Minutes of the Spring 2021 Meeting of the

Advisory Committee on the Appellate Rules

April 7, 2021

Via Teams

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

In addition to Judge Bybee, the following members of the Advisory Committee on the Appellate Rules were present: Professor Stephen E. Sachs, Danielle Spinelli, Judge Paul J. Watford, Judge Richard C. Wesley, and Lisa Wright. Acting Solicitor General Elizabeth Prelogar was represented by H. Thomas Byron III, Senior Appellate Counsel, Department of Justice. Judge Stephen Joseph Murphy III did not attend due to a power outage. Judges Watford and Wesley each missed different parts of the meeting because they were hearing oral arguments.

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

I. Introduction

Judge Bybee opened the meeting, acknowledged the work of Committee members, and welcomed guests and observers. He noted that Judge Richard Wesley is a new member of the Committee, and he thanked Judge Stephen Murphy, whose term on the Committee ends in September, for his service.

II. Report on Meeting of the Standing Committee

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

III. Approval of the Minutes

The draft minutes of the October 10, 2020, Advisory Committee meeting were approved.

IV. Discussion of Matters Published for Public Comment

A. Proposed Amendment to Rule 42—Stipulated Dismissal of Appeal (17-AP-G)

Judge Bybee stated that the proposed amendment to Rule 42 had previously been published for public comment (in August of 2019) and been approved by this Committee but remanded by the Standing Committee. The Reporter added that the Standing Committee had been concerned about how the proposed amendment could interact with local circuit rules that require evidence of a criminal defendant's consent to dismissal of an appeal. As reflected in the agenda book (page 96), a new paragraph (d) was added at the October 2020 meeting to deal with this concern. This addition met the concern of the Standing Committee, and a corresponding paragraph has since been added to the Committee Note.

The Committee approved the proposed amendment, recommending that the Standing Committee give final approval to the proposed amendment as it appears in the agenda book.

B. Proposed Amendment to Rule 25—Railroad Retirement Act (18-AP-E)

Judge Bybee stated that the proposed amendment to Rule 25 had been published for public comment (in August of 2020). No comment opposing the proposed amendment has been received.

Judge Bates suggested that the phrase "remote access" in the text of the proposed amendment and the phrase "electronic access" in the Committee Note both be replaced by the phrase "remote electronic access." After a discussion of the phrasing used in parallel provisions of other sets of rules, the Committee agreed with this suggestion.

With these changes, the Committee approved the proposed amendment, recommending that the Standing Committee give final approval to the proposed amendment.

V. Discussion of Matters Before Subcommittees

A. Proposed Amendment to Rule 2—CARES Act

The Reporter presented the subcommittee's report regarding the CARES Act (Agenda book page 106). He stated that the discussion draft that this Committee had forwarded to the Standing Committee had two distinctive features. First, it empowered both the Judicial Conference and each court of appeals to declare a rules emergency, permitting the chief judge to act on behalf of the court of appeals. Second, if a rules emergency were declared, it permitted the court to suspend any provision of the rules, other than time limits imposed by statute and described in Rule 26(b)(1)-(2).

In large part due to the importance of uniformity, the Standing Committee preferred to vest the power to declare a rules emergency in the Judicial Conference alone. However, it seemed comfortable with the open-ended approach permitting the court to suspend nearly any rule once a rules emergency is declared. It also favored the inclusion of a sunset provision. Another concern the Standing Committee raised was that the discussion draft did not clearly state what happened once a rule was suspended.

The subcommittee incorporated this feedback into a new draft. The new draft vests the power to declare a rules emergency solely in the Standing Committee. It includes a sunset provision. And it makes explicit, using language from the existing Rule 2, that when a rule is suspended, the court may order proceedings as it directs. Some further stylistic changes were made in coordination with other advisory committees. (Agenda book page 122).

In response to a question from Mr. Byron, the Reporter clarified that the plan was to emerge from this meeting with a draft that this Committee would ask the Standing Committee to approve for publication for public comment.

A lawyer member noted that since the latest draft does not empower a chief judge to declare a rules emergency, the first reference to "the court" in 2(b)(1) should be to "a court." Professor Capra stated that this was a good catch. Mr. Byron noted that the singular would include the plural, and Professor Capra said that use of "a court" had gone through style on that point.

An academic member stated that his prior concerns about authority were largely addressed by this change in the rule. The Judicial Conference simply declares

the emergency exists. The court can then fall back on its preexisting power once the rules back off.

