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

MEMORANDUM

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

FROM: Hon. Allison Eid, Chair
Advisory Committee on Appellate Rules

RE: Report of the Advisory Committee on Appellate Rules

DATE: December 16, 2024

I. Introduction

The Advisory Committee on Appellate Rules met on Wednesday, October 9, 2024, in Washington, DC. The draft minutes from the meeting accompany this report.

The Advisory Committee has no action items for the January 2025 meeting.

Proposed amendments to Rule 29, dealing with amicus briefs, along with conforming amendments to Rule 32 and the Appendix of Length Limits, and proposed

amendments to Form 4, the form used for applications to proceed in forma pauperis, were published for public comment in August 2024. The text of those proposed amendments, with Committee Notes, are included in the 2024 Preliminary Draft of Proposed Amendments found at this link. The Advisory Committee expects to present both proposed amendments (changed if appropriate in light of public comment) for final approval at the June 2025 meeting. (Part II of this report.)

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

- creating a rule dealing with intervention on appeal;
- addressing the "incurably premature" doctrine regarding review of agency action under Rule 15;
- addressing issues concerning reopening of the time to appeal under Rule 4(a)(6);
- amending Rule 8 to provide limits on administrative stays;
- providing greater protection for Social Security numbers in court filings; and
- expanding electronic filing by self-represented litigants.

The Advisory Committee also considered several items and removed them from the Committee's agenda (Part IV of this report):

- a belated comment on Rule 39 that was docketed as a suggestion;
- a new suggestion prohibiting the use of all caps for the names of persons and requiring the use of proper diacritical marks;
- a new suggestion calling for common local rules to be moved into the national rules;
- a new suggestion that similar rules across the various rule sets be moved to a set of Federal Common Rules;
- a new suggestion that page equivalents for words be standardized and length limits simplified and
- a new suggestion that Rule 29 be amended to provide guidance about standards of review.

II. Items Published for Public Comment

A. Amicus Briefs—Rule 29 (21-AP-C; 21-AP-G; 21-AP-H; 22-AP-A; 23-AP-B; 23-AP-I; 23-AP-K)

The proposed amendments to Rule 29 address two major areas.

First, they address disclosures by amici. The Advisory Committee has been working on this issue for years and has received considerable feedback from the Standing Committee, feedback that has been incorporated into the proposal published for public comment.

The Advisory Committee has received several public comments since publication, in addition to ones received before the comment period opened and docketed as new suggestions. It expects still more before the comment period ends on February 17, 2025. It has also received requests to testify at hearings scheduled for early 2025.

Because the Advisory Committee has been considering disclosures by amici for many years and will receive additional public comment before its spring meeting, it decided to await full public comment before discussing this issue further.

Second, the proposed amendments address an issue that arose later in the process: whether to change the requirements for filing an amicus brief. Current Rule 29(a)(2) permits a nongovernmental party to file an amicus brief during a court's initial consideration of a case either by making a motion or by obtaining the consent of the parties. Current Rule 29(b)(2) requires a motion at the rehearing stage.

The proposal published for public comment would eliminate the consent option from Rule 29(a)(2), requiring a motion during a court's initial consideration of the case. There was substantial concern about this proposal at the Standing Committee meeting in June of 2024, particularly about the additional work for lawyers and courts on motions that are not currently required.

Representatives from several circuits (Second, Ninth, and Tenth) at the Advisory Committee meeting voiced support for requiring a motion at the initial hearing stage. The major concern is with the interaction of amicus filing on consent and recusals. The filing of an amicus brief on consent can lead the clerk's office, operating under a computer program that checks for recusals, to block a case from being assigned to a judge before the case is assigned to a panel. That means that a judge is stricken from a case at the outset, as a result of the consent of the parties. By requiring a motion, a judge would decide whether to recuse or to strike the brief—as opposed to the computer simply not assigning the judge to the case in the first

place. The Court of Appeals for the Ninth Circuit is considering a local rule that would eliminate the consent option; its attorney advisory group is supportive.

This problem may not arise in circuits where cases are assigned to panels earlier in the process. The Advisory Committee is surveying the circuits. One approach would be a national rule with the ability of some circuits to opt out.

At its April 2025 meeting, the Advisory Committee will consider the public comments. It expects to seek final approval, taking into account public comment, at the June 2025 meeting of the Standing Committee.

B. Form 4 (19-AP-C; 20-AP-D; 21-AP-B)

The proposed amendment to Form 4 would make that form—which applies when seeking in forma pauperis status—simpler and less intrusive.

At the time of the Advisory Committee's meeting in October, it had received only one comment, a favorable comment. Since then, it has received requests to testify about the proposed amendments to this Form.

