the drop box for filers' use, and the drop box is checked by the court's staff at least twice a day.

There is no procedure for prisoners to file electronically.

The Court of Appeals for the Sixth Circuit

This court of appeals was selected for this study because it is the only one with rules forbidding electronic filing by pro se litigants.

The United States Court of Appeals for the Sixth Circuit has sixteen judgeships. The clerk's office in Cincinnati is open from 8:00 to 5:00.

Electronic filing is governed by the court's Rule 25 and the court's Guide to Electronic Filing [hereinafter ECF Guide], *see* 6th Cir. R. 15. "No unrepresented party may file electronically; unrepresented parties must submit documents in paper format. The clerk will scan such documents into the ECF system, and the electronic version scanned in by the clerk will constitute the appeal record of the court as reflected on its docket." 6th Cir. ECF Guide ¶ 3.3. Pro se litigants have occasionally been granted individual exceptions to this proscription. The court is exploring more expansive permission for pro se electronic filing.

Because of the COVID-19 pandemic, the court began permitting nonprisoner pro se litigants to submit filings by email without advance permission. This resulted in some improper emails, such as an article a pro se litigant thought, in the middle of the night, that the court should read. The court is more comfortable with email submission than CM/ECF filing for pro se litigants because it gives the clerk's office a chance to review submissions before they are docketed. As it is, even attorneys sometimes make mistakes with their filings, incorrect docket entries are locked, and attorneys are notified of the errors so that they can correct them.

There is no provision in the circuit for electronic submission by prisoners. Paper submissions by prisoners are sometimes physically filthy.

Signatures in email submissions must be handwritten and scanned.

Paper filers must provide paper service even to parties receiving electronic service. Case managers scrutinize certificates of service.

Fax submissions are not accepted. Nor does the court have a physical drop box.

One challenge of electronic docketing is electronic notice. Sometimes attorneys' email addresses change, such as when they change firms. The clerk's office has to track down new email addresses for those attorneys. Electronic notice to pro se filers could pose similar problems, although litigants' street addresses also could change. Pro se litigants currently receive notice only by regular mail. A temporary difficulty arose when the Ohio Department of Corrections decided that each piece of mail to a prisoner had to be registered electronically and individually in advance. The problem was remedied by granting the federal courts an exception, although they still had to register as recognized senders.

The Court of Appeals for the Ninth Circuit

This court of appeals was selected for this study because of its unusual size and complexity.

The United States Court of Appeals for the Ninth Circuit has twenty-nine judgeships. The clerk's office in San Francisco is open from 8:30 to 5:00.

Electronic filing is governed by the court's Rule 25-5 and the court's CM/ECF User Guide. Instructions in the Guide for pro se filers imply opportunities for pro se litigants to file electronically.

In fact, the court encourages pro se use of CM/ECF. Pro se litigants can register through Pacer to use CM/ECF, and they are not limited to use of CM/ECF in pending cases. The clerk regards litigants as customers, so pro se litigants should be afforded high-quality customer service.

Prisoners who can submit filings to the district courts electronically, generally with the help of prison librarians, can also submit filings electronically to the court of appeals. During the COVID-19 pandemic, the court began to more generally allow pro se filing by email.

The courts of appeals for the Ninth and Second Circuits are developing a new case-management system to replace CM/ECF. Pro se litigants are not yet given filing privileges in the new system.

Electronic filings made by 11:59 p.m. are docketed as filed that day. 9th Cir. R. 25-5(c)(2).

The Court of Appeals for the Tenth Circuit

This court was selected for this study at random from among the courts of appeals with rules stating that pro se litigants can file electronically with permission.

The United States Court of Appeals for the Tenth Circuit has twelve judgeships. The clerk's office in Denver is open from 8:00 to 5:00.

Electronic filing is governed by the court's Rule 25.3 and the court's CM/ECF User's Manual. A pro se litigant may seek permission to file electronically. 10th Cir. CM/ECF User's Man. ¶¶ II.A.2 and .C.2. The court has delegated to the clerk's office authority to grant electronic filing privileges to pro se litigants. It is on a case-by-case basis, and available only in pending cases. The request can be made by motion or more informally by letter. There are no specific form or content requirements. The court looks at prospective electronic filers' litigation history for evidence of vexatious filing.

Electronic filing privileges have not been granted to criminal defendants or prisoners. But during the COVID-19 pandemic, the court did arrange with a medium-security facility in Wyoming for electronic transmission of a prisoner's filings to the court and electronic transmission to the facility of the court's filings.

The court has a new rule in 2022 that relieves paper filers of the obligation of paper service on parties receiving electronic notice. 10th Cir. R. 25.4(C).

The court does not accept filings by email or fax, except in emergencies. It does have a drop box in its Denver courthouse with a time-stamp machine. The drop box was set up because of COVID-19 closures, but it will remain. It is only available during the court's business hours, but it is available to persons who do not wish to comply with the court's COVID-19 vaccination requirement for entry, and they do not have to go through security.

"Electronic filing must be completed before midnight, Mountain Standard Time, as shown on the Notice of Docket Activity, to be considered timely filed on the day it is due." 10th Cir. CM/ECF User's Man. ¶ II.D.1.

The Court of Appeals for the Federal Circuit

This court of appeals was selected for this study because of its unusual jurisdiction.

The United States Court of Appeals for the Federal Circuit has twelve judgeships. The clerk's office in Washington is open from 8:30 to 4:30.

Electronic filing is governed by the court's Rule 25 and the court's Electronic Filing Procedures [hereinafter ECF Procs.]. The court also has a Guide for Unrepresented Parties [hereinafter Pro Se Guide]. Unrepresented parties may register as CM/ECF users, "but new notices of appeal or petitions for review must be filed in paper or by email." Fed. Cir. ECF Procs. ¶ II.A; *see* Fed. Cir. R. 25(a)(1)(B) (permitting the clerk to allow pro se electronic filing); Fed Cir. Pro Se Guide ¶ I.C.

An appeal is initiated by filing a notice of appeal and paying the filing fee in the district court, which transfers to the court of appeals a partial record: the docket sheet, the notice of appeal, and the order being appealed. The clerk's office for the court of appeals then electronically opens the appeal. Counsel can open agency appeals using CM/ECF; they electronically submit initiating

documents to the clerk's office, which then opens the case. Pro se litigants cannot use CM/ECF to initiate cases, but they can initiate agency appeals by email. The court does not otherwise accept filings by email or fax. Currently, pro se litigants who initiate cases by email have the option to continue as either electronic or paper filers.

The court requires courtesy paper copies of all briefs to be delivered or shipped to the court.

"Papers may be deposited until midnight on weekdays in the night box at the garage entrance . . . ." Fed Cir. Pro Se Guide ¶ I.A. Documents are time stamped for the previous day when the clerk's office retrieves them in the morning.

Although the rules technically require paper filers to serve parties receiving electronic service, this is not enforced. Parties, counseled or otherwise, can agree with each other to service by email.

"Unless a time for filing is ordered by the court, filing must be completed before midnight Eastern Time on the due date to be considered timely." Fed. Cir. R. 26(a)(2); *see* Fed. Cir. ECF Procs. ¶ IV.A.16(a) ("Filers in other time zones must account for any time difference to ensure a filing is completed before midnight (Eastern) on the day the document is due.").

Combined District and Bankruptcy Courts

The District and Bankruptcy Courts for the District of Columbia

This district was selected for this study because its district court rules state that pro se electronic filing is allowed with permission in both civil and criminal cases. It is one of the districts where the district court clerk is also the bankruptcy court clerk.

The United States District Court for the District of Columbia has fifteen judgeships and one office code: Washington (office code 1). The United States Bankruptcy Court for the District of Columbia has one judgeship and one office, also Washington.

The clerk's office is open from 9:00 to 4:00.

Electronic filing in the district court is governed by the court's Civil Rule 5.4 and the court's Criminal Rule 49. "A *pro se* party may obtain a CM/ECF user name and password from the Clerk with leave of Court." D.D.C. Civ. R. 5.4(b)(2); *id.* Crim. R. 49(b)(2). Pro se parties cannot open cases electronically, but they can receive permission from the presiding judge to use CM/ECF in pending cases. The court has not experienced much in the way of abuse of the privilege.

Electronic filing in the bankruptcy court is governed by the court's Rule 5005-4 and the court's Administrative Procedures for Filing, Signing, and Verifying Documents by Electronic Means [hereinafter ECF Procs]. "Pro se debtors and other parties (other than creditors and claimants) not represented by counsel may not file electronically; therefore, the Administrative Procedures do not apply to such filers." Bankr. D.C. Administrative Order Relating to

TAB 6D

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett

Re: FRAP 5 and 6 and Bankruptcy Direct Appeals

Date: September 16, 2022

At the spring 2022 meeting of the Advisory Committee, the Committee was informed that the Advisory Committee on the Federal Rules of Bankruptcy Procedure was proposing to amend Bankruptcy Rule 8006(g) to clarify that any party could request permission to appeal directly to the court of appeals. Professor Cathie Struve was concerned about how this would interact with the Federal Rules of Appellate Procedure. Rule 5, which governs appeals by permission, seems to envision that the party seeking leave to appeal is the appellant.

Because the issue arose at the meeting, there was only a brief discussion and no action taken. With Judge Bybee's encouragement, I worked with the reporters for the Bankruptcy Rules Committee and met with its Privacy, Public Access, and Appeals Subcommittee.

Some background may be helpful. Under 28 U.S.C. § 158, appeals from bankruptcy courts are usually heard by either a district court or a bankruptcy appellate panel, perhaps followed by an appeal from those courts to a court of appeals. But in certain circumstances, an appeal can be taken directly from a bankruptcy court to a court of appeals. 28 U.S.C. § 158(d)(2). Such direct appeals to a court of appeals require both certification by the appropriate lower court and authorization by the court of appeals.

Significantly, the question under § 158(d)(2) is not whether an appeal will be heard at all. If the appropriate lower court does not certify a direct appeal, or the court of appeals does not authorize a direct appeal, the appeal will simply be heard by the district court or bankruptcy appellate panel. For that reason, it makes sense for Bankruptcy Rule 8006(g) to be revised to clarify that any party to the appeal may file a request that the court of appeals authorize a direct appeal. The Bankruptcy Rules Committee views this as clarification of existing law, not a change in the law.

Here is the proposed amendment to Bankruptcy Rule 8006(g):

> (g) REQUEST AFTER CERTIFICATION FOR ~~LEAVE TO TAKE A DIRECT APPEAL TO~~ A COURT OF APPEALS TO AUTHORIZE A DIRECT APPEAL~~AFTER CERTIFICATION~~. Within 30 days after the certification has become effective under (a), any party to the appeal may ask the court of appeals to authorize a direct appeal by filing a petition ~~a request for leave to take a direct appeal to a court of appeals must be filed~~ with the circuit clerk in accordance with Fed. R. App. P. 6(c).

This change helps to reveal that Appellate Rule 5 is an awkward fit for direct appeals in bankruptcy cases. In other appeals which require the permission of the court of appeals, the question is whether an appeal will be allowed at all. In that context, the party seeking permission to appeal is the appellant. Those are the kinds of cases on which Appellate Rule 5 is focused.

The problem, from an appellate perspective, is that Appellate Rule 5 is aimed at appeals that can be taken only by permission—that is, whether the appeal can be taken at that time at all—while Bankruptcy Rule 8006 and § 158(d)(2) are about which court will hear an appeal. (It's a bit like the Supreme Court granting certiorari before judgment in the court of appeals: there is an appeal pending in the court of appeals, but the Supreme Court can take the case directly.) Yes, this lack of fit is in the current rules. But I think this lack of fit was relatively easy to squint at when the same party was appealing and seeking to have the court of appeals hear the appeal. It's harder to squint at when we think about these being different parties.

To create a better fit, the draft below would amend Appellate Rule 6(c) to provide additional procedures specifically designed for direct appeals under § 158(d)(2).

I considered the possibility of making Appellate Rule 6(c) completely self-contained and eliminating all reliance on Appellate Rule 5. But that seemed (at least at this point) to be overkill and run risks of unintended consequences. Most significantly, Appellate Rule 5(b), which governs the content of a petition for permission to appeal, would continue to apply. Nevertheless, the draft below would reduce the reliance on Appellate Rule 5. It has more specific provisions in Appellate Rule 6(c) for direct appeals in bankruptcy.

The draft would make Appellate Rule 5(d) inapplicable to direct appeals. Rule 5(d)(1)(A) and 5(d)(2) are unnecessary because a notice of appeal will already have been filed, and fees should already have been paid. The first two sentences of Rule 5(d)(3) seem designed to work in connection with 5(d)(1)(A): they require the district clerk to notify the circuit clerk once fees are paid and the circuit clerk to enter the appeal on the docket upon receiving this notice. The third sentence, which governs

the filing of the record, is also unnecessary because Rule 6(c)(1)(C) says to read the references in that third sentence as references to Rule 6(c)(2), which in turn provides that various Bankruptcy Rules apply.

That leaves Rule 5(d)(1)(B), which governs appellate costs bonds under Rule 7. Rather than use a cross-reference to this one small part of Rule 5, the draft below has a self-contained provision regarding appellate cost bonds. This approach is particularly fitting because the Bankruptcy Rules themselves do not have an analog to Appellate Rule 7 governing appeals to the district court or bankruptcy appellate panel.

The draft below would also add new provisions applicable to direct appeals. These new provisions would:

> (a) permit any party to the appeal to petition the court of appeals to authorize a direct appeal;
>
> (b) require the inclusion of a copy of the notice of appeal, the certificate, and any decision on a motion under Bankruptcy Rule 8004;[1]
>
> (c) specify how time is calculated; and
>
> (d) specify which court may require an appellant to file a bond or provide other security for costs on appeal under Rule 7.

The draft below differs somewhat from the draft before the Bankruptcy Rules Committee; that's because some changes have been made in response to suggestions from the style consultants. Although the only changes proposed in the draft below are to Rule 6, Rule 5 is also included for ease of reference.

[1] Some bankruptcy orders are appealable as of right. 28 U.S.C. § 158 (a)(1) and (2). Others are appealable only with leave of court. 28 U.S.C. § 158 (a)(3). Bankruptcy Rule 8004 governs the process for seeking leave to appeal under § 158(a)(3). If the appeal for which some party seeks direct review in the court of appeals is not appealable as of right, but is appealable only with leave of court under § 158(a)(3), any decision on a motion seeking such leave to appeal must be included when seeking permission for a direct appeal to the court of appeals.

Rule 5. Appeal by Permission

(a) Petition for Permission to Appeal.

(1) To request permission to appeal when an appeal is within the court of appeals' discretion, a party must file a petition with the circuit clerk and serve it on all other parties to the district-court action.