In response to a question from Judge Bybee, Professor Struve stated that under the current draft, no individual judge, including the chief judge, would have suspension power, but the full court, or in some circumstances a panel, would. The Reporter agreed that the current draft leaves it to the court; the default would be the full court, but as to matters within the authority of a panel, the panel would have authority.

Judge Bates observed that the court must mean the full court because a panel could not suspend a rule in all or part of a circuit. Judge Bybee stated that his court uses an executive committee, and he would not want to impair that. A judge member added that her court has the same thing and suggested a Committee Note stating that each court can choose how to implement this power, observing that sometimes something is so obvious that the chief does something subject to anyone objecting.

The Reporter agreed that Judge Bates was correct that the power under 2(b)(5)(A) to suspend in all or part of a circuit would not be the sort of power that could be exercised by a panel, but that the power under 2(b)(5)(B) to order proceedings as it directs might be. Judge Bybee stated that he was fond of the ambiguity.

An academic member suggested acting by local rule, or by a majority of active judges. Judge Bybee responded that he did not want to get involved with local rules rather than orders. A judge agreed with leaving the ambiguity and withdrew the suggestion of adding to the Committee Note. Professor Struve observed that Rule 47(b) provides that no disadvantage may be imposed on a litigant for noncompliance with any requirement not in federal law, federal rules, or the local circuit rules unless the alleged violator has notice of the requirement, so there is no risk of harm to litigants.

Mr. Byron drew attention to the distinctive requirement of the proposed Emergency Criminal Rule that no feasible alternative be available. The Reporter noted that there did not appear to be any objection to Criminal being different in this respect. Professor Capra added that Criminal is proud to be different.

With the one change noted above—"the court" to "a court"—the Committee agreed to recommend that the Standing Committee approve publication of the proposed amendment to Rule 2 for public comment.

The Reporter stated that the subcommittee had also coordinated with the Advisory Committee on the Federal Rules of Civil Procedure regarding the proposed Emergency Civil Rule 6. (Agenda book page 110). Emergency Civil Rule 6 would empower a district court to extend the time to file certain post-judgment motions. Coordination is necessary to be sure that extensions work appropriately with Federal

Rule of Appellate Procedure 4, which resets the time to appeal when certain post-judgment motions are filed.

The draft in the agenda book may be ambiguous whether the extension granted runs from when the period would otherwise have expired or from when the court grants the extension. From the perspective of this Committee, the choice doesn't seem to matter, so long as it is clear. In response to a question by Mr. Byron about why the maximum extension was 30 days rather than 28 days, Professor Struve stated that she had seen drafts both ways.

The Reporter stated that a substantial difficulty has been drafting the rule so that it works appropriately with motions under Civil Rule 60. That's because Appellate Rule 4 gives resetting effect to most of the relevant post-trial motions so long as they are timely filed under the Civil Rules. If an extension is granted under an Emergency Civil Rule and a motion is filed within the time as extended, it is timely under the Civil Rules. That doesn't work for Rule 60 motions, however, because Rule 60(b) motions need only be filed within a reasonable time, with some subject to an outside limit of one year. For that reason, existing Appellate Rule 4(a)(4)(A)(vi) grants resetting effect to Rule 60 motions if they are filed within 28 days of the judgment. Without some specific provision dealing with Rule 60, an extension granted under the Emergency Civil Rule would not result in resetting effect for a Rule 60 motion. Efforts are continuing to solve this problem; one possibility is to favor simplicity and not cover Rule 60 motions in the Emergency Civil Rule at all. From the perspective of this Committee, as long as the working of Emergency Civil Rule is clear, it does not seem to matter whether or not the Emergency Civil Rule covers Rule 60.

An academic member suggested that if drafting the Emergency Civil Rule to integrate with Appellate Rule 4 is so difficult, perhaps the problem could be solved by amending Appellate Rule 4(a)(4)(A)(vi) to refer to "the time for filing the above motions," or "the time to file motions under Rules 50, 52, and 59," rather than "28 days."

Mr. Byron stated that it is an appellate problem if Rule 60 motions are not covered. The existing treatment of Rule 60 motions is that appellate lawyers and courts don't have to worry about the proper characterization of motions; the benefit of the existing treatment of Rule 60 motions is that there is no need to fight about it. He urged that alignment of Rule 60 motions with other post-judgment motions be continued.

The Reporter noted that the problems should be less likely to arise if, as expected, most of the time an extension would be prompted by a motion and order in a particular case. In those circumstances, the litigant would have an order specifying which motion could be filed, making it less likely that a motion other than one authorized would be filed. Professor Struve added that sometimes there would be a district-wide extension order. She also clarified, in response to a question from Judge

Bybee, that the one-year outside limit for some Rule 60(b) motions does not affect the resetting of time to appeal.