The Advisory Committee decided to await full public comment before discussing this issue further.

At its April 2025 meeting, the Advisory Committee will consider the public comments. It expects to seek final approval, taking into account public comment, at the June 2025 meeting of the Standing Committee.

III. Other Matters Under Active Consideration

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

The Advisory Committee is continuing its work on the possibility of a new Federal Rule of Appellate Procedure governing intervention on appeal. There is currently no Appellate Rule governing intervention, other than Rule 15 which sets a deadline but no criteria for intervention in agency cases. In the past, the Advisory Committee decided not to pursue creating a new rule governing intervention on appeal, fearing that creating such a new rule would invite more motions to intervene on appeal.

The Advisory Committee is exploring both whether there is a sufficient problem to warrant rulemaking and whether it is possible to create a useful rule. At this point, it appears that there is little problem in most agency cases that go directly to the courts of appeals. Intervention on appeal is common there, particularly by a

party who appeared before the agency and prevailed there. Similarly, there does not appear to be a problem in cases presenting constitutional challenges and the government entity whose action is challenged seeks to intervene, or where the interest of a foreign sovereign or tribe becomes clear for the first time on appeal.

Problems are more evident in high profile cases where an ideological plaintiff or a state files a case and later there is a change in the administration of the government (President or Governor) whose law or policy is challenged. Similarly, there can be problems in cases involving universal remedies, that is, remedies that grant relief not only to the parties but also for the benefit of nonparties. In addition, some circuit judges (so far, in separate opinions rather than majority opinions) appear to view Civil Rule 24 as applying to intervention on appeal more directly, as opposed to the traditional view that intervention on appeal is available only in exceptional cases for imperative reasons.

Developments in these areas may make it more or less important to create a new rule governing intervention on appeal. To the extent that non-party remedies become less prevalent, the need for a rule may be reduced. If the view that Civil Rule 24 governs more directly prevails in a circuit, the need for a new rule may be great.

The Federal Judicial Center is doing research to support this project. Its research reaches well beyond high profile cases and reported decisions.

The Advisory Committee may decide to leave agency cases, or agency cases that go directly to the courts of appeals, to current practice rather than address them with a new rule. It may be able to craft a rule that provides guidance, limits the range of debate, puts the right factors on the table, structures the analysis, requires timeliness, and makes clear that intervention on appeal is rare.

There seems to be a consensus that it would be better if there had been an appellate rule governing intervention on appeal for decades. But the question remains whether the benefits of adding one now are outweighed by the risk of inviting more motions to intervene on appeal.

B. "Incurably Premature"—Rule 15 (24-AP-G)

The Advisory Committee is considering a suggestion to fix a potential trap for the unwary in Rule 15. The "incurably premature" doctrine, which governs in the D.C. Circuit and maybe in others, holds that if a motion to reconsider an agency decision makes that decision unreviewable in the court of appeals, then a petition to review that agency decision is not just held in the court of appeals awaiting the agency's decision on the motion to reconsider. Instead, the petition for review is

dismissed, and a new petition for review must be filed after the agency decides the motion to reconsider.

Rule 4, dealing with appeals from district court judgments, used to work in a similar way regarding various post-judgment motions. But in 1993, Rule 4 was amended to provide that such a premature notice of appeal becomes effective when the post-judgment motion is decided. The suggestion is to do for Rule 15 what was done for Rule 4.

A similar suggestion was considered in the wake of the 1993 amendment to Rule 4. But it was dropped due to the strong opposition of the D.C. circuit judges who were active at the time. Technology and administrative changes might reduce the concerns that motivated the D.C. circuit judges in the past. In addition, this is not just a D.C. Circuit issue.

The Advisory Committee is seeking a sense of the current views of the D.C. Circuit, as well as the view of others, before proceeding down this path again.

C. Reopening Time to Appeal—Rule 4 (24-AP-M)

The Advisory Committee has begun to consider a suggestion by Chief Judge Sutton addressing Rule 4(a)(6), which permits a district court to reopen the time to appeal in limited circumstances. In *Winters v. Taskila*, 88 F.4th 665 (6th Cir. 2023), a habeas petitioner did not receive notice of the district court's decision denying relief until long after the time to appeal. The court of appeals held that the district court properly treated the notice of appeal as a motion to reopen the time to appeal and granted that motion. There was no need to file an additional notice of appeal because the original notice of appeal ripened once the motion to reopen the time to appeal was granted. In addition, the notice of appeal was construed as a request for a certificate of appealability.

