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

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MEMORANDUM

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

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

RE: Report of the Advisory Committee on Appellate Rules

DATE: June 1, 2021

I. Introduction

The Advisory Committee on the Appellate Rules met on Wednesday, April 7, 2021, via Teams. The draft minutes from the meeting are attached to this report.

The Committee approved proposed amendments previously published for public comment for which it now seeks final approval. One is a proposed amendment to Rule 42, dealing with stipulated dismissals. A second is a proposed amendment to Rule 25, dealing with privacy protections in Railroad Retirement Act cases. (Part II of this report.)

As discussed in a separate memo, the Committee also seeks approval for publication of a proposed amendment to Rule 2, dealing with the suspension of rules in an emergency, and an amendment to Rule 4, to coordinate with a proposed emergency Civil Rule.

In addition, the Committee seeks approval for publication of a consolidation of Rule 35 and Rule 40, dealing with rehearing. (Part III of this report.)

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

- expanding disclosures by amici curiae;
- amicus briefs and recusal;
- regularizing the criteria for granting in forma pauperis status and revising Form 4;
- a proposed amendment to Rule 4 to deal with premature notices of appeal;
- in conjunction with other Advisory Committees, making the deadline for electronic filing earlier than midnight; and
- in conjunction with the Civil Rules Committee, amendments to Civil Rules 42 and 54 to respond to the Supreme Court's decision in *Hall v. Hall*, 138 S. Ct. 1118 (2018), which held that consolidated actions retain their separate identity for purposes of appeal.

The Committee also considered other items, removing several from its agenda and tabling one. (Part V of this report.)

II. Action Items for Final Approval After Public Comment

A. Rule 42—Voluntary Dismissal

The proposed amendment to Rule 42 was published for public comment in August 2019. At the June 2020 meeting of the Standing Committee, the Committee presented it for final approval. The Standing Committee was concerned about how the proposed amendment might interact with local circuit rules that require evidence of a criminal defendant's consent to dismissal. It decided to withhold approval until local rules were examined.

The Committee examined several local rules that are designed to be sure that a defendant has consented to dismissal. These local rules take a variety of approaches, such as requiring a signed statement from the defendant personally or requiring a statement from counsel about the defendant's knowledge and consent. The Committee added a sentence to guard against the risk that these local rules might be superseded by the proposed amendment, and now seeks final approval of the following:

Rule 42. Voluntary Dismissal

* * * * *

(b) Dismissal in the Court of Appeals.

(1) Stipulated Dismissal. The circuit clerk ~~may~~ must dismiss a docketed appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any court fees that are due. ~~But no mandate or other process may issue without a court order.~~

(2) Appellant's Motion to Dismiss. An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court.

(3) Other Relief. A court order is required for any relief under Rule 42(b)(1) or (2) beyond the dismissal of an appeal—including approving a settlement, vacating an action of the district court or an administrative agency, or remanding the case to either of them.

(c) Court Approval. This Rule 42 does not alter the legal requirements governing court approval of a settlement, payment, or other consideration.

(d) Criminal Cases. A court may, by local rule, impose requirements to confirm that a defendant has consented to the dismissal of an appeal in a criminal case.

Committee Note

The amendment restores the requirement, in effect prior to the restyling of the Federal Rules of Appellate Procedure, that the circuit

clerk dismiss an appeal if all parties so agree. It also clarifies that the fees that must be paid are court fees, not attorney's fees. The Rule does not alter the legal requirements governing court approval of a settlement, payment, or other consideration. See, e.g., F.R.Civ.P. 23(e) (requiring district court approval).

The amendment replaces old terminology and clarifies that any relief beyond dismissal of an appeal—including approving a settlement, vacating, or remanding—requires a court order. Pursuant to Rule 20, Rule 42(b) applies to petitions for review and applications to enforce an agency order. For Rule 42(b) to function in such cases, "appeal" should be understood to include a petition for review or application to enforce an agency order.

The amendment permits local rules that impose requirements to confirm that a defendant has consented to the dismissal of an appeal in a criminal case.

B. Rule 25—Railroad Retirement Act

Th proposed amendment to Rule 25 was published for public comment in August 2020. It would extend the privacy protection now given to Social Security and immigration cases to Railroad Retirement Act cases. The reason for the amendment is that Railroad Retirement Act benefit cases are very similar to Social Security Act cases. But unlike Social Security Act cases, Railroad Retirement Act cases are brought directly to the courts of appeals.