Professor Struve indicated that the suggested change to Appellate Rule 4(a)(4)(A)(vi) appeared to work, as did Mr. Byron, who added that we should advise Civil to include Rule 60. The Reporter tentatively agreed.

A judge member thought that the suggested change to Appellate Rule 4(a)(4)(A)(vi) was confusing, and that judges recharacterize filings all the time. Another added that we need to step back from the expertise on this committee and into the shoes of a regular consumer of these rules. A lawyer member suggested explicitly referring to extensions under the Civil Emergency Rule. Professor Struve emphasized that relying on judges to recharacterize filings does not solve the litigant's problem who does not know whether or how a judge will recharacterize and therefore whether it resets appeal time. Two lawyer members stated that the suggested change to Appellate Rule 4(a)(4)(A)(vi) did not make the rule that much more complicated; the rule already refers to motions under various Civil Rules. Mr. Byron suggested that Appellate Rule 4(a)(4)(A)(vi) refer only to Rule 59(e).

A judge member suggested referring to any extension. Professor Struve responded that such a provision would suggest that extensions are more readily available than they are. Under the non-emergency rules, a district court can't extend these times, and if a court does so anyway, a litigant can't rely on the extension.

The Reporter suggested that a reference to Rule 59 would be sufficient, noting that it is more likely that a district court would grant an extension for a Rule 59 motion but not a Rule 50 motion than the other way around. Mr. Byron added that he is not so concerned about Rule 50 motions. A lawyer member agreed that a reference to Rule 59 is clearest.

Professor Capra noted that while he thinks Civil will ultimately advise an Emergency Rule, it is not committed to it. A judge member suggested keeping the existing 28-day requirement in Appellate Rule 4(a)(4)(A)(vi) and adding the reference to Rule 59. This would give resetting effect to a motion "for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered or within the time allowed for filing a motion under Rule 59," letting a litigant rely on the number of days without having to cross-reference the Civil Rules.

A lawyer member noted that Appellate Rule 4 requires a litigant to look to the Civil Rules anyway. Professor Struve added that including both 28 days and the time for filing a Rule 59 motion suggests that there is some daylight between the two. In non-emergencies, there isn't.

After a ten-minute break, the Reporter shared a screen with the relevant provisions of Rule 4 and reviewed how Rule 4(a)(4)(A) currently works. He suggested

that Rule 4(a)(4)(A)(vi) be amended to give resetting effect to a motion "for relief under Rule 60 if the motion is filed ~~no later than 28 days after the judgment is entered~~ within the time allowed for filing a motion under Rule 59."

Judge Bybee noted that while most of the subdivisions of Civil Rule 59 have 28-day time limits, Rule 59(c) refers to 14 days. The Reporter noted that the 14-day requirement applies to opposing affidavits, not to motions.

After a brief discussion, no one was uncomfortable with a change from "no later than" to "within the time allowed."

An academic member noted that there might be extensions to file motions under Rule 50 or Rule 54, without an extension to file a motion under Rule 59. For example, there might be an issue about the admissibility of evidence that could result in judgment as a matter of law but not a new trial. And there might be a bench trial, with a motion under Rule 52. To account for these, Rule 4(a)(4)(A)(vi) could be amended to give resetting effect to a motion "for relief under Rule 60 if the motion is filed ~~no later than 28 days after the judgment is entered~~ within the time allowed for filing any of the above motions."

Mr. Byron stated that complications would arise under Rule 58; it is cleaner with just Rule 59. Professor Struve added that adding Rule 58 would lead to more analysis but unlikely it would operate to make the time limit more permeable. Referring to Rule 59 is simpler.

Judge Bates stated that if the goal is to capture extensions granted under the CARES Act, Rule 59 is the way to go. If the goal is broader than that, the broader language may be appropriate, but they have not been thought through. Changing 28 days to Rule 59 makes no substantive change (in how Rule 4 operates in a non-emergency).

Judge Bybee suggested keeping it simple. Referring to Rule 59 in (vi) keeps it parallel to the other romanettes. The proposed amendment to Rule 4(a)(4)(A)(vi) is as follows:

> "for relief under Rule 60 if the motion is filed ~~no later than 28 days after the judgment is entered~~ within the time allowed for filing a motion under Rule 59."

The Committee agreed to recommend that the Standing Committee approve publication of the proposed amendment to Rule 4(a)(4)(A)(vi) for public comment.