(2) The petition must be filed within the time specified by the statute or rule authorizing the appeal or, if no such time is specified, within the time provided by Rule 4(a) for filing a notice of appeal.

(3) If a party cannot petition for appeal unless the district court first enters an order granting permission to do so or stating that the necessary conditions are met, the district court may amend its order, either on its own or in response to a party's motion, to include the required permission or statement. In that event, the time to petition runs from entry of the amended order.

(b) Contents of the Petition; Answer or Cross-Petition; Oral Argument.

(1) The petition must include the following:

(A) the facts necessary to understand the question presented;

(B) the question itself;

(C) the relief sought;

(D) the reasons why the appeal should be allowed and is authorized by a statute or rule; and

(E) an attached copy of:

(i) the order, decree, or judgment complained of and any related opinion or memorandum, and

(ii) any order stating the district court's permission to appeal or finding that the necessary conditions are met.

(2) A party may file an answer in opposition or a cross-petition within 10 days after the petition is served.

(3) The petition and answer will be submitted without oral argument unless the court of appeals orders otherwise.

(c) Form of Papers; Number of Copies; Length Limits. All papers must conform to Rule 32(c)(2). An original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case. Except by

the court's permission, and excluding the accompanying documents required by Rule 5(b)(1)(E):

(1) a paper produced using a computer must not exceed 5,200 words; and

(2) a handwritten or typewritten paper must not exceed 20 pages.

(d) Grant of Permission; Fees; Cost Bond; Filing the Record.

(1) Within 14 days after the entry of the order granting permission to appeal, the appellant must:

(A) pay the district clerk all required fees; and

(B) file a cost bond if required under Rule 7.

(2) A notice of appeal need not be filed. The date when the order granting permission to appeal is entered serves as the date of the notice of appeal for calculating time under these rules.

(3) The district clerk must notify the circuit clerk once the petitioner has paid the fees. Upon receiving this notice, the circuit clerk must enter the appeal on the docket. The record must be forwarded and filed in accordance with Rules 11 and 12(c).

Rule 6. Appeal in a Bankruptcy Case

(a) Appeal From a Judgment, Order, or Decree of a District Court Exercising Original Jurisdiction in a Bankruptcy Case. An appeal to a court of appeals from a final judgment, order, or decree of a district court exercising jurisdiction under 28 U.S.C. §1334 is taken as any other civil appeal under these rules.

(b) Appeal From a Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel Exercising Appellate Jurisdiction in a Bankruptcy Case.

(1) **Applicability of Other Rules.** These rules apply to an appeal to a court of appeals under 28 U.S.C. §158(d)(1) from a final judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction under 28 U.S.C. §158(a) or (b), but with these qualifications:

(A) Rules 4(a)(4), 4(b), 9, 10, 11, 12(c), 13–20, 22–23, and 24(b) do not apply;

(B) the reference in Rule 3(c) to "Forms 1A and 1B in the Appendix of Forms" must be read as a reference to Form 5; and

(C) when the appeal is from a bankruptcy appellate panel, "district court," as used in any applicable rule, means "bankruptcy appellate panel"; and

(D) in Rule 12.1, "district court" includes a bankruptcy court or bankruptcy appellate panel.

(2) **Additional Rules.** In addition to the rules made applicable by Rule 6(b)(1), the following rules apply:

(A) **Motion for Rehearing.**

(i) If a timely motion for rehearing under Bankruptcy Rule 8022 is filed, the time to appeal for all parties runs from the entry of the order disposing of the motion. A notice of appeal filed after the district court or bankruptcy appellate panel announces or enters a judgment, order, or decree—but before disposition of the motion for rehearing—becomes effective when the order disposing of the motion for rehearing is entered.

(ii) If a party intends to challenge the order disposing of the motion—or the alteration or amendment of a judgment, order, or decree upon the motion—then the party, in compliance with Rules 3(c) and 6(b)(1)(B), must file a notice of appeal or amended notice of appeal. The notice or amended notice must be filed within the time prescribed by Rule 4—excluding Rules 4(a)(4) and 4(b)—measured from the entry of the order disposing of the motion.

(iii) No additional fee is required to file an amended notice.

(B) **The record on appeal.**

(i) Within 14 days after filing the notice of appeal, the appellant must file with the clerk possessing the record assembled in accordance with Bankruptcy Rule 8009—and serve on the appellee—a statement of the issues to be presented on appeal and a designation of the record to be certified and made available to the circuit clerk.

(ii) An appellee who believes that other parts of the record are necessary must, within 14 days after being served with the

appellant's designation, file with the clerk and serve on the appellant a designation of additional parts to be included.

(iii) The record on appeal consists of:

- the redesignated record as provided above;
- the proceedings in the district court or bankruptcy appellate panel; and
- a certified copy of the docket entries prepared by the clerk under Rule 3(d).

(C) **Making the Record Available.**

(i) When the record is complete, the district clerk or bankruptcy-appellate-panel clerk must number the documents constituting the record and promptly make it available to the circuit clerk. If the clerk makes the record available in paper form, the clerk will not send documents of unusual bulk or weight, physical exhibits other than documents, or other parts of the record designated for omission by local rule of the court of appeals, unless directed to do so by a party or the circuit clerk. If unusually bulky or heavy exhibits are to be made available in paper form, a party must arrange with the clerks in advance for their transportation and receipt.

(ii) All parties must do whatever else is necessary to enable the clerk to assemble and forward the record. The court of appeals may provide by rule or order that a certified copy of the docket entries be sent in place of the redesignated record, but any party may request at any time during the pendency of the appeal that the redesignated record be sent.

(D) **Filing the record**

When the district clerk or bankruptcy-appellate-panel clerk has made the record available, the circuit clerk must note that fact on the docket. The date noted on the docket serves as the filing date of the record. The circuit clerk must immediately notify all parties of the filing date.

(c) Direct Appeal ~~Review~~ by Permission Under 28 U.S.C. § 158(d)(2).

(1) **Applicability of Other Rules.** These rules apply to a direct appeal by permission under 28 U.S.C. § 158(d)(2), but with these qualifications:

(A) Rules 3–4, 5(a)(3), 5(d), 6(a), 6(b), 8(a), 8(c), 9–12, 13–20, 22–23, and 24(b) do not apply; and

(B) as used in any applicable rule, "district court" or "district clerk" includes—to the extent appropriate—a bankruptcy court or bankruptcy appellate panel or its clerk~~; and~~

~~(C) the reference to "Rules 11 and 12(c)" in Rule 5(d)(3) must be read as a reference to Rules 6(c)(2)(B) and (C)~~.

(2) **Additional Rules.** In addition, the following rules apply:

(A) Petition to Authorize a Direct Appeal. After the notice of appeal has been filed in the bankruptcy court and a certification under 28 U.S.C. § 158(d) has been filed in the appropriate court under Bankruptcy Rule 8006(b), any party to the appeal may petition the court of appeals to authorize a direct appeal.

(B) **Content**. The petition must include the material required by Rule 5(b), a copy of the notice of appeal, and a copy of the certificate under § 158(d). If the appeal to the district court or bankruptcy appellate panel is not as of right under 28 U.S.C. § 158(a)(1) or (2) but requires leave of court under § 158(a)(3), the petition must also include a copy of any decision on a motion under Bankruptcy Rule 8004.

(C) **Calculating Time**. The date when an authorization is entered serves as the date of the notice of appeal for calculating time under these rules.

(D) **Bond for Costs on Appeal**. The court in which the certificate under 28 U.S.C. § 158(d) was filed may require an appellant to file a bond or provide other security for costs on appeal under Rule 7.

(E) ~~(A) The~~ **Record on Appeal**. Bankruptcy Rule 8009 governs the record on appeal.

~~(B)~~ (F) **Completing and Making the Record Available.** Bankruptcy Rule 8010 governs completing the record and making it available.

~~(C)~~ (G) **Stays Pending Appeal**. Bankruptcy Rule 8007 applies to a stay~~s~~ pending appeal.

~~(D)~~ (H) **Duties of the Circuit Clerk**. When the bankruptcy clerk has made the record available, the circuit clerk must note that fact on the docket. The date noted on the docket serves as the filing date of the

record. The circuit clerk must immediately notify all parties of the filing date.

~~(E)~~ (I) **Filing a Representation Statement**. Unless the court of appeals designates another time, within 14 days after entry of the order granting permission to appeal, each ~~the~~ attorney who sought permission must file a statement with the circuit clerk naming the parties that the attorney represents on appeal.

Committee Note

This amendment is made in conjunction with an amendment to Bankruptcy Rule 8006(g).

In the ordinary case, decisions by bankruptcy courts are appealable to either the district court or a bankruptcy appellate panel, perhaps followed by an appeal from those courts to the court of appeals. But in certain circumstances, the appeal can be taken directly from a bankruptcy court to a court of appeals. 28 U.S.C. §158(d)(2). Such direct appeals to a court of appeals require both certification by the appropriate lower court and authorization by the court of appeals.

In other appeals which require the permission of the court of appeals, the question is whether an appeal will be allowed at all. Appellate Rule 5 governs such petitions for permission to appeal. But in the context of 28 U.S.C. §158(d)(2), the question is not whether there will be an appeal, but only whether that appeal will be heard by the court of appeals—as opposed to the district court or bankruptcy appellate panel. Accordingly, Bankruptcy Rule 8006(g) is revised to clarify that any party to the appeal may file a request that a court of appeals authorize a direct appeal.

These features of direct appeals under §158(d)(2) make Appellate Rule 5 an awkward fit. To create a better fit, Appellate Rule 6(c) is revised to specify further procedures specifically designed for direct appeals under §158(d)(2). New provisions (a) permit any party to the appeal to petition the court of appeals to authorize a direct appeal; (b) require the inclusion of a copy of the notice of appeal, the certificate, and any decision on a motion under Bankruptcy Rule 8004; (c) specify how time is calculated; and (d) specify which court may require an appellant to file a bond or provide other security for costs on appeal under Rule 7.

TAB 6E

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett

Re: Appeals in Consolidated Cases; *Hall v. Hall*

Date: September 11, 2022

The Joint Civil-Appellate Subcommittee has been considering whether any rule amendments would be appropriate in response to the Supreme Court's decision in *Hall v. Hall*, 138 S. Ct. 1118 (2018). In that case, the Court held that consolidated cases retain their separate identity for appeal purposes—so that complete disposition of one such case is immediately appealable.

Research by the Federal Judicial Center (FJC) initially focused on reviewing district court dockets in an effort to determine how frequently district courts fully decide one case that was consolidated with another case while that other case remained undecided. That research did not yield a sizable number of such instances.

Research then turned to looking at the issue from the other end: examining appellate court dockets looking for appeals in cases where the district court had entered consolidation orders.

MDL proceedings were not included in the research.

The FJC research showed that there are few appeals in consolidated cases, and that few of these appeals presented instances of a final judgment in one of the consolidated cases. Moreover, even prior to *Hall v. Hall*—when in most circuits a final judgment in one of the consolidated cases might not be appealable—it appeared that lawyers erred on the side of filing premature notices of appeal rather than waiting until all claims in all the consolidated actions were resolved.

After reviewing this research, the subcommittee concluded that there is not enough evidence of a problem to warrant a rule change. It therefore recommends that the matter be removed from the Advisory Committees' agenda.

TAB 7

TAB 7A

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett

Re: Identification of Amicus Causing Recusal (22-AP-B)

Date: September 16, 2022

The Reporters Committee for Freedom of the Press has submitted a suggestion to amend Rule 29. Rule 29(a)(2) provides that a court of appeals may prohibit the filing of an amicus brief or strike an amicus brief that would result in a judge's disqualification.

The Advisory Committee has already removed from its agenda a suggestion that it assist in developing standards for when an amicus brief requires a judge's disqualification. (20-AP-G).

The current suggestion is different. It does not address the standards for disqualification. Instead, the suggestion calls for a court, if it prohibits the filing of an amicus brief or strikes a brief under Rule 29(a)(2), to identify the amicus or counsel that caused the disqualification issue.

Frequently an amicus brief will be submitted on behalf of a number of amici and involve a number of counsel. If the amicus or counsel causing the problem is identified, the problem can be avoided in the future.

This suggestion was filed after the agenda book for the Spring 2022 meeting was compiled but before the meeting itself. Because this suggestion was related to another suggestion on the agenda for that meeting (20-AP-G), there was brief discussion of it.

Concerns were raised in that brief discussion that such disclosure could enable litigants to reverse engineer the judge who would be disqualified or serve as a backdoor way to get the reasons for recusal articulated. A published advisory opinion from the Committee on Codes of Conduct follows this memo.

Although there was mention at the spring meeting of referring this matter to the subcommittee dealing with amicus disclosures and expanding that subcommittee, that subcommittee was not expanded. As a result, this matter was not referred to that subcommittee. Unless the Advisory Committee decides that this issue brushes too closely against the standards for recusal and removes the matter from its agenda, a subcommittee to further consider the suggestion would seem appropriate.

TAB 7B

REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS
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March 14, 2022

Hon. Roslynn R. Mauskopf, Director
Administrative Office of the United States Courts
United States Judicial Conference
One Columbus Circle, NE
Washington, D.C. 20544

Via email: RulesCommittee_Secretary@ao.uscourts.gov

Re: Proposal to Amend Federal Rule of Appellate Procedure 29(a)(2)

Dear Judge Mauskopf:

The Reporters Committee for Freedom of the Press (the "Reporters Committee") writes regarding the changes to Federal Rule of Appellate Procedure 29 under consideration by the Advisory Committee on Appellate Rules. The Reporters Committee understands that the subcommittee appointed to address Rule 29 has thus far focused on the issue of disclosures by amici curiae. In addition to that important issue, the Reporters Committee urges the Judicial Conference to also consider an amendment to or guidance for the application of Rule 29(a)(2), which governs when the filing of an amicus brief is permitted.