The Committee replaced both the phrase "remote access" in the text of the proposed amendment and the phrase "electronic access" in the Committee Note with the phrase "remote electronic access." With this change, the Committee seeks final approval of the following:

Rule 25. Filing and Service

(a) Filing

* * * * *

(5) Privacy Protection. An appeal in a case whose privacy protection was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same rule on appeal. In all other

proceedings, privacy protection is governed by Federal Rule of Civil Procedure 5.2, except that Federal Rule of Criminal Procedure 49.1 governs when an extraordinary writ is sought in a criminal case. The provisions on remote electronic access in Federal Rule of Civil Procedure 5.2(c)(1) and (2) apply in a petition for review of a benefits decision of the Railroad Retirement Board under the Railroad Retirement Act.

* * * * *

Committee Note

There are close parallels between the Social Security Act and the Railroad Retirement Act. One difference, however, is that judicial review in Social Security cases is initiated in the district courts, while judicial review in Railroad Retirement cases is initiated directly in the courts of appeals. Federal Rule of Civil Procedure 5.2 protects privacy in Social Security cases by limiting remote electronic access. The amendment extends those protections to Railroad Retirement cases.

III. Action Items for Approval for Publication

A. Proposed Amendments to Rule 2 and Rule 4

See the report from this Committee on the proposed amendments to Rule 2 and Rule 4, which is attached to the report on the CARES Act prepared by Daniel Capra and Catherine Struve.

B. Consolidation of Rules 35 and 40—Rehearing

For several years, the Advisory Committee has been considering a comprehensive revision of Rules 35 and 40. (See June 2018 Standing Committee Agenda Book at 85). Rule 35 addresses hearing and rehearing en banc, and Rule 40 addresses panel rehearing.

Under the current Rules, a lawyer must consider both Rule 35 and Rule 40 when petitioning for rehearing. Litigants frequently request both panel rehearing and rehearing en banc, and while a litigant seeking only panel rehearing need only rely on Rule 40, it would be necessary even in that instance to check both Rules. Reconciling the differences between the two current rules while combining petitions for panel rehearing and rehearing en banc in one rule would provide clear guidance.

For a time, the Committee decided to forego any comprehensive revision and focus instead on spelling out what happens when a petition for rehearing en banc is filed and the panel believes that it can fix the problem. The goal was to make clear that a panel can act while still preserving a party's ability to access the full court. (See June 2019 Standing Committee Agenda Book at 98-99; January 2020 Standing Committee Agenda Book at 98-101). But working on the specifics led the Committee to revisit the possibility of a comprehensive revision. (See June 2020 Standing Committee Agenda Book at 114).

The Committee's report at the January 2020 meeting of the Standing Committee included a working draft showing substantial progress toward creating an integrated draft that would enable the Committee—and others in the Rules Enabling Act process—to decide whether the benefits of such a revision are worth the costs. It also noted issues that were still under discussion. (See January 2020 Standing Committee Agenda Book at 204-08).

After considerable discussion, the Committee now recommends publication of a proposed amendment that abrogates Rule 35 and unites the two rules under Rule 40. With this proposed amendment, the Committee seeks to achieve the clarity and user-friendliness of unification while avoiding unnecessary changes. Many existing provisions are retained but relocated, important differences between panel rehearing and rehearing en banc are clarified, duplication and cross-references are reduced, and matters such as timing, form, and length are made mostly uniform. Although there had been some opposition on the Committee to embarking on this project, once the Committee produced this proposed amendment, all agreed that it is clearer than the existing rules and no one dissented from the decision to seek publication.

The central feature of the proposed amendment is that it abrogates Rule 35 and revises Rule 40 to govern all petitions for rehearing (and the rare initial hearing en banc).

- Rule 40(a) provides that a party may petition for panel rehearing, rehearing en banc, or both.

- Rule 40(b) sets forth the criteria for each kind of rehearing, drawn from existing Rule 35(b)(1) and existing Rule 40(a)(2).

- Rule 40(c) describes when rehearing en banc may be ordered and the applicable voting protocols, drawn from existing Rule 35(a) and (f).

- Rule 40(d) brings together in one place uniform provisions governing matters such as the time to file, form, and length, drawn from existing Rule 35(b), (c), (d), and existing Rule 40(a), (b), and (d). It generally requires a party seeking

both panel rehearing and rehearing en banc to file a single petition, but in deference to existing practice in the Fifth Circuit—a practice authorized by existing Rule 35(b)(3)—permits a local rule to provide otherwise. It adds that any amendment to a decision restarts the clock for seeking rehearing.