B. Various Amendments Occasioned by CARES Act Review

The Reporter presented the report of the subcommittee regarding various amendments occasioned by the CARES Act review. (Agenda book page 113). He explained that early in the process called for by the CARES Act, the subcommittee reviewed every Federal Rule of Appellate Procedure to determine whether any amendments were appropriate to deal with future emergencies. That review led the subcommittee to present to the full Committee at the last meeting some minor amendments that might be appropriate in light of the experience of the pandemic without regard to a rules emergency. The subcommittee met again to review these possible minor amendments.

Upon further review, the subcommittee decided to not recommend any amendment to Rule 4(c), the prisoner mailbox rule. One concern is that an amendment providing additional time when an internal mail system is not available might be an invitation to inmates to contend that the mail system was not available to them because of their own individual circumstances. In response to a question, the Reporter explained that the idea for an amendment had not arisen from any sense that there is a problem, but rather from a CARES Act review of every Appellate Rule. Judge Bybee noted that the problem can be dealt with on an ad hoc basis under the existing rule.

The Committee agreed to propose no change to Rule 4(c).

The Reporter stated that the subcommittee did recommend a minor change to Rule 33, dealing with appeal conferences. The current rule states that conferences may be conducted "in person or by telephone"; the subcommittee suggested amending to allow conferences to be conducted "in person or remotely."

The Committee approved this minor amendment.

The Reporter presented the subcommittee's suggestion that Rule 34(b), dealing with oral argument, be amended to directly address remote arguments. In particular, the amended Rule 34 would continue to require the Clerk to inform the parties of the "place" of in-person argument, but require the Clerk, for an argument that was to be heard remotely in whole or in part, the "manner" in which the argument would be heard. He noted that one concern was, if an argument were partly remote because of the particular circumstances of a judge, that there was a risk of revealing the composition of the panel before the court would otherwise do so. Ms. Dwyer stated that there was no need for this change. Clerks let parties know what they need to know. If the argument is being held remotely, parties will know that the "place" of the argument can be their own home. Mr. Byron stated that it may be better to retain the flexibility of the existing rule.

The Reporter presented the subcommittee's suggestion that Rule 34(g), dealing with the use of physical exhibits at oral argument and requiring arrangements for placing them in the courtroom and removing them from the courtroom, be amended to deal only with in-person arguments. While a remote oral argument may involve exhibits, there is no need to arrange for placing them in and removing them from the courtroom. Ms. Dwyer stated that if an argument is held via Zoom, then Zoom is the courtroom.

The Committee agreed to propose no change to Rule 34.

The Reporter presented the subcommittee's suggestion that Rule 45, which requires that the clerk's office "must" be open with a clerk or deputy in attendance during business hours except for weekends and holidays, be amended to state that it "will" be open with a clerk or deputy in attendance at those times. The idea is to recognize that circumstances may prevent someone from being present. He noted that the Civil and Criminal Rules have similar provisions.

Mr. Byron noted that this change would require coordination with other Advisory Committees and would be on a slower track. Ms. Dwyer noted that "in attendance" could be read as "be available" and that the Clerk's Office has been available through remote work.

The Committee agreed to propose no change to Rule 45.

The Reporter then asked the Committee whether it was worth going forward with the only change of this group that the Committee had approved, the replacement of "by telephone" with "remotely" in Rule 33, dealing with appeal conferences. Judge Bybee said that it would depend on whether the word "telephone" appears in other rules. Ms. Dwyer noted that there will probably be lots of remote proceedings going forward. Mr. Byron noted that we should keep in mind that Rule 2 is available. Judge Bybee added that further coordination might be appropriate.

The Committee reconsidered its earlier decision and agreed to propose no change to Rule 45 at this time, leaving any possible change along these lines to the future.

The Committee took a short lunch break.

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

Professor Sachs presented the subcommittee's report regarding Rules 35 (dealing with hearing and rehearing en banc) and Rule 40 (dealing with panel rehearing). (Agenda book page 125). He noted that the Committee had been considering small changes to these rules, but the result was a spaghetti string of cross-references, leading to an effort at a comprehensive revision that abrogates Rule

35 and unites the two rules under Rule 40. The proposed comprehensive revision leaves some provisions in the same place they have been, preserves some provisions from the two rules where there are important differences, and creates mostly uniform provisions for matters such as timing, form, and length.

There are three issues addressed by the subcommittee.

First, should separate petitions for panel rehearing and rehearing en banc be permitted? The Fifth Circuit requires separate petitions by local rule, as current Rule 35 allows. The subcommittee draft requires a single petition unless a local rule provides otherwise.