Chief Judge Sutton noted that one could fairly wonder about allowing a single two-sentence document to be a notice of appeal, a motion for an extension of time, a motion to reopen, and a request for a certificate of appealability. He pointed out the lack of agreement in the courts of appeals on these issues, and suggested the Advisory Committee take a look.

Later, the Court of Appeals for the Fourth Circuit insisted that an appellant must file a notice of appeal after a motion to reopen the time to appeal is granted—and cannot rely on an earlier notice of appeal that was treated as a motion to reopen. *Parrish v. United States*, No. 20-1766, 2024 WL 1736340 (4th Cir. Apr. 23, 2024). Judge Gregory, joined by three other judges, dissented from rehearing en banc, and urged the Advisory Committee to provide guidance.

D. Administrative Stays—Rule 8 (24-AP-L)

The Advisory Committee has begun to consider a suggestion by Will Havemann to amend Rule 8 to provide limits on administrative stays. Several justices of the Supreme Court have noted problems with the use of administrative stays. A rule could make clear the purpose of administrative stays and perhaps limit their length, by analogy to the way Civil Rule 65 treats temporary restraining orders.

E. Security Numbers in Court Filings—Rule 25 (22-AP-E)

The Advisory Committee defers to Mr. Byron for the update regarding the joint project dealing with full redaction of social security numbers and other privacy matters, but adds the following:

Because Appellate Rule 25 incorporates the other rules, it may not be necessary to amend the Appellate Rules. On the other hand, if there are few if any appellate cases in which it would be necessary for a publicly filed brief or appendix to include a social security number, perhaps the Appellate Rules should broadly require full redaction.

In addition, some members of the Advisory Committee voiced concern that we not wait for problems to develop before acting to protect information such as a date of birth and personal phone numbers and before reconsidering the exemption for court records.

F. Unrepresented Parties; Filing and Service

The Advisory Committee defers to the Reporter for the Standing Committee for the update regarding the joint project dealing with electronic filing and service by unrepresented parties.

IV. Items Removed from the Advisory Committee Agenda

A. Belated Comment on Rule 39 (24-AP-F)

The Advisory Committee received a belated comment on the proposed amendment to Rule 39, dealing with costs. The Advisory Committee considered this comment when it was received, and no member sought to reopen discussion of Rule 39. It was, however, docketed as a new suggestion and the Advisory Committee has voted to formally remove the suggestion from the agenda.

B. Correct Case and Diacritics (24-AP-H)

The Advisory Committee considered a new suggestion from Sai, who suggested that filings avoid using all caps for the names of persons and that proper diacritics be used. Sai's approach appears to be the better approach, but the Advisory Committee did not want to add such a new requirement that would give the clerk's office one more task in bouncing briefs.

The Advisory Committee, without dissent, removed this item from its agenda.

C. Widespread Local Rules (23-AP-I)

The Advisory Committee considered a new suggestion from Sai, who suggested that many local rules are universal or nearly so and could usefully be moved into the national rules. Members thought that this undertaking would be a lot of work and did not see a real problem that needed to be solved here.

The Advisory Committee, without dissent, removed this item from its agenda.

D. Federal Common Rules (23-AP-J)

The Advisory Committee considered a new suggestion from Sai, who noted that the various rule sets have similar provisions and suggested that such provisions be moved to a set of Federal Common Rules. Instead of coordinating any changes to such provisions across the various rule sets, they could be done in one place. The individual rule sets could provide for differences from the Common Rules where appropriate. If starting from scratch, there is much to be said for such an approach. But it would be a massive undertaking, and there is no particular problem requiring a solution.

The Advisory Committee, without dissent, removed this item from its agenda.

E. Standardizing Page Equivalents for Word Limits (23-AP-K)

The Advisory Committee considered a new suggestion from Sai, who noted that the Federal Rules of Appellate Procedure do not use a uniform words-to-page ratio in setting length limits. The reason for the disparity is historical: in setting these limits, the Advisory Committee selected a 260 word per page ratio as the most accurate ratio, but it chose a 30-page limit for principal briefs on the merits of an appeal as a safe harbor (which results in a 433 word per page ratio) for those without access to word processing software.

Other simplifications, such as deleting references to monospace fonts and lines of text or even requiring all filers to use word limits, might be possible. But the Advisory Committee did not see a sufficient real-world problem worth fixing.

The Advisory Committee, without dissent, removed this item from its agenda.

F. Standards of Review (24-AP-E)

The Advisory Committee considered a new suggestion from Jonathan Cohen that Rule 29, which requires a statement of the standard of review, be amended to provide guidance about those standards. Members saw no identified problem that called for a rules amendment and expressed concern that such an amendment could be distracting and invite lots of discussion.

The Advisory Committee, without dissent, removed this item from its agenda.