- Rule 40(e) clarifies for litigants some of the actions a court that grants rehearing might take by clarifying the language of existing Rule 40(a)(4) and extending these provisions to rehearing en banc.

- Rule 40(f) provides that a petition for rehearing en banc does not limit a panel's authority to grant relief.

- Rule 40(g) deals with initial hearing en banc, drawn from existing Rule 35.

By explicitly providing (in Rule 40(f)) that a petition for rehearing en banc does not limit a panel's authority to grant relief, while providing (in Rule 40(d)) that an amendment to a decision restarts the clock for seeking rehearing, the proposed amendment makes clear that a panel can fix a problem identified by a petition for rehearing while not blocking access to the full court.

The Committee decided that there was no need for the text of the proposed Rule to address whether a party can stand on its previously filed petition for rehearing en banc rather than file a new petition for rehearing when the panel amends its decision. That's because, as the Committee Note mentions, 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. The Committee also decided that it was wiser not to include in the text of the proposed Rule explicit mention of foreclosing the ability to file an additional petition for rehearing. Instead, the Committee Note points to various ways a court could deal with the risk that an additional petition might cause inappropriate delay. Those include shortening the time for filing a new petition or for issuance of the mandate or using Rule 2 to suspend the ability to file a new petition for panel rehearing. The Committee Note also suggests that, before doing so, a court ought to consider the difficulty of predicting what a party filing a new petition might say.

Conforming amendments to Rule 32(g) and the Appendix of Length Limits would also be appropriate. (A different amendment to the Appendix of Length Limits will be appropriate if the proposed amendments to Rule 35 and 40 does not go forward; it would simply add the page limits for responses to petitions for rehearing without changing the rule referenced.)

Here is the proposed amendment as approved by the Committee, but with some stylistic changes recommended by the style consultants:

Rule 35. En Banc Determination (Abrogated.)

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

(a) 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 a petition for both. Panel rehearing is the ordinary means of reconsidering a panel decision. Rehearing en banc is not favored.

(b) Criteria; Content of Petition.

(1) 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) Petition for Rehearing En Banc. A petition for rehearing en banc 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 the full court's consideration 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, by asserting that the panel decision conflicts with the authoritative decisions of other United States courts of appeals that have addressed the issue.

(c) When 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 reheard by the court of appeals en banc. A vote need not be taken to determine

whether the case will be reheard en banc unless a judge calls for a vote. Ordinarily, rehearing en banc 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.

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

(1) Time. Unless the time is shortened or extended by order or local rule, a petition for rehearing may be filed within 14 days after entry of judgment—or, if the panel later amends its decision (on rehearing or otherwise), within 14 days after the entry of the amended decision. 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 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) 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. If a party seeks both panel rehearing and rehearing en banc, the party must file a single petition subject to the limits in (3), unless a local rule provides otherwise.

(3) Length. Except by the court's permission:

(A) a petition produced using a computer must not exceed 3,900 words; and

(B) a handwritten or typewritten petition must not exceed 15 pages.

(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) Court Action If a Petition Is Granted. If a petition is granted, the court may do any of the following:

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

(B) order additional briefing or argument; or

(C) issue any other appropriate order.

(f) Panel's Authority After a Petition for Rehearing En Banc. A petition for rehearing en banc of a panel decision does not limit the panel's authority to grant relief under (e).

(g) Initial Hearing En Banc For an Appeal or Other Proceeding. A party may petition for an appeal or other proceeding to be heard initially en banc. The petition must be filed no later than the date when the appellee's brief is due. The provisions of (c) apply to an initial hearing en banc, and those of (b)(2) and (d)(2)–(5) apply to a petition for one. But an 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). Rule 35 is abrogated, and Rule 40 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. The ordinariness of panel rehearing is only by way of contrast to 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.

Subdivision (b). Panel rehearing and rehearing en banc are designed to deal with different circumstances. The amendment clarifies the distinction by contrasting the criteria for and required content of a petition for panel rehearing (preserved from Rule 40(a)(2)) with those relating to 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 on 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, on 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. 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. Finally, the amended Rule requires a party seeking both panel rehearing and rehearing en banc to file a single petition subject to the same length limitations as any other petition, preserving the court's power (previously found in Rule 35(b)(3)) to provide otherwise by local rule.

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)).

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. It also extends to rehearing en banc the existing suggestion (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, as opposed to oral argument on the reheard case.

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. 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 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 retained; 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. As above, the amendment's discussion of petitions for initial hearing en banc is not intended to diminish the court's existing power to order such hearing sua sponte, without any petition having been filed.

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)—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 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.