In 2018, Rule 29 was amended to authorize a court of appeals to prohibit the filing of or strike an amicus brief if that brief would result in a judge's disqualification. *See* Fed. R. App. P. 29(a)(2) advisory committee's note to 2018 amendment. Currently, the rule does not provide standards for when an amicus brief requires a judge's disqualification, nor does it require any notice or disclosure when that provision is invoked.[1] *Id.* Accordingly,

[1] The Reporters Committee is aware that Associate Dean Alan Morrison of the George Washington University School of Law has proposed that the subcommittee provide standards for when an amicus brief triggers disqualification. *See e.g.*, Report to the Standing Comm., Advisory Comm. on Appellate Rules of the Judicial Conf. of the U.S., 110 (Dec. 8, 2021); Advisory Comm. on Appellate Rules, Agenda for Apr. 7, 2021 Meeting of Advisory Comm. on Appellate Rules, 217–23 (2021); Letter from Alan Morrison, Associate Dean, George Washington Univ. Law Sch., to Hon. David Campbell, Chair, Comm. on Rules of Prac. and Proc. (Jun. 1, 2017) ("Morrison 2017 Letter"), https://perma.cc/NPT9-GFK4. The Reporters Committee takes no position on Associate Dean Morrison's proposal. However, as explained herein, the Reporters Committee's proposal does not conflict with that proposal and would not implicate concerns identified by Associate Dean Morrison in his 2017 letter regarding en banc review and potential strategic amicus briefs.

for the reasons herein, the Reporters Committee proposes that the Advisory Committee on Appellate Rules amend Rule 29(a)(2) to require courts that prohibit or strike an amicus brief pursuant to that provision to (i) issue a written order, filed on the public docket in the relevant case, that cites that provision, and (ii) identifies each amicus or amicus counsel whose involvement would result in a judge's disqualification.

Specifically, the Reporters Committee proposes the following amendment (added text bold) to Rule 29(a)(2):

> (a)(2) When Permitted. The United States or its officer or agency or a state may file an amicus brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing, but a court of appeals may prohibit the filing of or may strike an amicus brief that would result in a judge's disqualification.
>
> > **(A) If a court of appeals prohibits the filing of or strikes an amicus brief under this paragraph it shall issue a written order on the docket in the relevant case that:**
> >
> > > **(i) identifies Rule 29(a)(2) as the basis for the decision; and**
> > >
> > > **(ii) identifies each amicus curiae or amicus curiae counsel that, if permitted to appear as or on behalf of amicus curiae in the matter, would result in a judge's disqualification.**

* * *

Founded in 1970, the Reporters Committee is an unincorporated nonprofit association that provides pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists. Reporters Committee attorneys frequently represent coalitions of media organizations as amici curiae in appellate cases that present legal issues of importance to members of the press. By participating in Reporters Committee-led amici coalitions, media organizations have the ability to speak collectively, with a unified voice, to provide courts of appeals with relevant information, argument, and perspective that can assist those courts in ruling on cases with implications for journalists' rights—considerations that may be unrepresented or underrepresented in party filings.

In *Cause of Action v. F.T.C.*, for example, Cause of Action, a government accountability group, sued the Federal Trade Commission after it denied the group's requests for a fee benefit as a "representative of the news media" and a public interest fee waiver under the Freedom of Information Act (FOIA). *See* 799 F.3d 1108 (D.C. Cir. 2015). The Reporters Committee, along with eight other media groups, filed an amicus

brief with the D.C. Circuit to argue that the current test agencies and courts use to define "representative of the news media" is too narrow and does not accord with the language of the 2007 FOIA amendments or the congressional intent behind those amendments, and does not leave room for evolving media outlets to qualify for waivers. *See* Br. of Amici Reporters Comm. for Freedom of the Press, et al., *Cause of Action v. F.T.C.*, 799 F.3d 1108 (D.C. Cir. 2015) (No. 13-5335). As advocates for the media's ability to gather information from the government and disseminate information to the public, the Reporters Committee highlighted the acute need to ensure that both established and new media outlets are able to obtain a reduction and/or waiver of fees for public records under FOIA.

By filing amicus briefs on behalf of coalitions of media organizations, the Reporters Committee can present the collective perspective of the news media, emphasize the weight of the issues at stake for newsgathering and First Amendment rights, and avoid repetitive amicus filings from media organizations. However, because they are frequently submitted on behalf of large coalitions of diverse media interests, Reporters Committee-led amicus briefs are also exposed to potential Rule 29(a)(2) prohibition. For instance, in *Parekh v. CBS*, 820 F. App'x 827 (11th Cir. 2020), the Reporters Committee and 33 media organizations wrote collectively as amici to offer their unique perspective on the application of Florida's anti-SLAPP law in federal court. As representatives of the news media, who are frequently the target of Strategic Lawsuits Against Public Participation (SLAPPs), the amici that joined that brief shared a strong interest in ensuring that state anti-SLAPP laws are properly applied in diversity cases so that newsgathering, reporting, and other First Amendment-protected activities remain shielded from meritless claims.

The Eleventh Circuit denied the Reporters Committee's motion for leave to file its amicus brief in that case, citing Rule 29(a)(2) but providing no further detail. *See* Order Denying Motion for Leave to File as Amicus, *Parekh v. CBS*, 820 F. App'x 827 (11th Cir. 2020) (No. 19-11794). Because the court did not identify which of the amici media organizations or counsel for amici was the source of a potential conflict, the Reporters Committee was unable to address the situation. And, crucially, that lack of information has left the Reporters Committee on uncertain ground when it comes to the filing of future coalition amicus briefs in the Eleventh Circuit. The proposed amendment to Rule 29(a)(2) would enable the Reporters Committee to avoid potential conflicts with future briefs filed in that court by, for example, excluding specific media organizations from future amici coalitions.

The benefits of the amendment proposed above are not unique to briefs authored or joined by the Reporters Committee. For example, in December 2020, the Fourth Circuit cited Rule 29 in its order striking an amicus brief filed on behalf of 104 companies in *CASA de Md., Inc. v. Trump*, a case challenging the Trump administration's "public charge" immigration rule. *See* Marcia Coyle, *4th Circuit Scraps McDermott Amicus Brief in Rare Nod to Recusal Rule*, Nat'l L.J., Dec. 4, 2020. Similarly, in April 2019, the Fifth Circuit struck an amicus brief submitted on behalf of First Focus and Children's Partnership pursuant to Rule 29 in *Texas v. United States*, a case involving a

challenge to the Affordable Care Act. *Id.* In both instances the amicus briefs were removed from the record.

The proposed amendment is of particular importance for matters heard en banc, where the likelihood of a conflict or potential conflict triggering application of Rule 29(a)(2) is highest. In *Nunes v. Lizza*, No. 20-2710 (8th Cir. 2020), for example, the Reporters Committee and 35 national and local media organizations and journalists filed an amicus brief urging en banc rehearing of the panel's decision in that libel case. The court denied the potential amici's motion for leave to file the brief, citing Eighth Circuit Rule 29A(a).[2] Counsel for the amici coalition, attorneys at the law firm of Ballard Spahr LLP, filed a motion for reconsideration asking the court to allow "the filing of the brief without the participation of the amicus or amici that previously necessitated denial of the motion for leave to file the brief under Rule 29A(a)." *See* Motion of Amici Curiae for Reconsideration of the Court's November 5, 2021 Order, *Nunes v. Lizza*, at 3 (8th Cir. 2020) (No. 20-2710). The court denied the motion for reconsideration as well and struck the proposed amicus brief from the record. The coalition of media organizations thus went unheard, despite its various members' strong interests in the outcome of the matter. The petition for rehearing was subsequently denied.

The proposed amendment would increase transparency and help prevent conflicts that would trigger application of Rule 29(a)(2). If an organization is aware that its participation as amicus curiae could present a conflict within a given circuit, it could choose, proactively, not to participate and organizations like the Reporters Committee could exclude that party from future coalition amicus briefs to avoid having that brief struck from the record. Often, the contents of a coalition amicus brief are not dictated by the participation of any particular amici; removing an individual party from subsequent coalition amicus briefs is a simple way to avoid Rule 29(a)(2) conflicts. And altering the rules in this manner would allow the court to continue to benefit from amicus participation.

The proposed amendment would not require the court to disclose which judge is at risk of disqualification. As Associate Dean Morrison indicated in his 2017 letter to the Judicial Conference, identifying individual judges' conflicts could pose a potential risk that future litigants could game the system by attempting to intentionally trigger the recusal of judges, especially during en banc proceedings. *See* Morrison 2017 Letter, *supra*. The Reporters Committee's proposal, however, requires only the disclosure of which amicus or amicus counsel would trigger Rule 29(a)(2).

Amicus briefs can provide a unique, valuable perspective to the courts of appeals, beyond what parties can provide. And amicus briefs filed on behalf of broad coalitions of similarly situated amici enables those interested parties to speak with a unified voice and

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[2] Eighth Circuit Rule 29A(a) is substantially similar to Rule 29(a)(2). It provides: "The court will prohibit the filing of or strike an amicus brief that would result in the recusal of a member of the panel to which the case has been assigned or in the recusal of a judge in regular active service from a vote on whether to hear or rehear a case en banc."

decreases the likelihood of redundant amicus filings. The Reporters Committee's proposed amendment would thus have a profoundly beneficial impact on the amicus process, as it would allow organizations like the Reporters Committee to continue filing amicus briefs on behalf of coalitions without the risk for the potential prohibition of a brief under Rule 29(a)(2).

* * *

Thank you for your consideration. Please do not hesitate to contact Reporters Committee Deputy Executive Director and Legal Director Katie Townsend (ktownsend@rcfp.org) with any questions. We would be pleased to provide any additional information to the Judicial Conference in aid of this important work.

Sincerely,
Reporters Committee for Freedom of the Press

TAB 7C

Committee on Codes of Conduct Advisory Opinion
No. 63: Disqualification Based on Interest in Amicus that is a Corporation

In this opinion we consider whether recusal is required when a judge has an interest in a corporation that is an *amicus curiae*. This opinion does not consider other recusal questions that may arise in relation to *amici*, such as when a law firm that is on a judge's recusal list represents an *amicus*, or when a judge has an interest in a nonprofit organization that is an *amicus. See, e.g.*, Advisory Opinion No. 34 ("Serving as Officer or on Governing Board of Bar Association").

Canon 3C(1)(c) of the Code of Conduct for United States Judges provides that the judge shall disqualify when:

> [T]he judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding.

Canon 3C(3)(c) defines "financial interest" as "ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party." In most cases, a judge with an interest in a corporate *amicus* will not have a legal or equitable interest in a party to the proceeding or in the subject matter in controversy that would constitute a financial interest under the Code. There remains, however, the question of whether the judge's interest in the *amicus* constitutes "any other interest that could be affected substantially by the outcome of the proceeding."

Any interest that could be substantially affected by the outcome of a proceeding is a disqualifying interest; this restriction applies to an ownership interest in *any* corporation, whether or not the corporation appears as an *amicus*. An example of when an ownership interest in an *amicus* could result in disqualification would be when the *amicus* is in the same industry as the party and the value of industry stock generally could be substantially affected by the decision in the pending case. Even in those situations where an ownership interest could be substantially affected, one might doubt that a judge's impartiality might reasonably be questioned if the interest is minimal. However, under the Code the extent of the judge's interest is irrelevant.

Given the mandatory nature of Canon 3C(1)(c), the requirement to recuse if a disqualifying interest in an *amicus* exists is the same even when the *amicus* does not surface until, for example, the rehearing stage.

In the event that a decision in a pending case will not substantially affect a judge's interest in an *amicus*, the judge still must consider whether recusal is required because "the judge's impartiality might reasonably be questioned." Canon 3C(1).

To conclude, if an interest in an *amicus* would not be substantially affected by the outcome, and if the judge's impartiality might not otherwise reasonably be questioned, stock ownership in an *amicus* is not *per se* a disqualification.

The Committee notes that recusal decisions are also governed by the recusal statutes, 28 U.S.C. §§ 455 and 144, and the case law interpreting them. Although the Committee on Codes of Conduct is not authorized to render advisory opinions interpreting §§ 455 and 144, Canon 3C of the Code of Conduct for United States Judges closely tracks the language of § 455, and the Committee is authorized to provide advice regarding the application of the Code.

June 2009

TAB 7D

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett

Re: Disclosure of Third-Party Litigation Funding (22-AP-C)

Date: September 16, 2022

Lawyers for Civil Justice (LCJ) has submitted a suggestion to amend Rule 26.1. Rule 26.1 requires non-governmental corporations to identify any parent corporation and any publicly held corporation that owns 10% or more of its stock. LCJ suggests that this disclosure should be expanded to require disclosure of a non-party that has a financial stake in the outcome of an appellate case. It observes that non-parties fund appellate litigation and obtain the right to a portion of any financial recovery. The investments are non-recourse, so the recipient of the funding owes nothing if there is no recovery. LCJ contends that circuit judges should know who has this kind of interest in the cases before them in order to comply with their recusal obligations. The suggestion follows this memo.

The Advisory Committee on Civil Rules has been considering the issue of disclosure of third-party litigation funding for years. Its agenda book from the Fall of 2021 recaps that history; the relevant pages are included after this memo.

It is not clear how commonly judges have investments in entities that engage in litigation finance. Nor is it clear that there is anything distinctive about appeals that would call for disclosure of third-party litigation funding on appeal that was not required in the district court. (One of the rationales for required disclosure in the district court—so that a judge trying to facilitate a settlement has people with settlement authority at the table—is much weaker on appeal.)

The Advisory Committee may want to establish a subcommittee to explore this issue, or it might decide to let the Civil Rules Committee take the lead.

The report of its Fall 2021 meeting states:

> The Advisory Committee [on the Federal Rules of Civil Procedure] has determined that it remains premature to begin work toward possible rules related to third party litigation financing. Third-party funding continues to grow and to take on new forms. The agreements that establish funding relationships vary widely, and may not express the full reality of the actual relationships. It would be difficult even to define what sorts of funding might be brought within the scope of a rule. And many of the questions raised about third-party funding address issues of possible regulation that are beyond the reach

of Enabling Act rules. The Advisory Committee continues to gather information.

Agenda Book for the January 2022 Meeting of the Standing Committee 185.

The Advisory Committee might also want to be aware of two other disclosure suggestions. Magistrate Judge Patty Barksdale has suggested that Civil Rule 7.1 be amended to require a party to check a judge's publicly available financial disclosures for possible conflicts. Circuit Judge Ralph Erickson has suggested that Civil Rule 7.1 be amended to require the disclosure of "grandparent" corporations, that is, parent corporations of parent corporations of parties. Appellate Rule 26.1 is similar to Civil Rule 7.1. So are Bankruptcy Rules 7007.1 and 8012, and Criminal Rule 12.4. After consulting with the Chairs and Reporters of these Committees, it was determined that Civil will take the lead on these two suggestions, perhaps with a Bankruptcy representative on the Civil subcommittee.

TAB 7E

RULES SUGGESTION
to the
ADVISORY COMMITTEE ON APPELLATE RULES

PERVASIVE, YET UNKNOWN: THE PREVALENCE OF DIRECT, UNDISCLOSED NON-PARTY FINANCIAL STAKES IN APPELLATE OUTCOMES, AND WHY THE COMMITTEE SHOULD AMEND RULE 26.1

September 1, 2022

Lawyers for Civil Justice ("LCJ")[1] respectfully submits this Rule Suggestion to the Advisory Committee on Appellate Rules ("Committee").

