

Minutes of the Spring Meeting of the
Advisory Committee on Appellate Rules

April 2, 2025

Atlanta, GA

Judge Allison Eid, Chair, Advisory Committee on the Appellate Rules, called the meeting of the Advisory Committee on the Appellate Rules to order on Wednesday, April 2, 2025, at approximately 9:00 a.m. EDT.

In addition to Judge Eid, the following members of the Advisory Committee on Appellate Rules were present in person: Linda Coberley, Professor Bert Huang, Judge Carl J. Nichols, and Lisa Wright. The Solicitor General was represented by Mark Freeman, Director of Appellate Staff, Civil Division, Department of Justice. Judge Richard C. Wesley, Judge Sidney Thomas, Justice Leondra Kruger, and George Hicks attended via Microsoft Teams.

Also present in person were: Judge John D. Bates, Chair, Committee on Rules of Practice and Procedure (Standing Committee); Judge Daniel Bress, Member, Advisory Committee on Bankruptcy Rules and Liaison to the Advisory Committee on Appellate Rules; Andrew Pincus, Member, Standing Committee, and Liaison to the Advisory Committee on Appellate Rules; Christopher Wolpert, Clerk of Court Representative; Carolyn Dubay, Secretary to the Standing Committee, Rules Committee Staff (RCS); Bridget M. Healy, Counsel, RCS; Kyle Brinker, Rules Law Clerk, RCS; Rakita Johnson, Administrative Assistant, RCS; Maria Leary, Federal Judicial Center; Professor Catherine T. Struve, Reporter, Standing Committee; and Professor Edward A. Hartnett, Reporter, Advisory Committee on Appellate Rules.

Professor Daniel R. Coquillette, Consultant, Standing Committee, Tim Reagan, Federal Judicial Center, and Shelly Cox, Management Analyst, RCS, attended via Microsoft Teams.

I. Introduction and Preliminary Matters

Judge Eid opened the meeting and welcomed everyone, including the members attending remotely. She noted that Lisa Wright's term was ending and thanked her for her work on the committee's projects. She also congratulated Scott Myers on his retirement and welcomed Carolyn Dubay. She thanked the Court of Appeals for the Eleventh Circuit for hosting the meeting.

No one had questions about the report from the Federal Judicial Center. (Agenda book page 29).

Mr. Brinker referred to the pending legislation chart and noted that there is no recent Congressional action regarding the Federal Rules of Appellate Procedure. (Agenda book page 26).

Ms. Healy called attention to the rules tracking chart and noted that the amendments to Rules 6 and 39 are in the hands of the Supreme Court. (Agenda book page 19). They are scheduled to take effect December 1 of this year.

Judge Eid noted the draft minutes of the meeting of the Standing Committee and the Report to the Judicial Conference. (Agenda book page 41). We will discuss the matters addressed at the Standing Committee later on the agenda.

II. Approval of the Minutes

The reporter noted a typographical correction to the minutes of the October 9, 2024, Advisory Committee meeting. (Agenda book page 83). There should be a period rather than a comma on the last line of page 90. With this correction, the minutes were approved without dissent.

III. Discussion of Joint Committee Matters

Professor Struve provided an update regarding electronic filing and service for self-represented parties. (Agenda book page 103). The working group has made progress but is not yet seeking publication. The hope is to request publication in the next round. The Bankruptcy Rules Committee has concerns; the Standing Committee is ok with other committees going forward without Bankruptcy. The agenda book sketches a possible amendment to FRAP 25.

The working group is pursuing two major ideas. The first is that since filings made by non-electronic filers are uploaded by the clerk's office, triggering a notice to electronic filers, there does not seem to be a need to require the non-electronic filer to make paper copies and mail them to other parties. The second involves making electronic filing more available to self-represented parties. Future drafts will use the term "unrepresented parties" because of the number of places in the rules where that phrase is already used.

At the time the sketch was drafted, it was thought that there might not be any situations in the courts of appeals—unlike the district courts—where litigants would have to serve documents on the parties but not file them with the court. But others have since pointed out that there are some, so that aspect of the sketch will have to be changed.

The sketch of FRAP 25 largely follows that sketched for Civil Rule 5, switching the presumption to filing electronically, but allowing local rules that limit electronic filing so long as they have reasonable exceptions or alternatives. It is also permissible

to impose conditions, particularly limiting an unrepresented party's access to that party's case. Word choices follow the existing Rule. There are ongoing discussions with the style consultants seeking to balance concision with ease of use for unrepresented parties.

Revised FRAP 25 would begin with the idea that notice of electronic filing constitutes service, placing other means of service after that. Service is complete as of the date of the notice. There is no provision, as there is in the current rule, to situations where one learns that a document has not been received; that doesn't seem to be a problem with court-generated notices of electronic filing.