Second, what happens if the panel acts and changes its decision while a petition for rehearing en banc is pending? Rather than address this situation in the text of the rule, the subcommittee draft has a Committee Note that explains that the petition for rehearing en banc remains pending until the en banc court deals with it. If a party thinks that a new petition is needed, either because the panel did not fix the problem or created a new problem, proposed Rule 40(d)(1) provides the time to file a new petition.

Third, what happens if the panel changes its decision and doesn't want to hear any more; should it be able to order that no further petitions for panel rehearing will be entertained? The subcommittee was loath to officially close those off. Instead, the Committee Note mentions the many tools available for dealing with this situation, including a short deadline for filing a new petition, a shorter time for issuing the mandate, or invoking Rule 2 to prevent a new petition. It also adds a note of caution because the court doesn't know what the parties would say in a new petition.

The subcommittee also moved the provision dealing with oral argument.

Rule 40(d)(4) states that "ordinarily" a petition will not be granted in the absence of a request for a response, leaving enough wriggle room for the court to act without a response where appropriate.

Rule 40(d)(5) simplifies the existing provision regarding what the court might do, eliminating somewhat dated language that is unneeded.

Judge Bybee stated that the subcommittee worked very hard, and that not everyone is uniformly in favor. Judges may have a different reaction. He reached out to the Chief Judge of the Fifth Circuit to ask how strongly that court is committed to its requirement of separate petitions but has not yet heard back, perhaps because that court just issued a 325-page decision.

A judge member commended the work of the subcommittee. She explained that she had thought that the two rules should not be consolidated. She provided the

subcommittee with lots of input from the Clerk. She does not plan to advocate against it. It's a big change, but it is now really clear and well done. She is not won over, because her court will get more en banc petitions, but has no objection. Judge Bybee added that this is a great compliment to the subcommittee.

While she did not feel strongly, she suggested adding a Committee Note about denying rehearing without a response where the lack of a need for rehearing is so clear. Judge Bybee emphasized that the rule provides that rehearing ordinarily won't be *granted* without requesting a response; "ordinarily' deals with situations where the need for a grant is obvious, such as an intra-circuit conflict.

[At this point, Judge Wesley joined the meeting and was welcomed. He had been delayed because he was hearing oral arguments.]

A lawyer member stated that she was not on the subcommittee and that the proposal looks very good. She had been bothered at the last meeting by the provision that panel rehearing is the "ordinary" means of reconsidering a panel decision, but the Committee Note takes care of that concern.

A judge member stated that his court allows combined petitions and has no objections to the proposal. Ms. Dwyer added that Clerk's office staff is also supportive.

After a discussion about the relative frequency of en banc proceedings in the various circuits, the Committee approved the proposal without objection.

The Reporter turned to a possible amendment to the table of page lengths in the appendix. This table should have been amended when the rules were amended to provide a length limit for responses, but the table was overlooked at the time. The subcommittee's proposed language is in the report. (Agenda book page 131). Competing language has been submitted as a separate suggestion by Dean Benjamin Spencer; his suggestion was designed to correct the prior oversight and does not make changes to reflect the proposed comprehensive revision of Rules 35 and 40.

Several members of the Committee indicated a preference for the language in the subcommittee report. Mr. Byron asked if the amendment to the table should go forward separately as a clarification. The Reporter thought not, because it would then have to be amended again to change the rule numbers in accordance with the proposed comprehensive revision of Rules 35 and 40.

The Reporter added that there was also a need for a conforming amendment to Rule 32(g) to accompany the comprehensive revision. Rule 32(g) contains cross-references to Rules 35 and 40 that need to be changed. A Committee member noted that the amendment language shared by the Reporter needed the word "or" added before the last listed rule.

With that change, the Committee approved the proposed amendments without objection.

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

Danielle Spinelli presented the report of the AMICUS subcommittee. (Agenda book page 133). She explained that in 2019 a bill was introduced in Congress that would institute a registration and disclosure system like the one that applies to lobbyists. It would apply to those who filed three or more amicus briefs per year but would not be tied to a specific amicus brief. The letters and article by Senator Whitehouse explain the rationale. Amicus briefs filed without meaningful disclosures can enable parties to evade the page limits on briefs and, if one or a small number of people with deep pockets fund multiple amicus briefs, can give the misleading impression of a broad consensus.

In October 2019, the AMICUS subcommittee was appointed. In February of 2021, 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 this Committee had already established a subcommittee to do so.