Introduction

Direct, yet undisclosed non-party financial stakes in appellate outcomes are pervasive in federal circuit courts. These concrete rights—typically, a right to receive a percentage of proceeds contingent on the court's decision to uphold a judgment—arise from litigation funding contracts and popular "crowdfunding" web sites. Such rights can be held by individuals, investment funds (including family offices), and institutions, both domestic and non-US. Unfortunately, circuit judges are largely unaware that such non-party interests are present in the cases they decide. Rule 26.1 of the Federal Rule of Appellate Procedure does not require disclosure of these financial arrangements and therefore does not assist judges in determining whether they pose potential conflicts of interest or create the appearance of impropriety. Local rules do not do so either; although six of the twelve circuit local disclosure rules are broad enough to include such rights, none of them specifically mentions non-party rights created by funding contracts—an oversight that litigation funders rely upon to conclude that those rules do not apply to their financial stakes. Closing this disclosure gap would be consistent with the Chief Justice's recent call for "greater attention to promoting a culture of compliance" in the federal judiciary,[2] which

[1] LCJ is a national coalition of corporations, law firms, and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. For over 35 years, LCJ has been closely engaged in reforming federal procedural rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

[2] John G. Roberts, Jr., Chief Justice of the United States, *2021 Year-End Report on the Federal Judiciary*, at 3-4, https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf.

was inspired by the *Wall Street Journal*'s reporting of 685 instances of conflicts of interest.[3] Amending Rule 26.1 to cover non-party outcome-contingent rights to share in the proceeds of litigation matters is necessary to provide judges adequate, uniform disclosures.[4]

I. Undisclosed Non-Party Financial Rights Are Commonplace in Appellate Cases

There are $11 billion worth of non-party financial rights in litigation outcomes in the United States today, according to a recent survey.[5] Such rights exist for litigation at all stages[6]—including appeals[7]—in all federal courts and in cases of a wide variety of subject matters. Appellate cases "seem[] to be a significant sub-category of litigation funding,"[8] according to the Advisory Committee on Civil Rules, which has been studying the matter since 2014. These financial rights are held by individuals, asset managers (including family offices), hedge funds, and institutions,[9] including both non-US individuals[10] and sovereign wealth funds.[11]

II. The Financial Rights Held by Non-Party Investors Are Directly Contingent on the Outcome of Appeals

The financial rights that non-party litigation investors receive in exchange for their investments are directly contingent upon the outcome of cases. Litigation finance "is the practice where a third party unrelated to the lawsuit provides capital to a plaintiff involved in litigation in return for a portion of any financial recovery from the lawsuit."[12] These are not loans. Litigation finance provider LexShares explains:

> Solutions are instead structured as non-recourse investments, which means that the funding recipient owes nothing if the lawsuit does not result in a recovery. If the case reaches a

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[3] *Id*. at 3.
[4] The Committee is separately devoting attention to considering whether to require more disclosures from amici curiae. The need for disclosure about non-party financial rights contingent on the outcome of an appeal is far more compelling. Non-parties with financial rights that are directly contingent in the outcome of an appeal are akin to real parties in interest, and are far different from ordinary members of an advocacy organization or trade association that publicly files an amicus brief, thus identifying their group as interested in the appeal. Litigation funds are completely unknown to the court.
[5] Bloomberg Law, *Willkie, Longford Reach $50 Million Litigation Funding Pact* (June 23, 2021), https://news.bloomberglaw.com/business-and-practice/willkie-longford-partner-in-50-million-litigation-funding-pact ("[L]itigation funding . . . has attracted more than $11 billion in capital, according to a survey this year."). In 2021, a single company, Burford, committed over a billion dollars to fund litigation. Burford Capital 2021 Annual Report, at iv, https://www.burfordcapital.com/media/2679/fy-2021-report.pdf ("Burford 2021 Annual Report"); *see also* Christopher Bogart, *Common sense vs. false narratives about litigation finance disclosure*, Burford Capital (July 12, 2018), https://www.burfordcapital.com/insights/insights-container/common-sense-vs-false-narratives-about-litigation-finance-disclosure/ ("Burford Article") ("[L]itigation finance continues to grow as an increasingly essential tool to law firms and litigants.").
[6] LexShares, Frequently asked questions, https://www.lexshares.com/faqs ("LexShares FAQs").
[7] *See* Appeal Funding Partners, https://appealfundingpartners.com/.
[8] Advisory Committee on Civil Rules, Agenda Book, at 381 (Oct. 5, 2021).
[9] LexShares FAQs ("LexShares investors include high net worth individuals and institutional investors, including select family offices, hedge funds and asset managers.").
[10] *Id.* ("LexShares supports funding by non U.S. based investors through our online platform").
[11] Burford 2021 Annual Report at 12.
[12] LexShares, Litigation Finance 101, https://www.lexshares.com/litigation-finance-101.

> positive outcome, then the funding recipient would owe a predetermined portion of any damages recovered.[13]

Another large litigation financing firm, Burford, similarly explains:

> In return [for our investment], we receive our contractually agreed entitlement from the ultimate settlement or judgment on the claim and, if the claim does not produce any cash proceeds, we generally lose our capital.[14]

The nature of investors' financial rights is the same in appellate cases, as a firm specializing in appellate investments, Appeal Funding Partners, explains:

> An Appeal Funding cash advance is not a loan. It is an investment in a portion of a judgment on appeal. . . . In this regard, our goals and yours are perfectly aligned. *If you win, we win*. And you have the added security of knowing that if the case is eventually lost, you keep every dollar we advanced to you and you owe us nothing. If the case is ultimately won, we all win.[15]

Because the non-party financial entitlements that we are describing are directly dependent on the outcome of cases, and because there are no countervailing interests in nondisclosure of this information,[16] judges should know when they are present.

III. Circuit Judges Should Be Able to Determine Whether Financial Rights Contingent on the Outcome of Appeals Pose a Conflict of Interest

Circuit judges are required by statute,[17] the Code of Conduct for Federal Judges,[18] and the Judicial Conference Mandatory Conflict Screening Policy[19] to recuse themselves when they know that they have a financial interest that would be substantially affected by the outcome of the proceeding. This responsibility applies to financial interests "however small"[20] and extends to include any "appearance of impropriety."[21] Compliance with these provisions requires judges

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[13] *Id.*
[14] Burford 2021 Annual Report at 13.
[15] Appeal Funding Partners, Our Solutions, https://appealfundingpartners.com/our-solutions/ (emphasis added).
[16] By contrast to the funding at issue here, the U.S. Supreme Court has recognized the First Amendment prohibits "compelled disclosure of affiliation with groups engaged in advocacy" where the government has "no offsetting interest 'sufficient to justify the deterrent effect' of [such] disclosure." *See Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2382 (2021) (citation omitted). It has counseled, "Protected association furthers 'a wide variety of political, social, economic, educational, religious, and cultural ends,' and 'is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority. . . . [I]t is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action." *Id.* (citations omitted).
[17] 28 U.S.C. § 455.
[18] Code of Conduct for Federal Judges, Canon 3(C)(1)(c).
[19] U.S. Courts, Guide to Judiciary Policy, Mandatory Conflict Screening Policy, https://www.uscourts.gov/sites/default/files/guide-vol02c-ch04.pdf (last revised Mar. 15, 2022).
[20] Code of Conduct for Federal Judges, Canon 3(C)(3)(c).
[21] Code of Conduct for Federal Judges, Canon 2.

to be able to discover when non-party individuals, asset managers, and funds have contingent rights in proceeds triggered by the outcomes of appeals that they are handling.

IV. Rule 26.1 Should Be Amended to Provide Circuit Judges the Disclosures Necessary to Determine Whether Outcome-Contingent Non-Party Financial Entitlements Pose Conflicts of Interest

The purpose of Rule 26.1 is to "assist[] a judge in ascertaining whether or not the judge has an interest that should cause the judge to recuse himself or herself from the case," according to the 1998 Committee Notes.[22] But the Rule says nothing about potential non-party financial rights, even where those interests are directly affected by the outcome of the case. It merely requires that "[a]ny nongovernmental corporation that is a party to a proceeding in a court of appeals must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation."[23] To assist circuit judges in obtaining the information required to ascertain whether any potential non-party financial rights exist in the case, the Rule should be amended to require disclosure of non-party financial rights that are directly contingent upon the outcome of the appeal. Such an amendment would be consistent with the current Rule's focus on interests that are concretely affected by the outcome of an appeal; as the 1998 Committee Notes explain, "disclosure of entities that would *not* be adversely affected by a decision in the case is unnecessary."[24]

V. Circuit Local Rules are Inconsistent, Unclear, and Not Specific Enough to Encompass the Commonplace Non-Party Financial Entitlements Held by Litigation Investors

The variation in circuits' local rules on this subject further highlights the case for amending Rule 26.1 to create a uniform rule requiring disclosure of non-party financial rights contingent on the outcome of appeals.[25] Six circuits generally require disclosure of "all persons" or "other legal entities" that "are financially interested in the outcome of the litigation."[26] But because those rules do not specifically mention rights created by litigation financing contracts, some holders of these entitlements interpret the rules not to apply. Burford explains:

> Six out of 12 federal circuit courts of appeal have local variations on Rule 26.1 that additionally require outside parties with a financial interest in the outcome to be disclosed. None of these rules, however, singles out litigation finance providers for disclosure . . . .[27]

The result is today's lack of disclosure of such arrangements. In Burford's words: "[T]hese broad disclosure provisions in local rules do not appear to be much-followed or enforced."[28]

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[22] Fed. R. App. P. 26.1 committee notes to 1998 amendment.
[23] Fed. R. App. P. 26.1(a).
[24] Fed. R. App. P. 26.1 committee notes to 1998 amendment.
[25] Memorandum from Patrick A. Tighe, Rules Law Clerk, to Ed Cooper, Dan Coquillette, Rick Marcus, and Cathie Struve, *Survey of Federal and State Disclosure Rules Regarding Litigation Funding* (Feb. 7, 2018), *in* Advisory Committee on Civil Rules, Agenda Book, at 209 (Apr. 10, 2018).
[26] *See, e.g.*, 5th Cir. R. 28.2.1.
[27] Burford Article.
[28] *Id.*

Accordingly, amending Rule 26.1 to provide an explicit, uniform[29] disclosure standard for non-party outcome-contingent financial entitlements—and specifically mentioning rights to settlement or judgment proceeds that stem from litigation investment arrangements—is necessary for judges to determine whether such rights pose a conflict of interest in their cases.

Conclusion

Rule 26.1 is failing to provide circuit judges any information about the non-party, outcome-contingent financial rights that are commonplace in appellate cases today. Because circuit judges are responsible for determining whether such interests pose a conflict of interest, Rule 26.1's omission hampers the Judicial Conference's goal of promoting a greater "culture of compliance" in the judiciary. The various local disclosure rules have not proven an adequate substitute. The Committee should thus amend Rule 26.1 to require disclosure of non-party outcome-contingent rights to settlement or judgment proceeds tied to the outcome of cases, specifically including such interests arising from litigation investment contracts.

[29] The 1989 Committee Notes to Rule 26.1 invited circuits to develop local disclosure rules, but stated: "However, the committee requests the courts to consider the desirability of uniformity and the burden that varying circuit rules creates on attorneys who practice in many circuits." Fed. R. App. P. 26.1 advisory committee notes (1989 addition).

TAB 7F

24. THIRD-PARTY LITIGATION FUNDING (TPLF)

This matter is on the agenda for the Fall 2021 meeting because it seemed timely to report back to the Committee, in part due to an inquiry in May 2021 from Senator Grassley and Representative Issa.

This report identifies a variety of challenges that any rulemaking effort on this front might present, and also includes a catalog (prepared by successive Rules Law Clerks) that collects materials on the subject.

This memorandum does not recommend any immediate action, but provides an opportunity for Committee members to address these issues. The agenda book therefore contains a rather expansive treatment of this topic to acquaint Advisory Committee members with the issues, should the Committee be interested in proceeding at this time. If not, it is expected that the Committee will continue to monitor developments. It is likely that further information can be brought to bear. If the decision at present is to continue monitoring TPLF developments, there is no present need (despite the number of pages that follow) to delve deeply into these issues. But moving forward likely will present them.

The appendix to this report includes the following:

- Excerpt from the agenda book for the Advisory Committee's November 7, 2017 meeting (Excerpt)
- Suggestion 21-CV-L
- Catalog of materials collected by successive Rules Law Clerks on TPLF issues since 2019 (TPLF Catalog)

Rulemaking Background

Because it has been some time since the Committee discussed TPLF issues, it seems useful to provide some detail about the background of the current situation.

Proposals to add disclosure regarding third-party litigation funding first appeared on the Committee's agenda in Fall 2014. The U.S. Chamber of Commerce Institute for Legal Reform recommended then that a requirement to disclose TPLF be added to Rule 26(a)(1)(A), and apply to all civil actions. At that time, the Committee concluded that the field was changing rapidly and that not enough was known about it to support adding a disclosure requirement, and also that there were other questions about the wisdom of doing so.

Essentially the same proposal was raised again in 2017, submitted by the Chamber Institute for Legal Reform and more than two dozen other entities (Suggestion 17-CV-O). That proposal drew responses from two of the largest entities in the litigation funding business and also from two law professors who are prominent in the legal ethics field and familiar with the operation of TPLF entities. The agenda book for the November 2017 meeting of the Committee included more than 120 pages devoted to TPLF disclosure issues. The agenda memo presented at that meeting is included in this agenda book.

During the November 2017 meeting, the Committee discussed a variety of issues related to the role of TPLF in contemporary litigation. On the day after that meeting, the Humphreys Complex Litigation Institute of George Washington University National Law Center organized an all-day conference about TPLF that was attended by several members of the Committee.

Thereafter, the TPLF issues were among many studied by the MDL Subcommittee. Information from the Judicial Panel on Multidistrict Litigation and other sources indicated that such arrangements were not commonplace in MDL proceedings and, at the Committee's October 2019 meeting the subcommittee reported that TPLF did not seem particularly prominent in MDL proceedings. The conclusion reached was that further work on a possible rule would be suspended, but the evolution of TPLF would be monitored going forward, not with a primary focus on MDL proceedings but with regard to all civil litigation, the focus on the original 2014 proposal. This changed treatment was reported to the Standing Committee at its January 2020 meeting.

That monitoring has continued, and successive Rules Law Clerks have assisted in preserving a collection of materials on the subject, as well as preparing a summary of what's in the collection. As noted above, the current version of this catalog is in this agenda book.