Appendix

Length Limits Stated in the

Federal Rules of Appellate Procedure

		* * *			
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

IV. Other Matters Under Consideration

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

In May of 2019, a bill was introduced in Congress that would institute a registration and disclosure system for amici curiae like the one that applies to lobbyists. Senator Sheldon Whitehouse introduced S. 1411, the Assessing Monetary Influence in the Courts of the United States Act (the AMICUS Act). An identical bill, H.R. 3993, sponsored by Representative Henry Johnson, was introduced in the House. Under the bill, the registration and disclosure requirements would apply to those who filed three or more amicus briefs per year but would not be tied to a specific amicus brief. Fines would be imposed on those who knowingly fail to comply.

In October 2019, the Committee appointed a subcommittee to address amicus disclosures. In February of 2021, after correspondence with the Clerk of the Supreme Court, Senator Whitehouse and Congressman Johnson wrote to Judge Bates requesting the establishment of a working group to address the disclosure requirements for organizations that file amicus briefs. Judge Bates was able to

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

Appellate Rule 29 currently requires that most amicus briefs include a statement that indicates whether:

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

Both the subcommittee and the full committee have begun careful exploration of whether additional disclosures should be required. While it has not reached any conclusions, some themes have emerged.

First, the question of amicus disclosures involves important and complicated issues. One concern is that amicus briefs filed without sufficient disclosures can enable parties to evade the page limits on briefs or produce a brief that appears independent of the parties but is not. Another concern is that, without sufficient disclosures, one person or a small number of people with deep pockets can fund multiple amicus briefs and give the misleading impression of a broad consensus. There are also broader concerns about the influence of "dark money" on the amicus process. Any disclosure requirement must also consider First Amendment rights of those who do not wish to disclose themselves. *See, e.g.*, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). The Supreme Court's forthcoming decision in *Thomas More Law Center v. Bonta*, No. 19-255 (argued April 26, 2021) may provide some additional guidance.

Second, some matters are within the purview of the rule making process under the Rules Enabling Act, while some are not. Changes to the disclosure requirements of Rule 29 are, but public registration and fines are not. A change to Rule 29 would not be limited to those who file multiple amicus briefs.

Third, there is considerable resistance to treating amicus briefs as akin to lobbying. Lobbying is done in private, while an amicus filing is made in public and can be responded to.

Fourth, it may well be possible to revise Rule 29 to reduce the possibility of evasion by parties. Rule 29 could be amended to reject an excessively narrow

interpretation of the phrase "preparing or submitting" as reaching only the printing and filing of the amicus brief. Recognizing the fungibility of money, Rule 29 might also be amended to cover contributions by parties to an amicus that are not earmarked for a particular amicus brief. (Careful consideration would be required here to not sweep too broadly.) In addition, Rule 29 might be amended so that parties who are members of an organization submitting an amicus brief could be required to disclose that fact.

Fifth, there is concern about the appropriateness of amending Rule 29 to require broad disclosures about nonparties who contribute to an amicus or are members of an amicus. While it is appropriate to guard against undue influence by the parties and by those who claim to be independent of the parties but aren't, requiring disclosure of nonparty contributions and nonparty members presents harder questions. Such contributors and members may have no influence on the amicus brief. On the other hand, if one person or a small group of undisclosed persons underwrite numerous amicus briefs, it can look like the court was hoodwinked.

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

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

The matter was considered for the first time at the April 2021 meeting and referred to the subcommittee dealing with the AMICUS Act and Rule 29.

C. IFP Status

The Committee is continuing to consider suggestions to regularize the criteria for granting IFP status and to revise Form 4 of the Federal Rules of Appellate Procedure. It is gathering information about how the courts of appeals handle IFP applications, including what standards are used and what information from Form 4 is actually useful.

D. Relation Forward of Notices of Appeal

The Committee is continuing to consider a suggestion to deal with premature notices of appeal. In many situations, existing Rule 4(a)(2)—which provides that a

notice of appeal filed after the announcement of a decision but before its entry is treated as if it were filed immediately after its entry—works appropriately to save premature notices of appeal. But there are other premature notices of appeal that are not saved. It considered this problem about a decade ago but did not find an appropriate solution, apparently because of a concern with inviting more premature notices of appeal.

The Committee explored ways to deal with appeals from district court decisions that could have been certified for immediate appeal under Civil Rule 54(b) but were not. It has not been able to come up with a good solution. It does not want to allow any premature notice of appeal to become effective once a judgment or appealable order is filed because it fears that this would cause more problems than it solves by inviting premature notices of appeal.