There are important and complicated issues, some of which are within the purview of this Committee, and some of which are not. Public registration and fines are not within the purview of this Committee, but changes to the disclosure requirements of Rule 29 are. Current Rule 29 is based on a corresponding Supreme Court rule and requires disclosure of (i) whether a party's counsel authored an amicus brief; (ii) whether a party or a party's counsel contributed money intended to fund preparing or submitting the brief; and (iii) whether a person—other than the amicus curiae, its members, or its counsel—contributed money intended to fund preparation or submission of the brief.

Some may construe the second requirement narrowly to cover only the printing and filing of the amicus brief, although that is not the way it is typically understood. Parties may also be able to evade the second requirement by giving money (which is fungible) to an organization without earmarking it for a particular amicus brief. In addition, parties who are members of an organization submitting an amicus brief could take advantage of the third requirement's exception for members of the amicus organization.

There are also broader concerns about the influence of "dark money" on the amicus process. The subcommittee would like some exploration by the full committee of whether this is a concern it should address before moving forward and, if so, what steps are appropriate.

The subcommittee has sketched out some language addressing some of the issues that the rules could address. (Agenda book page 140-41). This is not a suggestion of language to adopt, but rather a first step illustrating how some issues could be addressed.

To deal with the narrow construction of the second requirement, the word "drafting" is added, making clear that disclosure is required of contributions made for writing the brief, not just printing and filing it.

To deal with possible evasion by parties, a new provision is added requiring greater disclosure of contributions by a party to an amicus and changing the existing exception for members of an amicus to not apply to members who are parties or counsel to parties.

The subcommittee has not drafted any language addressing the issue of nonparties funding multiple amici.

Judge Bybee stated that the subcommittee had done a lot of work and that the principal author of the memo was Danielle Spinelli. Noting the connection between our rule and the Supreme Court rule, he noted that coordination would be necessary.

Ms. Spinelli stated that the subcommittee is looking for guidance from the full Committee; it would be helpful to get the full Committee's reaction to the underlying concerns. She noted that there are countervailing constitutional issues regarding the disclosure of the membership of an organization.

Judge Bybee stated that he was struck by the idea of requiring disclosures by those who file three or more amicus briefs; that's not the kind of thing we do. Ms. Spinelli added that the subcommittee envisions rules for all amici, not just those who file a certain number of amicus briefs.

An academic member stated that lobbying is not the same as filing an amicus brief. Lobbying is done in private. An amicus filing is made in public and can be responded to. An amicus brief is more like a billboard outside the courthouse paid for by "Citizens for Goodness and Wonderfulness." 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. The language in romanette (ii), which is designed to avoid the narrow interpretation of that provision, and in romanette (iv), which would remove the exception for parties and their counsel who are members of an amicus organization, could go forward separately from the new romanette (iii). Trying to determine who counts as a direct or indirect parent can be difficult with corporate parents, and its application to LLCs even harder.

Ms. Spinelli posed more precise questions for the Committee. Should the focus remain on contributions by parties? Should the subcommittee think about

contributions by nonparties so that, for example, the court would know that ten amicus briefs were all paid for by one person? Because amicus briefs are more of an issue for the Supreme Court than for the courts of appeals, we should be in communication with the Supreme Court; should this Committee bless such communication? Anything else we should consider?

A judge member stated that the premise of the article and bill is that an amicus give someone a leg up. He used to be in the state legislature and has been lobbied. Lobbying is different than filing an amicus brief. We should not accept the premise that they are the same and should be careful not to be drawn into debate on those terms.

Judge Bates stated that we should not expect more guidance from the Supreme Court. We should touch base with the Clerk of the Supreme Court before moving forward, and Judge Bates should be included in any such discussions. But the hope is that this Committee and the rule making process will thoroughly examine the matter. We obviously must consider the NAACP case and keep an eye on the pending SCOTUS case.

Ms. Spinelli then turned attention to the language sketched out to deal with parties, an area clearly within our purview. Perhaps members could send any ideas about that language via email, as well as any thoughts about a broader disclosure rule and competing concerns.

Judge Bybee asked where the 10% threshold came from. Ms. Spinelli responded that it was drawn from the corporate disclosure rule (Rule 26.1). A judge member noted that this is like the discussion of disclosure of educational programs attended by judges. The perception of fairness and independence is important. The Code of Conduct Committee spent a long time dealing with those disclosures. Judges are not likely to be affected, but perceptions matter.

A lawyer member emphasized the importance of the perception that parties may be getting around the disclosure rules. The tricky question involves nonparties. A court can look very bad, even if not influenced, because it can look like the court was hoodwinked.

Ms. Spinelli asked if the full Committee thought that the subcommittee should continue its work regarding parties, as sketched out in the agenda book. Two judge members urged that we not start from a presumption of improper influence; the question is transparency. A judge member stated that the language in the agenda book was a good start regarding parties. In response to a question from Judge Bybee, Ms. Spinelli stated that the subcommittee did not deal with recusal issues.