The purpose of this memo, then, is to introduce the current status of these issues. One starting point might be drawn from the Institute for Legal Reform's 2017 submission in support of its proposal in 2017 (Suggestion 17-CV-O at 9), which urges that disclosure should be required because TPLF arrangements "often distort the traditional adversarial system of civil justice." Somewhat the same point appears in the minutes of the Advisory Committee's minutes of the November 2017 meeting (at p. 17, lines 744-48):

> "Warring camps" are involved. The proponents of disclosure have strategic interests. They would like to outlaw third-party financing because it enables litigation that would not otherwise occur. There is no question that funding enables lawsuits. Many of them are meritorious, though perhaps not all.

Perhaps further evidence of that dispute is that a new organization — the International Legal Finance Association, founded in September 2020 — submitted a comment to the Committee on April 7, 2021 (Suggestion 21-CV-H), pushing back against points made in the most recent submission by the U.S. Chamber Institute for Legal Reform (Suggestion 20-CV-II), citing the "countless hearings, receipt of testimony" and "extensive factfinding" by this Committee in deciding not to proceed with the disclosure proposal before it, and noting that district courts have often rejected discovery requests directed to litigation funding.

It is clear that there are strong views on both sides of the disclosure issues. It is not clear that either set of views is correct in all instances, or most of the time. TPLF organizations (and others) emphasize that such funding enables people with valid claims to sustain litigation. TPLF funders urge that they carefully scrutinize the validity of claims before funding litigation because, given the usual non-recourse nature of their financing, they can only make money if the litigation produces positive financial results. For example, a law firm blog mentioned in the TPLF Catalog noted on April 2, 2019 that litigation funding can be used by insurance policyholders to counteract an insurer's incentives to drag out litigation and delay paying claims.

Disclosure proponents point to reported instances of TPLF financing used to support outreach of "claims aggregators" who collect claims and funnel them to lawyers. It is not clear that any across-the-board judgment on whether TPLF is desirable or not desirable will be possible.

Meanwhile, in some states there have been legislative initiatives to address allegedly overreaching tactics by some litigation funders. In general, this legislative activity has had a "consumer protection" cast, and it has focused on the "consumer" part of the TPLF market. The "commercial" version of TPLF usually involves much larger sums of money and sophisticated actors. One feature of such consumer protection initiatives has to do with usury protections. Disclosure of terms to the borrower, not disclosure to the litigation adversary, is sometimes included.

In addition, as noted below, in late June 2021, the District of New Jersey adopted a local rule addressing TPLF, and in early 2017, the Northern District of California adopted a local rule calling for disclosure of TPLF arrangements in connection with class actions.

Inquiry from Senator Grassley and Representative Issa (Suggestion 21-CV-L)

In May 2021, Senator Grassley, Ranking Member of the Senate Judiciary Committee, and Representative Issa, Ranking Member of the House Judiciary Committee, wrote to the Committee inquiring about its ongoing consideration of TPLF issues. In part this submission says:

> The practice of TPLF cannot be allowed to proceed in its current form. Under present law, virtually all TPLF activity occurs in secrecy because there is no procedural or evidentiary rule requiring disclosure of the use and terms of such funding. Moreover, to the extent defendants seek this information through ordinary discovery, plaintiffs generally object to providing it, and courts often do not compel production of the requested information.
>
> Transparency brings accountability. It is true of Congress, the Executive, and our courts. A healthy dose of transparency is necessary to ensure that profiteers are not distorting our civil justice system for their own benefit.

Both Senator Grassley and Representative Issa have introduced legislation addressing TPLF that closely resembles bills introduced in prior Congresses. Senate Bill 840 would add a new § 1716 to Title 28, providing in part that:

> (a) IN GENERAL. — In any class action, class counsel shall —
>
> (1) disclose in writing to the court and all other named parties to the class action the identity of any commercial enterprise other than a class member or class counsel of record, that has a right to receive payment that is contingent on the receipt of monetary relief in the class action by settlement, judgment, or otherwise; and

(2) produce for inspection and copying, except as otherwise stipulated or ordered by the court, any agreement creating the contingent right.

The bill would also add a new subsection (g) to § 1407 of Title 28, saying in part:

(g)(1) In any coordinated or consolidated pretrial proceedings conducted pursuant to this section, counsel for a party asserting a claim whose civil action is assigned to or directly filed in the proceedings shall —

(A) disclose in writing to the court and all other parties the identity of any commercial enterprise, other than the named parties or counsel, that has a right to receive payment that is contingent on the receipt of monetary relief in the civil action by settlement, judgment, or otherwise; and

(B) produce for inspection and copying, except as otherwise stipulated or ordered by the court, any agreement creating the contingent right.

If enacted, this bill might produce some questions of implementation. For one thing, it is not clear what consequences follow from failure to comply with the disclosure requirements. Should that lead to dismissal with prejudice? Perhaps that would give the funder a strong incentive to ensure disclosure.

But complying might prove difficult for class counsel in class actions. For one thing, it is not clear whether the bill would apply from the moment the proposed class action is filed or only after class certification. Rule 23(g)(3) permits the court to appoint interim class counsel before certification. Would the disclosure apply to this lawyer as well? Would that mean that class counsel must collect and report the contingency fee agreements class members have reached with retained counsel? Perhaps the limitation to a "commercial enterprise" would exclude retained counsel, though one might say that lawyers are engaged, at least in part, in a commercial enterprise.

A different set of complications could ensue if putative class counsel (whether or not appointed as interim class counsel) negotiate a pre-certification settlement that includes class certification as well as the substantive relief available via the settlement. Rule 23(e) requires notice to the class of the proposed settlement and, in Rule 23(b)(3) class actions, Rule 23(c)(2)(B) requires individual notice to class members who can be identified through reasonable effort. They can opt out if they choose. Are class counsel obliged to determine and disclose whether any class members have made TPLF arrangements, perhaps of a "consumer" sort? Should the Rule 23(c) notice advise class members that such disclosure is required if they do not opt out?

In the MDL setting, related but somewhat different issues might be presented. The disclosure responsibility seems to rest on retained counsel there rather than leadership counsel. In MDL proceedings in which there is a PFS or Census practice, perhaps disclosure of TPLF arrangements would be appended to that.

Earlier bills regarding TPLF before Congress did not all focus only on class actions and MDL proceedings.

"Consumer" Funding Issues

As already introduced, another set of potential issues relates to the funding not obtained by lawyers but by clients themselves. We have been told repeatedly that there are at least two disparate worlds of litigation funding — "commercial" litigation funding (often involving funding commitments in the millions) and "consumer" litigation funding, often involving much smaller amounts of money that plaintiffs use to support themselves while their cases are pending. At least in some instances lawyers may not be aware of all such funding. At least the "commercial enterprise" provision would seem to exclude disclosure regarding financing from friends and relatives who provide support to the plaintiff during the litigation in expectation that they would be paid back after a successful conclusion of the case. But it would seem to call for disclosure of funding from an entity in the business of providing "consumer" TPLF.

The 2017 and 2014 proposals to this Committee sought to add a new subsection (v) to Rule 26(a)1)(A) as follows:

> (v) for inspection and copying as under Rule 34, any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on, and sourced from any proceeds of the civil action, by settlement, judgment or otherwise.

This proposal would apply to all civil litigation. It is not limited to "commercial enterprises," and could reach relatives of the plaintiff who provided support for the plaintiff's living expenses while the suit was pending, expecting to be repaid after the suit's successful conclusion.

All these proposals could be criticized as being one-sided. That is, they are directed only at those asserting claims, and not at those defending against them. Yet (as mentioned in some of the recent literature) there are indications that in at least some instances TPLF arrangements exist to support defendants litigating against claims. It seems that at least some of those are arranged by "commercial enterprises." One might ask whether the existence of such arrangements might also distort the traditional adversary system of U.S. civil justice.

Growing Importance of TPLF

Another starting point is to recognize that TPLF is, according to some, an increasingly big deal: "Litigation finance is our civil justice system's killer app. Unheard of yesterday, it is a mainstay today." Suneal Bedi & William Marra, *The Shadows of Litigation Finance*, 74 Vand. L. Rev. 563, 565 (2021). There is even a publication called the Third Party Litigation Funding Law Review, published by Law Business Research Ltd. of London. Its 2019 third edition had chapters on TPLF arrangements in 23 countries, including Indonesia, Nigeria, Ukraine, and the United Arab Emirates.

Chapter 23 of this TPLF Law Review is about the U.S. It distinguishes between two "main categories" of funding activity — commercial claims often in excess of $10 million, and consumer claims, typically of a mass tort or personal injury nature. It also identifies a number of sorts of funders. *Id.* at 217-18.

1. Large, publicly-traded entities

2. US-based private funds

3. privately held foreign funders

4. funders focused on smaller opportunities

5. lesser known, smaller entities, some of which are backed by single investors or raise capital on an investment by investment basis

It also reports that "a growing secondary market exists, in which hedge funds and other investment managers increasingly participate." In addition, "major funders have increasingly shifted toward portfolio funding," involving "a collateral pool of multiple cases. * * * Some funders also provide loans to law firms against legal receivables." *Id.* at 218-19. At some point, those may come to resemble bank financing of law firms secured by receivables.

Looking beyond the U.S., TPLF appears to be prominent internationally. For example, Professor Victoria Sahini of Arizona State University College of Law published a book entitled Third Party Funding in International Arbitration (Walters-Kluwer 2017, co-authored with Lisa Bench Nieuwveld). According to her online law school biography, Prof. Sahini has also published at least four articles in U.S. law reviews on TPLF, and also has contributed chapters on TPLF to three forthcoming books to be published in Europe.

As noted in the catalog of materials gathered during the monitoring of TPLF issues, there are less orthodox arrangements that may be viewed as funding. One example is *Lawson v. Spirit AeroSystems, Inc.*, 2020 WL 3288058 (D. Kan., June 18, 2020), a dispute between the former CEO of one company and a company with which he signed on as a consultant. The CEO was owed periodic payments from his former company that it threatened to terminate on the ground that he was forbidden from serving as a consultant to the new company. The new company then promised to pay the CEO the amounts that he was to receive from his old company in return for being subrogated to claims (asserted in this lawsuit) against his former company for separation payments. As the court put it, "Elliot [the new company] is now funding this lawsuit to recover the amounts Spirit [the old company] owes Lawson pursuant to his Retirement Agreement." This certainly looks like a one-off arrangement, but it also suggests the variety of litigation funding arrangements that may come into existence.

Other recent cases point up other sorts of arrangements that may occur and be regarded as TPLF. For example, *Ruckh v. Salus Rehabilitation, LLC*, 963 F.3d 1089 (11th Cir. 2020), was a False Claims Act case in which the relator got funding when defendant filed a motion for judgment as a matter of law. At that point (well into the case), the relator sold 4% of her interest in the recovery (estimated to be many millions of dollars) to a funder. The court addressed the question whether this arrangement deprived the relator of Article III standing. The court rejected

the argument. Though it is an odd example, it may suggest a whole area of litigation funding that has existed for some time — funding after a successful result in the trial court to support appellate efforts to protect the resulting judgment. Some items listed in the TPLF Catalog thus focus on litigation funding for judgment enforcement efforts. It is not clear whether the various proposals before this Committee seek to require disclosure of funding sought to enforce or protect judgments entered by district courts; the focus seems to be more at funding obtained near the outset, not after judgment in the trial court.

Still other recent developments point up possible additional considerations. In some Bankruptcy Court proceedings, for example, litigation on behalf of the estate may be financed by litigation funders. Indeed, court approval may be necessary before such funding arrangements can be consummated. One example is provided by *In re Bronson Masonry, LLC*, Case No. 15-34713-sgj7 (N.D. Tex.) — a transcript of an evidentiary hearing on April 13, 2016 concerning approval by the court for such an arrangement. It is not clear how frequent such arrangements might be, but it is understandable that they may sometimes be considered. Bankruptcy Rule 7026 says that "Fed. R. Civ. P. 26 applies in adversary proceedings." It may be that the possible impact of an amendment to Rule 26(a)(1)(A) in bankruptcy court proceedings should be considered. It does not appear that the pending bill in Congress would affect those proceedings.

Issue Presently Before the Committee

The question at present is whether to launch a serious study of TPLF activity to support possible rulemaking. Though there certainly have been developments since 2019, it seems that many or most of the questions that existed when the Committee last considered these issues continue to be challenging. For the present, it seems useful to draw from the reports cataloged in Appendix D a partial list of issues suggested by those materials that would affect any such rulemaking effort. The effort would require a considerable amount of work. As information about the multitude of issues increases, it may be that one response is to conclude that this collection of issues is too diverse to be handled by a civil rule amendment. Another is to conclude that regulation of TPLF is best left to other entities, such as state legislatures, rather than individual federal judges.

The following provides information bearing on the Committee's role.

<u>Local Rules and State Legislation Addressing Disclosure</u>

There has been some consideration in the past of local rules addressing disclosure of TPLF. In 2018, Rules Law Clerk Patrick Tighe prepared a memorandum on local rules in the courts of appeals and the district courts that was included in the agenda book for the Committee's April 2018 meeting. *See* Agenda Book for April 2018 Meeting at 209-18. Tighe found disclosure requirements in some two dozen district courts, seemingly designed to alert the court to possible grounds for recusal. (About half the courts of appeals had similar rules.) It does not seem that these disclosure rules are focused on the main issues the current proposal before this Committee addresses.

On June 21, 2021, the District of New Jersey adopted its Local Rule 7.7.1 that seems to be focused more closely on issues like those raised by the current submission before this Committee. It applies to all cases, and calls for compliance in pending cases within 45 days (i.e., by early August 2021). It provides, in pertinent part:

> (a) Within 30 days of filing an initial pleading or transfer of the matter to this district, including the removal of a state action, or promptly after learning of the information to be disclosed, all parties, including intervening parties, shall file a statement (separate from any pleading) containing the following information regarding any person or entity that is not a party and is providing funding for some or all of the attorneys' fees and expenses for the litigation on non-recourse basis in exchange for (1) a contingent financial interest based upon the results of the litigation or (2) a non-monetary result that is not in the nature of a personal or bank loan or insurance:
>
> 1. The identity of the funder(s), including the name, address, and if a legal entity, its place of formation;
>
> 2. Whether the funder's approval is necessary for litigation decisions or settlement decisions in the action and if the answer is in the affirmative, the nature of the terms and conditions relating to that approval; and
>
> 3. A brief description of the nature of the financial interest.
>
> (b) The parties may seek additional discovery of the terms of any such agreement upon a showing of good cause that the non-party has authority to make material litigation decisions or settlement decisions, the interests of the parties or the class (if applicable) are not being promoted or protected, or conflicts of interest exist, or such other disclosure is necessary to any issue in the case.