It considered formalizing the process recognized in *Behrens v. Pelletier*, 516 U.S. 299, 310–11 (1996), that permits a district court to proceed despite a notice of appeal by certifying that the appeal is frivolous. But this doesn't seem to be an effective solution for the underlying problem: If the party filing the notice of appeal isn't aware of its significance and no one seeks a Rule 54(b) certification, there isn't an obvious trigger to invoke the *Behrens* process.

Nevertheless, the Committee is not ready to take the matter off the agenda. Instead, it will look more closely at the circuit split, seeking to clarify whether there are clear splits between circuits as opposed to splits within circuits. In addition, the Committee will look more closely at the current rule's different treatment of post-trial motions in civil and criminal cases.

E. Deadline For Electronic Filing (with other Advisory Committees)

The joint subcommittee considering whether the deadline for electronic filing should be moved to some time prior to midnight continues to gather information. The Federal Judicial Center is analyzing data on the time of day when filings are made, but a planned survey is on hold due to the pandemic.

F. Finality in Consolidated Cases after *Hall* (with Civil Rules Committee)

The joint subcommittee dealing with finality in consolidated cases continues to gather information. Any amendment would likely be made to the Civil Rules, particularly Rule 42 and Rule 54(b), not the Appellate Rules.

The Supreme Court in *Hall v. Hall*, 138 S. Ct. 1118 (2018), decided that consolidated actions retain their separate identity for purposes of appeal. If one such action reaches final judgment it is appealable, even though other consolidated cases remain pending. This decision creates the risk that some will lose their appellate rights because they did not realize that their time to appeal had begun to run, and it creates the risk of inefficiency in the courts of appeals because multiple appeals are taken at different times from a proceeding that a district judge thought similar enough to warrant consolidation.

Research by the Federal Judicial Center did not reveal significant problems and further research by the FJC does not seem warranted at this point. However, problems may remain hidden, either because no one notices the issue or because by the time the issue is discovered it is too late to do anything about it. The joint subcommittee will continue to monitor the situation and consider whether to propose any amendments.

V. Items Removed or Tabled

As noted in the Committee's last report to the Standing Committee, its review of every Federal Rule of Appellate Procedure to determine whether any amendments were appropriate to deal with future emergencies led the Committee to consider some minor amendments that may be appropriate in light of the experience of the pandemic without regard to a rules emergency. (See January 2021 Standing Committee Agenda Book at 200-03). It anticipated that it would seek approval at the June 2021 meeting to publish these minor amendments to Rule 4, Rule 33, Rule 34, and Rule 45. On further consideration, it has decided not to pursue these possible amendments at this time. None of these possible amendments was inspired by any real problem; they all arose when scouring every Appellate Rule for possible amendments. Some risked inviting more problems; others would require coordination with other Advisory Committees because of parallel provisions in other sets of rules. The most promising one—to replace the phrase "by telephone" with the word "remotely" in Rule 33 thereby explicitly authorizing appeal conferences by technology other than telephones—did not appear worth pursuing on its own, especially once one realizes that Federal Rule of Criminal Procedure 1(b)(11) defines "telephone" as "any technology for transmitting live electronic voice communication." While the Appellate Rules have no similar definition, amending Appellate Rule 33 to preclude objections to appeal conferences via Zoom or Teams did not seem sufficiently pressing.

The Committee also considered and removed from its agenda a suggestion (1) to explicitly provide for an extra three days after service of a judgment to file a motion

that tolls the time to appeal under Rule 4(a)(4) and (2) to delete the 28-day provision from Appellate Rule 4(a)(4), while adding a similar provision to Civil Rule 60. The extra three-day provision applies only to the time limits that run from the date of service, not time limits that run from some other event. The time to file motions that toll the time to appeal runs from the date of entry of the judgment, not the date of service. Changing any of the deadlines that run from entry of judgment to deadlines that run from service would be a major shift and require considerable reworking of various rules, and there does not seem to be reason to do so. The provision in Rule 4(a)(4) for Rule 60 motions is not designed to encourage Rule 60 motions to be brought within 28 days of judgment, but to treat Rule 60 motions filed within 28 days of judgment like other post-judgment motions.

Finally, the Committee revisited the possibility of changes to appendices to deal with the problem of including too much material. Three years ago, the Committee had deferred the matter in the hope of a technological fix, such as electronic briefs with hyperlinks to an electronic record. We are not there yet. Upgrades to ECF are being discussed. Coordination with CACM, IT, and district judges would be appropriate. The Committee once again deferred the matter to be revisited in another three years.