The Reporter asked if anyone thought that the subcommittee should not consider dealing with nonparties. An academic member stated that he was hesitant

to require disclosure for nonparties when not intended to fund the brief. He understands the concern about non-circumvention, but some donors may not have influence. Consider the difference between someone who provides 3% of the revenue to the Chamber of Commerce and someone who wholly owns an organization. A disclosure rule can create all kinds of complications dealing with LLCs and other types of structures. Ms. Spinelli added that the corporate disclosure rule is designed for recusal purposes and that's why it is focused on public corporations. It is not easy to block all methods of circumvention.

Judge Bybee stated that it was clear that the subcommittee would continue its work. Ms. Spinelli agreed that the subcommittee would move forward and welcome input as it does.

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

Ms. Wright presented the report of the subcommittee. (Agenda book page 193). She noted that Sai had submitted a suggestion regarding the standards for granting IFP status and for revising Form 4. A staff attorney from the Ninth Circuit joined the subcommittee meeting and provided insight into how the IFP process works in practice. She will survey other circuits to get information from them about the standard used, how Form 4 is used, and what parts of it are helpful.

Judge Bybee added that it was a very productive subcommittee meeting and asked if there were any other comments. The Reporter called the Committee's attention to an additional relevant submission from Sai.

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

Tom Byron presented the report of the subcommittee. He explained that in prior discussions of this issue, one category of cases stood out: cases where an order could have been certified for immediate appeal under Civil Rule 54(b) but was not, a notice of appeal is filed, sometime later final judgment is entered, no new notice of appeal is filed, and the old notice of appeal does not ripen so the appeal is lost.

The problem arises because, even after a party files a notice of appeal, the case goes forward in the district court notwithstanding the notice of appeal. Perhaps this is due to unawareness of the significance of the notice of appeal. Or perhaps there is some other reason the case proceeds.

The question for the subcommittee is whether there is any way to do something about these situations. It has not identified a clear way to solve the problem—a problem that seems to be partly of a party's own making by failing to follow up on what it should do.

Professor Lammon suggests that all notices of appeal ripen once final judgment is entered. The subcommittee rejects that approach because it would encourage premature notices of appeal and cause more problems than it solves.

The subcommittee considered formalizing the process recognized in the *Behrens* case (*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 effective for the problem identified, that is, that the party filing the notice of appeal seems to be unaware of its significance. There isn't an obvious trigger to invoke the process; the problem was the failure to seek a Rule 54(b) certification.

The bottom line is the subcommittee couldn't come up with a good solution and therefore is not recommending any action. However, the subcommittee is not ready to take the matter off the agenda. The subcommittee and the Reporter will look more closely at the circuit split, seeking to clarify whether there are clear splits between circuits as opposed to splits within circuits. The latter may reflect case specific outcomes.

In addition, the subcommittee will look more closely at another issue, one involving the denial of post-trial motions. The Reporter added that he will investigate the current rule's different treatment of post-trial motions in civil and criminal cases.

An academic member stated that splits within circuits, where some panels forgive and others don't, may be worse and more in need of a fix. He also noted that opposing parties can be blamed as well because they could raise the issue themselves. Perhaps they should forfeit the issue if they move to dismiss the appeal too late.

Ms. Spinelli stated that the subcommittee batted around several possible solutions, but none were satisfactory. Judge Bybee added that it may be muddled, that panels are making ad hoc decisions, and there may not be a good rule.

VI. Discussion of Matters Before Joint Subcommittees

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

First, the joint subcommittee considering the midnight deadline for electronic filing is continuing to gather information. 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. (Agenda book page 211).

Second, the joint subcommittee considering the final judgment rule in consolidated actions is continuing its study. Research by the Federal Judicial Center did not reveal significant problems and further research by the FJC does not seem

warranted at this point. (Agenda book page 213). 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.

VII. Discussion of Recent Suggestions

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

The Reporter introduced the suggestion from Dean Alan Morrison. (Agenda book page 217). 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 Morrison suggests that this Committee, or perhaps the Administrative Office or the Federal Judicial Center, study the issue and recommend guidelines for adoption. The Reporter suggested that this matter be referred to the AMICUS subcommittee. Ms. Spinelli, the chair of that subcommittee, agreed.

Judge Bybee noted that an important source of information regarding recusal is financial disclosures by judges and that these disclosures are open to the public. To the extent that a judge recuses because of a personal connection to a law firm, the firm itself should know that connection.