A Bloomberg Law News story on May 24, 2021, while the local rule was under consideration, reported that a practitioner involved in drafting this rule proposal invoked Patrick Tighe's 2018 study of other district court local rules. But it does not seem that the local rules Tighe found, focused on recusal issues, resemble the proposals on which this memorandum is focused. And there appears to have been some controversy about the D.N.J. local rule proposal. Thus, the May 24 Bloomberg Law News story about it is entitled "New Jersey Sees New Battle Over Litigation Finance Disclosure."

The D.N.J. local rule does not automatically require the party that obtained funding to turn over the funding agreement. Instead, it focuses on issues of funder control of litigation and contemplates further discovery based on the showings outlined in section (b) of the proposed rule.

In 2018, the Wisconsin Legislature adopted a provision for the Wisconsin state courts that required disclosures of the sort called for by the proposal before this Committee. That

provision was part of a larger bill known as Wisconsin Act 235, which also included other provisions like one revising the scope of discovery in Wisconsin state courts to correspond to the revised scope definition in Rule 26(b)(1). Two days after Wisconsin Governor Scott Walker signed the Wisconsin act, the president of the U.S. Chamber Institute for Legal Reform said other states would follow Wisconsin's lead. *See* U.S. Chamber Institute for Legal Reform release, April 5, 2018 (citing Lisa Rickard's statement in an interview with the National Law Journal).

Informal research does not indicate that this Wisconsin legislation has had a major impact in the Wisconsin state courts. It is not clear whether any other states have adopted similar legislation.

In January 2017, the N.D. Cal. added the following to the paragraph of its Standing Order on the Contents of Joint Case Management Statement that relates to a certification of interested persons: "In any proposed class, collective, or representative action, the required disclosure includes any person or entity that is funding the prosecution of any claim or counterclaim." In its submission in support of the rule proposal before this Committee, the Institute for Legal Reform quoted a newspaper article saying that this court's action was "a harbinger and a signal that courts * * * need to consider the presence of third-party financiers." Suggestion 17-CV-O at 10. Though no search has been made, it is not clear that other federal courts have followed the California lead.

It bears noting, however, that this provision is (like the pending legislation in Congress) not applicable to all civil litigation but instead only to class, collective, or representative actions. In addition, it requires only the identification of the person that is funding the litigation. To date, there has evidently been only one occasion of disclosure pursuant to the N.D. Cal. order. That disclosure was of a grant from a public entity (not a litigation funder per se) to help with the costs of a prisoner civil rights litigation.

Problems of scope: As already noted, the pending proposal before this Committee and the bill in Congress have different scopes in terms of what they apply to. As was noted in 2017, there would be problems of scope if this Committee pursues rulemaking. *See infra* Excerpt. The information obtained since 2017 suggests that many would need to be confronted:

All civil litigation or only class, MDL, and "representative" litigation: One of the most active litigation areas for litigation funding is reportedly patent litigation, but that would not seemingly be affected by the bill in Congress. On the other hand, including all personal injury auto accident cases in federal court might be seen as excessive, in part depending on what is considered "litigation funding." When a relative helps the victim with living expenses, should that be covered? Should "consumer" litigation funding be included?

"Commercial" v. "consumer" funding: There seem to be at least two major branches of litigation funding. The "commercial" branch appears to involve large funding amounts (millions of dollars) that sometimes go directly to the lawyers to pay for the litigation. The consumer form of funding tends to involve payments to the plaintiffs to cover rent, groceries, etc. Limiting a rule to "commercial" funding could prove difficult. Would that dividing line look to the dollar

amount of the funding commitment, the nature of the litigant (natural person or legal entity), or the nature of the claim (e.g., personal injury or patent infringement)?

Sources of funding covered: It does not seem that the primary concern of those advancing disclosure proposals is to have them apply to relatives who help with living expenses. Thus, the bill in Congress speaks of "commercial enterprises." We have been informed that there are companies that are in the business of making relatively small loans to auto accident claimants. It is not clear that requiring disclosure of these "living expenses" arrangements addresses the concerns of the proponents of disclosure. Perhaps one can assume that most such cases will not be in federal court, but one might also consider that we are told defendants often prefer federal court and will remove if that is possible.

"Public interest" or "social interest" litigation funders: In the TPLF Catalog there is a reference to *Hyland v. Navient Corp.*, No. 18-cv-9031 (S.D.N.Y., Oct. 9, 2020) in which the American Federation of Teachers paid plaintiffs' counsel fees in a class action, but this arrangement was not disclosed to the court. The court therefore directed that what would otherwise be paid as an attorney's fees award instead be paid into a cy pres fund. Other discussions of TPLF have raised the possibility that "social justice" organizations might support litigation, and that requiring disclosure of those arrangements could be disruptive without seeming to address the concerns raised by the proponents of disclosure.

In a related vein, one might think of the action brought by Hulk Hogan against Gawker, in which his litigation costs were reportedly underwritten by the Silicon Valley billionaire Peter Thiel, who had an unrelated grudge against Gawker. Perhaps Thiel regarded bankrupting Gawker as "social justice," but that seems different from the efforts of the American Federation of Teachers.

Farther afield yet is a March 7, 2021 article (included in the catalog of materials in this agenda book) entitled "Who's Funding That Lawsuit? Implications for Lawfare." This article warns that an American company vying for a contract to build infrastructure in an African country might find itself facing a class action in U.S. courts funded by a foreign bidder for the same project. The foreign company or government might fund the American litigation; "the rise of phenomena like third-party litigation funding [could allow] foreign actors to weaponize the [American] legal system for their own influence objectives." This scenario may be far-fetched, but it is worth noting that the current proposals would not reach it because they focus on funders who seek a payout from the litigation; in the hypothetical situation the goal is only to hobble the American company. Indeed, the article posits that the hypothetical lawsuit would eventually be dismissed, but that dismissal would happen too late to enable the American company to compete for the business in Africa. This is surely not "public interest" litigation.

What must be disclosed: A different problem of scope is the scope of required disclosure. The proposal before this Committee requires that the parties' full agreement must be disclosed, and the bill in Congress says the same in instances in which it would apply. There are other gradations. Disclosure could be limited to the fact of funding. Disclosure could also require that the funder's identity be included. (This could address recusal issues.) Disclosure could call for a general description of the funding agreement. Disclosure could also include specific reference to any control the funder has over the conduct of the litigation. Disclosure cold also go beyond the

current proposals and include all communications between the funder and the attorney or party that received the funding. (This would raise serious work product issues, mentioned below.)

To whom must disclosure be made: The proposals before Congress and this Committee call for disclosure to all other parties, including (perhaps particularly) adverse parties. That is not the only option. In the Opioid MDL in the N.D. Ohio, Judge Polster directed that funding arrangements be disclosed to the court, with the possibility of in camera examination of funding materials if the court found that useful. As noted already, the MDL Subcommittee concluded that there is little indication of attorneys in MDL proceedings using litigation funding. In the Zantac MDL, Judge Rosenberg inquired about such finding but did not find any.

Follow-on discovery: As the D.N.J. local rule proposal shows, a rule could explicitly address follow-on discovery by specifying the showing that need be made. With regard to the other required disclosures under Rule 26(a)(1)(A), follow up discovery is normal, even the purpose of the initial disclosures. As noted below, district courts have been quite cautious about allowing substantial discovery regarding funding even where its existence is disclosed. One scope issue then might be whether to address this possibility in a rule. Another potential concern is that such discovery could be viewed as distracting from the merits of the case. And it might be that the fuller the disclosure the greater the potential for discovery designed to "follow up on" what was disclosed.

Portfolio funding: As the sources in the catalog of materials show, "portfolio" funding may be attractive to funders to expand the collateral available. A Bloomberg Law News story ("Firm Lawyers Wary of Portfolio Litigation Financing, March 5, 2019) says that lawyers strongly prefer single-case funding. From the rulemaking perspective, the possibility of portfolio funding could raise issues of scope. Is disclosure required in every case in the portfolio? Assuming the portfolio includes cases on file when the funding is advanced, what is the timing of disclosure for those pending cases? If the portfolio funding agreement provides that all obligations to the funder are satisfied once $X is paid (and that then the funding obligation no longer exists to pending cases), does that mean that the disclosure can somehow be withdrawn?

Cases on appeal: Funders emphasize that they pick the cases they will fund very carefully. (They stress this point in part to rebut claims that funding encourages the filing of groundless litigation.) At least with regard to cases in which a substantial verdict or judgment has been obtained, it would seem that the funder would be much more willing to provide funding to defend that judgment on appeal. Indeed, that seems to be a significant sub-category of litigation funding. Should that be included? Should it be included in the Appellate Rules? Can it really be said that funding for successful litigants facing appeals challenging their trial court success raises the concerns advanced as justifying the proposed disclosure requirement?

PPP loans included?: Solely to illustrate arguments that might be made, consider a June 12, 2020, post from California Attorney Lending (listed in the catalog of TPLF materials included in this agenda book). It suggests that PPP loans to law firms might be included even though they are not tied to specific litigation. Though they may be non-recourse (repayment not required if the recipient law firm retains its employees during the lockdown), it does not seem that anyone would seriously argue that they are subject to disclosure as TPLF. Certainly the PPP program will be behind us before any rule change goes into effect, but the possibility that such

arguments might be made illustrates the difficulties of proceeding without a great deal more knowledge.

Disclosure forbidden?: One final note on scope. There have certainly been instances in which parties that have funding want their adversaries to know about it, and perhaps to know the extent of the promised funding. That could be a club to use to encourage settlement. Conceivably, a rule might prohibit such disclosure. Nobody has suggested such a rule.

Work Product Concerns

The funders that have submitted comments to the Committee have emphasized their need to evaluate cases carefully before providing funding, explaining that intense scrutiny on the ground that non-recourse loans are high risk. A Feb. 14, 2020, article in Bloomberg Law News entitled "Litigation Finance — How to Get to 'Yes' After Hearing 'No'" (included in catalog of materials in this agenda book) cites an officer of a leading funder as saying that to obtain funding a prospective client should offer: "(1) a substantive memo on the claims, including a comprehensive explanation of how the law firm counsel plans to tackle any legal hurdles that may arise; (2) a thoughtful and supported early-stage estimate of damages; and (3) a detailed budget for counsel's fees and costs, keyed to stages in the litigation." It is not clear that all funders are this demanding; high-volume "consumer" funders of car crash claimants probably are not.

This kind of material is likely to be core opinion work product. For a litigation adversary to gain access to it would provide many strategic benefits. But ordinarily one would regard the funder and the litigating party as having a common interest sufficient to prevent waiver arguments. To require disclosure of such material would threaten to undermine that protection.

Current District Court Handling of Discovery Regarding Funding

As the letter from Senator Grassley and Representative Issa says, when defendants seek discovery of funding details "courts often do not compel production of the requested information." It seems that a significant objective of the current proposals is to overturn these district court decisions.

As Senator Grassley and Representative Issa say, the general view is that courts are reluctant to permit discovery regarding litigation funding. An illustration is *Continental Circuits LLC v. Intel. Corp.*, 435 F.Supp.3d 1014 (D. Az. 2020), decided by Judge David Campbell, a former Chair of a prior Discovery Subcommittee, of this Committee, and of the Standing Committee.

In this patent infringement action, plaintiff was a non-practicing entity, one that does not manufacture products but is primarily involved in seeking licensing fees for its patents. Plaintiff asserted that Intel had infringed several of its patents. Intel sought discovery of what it contended were "three narrowly-tailored categories of documents and information" about plaintiff's funding:

1. any final agreement between plaintiff and any funder; and

2. the identities of all persons or entities with a fiscal interest in the outcome of the litigation; and

3. the identities of any potential funders who declined to provide funding after being approached by plaintiff.

These discovery requests may offer a hint of the sort of discovery adopting a disclosure rule might invite.

Judge Campbell found that the first two requests satisfied the "relatively low bar" of relevancy, but that the third did not. Plaintiff objected to production with regard to items (1) and (2) on work product grounds. (Plaintiff did not raise attorney-client privilege grounds.) Intel argued that the funding materials were not generated "for use in" litigation, but Judge Campbell rejected that argument using the Ninth Circuit "because of" standard: "Litigation funding agreements are created 'because of' the litigation they will fund." Intel also argued that any work product protection had been waived. Judge Campbell had reviewed some funding agreements in camera and found that they included confidentiality provisions consistent with the common interest exception to waiver. Given that, Intel failed to show a substantial need to justify production of these materials. On this basis, Judge Campbell ordered plaintiff to identify its funders, but denied further discovery.

As this case demonstrates, the handling of discovery requests in given cases depends considerably on the specifics of those cases. It does seem that district judges have inquired into funding and provided discovery about it when justified in a given case. At the same time, it is apparent that tricky work product issues may arise with some frequency, particularly if funders seek and obtain opinion work product as part of their scrutiny of requests for funding.

It also seems likely that fairly aggressive discovery efforts will occur in some cases. There is a considerable argument that Rule 26 is calibrated to guide district judges in making discovery decisions in individual cases. To the extent that disclosure rules might alter the outcomes (which Senator Grassley and Representative Issa seem to say is a goal of their proposed legislation), that could deprive district judges of the discretion they currently wield in making these decisions. Doing the same thing by amending Rule 26(a)(1)(A) might similarly limit district court discretion. Presently, district judges may make case-by-case decisions, but a rule would likely change that.

Enforcement

As noted above, it is not clear how the pending bill in Congress would be enforced. Regarding the proposal to amend Rule 26(a)(1)(A) before this Committee, enforcement might prove a challenge.

For most of the other initial disclosure provisions, Rule 37(c)(1) is the enforcement device, and it says that material not disclosed may not be used by the party that failed to disclose it. That exclusion remedy has generated a great deal of case law. *See* 8B Fed. Prac. & Pro. § 2289.1.

Enforcing the disclosure of insurance coverage, required by Rule 26(a)(1)(A)(iv), is less easy. That coverage cannot usually be admitted in evidence under the Evidence Rules. And the insured (usually a defendant) ordinarily would not want to use that evidence. Perhaps this new proposed disclosure provision is similar. It hardly seems that the claim should be dismissed due to failure to disclose funding. Research on methods of responding to failures to comply with Rule 26(a)(1)(A)(iv) might yield analogies, but absent that the likely outcome will be further challenges for district judges who find that required disclosure has not been provided.

Funding for Defendants?

There is at least some suggestion that on occasion funding arrangements have been made to support litigation by the defendant rather than the plaintiff. To the extent that funding might facilitate unwarranted claims, it would seem possible that funding might also facilitate assertion of unwarranted defenses. All the proposals have focused only on claimants, and that will likely be the bulk of litigation funding activity. But if serious study of these issues is to occur, at least some thought might be given to funding of defendants. This might be regarded as another scope issue.