Two issues need to be addressed. The first, already mentioned, is to draft something like the provision for Civil Rule 5(b)(4) for situations where a document is served but not filed. The second is to deal with bankruptcy specific concerns.

It is likely that the Bankruptcy Rules Committee will not be on board. That raises the question of what to do on appeal in a bankruptcy case. The Civil Rules Committee is not inclined to have different service rules for bankruptcy appeals. The sketch for FRAP 25 similarly does not include different service and e-filing rules for bankruptcy appeals.

The Reporter voiced support for the idea described on page 172-73 of the agenda book, surmising that the committees would prefer to keep the practice in the courts of appeals uniform across types of appeal rather than exempting bankruptcy appeals. He invited any member of the Committee to tell us if we are wrong about that surmise. None did.

Mr. Wolpert expressed support for more detail in the rule, urging the inclusion of both sets of bracketed language. Specific provisions make it easier for the Clerk's Office to explain things to self-represented litigants.

Mr. Freeman asked about the structure of the proposed rule and the relationship among the various parts. What is paragraph (3) doing that isn't covered by the others? Professor Struve explained that (3) is addressed to types of cases, while (4) is address to particular litigants. Then what is the difference between (2) and (3)? The point of (2) is to overcome existing rules that bar unrepresented litigants from e-filing, requiring that they be permitted in at least some situations, while (3) is designed to allay concerns that there are cases where electronic filing would be inappropriate, such as prisoner cases. Professor Struve expressed openness to better ways to make these points clear. Mr. Freeman suggested the possibility of combining (2) and (3) in a single paragraph. Professor Struve stated that she would try to clarify, including the interaction with local rules.

Mr. Wolpert cautioned against requiring that conditions be in a local rule rather than an order. Mr. Freeman yielded to the view of the Clerks. Professor Struve saw value in (3), allowing the issuance of an order with conditions.

Professor Struve then turned to privacy issues. (Agenda book page 175). FRAP 25 adopts what applied below; currently this allows for the last 4 digits of a social security number to be included. Senator Wyden has suggested the redaction of the complete number. Civil, Criminal, and Appellate seem on board, but Bankruptcy needs a truncated number in some situations. Bankruptcy has done a lot to address the concern, including a published rule that would call for social security numbers on fewer occasions. In addition, there are suggestions to better protect the privacy of minors. There is an interesting twist: how to deal with bankruptcy appeals? There is also a question about whether the same protection is needed for taxpayer identification numbers, but there may be less of a security problem in that area. Criminal is taking the lead regarding pseudonyms for minors, which would also be relevant in some civil habeas actions.

The Reporter pointed to his memo. (Agenda book page 184). He had drafted a possible amendment to FRAP 25 in the expectation that other committees would be proposing amendments to be published this summer. Now it seems that isn't going to happen. The Committee might decide that there is no need to do anything to FRAP 25, on the theory that whatever is done with other rule sets will flow through to the Appellate Rules. Alternatively, it might form a subcommittee to look into the possibility of having a rule along the lines sketched in the agenda book: barring any part of a social security number in an appellate filing by a party not under seal. Most aggressively, it could seek publication this summer, on the theory that, whatever the need for social security numbers in other circumstances, there is no need for them in a public appellate filing by the parties, and getting out ahead of other committees could generate useful public response that those committees could use.

A couple of committee members initially expressed support for the more aggressive approach, but after Judge Bates stated that the Standing Committee would prefer to get proposals from all of the advisory committees at the same time, the Committee decided to wait. But no one saw any need for a subcommittee.

IV. Discussion of Matters 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 Reporter presented the report of the amicus subcommittee. (Agenda book page 189). Proposed amendments to Rule 29 were published for public comment. (Agenda book page 237). The Advisory Committee received hundreds of written comments and about two dozen witnesses testified at a hearing.

There are two major areas that led to comments. First, published FRAP 29(b)(4) would require some limited disclosure regarding the financial relationship between a party and an amicus. Second, published FRAP 29(a)(3) would require nongovernmental amici to move for leave to file.

Taking the latter first: Based on the public comment, there is no support in the bar for a motion requirement. The major reason for this proposal was to deal with recusal issues. Accordingly, the subcommittee offers two alternatives. One alternative is to allow amicus briefs to be filed freely, with no requirement either of a motion or party consent but make clear that a court of appeals may assign matters without regard to possible recusal based on amicus briefs and that a judge who might be recused because of an amicus brief could choose to recuse or to strike the brief. The other alternative is to leave this part of the rule as-is, so that party consent is sufficient at the initial consideration stage of a case, but that a motion is required for nongovernmental amici at the rehearing stage.