An academic member stated that this seems to be more of an issue for the Judicial Conference than for this Committee. It's really a question of interpretation of the recusal statute. A judge member noted that this is really an issue at the en banc stage because cases are screened for recusal issues at the panel stage.

A lawyer member suggested that the standard may be outside the purview of this Committee. Mr. Byron had some recollection that this issue had been canvassed before, and Professor Struve noted that we can try to dig that up. Mr. Byron also mentioned a related issue of the process for amicus briefing after the grant of rehearing. Ms. Dwyer noted that the Clerk's Office clears conflicts before ever sending a case to a panel. An academic member said that the issue is important, that the greatest need is at the en banc stage, and that it should be referred to the subcommittee.

The matter was referred to the AMICUS subcommittee.

B. Adding Time After Service of Judgment (21-AP-A)

The Reporter introduced the suggestion by Greg Patmythes that the rules 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). He also suggests adding a provision

to Civil Rule 60 that would require Rule 60 motions to be made within 28 days to toll the time to appeal and deleting the 28-day provision from Appellate Rule 4(a)(4).

The Reporter recommended that this suggestion be removed from the agenda. Some time limits run from the date of service, but other time limits run from some other event. The extra three-day provision applies only to the former. 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.

The Committee agreed unanimously to remove this suggestion from the agenda.

C. IFP Forms (21-AP-B)

The Reporter introduced Sai's response to the IFP subcommittee's September 2020 report; the response has been docketed as a new suggestion. (Agenda book page 233). The Reporter suggested that it be referred to the IFP subcommittee, and this was done without objection.

VIII. Old Business

The Reporter stated that in April of 2018 the Committee had decided to table consideration of possible changes to appendices but revisit the matter in three years. (Agenda book page 245). The concern was that appendices were too long and included much irrelevant information. The hope was that technology would solve the problem. He suggested that the Committee had three options at this point: 1) Re-form a subcommittee to address the issue; 2) Wait longer to return to the issue, perhaps on the theory that it is better addressed once a new post-pandemic normal is reached; or 3) Remove the issue from the agenda.

An academic member reported that the frustration that practicing lawyers have with appendices has been raised on Twitter. Mr. Byron stated that he had advocated change in this area in the past but been dissuaded by the prior Clerk's representative on the Committee. Ms. Dwyer stated that the circuits have struggled with this for years. Some judges want an electronic brief; others want paper. The practice in the Fifth Circuit may be best. There, the district court produces an enormous PDF that is placed on a site at the court of appeals; parties are required to cite to that location with hyperlinks. It requires lots of cooperation by district courts.

In response to a question by a judge member, Ms. Dwyer said that the PDF is searchable.

A judge member stated that he loves electronic briefs with hyperlinks. It's a lot easier to carry his iPad than 45 pounds of paper. He has bench memos prepared with hyperlinks to the record. Older judges resist, but it's a matter of time.

Mr. Byron raised a slightly different issue: procedures for designating and producing the appendix. Well before electronic filing, practice in the Fifth Circuit involved a literal box of papers with deferred designation of the appendix. In the Sixth Circuit, citation is directly to the district court electronic record. There is a disuniformity problem; there will be resistance to changing from one's own way of doing things until we can abandon designation and simply use the electronic record. A technological fix can let us abandon the old ways. He suggested revisiting the issue in another three years.

Ms. Dwyer added that upgrades to ECF are being discussed. The practical problem is wild over-designation. The designation task should not be given to the lowest paid person in the office.

A judge member stated that in the Eleventh Circuit there is a full electronic record on appeal. One problem is getting the district courts to scan everything; things are missing, such as trial exhibits. And the different approaches by judges is not only age-based. Two new judges want paper versions.

A judge member stated that the transition to electronic records has been seamless in the Sixth Circuit. Judges who want paper were given printers and told to print.

Mr. Byron suggested that this should be considered with CACM, IT, and district judges.

The Committee agreed to revisit the issue again in another three years.

IX. Review of Impact and Effectiveness of Recent Rule Changes

The issue we have been watching is whether courts of appeals are still requiring proof of service despite the 2019 amendment to Rule 25(d) to no longer require proof of service for documents that are electronically filed. Mr. Byron stated that it is still happening. We will get a list from Mr. Byron of which courts continue to do so and figure out a course of action.

X. New Business

No member of the Committee presented any new business.

XI. Adjournment

Judge Bybee thanked the participants, stating that it was a long and productive day.

The next meeting will be held on October 7, 2021. The hope is that it will be in person in Washington D.C.

The Committee adjourned at 4:25 p.m.