Lest it be thought that defense-side funding could not occur, one could refer to a case that is a law school staple regarding constitutional limits on personal jurisdiction — *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). That case arose out of a rear-end collision in Oklahoma leading to a fire that seriously injured several members of a family from New York who were moving to Arizona. They claimed that their Audi was defectively designed, leading to the fire. The county in which the crash occurred was regarded as a sort of "plaintiffs' paradise." Because the family had not gotten to Arizona (thereby acquiring Arizona domicile) they were still New Yorkers for diversity purposes.

Plaintiffs sued in state court, naming not only Audi, the German manufacturer of the car, and VW of America, the nationwide distributor, but also the New York retailer from whom they bought their car, and World-Wide, the distributor for New York, New Jersey, and Connecticut. These defendants moved to dismiss for lack of personal jurisdiction, but those objections were unsuccessful in the state courts. These "small fry" defendants were not willing to pay the cost of seeking Supreme Court review, but their lawyer persuaded Audi and VW of America that the big defendants should fund the appeal to the Court in an effort to make the case removable. *See* Charles Adams, *World-Wide Volkswagen v. Woodson — The Rest of the Story*, 72 Neb. L. Rev. 1112, 1135 (1993) (reporting that Audi agreed to pay for the Supreme Court petition, have its lawyers prepare briefing in the Court, and have a name partner in its New York law firm argue the case). This funding would not be covered by any of these disclosure provisions. Audi is clearly a "commercial enterprise," but it sought no payout sourced from the ultimate victory in the Court by the funded parties. It did get to remove after the Court's decision. Yet if the goal of disclosure is to reveal who is "really on the other side of the litigation," that principle might extend to funding for defendants.

Courts as Enforcers of Professional Responsibility Rules

Several of the arguments of the proponents of rule amendment are premised on various rules of professional responsibility. Ordinarily those rules are the province of state bar

authorities. Not all states may come out the same way. For example, the TPLF Catalog includes an October 26, 2020 Bloomberg Law News article entitled "California State Bar Opinion on Litigation Funding Could Have Sway." This article reports on Formal Opinion No. 2020-204 of the state bar "strongly support[ing] legal finance and confirm[ing] that its use presents no significant hurdles to the ethical practice of law."

On the other hand, a February 28, 2020 New York City Bar Report of its Working Group on Litigation Funding raised cautions about such arrangements, particularly with regard to fee sharing. A March 2, 2020 Bloomberg Law News article commented on the potential impact of this report. *See infra* TPLF Catalog.

In general, the federal courts have not regarded themselves as responsible to enforce state professional responsibility rules. It is certainly possible that litigation funding could put stress on a lawyer's duty of loyalty to the client. But that is not the only potential source of such stress. Consider the ordinary personal injury contingency fee agreement. That also might place the lawyer's self interest in prompt payment (via settlement) in tension with the client's desire to go to trial. But there is no general disclosure requirement regarding the existence or details of contingency fee agreements so that judges can police them.

Particularly in light of the seemingly divergent attitudes in various states about litigation funding, the Committee may consider it a dubious enterprise to adopt disclosure requirements designed to immerse federal judges in these issues, or in enforcing state professional responsibility rules.

And in MDL proceedings, that might become even more difficult, as it could present far trickier choice of law issues. Is the transferee judge to apply the professional responsibility rules of the state in which she sits, or refer to the rules that prevail in the jurisdictions from which transferred cases came? And how should cases "directly filed" in the transferee court (by stipulation of the defendants) be handled?

Federal Courts as Enforcers of Champerty and Maintenance Rules

The proponents of disclosure urge that one objective should be to unearth violations of rules against champerty and maintenance. Interesting debates can focus on whether these common law doctrines continue to serve a useful purpose. For purposes of this Committee, however, if it attempts to fashion rules to govern the entire federal court system, what may matter most is that the handling of these matters is hardly uniform across the nation.

To the contrary, some reports we have received from ethics experts suggest that both these doctrines are in decline. For example, the Institute for Legal Reform proposal in 2017 cited a Minnesota Court of Appeals decision emphasizing "Minnesota's local interest against champerty." Suggestion 17-CV-O, p. 12, citing *Maslowski v. Prospect Funding Partners LLC*, 2017 Minn. App. LEXIS 26, at *22 (Minn. Ct. App., Feb. 13, 2017). Yet as disclosed in the catalog of materials included in this agenda book, the Bloomberg Law News article "The Fall of Champerty and the Future of Litigation Funding" (June 16, 2020) reports that in *Maslowski v. Prospect Funding Partners, LLC*, 44 N.W.2d 235 (Minn. S. Ct. 2020), the state supreme court

held the challenged litigation funding contract in that case was enforceable under Minnesota law over objections based on champerty.

Careful investigation of the current importance and evolving viability of the doctrines of champerty and maintenance has not been done, but the auguries may make it seem odd to establish a procedure by national rule that is designed to further legal doctrines that no longer apply in significant parts of the nation.

* * * * *

This catalog of issues is hardly exhaustive, but suggests the challenges that may lie ahead for rulemaking on this subject. As should be apparent, a very large amount of fact-gathering would be necessary to fashion a disclosure rule addressing TPLF.

The following excerpt from the November 2017 agenda book provides more, but somewhat dated, information. This additional background may illuminate the issues presented by possible disclosure rules for TPLF arrangements. The variety of materials in the catalog of TPLF publications maintained by the Rules Law Clerks provides additional detail about the wide variety of issues that may arise. Moving forward likely involves addressing many of these issues.

Suggestion 21-CV-L raises a number of intriguing issues in relation to a just-emerging phenomenon. Should the Committee wish to proceed, it might well be important initially to try to get a better grasp of the TPLF phenomenon itself, for devising a rule that suitably deals with it seems to depend on some confidence about how it works. Although the phenomenon may have stirred controversy in some quarters, it is not clear how much a rule change would improve the handling of those controversies.

Excerpt from the Agenda Book for the Advisory Committee's November 7, 2017 Meeting

This is a joint submission from the U.S. Chamber Institute for Legal Reform, the American Insurance Assoc., the American Tort Reform Assoc., Lawyers for Civil Justice, and the National Association of Manufacturers. It proposes adding another provision to Rule 26(a)(1)(A) calling for initial disclosure (in addition to the four sorts of initial disclosure already required under the rule) of the following:

> (v) for inspection and copying as under Rule 34, any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on, and sourced from any proceeds of the civil action, by settlement, judgment or otherwise.

In some ways, this proposal builds on the requirement in Rule 26(a)(1)(A)(iv) of disclosure as follows:

(iv) for inspection and copying as under Rule 34, any agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

The explanation for this proposal is that third-party litigation funding (TPLF) has emerged as a "burgeoning aspect" of at least some litigation, and that it can produce "potentially adverse effects * * * on our civil justice system." Several reasons are advanced for adopting a change along the proposed lines. Before turning to those reasons, however, it seems useful to sketch out something about litigation funding and also to describe the development of what is now in Rule 26(a)(1)(A)(iv).

Third-Party Litigation Funding

In the "good old days," one might say that there was almost nothing that could be called TPLF. Private law firms called for their partners to put up the capital needed for firm operations. Contingency-fee lawyers might find their income very uneven as it depended on settlement of cases. In recent decades, some large private law firms have turned to letters of credit or similar arrangements with lenders, often banks, to finance ongoing firm activities. According to reports in the press, some of those firms have borrowed considerably, and that borrowing (and its conditions) may have contributed to the failure of some large law firms in the last decade or so. Plaintiff-side firms, meanwhile, seem increasingly to have obtained financing for their operations from other sorts of lenders, not traditional banks. Magazines targeting plaintiff firms therefore include ads about such financing options.

This proposal appears not to inquire into all these various kinds of law firm financing. Instead, it focuses on a relatively new field that sometimes involves lending tied to a specific lawsuit, with payment contingent on the outcome of that lawsuit, an activity which the proposers call TPLF. The proposed draft attempts to define that focus by calling for disclosure of "any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on, and sourced from any proceeds of the civil action, by settlement, judgment or otherwise." Whether this could include other means of financing litigation of plaintiff-side law firm operations might be debated in some cases.

The whole topic of law firm financing — including TPLF — has received quite a lot of attention in recent years. One illustration is a conference at DePaul University Law School in 2013 entitled *A Brave New World: The Changing Face of Litigation and Law Firm Finance*, which produced papers published at 63 DePaul L. Rev. 195-718 (2014). A Google search for "litigation financing" produced over 36 million responses, including, up front, several links to firms offering the sorts of services also appearing in ads in plaintiff-lawyer magazines. A quick review of those web pages suggests that they offer something in the nature of a general line of credit for law firms representing plaintiffs, not what this proposal is about. Others seem more directed to what appears to be the specific focus of this proposal — underwriting a specific litigation (often after some review of the litigation itself) in return for some sort of high return if the litigation produces a settlement or judgment, with the amount of the return related to the level of success.

Some bar organizations have addressed some issues about litigation financing, broadly considered, in recent years. Perhaps members of the Advisory Committee are familiar with some of those efforts. It may be that the entire landscape of other legal responses to new financing arrangements has not yet stabilized, which may be a factor in deciding whether to proceed now along the lines suggested by this proposal.

The Rule 26 Treatment of Insurance Coverage

As noted above, Rule 26(a)(1)(A)(iv) already has a requirement that insurance coverage be disclosed at the outset of the litigation. This disclosure requirement built on an amendment to the rule in 1970 prompted by a distinct split in the cases on whether insurance agreements were properly subject to discovery.

It is easy to understand why there was a split on that question before 1970. If discovery is designed to enable parties to obtain evidence for use at trial, this information does not seem within it. Indeed, evidence the defendant is insured is almost universally excluded. *See, e.g.*, Fed. R. Evid. 411. Thus, arguments that the existence of insurance (or absence of it) bear on whether defendant was negligent, etc., would not support discovery of this sort. More generally, discovery is not

ordinarily allowed to verify that the defendant will have sufficient assets to pay a judgment. Indeed, in California discovery regarding defendant's assets is permitted in relation to a punitive damages claim (where defendant's wealth may be a measure of the award) only after a showing that plaintiff has a "substantial probability" of prevailing on the punitive damages claim. Cal. Civ. Code § 3295(c). So more generally the question of discovery regarding assets is a sensitive one.

Notwithstanding, the rule makers decided in 1970 to opt in favor of allowing discovery regarding insurance coverage; as the committee note then explained:

> Disclosure of insurance coverage will enable counsel for both sides to make the same realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation. It will conduce to settlement and avoid protracted litigation in some cases, though in others it may have an opposite effect. The amendment is limited to insurance coverage, which should be distinguished from any other facts concerning defendant's financial status (1) because insurance is an asset created specifically to satisfy the claim; (2) because the insurance company ordinarily controls the litigation; (3) because information about coverage is available only from defendant or its insurer; and (4) because disclosure does not involve a significant invasion of privacy.

The rule makers emphasized the narrowness of the discovery opportunity:

> The provision applies only to persons "carrying on an insurance business" and thus covers insurance companies and not the ordinary business concern that enters into a contract of indemnification. Thus, the provision makes no change in existing law on discovery of indemnity agreements other than insurance agreements by persons carrying on an insurance business. Similarly, the provision does not cover the business concern that creates a reserve fund for purposes of self-insurance.

It should be apparent that there are differences between TPLF arrangements and the insurance agreements brought within discovery in 1970. An insurance agreement often contained two basic features — a duty to defend and a duty to indemnify. Although disclosure of the agreement presumably would ordinarily include both features, the focus of the 1970 amendment appears to have been on the indemnity aspect. Many may be familiar with "settlement for the coverage limits" discussions. Discovery about the insurer's indemnity obligation would provide information highly pertinent to those discussions. Under these circumstances, it seems that revealing information about the indemnification aspect would "conduce toward settlement," as the committee note observed.

Perhaps knowing the terms of TPLF agreements could similarly bear on litigants' willingness to settle; knowing that the other side has an "unlimited budget" to continue the litigation might prompt a party to settle if it had believed before that the adverse party's litigation budget was strapped. But that does not seem to be the reason that discovery of insurance agreements was authorized in 1970, and discovery of TPLF agreements seems to raise different issues.

The TPLF situation differs from the insurance situation in other ways. The 1970 amendment was designed to be limited to persons "carrying on an insurance business" and did not reach other indemnification arrangements. This limitation to insurance companies responds to their distinctive treatment in other ways. In many states, insurance is a peculiarly regulated business; it is not clear that those involved in the TPLF business are similarly regulated. Indeed, some of the recent discussion of TPLF seems to be about whether the activities of these entities, or of the lawyers who use them, should be regulated, and what the regulations should be.

Another point that may distinguish TPLF is the committee note's observation that the insurer "ordinarily controls the litigation." Much concern has arisen about whether that is true in the TPLF situation, a point made in this submission. At least some involved in this new business seem to abjure such efforts to control.

For example, in November 2011, the Association of Litigation Funders of England and Wales (where TPLF seems to be more widespread than in the U.S.) adopted a Code of Conduct for Litigation Funders including the following:

> A Funder will: * * *
>
> > (b) not take any steps that cause or are likely to cause the Litigant's solicitor or barrister to act in breach of their professional duties;
> >
> > (c) not seek to influence the Litigant's solicitor or barrister to cede control or conduct of the dispute to the Funder * * *

How such commitments actually work in the UK, and whether practices in the U.S. differ, are probably considerably debated.

One point of tension might be settlement; in the U.S. "bad faith failure to settle" claims against insurers have been recognized in many states. It is conceivable that similar arguments could be made if TPLF entities have a veto power over settlement, and disagreements about settlement emerge between plaintiffs and TPLF entities.

The contractual arrangements between plaintiffs and TPLF providers might have pertinent provisions on the proper role of each in the settlement

context. One American enterprise included the following in its "Code of Best Practices":

> 13. The LFA [litigation funding agreement] shall state plainly whether and in what circumstances the Funder may be entitled to participate in the Claimant's settlement decisions. For example, subject to agreement between the parties, the LFA may provide that:
>
> a. The Claimant, counsel and the Funder shall consult in good faith as to the appropriate course of action to take in connection with all settlement demands or offers.
>
> b. If the Funder and the Claimant differ in their views as to whether a claim should be settled and they are unable to resolve their differences after consulting in good faith, then either of them may refer their differences to an independent arbitrator for expedited resolution, whose decision shall be final and binding.

Bentham IMF, Code of Best Practices (January 2014).

In sum, authorizing discovery of TPLF arrangements might differ substantially from the authorization given in 1970 for discovery of insurance agreements and might immerse the Committee in tough and tricky emerging and uncertain issues surrounding TPLF activity. At the same time, it does appear that courts are struggling with whether such discovery should be allowed under the current rules. For a thoughtful and thorough examination of such issues by Magistrate Judge Jeffrey Cole, *see Miller UK Ltd. v. Caterpillar, Inc.*, 2014 WL 67340 (N.D. Ill., Jan. 4, 2014).

In 1993, initial disclosure was introduced and the insurance agreement discovery authority was converted into an initial disclosure obligation applicable in all cases. The committee note's explanation for making a discovery request unnecessary was that these four types of information "have been customarily secured early in litigation through formal discovery."

It seems unlikely that there has to date been a history of discovery of TPLF information. Even in cases that order such discovery, it seems to be justified by specific circumstances in the given case. For example, in *Conlon v. Rosa*, 2004 WL 1627337 (Mass. Land Court, July 21, 2004), a case cited in the submission, the court cited indications that the plaintiff's lawsuit was actually funded by a competitor of defendant and asserted that "[a] surprising number of plaintiff's lawsuits are secretly funded by outsiders, often commercial competitors or political opponents." The Massachusetts court cited, *e.g.*, *Jones v. Clinton*,

where the federal judge had ordered production of documents showing contributions to plaintiff to support her litigation against the President. In the Massachusetts case, the court noted that there was a claim that the funding was provided for competitive purposes by a competitor of defendant.

Whether or not such considerations sometimes would justify ordering discovery of TPLF information, it may be that there is no reason to add a TPLF provision to initial disclosure under Rule 26(b)(1)(A), which applies to all cases except those excluded under Rule 26(a)(1)(B). Moreover, it appears that such financing is sometimes extended only after the litigation has been under way for some time. Some funders may even wait until a favorable verdict occurs at trial and provide funding then during the pendency of an appeal. That timing would make "initial" disclosure impossible. Ordinary indemnity insurance agreements presumably do not present this timing wrinkle, but TPLF arrangements may present it often.

In sum, there are some ways in which the current proposal builds on the handling of insurance under Rule 26 presently, but other factors that make it appear significantly different.

Reasons Offered for Proposed Amendment

The proposal urges that "[w]henever a third party invests in a lawsuit, the court and the parties involved in the matter should be so advised." It offers four reasons:

Enabling courts and counsel to ensure compliance with ethical obligations: The first reason presented is that some TPLF entitles are publicly traded companies or companies supported by investment funds whose individual shareholders may include judges or jurors. Whether that would make information about this subject discoverable under Rule 26 is uncertain. It might be that the right focus would be on Rule 7.1 disclosure statements. Moreover, to the extent it is true that some funders only invest after a favorable verdict, it would seem that any possible implications about the interests of the trial court judge or the jurors would not be relevant then.

In addition, the submission says that "counsel in the case may have investment or representational ties to a funding entity that they may need to disclose to their clients." The example given is that defense counsel may be a shareholder in an entity that may profit from plaintiff's victory in the litigation, a potential conflict that counsel should broach with the defendant. At least some of these concerns seem to have occurred to some involved in the TPLF business. Thus, one TPLF enterprize includes in its best practices between the funder and claimants' attorneys the following: "7. The Funder shall not knowingly allow an attorney or law firm representing a Claimant to invest in the Funder." Bentham IMF Code of Best Practices (January 2014).

So these issues may be important in some cases, though it is not clear how many. Certainly, avoiding conflicts of interest for judges, jurors, and attorneys is a desirable goal. That would seem to be the role of disclosure statements like those called for by Rule 7.1. Whether discovery is a suitable vehicle for that purpose may be more debatable. A plaintiff's discovery request for information about the investment portfolio of defense counsel would likely be resisted vigorously. This proposal does not authorize such discovery, but does seem to involve the courts more deeply in policing such topics.

In the same vein, it is not at all clear that the way to police lawyers' ethics is for trial courts to take the lead. Traditionally, that is the job of state bar ethics committees and the like. Judges who become aware of questionable conduct thus may refer matters to the state bar. So the entire topic seems somewhat outside the normal scope of disclosure and discovery.

Alerting defendants to who is "really on the other side of an action": Citing the 2004 Massachusetts Land Court case involving financing of litigation by a commercial competitor of defendant mentioned above, the submission urges disclosure of all TPLF arrangements. It is not clear how many such cases there are, or whether they are a model that calls for a rule like the one proposed.

This second reason emphasizes a somewhat different concern, however — that "[a] party that must pay a TPLF entity a percentage of the proceeds of any recovery may be inclined to reject what might otherwise be a fair settlement offer in the hopes of securing a larger sum of money." Indeed, the agreement may show that the funder will get a disproportionate share of the first dollars in a settlement, which might deter otherwise reasonable settlements.

This argument resembles one of the reasons for allowing discovery of insurance coverage — that it would "enable counsel for both sides to make the same realistic appraisal of the case," in the words of the 1970 committee note. Given the history in many cases of settlement for "the coverage limit," that was an understandable motivation for the 1970 provision. How exactly information about TPLF arrangements factors into settlement discussions is less clear. It does not appear that those arrangements constitute funds to cover settlement payouts, which could play a role like the indemnity feature (not the duty to defend) of insurance policies. Perhaps the defendant would be moved to increase its offer once aware that plaintiff has ample financial resources to continue litigating. Perhaps information about the TPLF funder's "take" would inform that decision. But if that's really true, plaintiff's counsel would presumably have an incentive to alert defense counsel to these considerations during settlement negotiations.

The submission also suggests that, having learned of the role of the funder, "the court may wish to require that funder to attend any mediation." On that score, there is at least some uncertainty about whether the insurance analogy is useful. There has been uncertainty about the power of the court to command a nonparty insurer (rather than the insured party) to attend and participate in settlement

conferences. *See In re Novak*, 932 F.2d 1397, 1407-08 (11th Cir. 1991) (holding that the court did not have inherent authority to require attendance by a representative of a party's insurer at a settlement conference). Rule 16 was amended in response to rulings that the court could not require a represented party to attend settlement conferences, and Rule 16(c)(1) now authorizes the court to require a party to attend or be "reasonably available" to consider possible settlement. No specific provision extends to insurers or TPLF providers. It might be worthwhile to revisit the insurer question under Rule 16(c)(1) and add TPLF providers.

Finally, it might be noted that if the objective is to identify those with a real stake in the litigation, some revision of Rule 17(a) on real party in interest might be in order.

Facilitating resolution of motions for cost-shifting: The third reason given for the amendment focuses on cost-shifting with regard to discovery. The submission notes that, on questions of discovery cost-shifting, courts may consider the parties' financial ability to pay, and urges that it may be pertinent that one party's suit is "being financed by a lucrative TPLF company." It adds that the pending proposal to revise Rule 26(b)(1) invites consideration of "the parties' resources" in making that determination, a consideration that might be illuminated by requiring disclosure of TPLF agreements.

One reaction to this suggestion is that it is a variant on the "discovery about discovery" issue that occasionally arises — the question whether it is proper to order discovery about one matter in order to illuminate whether to order discovery about another. One recently-adopted example is Rule 26(b)(2)(B), which recognizes that there may sometimes be reason to allow discovery about the costs of retrieving information from sources that are allegedly not reasonably accessible. That discovery is not pertinent to the outcome of the suit, but only to the resolution of a discovery dispute about whether to order contested discovery. Similarly here, reference to TPLF arrangements would bear on proportionality only once a proportionality issue has arisen.

Whether initial disclosure of TPLF arrangements is useful to deciding cost-bearing issues is uncertain. Presumably, once parties have put proportionality at issue both the question of the cost of complying with discovery demands and the wherewithal of the party seeking discovery could merit examination. So it's possible that both sorts of "discovery about discovery" might come into play.

Perhaps relatedly, the submission seems to suggest that TPLF arrangements are somehow improper. Not only does it describe TPLF companies as "lucrative," it also notes that "[u]nlike an average plaintiff, a TPLF entity's business purpose is to raise funds to prosecute and to profit from litigation." Id. at 6, emphasis in original. How this factor should affect a determination about the parties' resources under amended Rule 26(b)(1) (if it is amended effective Dec. 1,

2015) is uncertain. It may be worth mentioning that the committee note to the current proposed amendment observes:

> [C]onsideration of the parties' resources does not foreclose discovery requests addressed to an impecunious party, nor justify unlimited discovery requests addressed to a wealthy party. The 1983 committee note cautioned that "[t]he court must apply the standards in an even-handed manner that will prevent use of discovery to wage a war of attrition or as a device to coerce a party whether financially weak or affluent."

How this observation will affect the courts' handling the role of the parties' resources in making proportionality determinations remains to be seen.

It may be premature to forecast how TPLF arrangements would affect consideration of the parties' resources beginning after Dec. 1, 2015, should the amendment be adopted. It is probably premature (and possibly unwise) for the Committee to take a view on the propriety of TPLF arrangements.

In regard to the current proposal, the key point seems to be that much depends on the interpretation of the pending amendment to Rule 26(b)(1). Furthermore, even if that amendment makes resources important sometimes, that nonetheless would likely be in the relatively rare case, so that a blanket rule of disclosure may be too broad.

Information bearing on sanctions: The fourth and final reason focuses on sanctions. Citing a Florida state-court case holding that TPLF funders who controlled a litigation should be regarded as parties for purposes of sanctions under a state statute authorizing levy of attorneys' fees for claims advanced "without substantial fact or legal support," the submission urges that the proposed disclosure provision would provide important information in such circumstances. It might be noted that Magistrate Judge Cole rejected defendant's reliance on this Florida case in *Miller UK Ltd. v. Caterpillar, Inc.*, 2014, WL 67340 (N.D. Ill., Jan. 6, 2014):

> Contrary to Caterpillar's assertion that the [Florida] court held the financing agreement was relevant to the issues in the case-in-chief, there was not so much as an insinuation that it was. Nor did the opinion have anything to do with pretrial discovery of a funding agreement; it involved an appeal of the trial court's denial of plaintiff's *post-trial* motion for attorney's fees and costs against [the nonparty] who funded and controlled plaintiffs' case.

Slip op. at 8-9 (emphasis in original).

The frequency of such situations is uncertain. As noted above, if the idea appears to be to recognize that the funder is actually the real party in interest, it might be that Rule 17(a) is the place to focus. Whether the right place to look for

sanctions of this nature is in the rules might also be a subject for discussion. Perhaps this issue really arises more in relation to 28 U.S.C. § 1927 sanctions. It is likely true that the number of cases in which sanctions of any sort are seriously considered is fairly limited, and the number of those that involve TPLF arrangements probably a good deal smaller. Under those circumstances, a disclosure regime that applies in every case except those exempted by Rule 26(a)(1)(B) might seem far too broad to address the concern raised.

Congress of the United States
Washington, DC 20515

21-CV-L

May 3, 2021

VIA ELECTRONIC TRANSMISSION

Honorable John D. Bates
Chairman
Committee on Rules of Practice and Procedure of the
Judicial Conference of the United States
Washington, DC 20544

Dear Judge Bates,

I write to inform you of the recent bicameral reintroduction of the Litigation Funding Transparency Act ("LFTA"). As you may be aware, the bill would bring much needed transparency to third-party litigation funding ("TPLF") by requiring plaintiffs' lawyers to disclose outside funding agreements in class action lawsuits and federal multi-district litigation. The bill has the support of several of my Senate Judiciary Committee colleagues and was introduced in the House by Representative Darrell Issa.

The practice of TPLF cannot be allowed to proceed in its current form. Under present law, virtually all TPLF activity occurs in secrecy because there is no procedural or evidentiary rule requiring disclosure of the use and terms of such funding. Moreover, to the extent defendants seek this information through ordinary discovery, plaintiffs generally object to providing it, and courts often do not compel production of the requested information.

Transparency brings accountability. It is true of Congress, the Executive, and our courts. A healthy dose of transparency is necessary to ensure that profiteers are not distorting our civil justice system for their own benefit. Our legislation would take one simple step towards bringing TPLF activity into the daylight.

I understand the Advisory Committee on Civil Rules has, for several years, been considering the adoption of such a disclosure requirement as a federal court procedural rule. In my view this is a commonsense matter and critical to the integrity of our federal court system. Opposing parties should be made aware of who is financing the litigation and whether there are any conflicts of interest, champerty concerns or other ethical issues, such as undue control, posed by the arrangement. I would therefore appreciate being advised of the status of the Committee's consideration of this issue, including when the next meeting on rule consideration will be held.

Thank you for your prompt attention to this important matter.

Sincerely,

Charles E. Grassley
Ranking Member
Committee on the Judiciary
U.S. Senate

Darrell Issa
Ranking Member
Subcommittee on Courts, Intellectual Property and the Internet
Committee on the Judiciary
U.S. House of Representatives

TAB 8

Effective Date	Rule	Summary
December 2018	8, 11, 39	The amendments to Rules 8(a) and (b), 11(g), and 39(e) conformed the Appellate Rules to a change to Civil Rule 62(b) that eliminated the antiquated term "supersedeas bond" and made plain an appellant may provide either "a bond or other security."
	25	The amendments to Rule 25 were part of the inter-advisory committee project to develop coordinated rules for electronic filing and service.
	26, Form 7	Technical amendments conforming to the changes in Rule 25.
	28.1, 31	This amendment extended the period within which an appellant (in a regular appeal) or an appellee (in a cross-appeal case) may file and serve its final reply brief.
	29	This amendment authorized the court to strike an amicus brief that would result in a judge's disqualification.
	41	This amendment clarified that an order is required for a stay of a mandate and amended the rules governing stays of the mandate pending a petition for certiorari.
	Form 4	This amendment removed the request for the last four digits of an IFP applicant's social-security number.
December 2019	3, 13	The amendments changed the word "mail" to "send" or "sends" in both rules, although not in the second sentence of Rule 13.
	26.1, 28, 32	Rule 26.1 was amended to change the disclosure requirements, and Rules 28 and 32 were amended to change the term "corporate disclosure statement" to "disclosure statement" to match the wording used in amended Rule 26.1.
	25(d)(1)	The amendment eliminated unnecessary proofs of service in light of electronic filing.
	5, 21, 26, 32, 39	A technical amendment that removed the term "proof of service."
December 2020	35, 40	The amendment clarified that length limits apply to responses to petitions for rehearing plus minor wording changes.

December 2021	3	The amendment addressed the relationship between the contents of the notice of appeal and the scope of the appeal. The structure of the rule is changed to provide greater clarity, expressly rejecting the *expressio unius* approach, and adds a reference to the merger rule.
	6	The amendment conformed the rule to amended Rule 3.
	Forms 1 and 2	The amendments conformed the forms to amended Rule 3, creating Form 1A and Form 1B to provide separate forms for appeals from final judgments and appeals from other orders.