The Reporter invited Judge Thomas, whose concerns about recusal led to the proposed motion requirement to express his views. Judge Thomas said that he preferred to leave the rule as-is. The major problem is with petitions for rehearing. Back when the national rule was changed, the Ninth Circuit left in place a local rule permitting amicus filings on consent at the rehearing stage. That wasn't a problem back then, but it has become a problem in recent years. Sometimes six judges are recused because of a consent filing. The Ninth Circuit is inclined to follow the national rule and require a motion at the rehearing stage. The Supreme Court model would harm us significantly. Mr. Wolpert added that at least half of the circuit clerks were concerned about the volume of motions to process if motions were required in all cases. The proposal of the California Appellate Lawyers wouldn't work. With the large number of panel permutations, automated recusal is important.

A different judge member agreed with Judge Thomas. If a decision to recuse or strike is made near the end, by that time the party briefs will have already responded to the amicus brief. Striking the brief at that point is too late; the amicus brief had infected the party briefs on the merits.

The Reporter sought to clarify if there was consensus to leave this aspect of the rule as-is. In response to the possibility of adopting the Supreme Court's approach, a liaison member noted that there are speed bumps in the Supreme Court that we don't have. The Reporter added that the Supreme Court has taken the position that an amicus brief does not create recusals there, but that is not the practice in the courts of appeals and there is reason to question whether a FRAP amendment could so provide in the courts of appeals. A different judge member said leave it alone.

In response to a question from Judge Bates, the Reporter stated his view that he did not think that republication would be necessary if the Committee chose to adopt the Supreme Court's approach, noting that the theme of many comments was

along the lines of “don’t change this, but if any change is made, it should be to adopt the Supreme Court’s approach.” On the other hand, there would certainly be no need for republication if the Committee simply decided not to make the proposed change and leave things as-is.

Mr. Freeman suggested the possibility of adopting the Supreme Court’s approach at the panel stage. He rarely sees objections there, and he is not sure what it is doing at the panel stage. Judge Thomas responded that it filters out frivolous amicus briefs, briefs that are more like letters to the editor. Pro se amici don’t get consent. It serves as a useful filter to keep all sorts of things out of the public record that do not belong there.

An academic member noted that the comments reflected satisfaction with the culture of consent that seemed to be working.

A judge member moved to leave well enough alone in this area. A different judge member clarified that this included no republication. The proposal was adopted unanimously.

The Committee took a break for approximately twenty minutes and resumed at approximately 10:50.

With that decision regarding the motion requirement, the Committee focused its attention on the alternative contained in the agenda book beginning at page 199. The Reporter noted that there were two areas of concern.

First, some commenters were concerned that the proposed rule’s description of the purpose of an amicus brief was too restrictive. (Agenda book page 199, line 7.) In particular, most things that an amicus might want to say would have been “mentioned” by a party, and a rule against redundancy among amicus briefs would be difficult to apply: there is little time between the filing of a party’s brief and the filing of an amicus brief, and an amicus might not even know who else is filing.

Many of these concerns were tied to the motion requirement. The decision to continue to allow filing on consent at the initial hearing stage takes care of most of these concerns. But the subcommittee took the point that “mentioned” can be too broad and recognized the difficulty in some cases of checking for redundancy among amicus briefs. It therefore moved the statement regarding redundancy among amicus briefs to the Committee Note and rephrased it as something that is helpful when feasible. (Agenda book page 208, line 227). And it revised the statement of purpose to more closely follow Supreme Court Rule 37.1.

Second, many commentators were concerned about the requirement in proposed FRAP 29(b)(4) for an amicus to disclose whether a party is a major contributor—that is, one who contributes 25% or more of the annual revenue of an

amicus. While there was considerable opposition to this proposal, there was also some significant support. Some argued that the 25% threshold was too high, and that a 10% threshold would be more appropriate.

It is important to be clear about what this proposal would and would not require. It would not require the disclosure of all contributors to an amicus. It would not require the disclosure of all major contributors to an amicus. It would not require the disclosure of all contributions by parties to an amicus. It would require the disclosure only of major contributions by parties to an amicus. The Committee previously settled on the 25% level as sufficiently high that the party would be in a position to influence the amicus. And there is reason to think that an amicus with that level of funding from a party would be biased toward that party. As Professor Allison Orr Larsen put it, “As any new researcher is taught and any cross-examiner knows well, a source’s motivation is intrinsically tied to its credibility.” (Agenda book page 190).

A majority of the subcommittee recommends approval of this aspect of the proposed rule as published. A minority of the subcommittee believes that there is not a sufficient problem to warrant moving forward over such broad opposition and that it would be evaded anyway.

By way of comparison, FRAP 26.1, dealing with corporate disclosures, assumes that if a judge owns stock in a publicly held corporation that in turn owns 10% or more of stock in the party, the judge may have sufficient interest to require recusal. And the Corporate Transparency Act defines a beneficial owner as someone who owns or controls not less than 25% of the ownership interests of the entity.”

As for earmarked contributions, current FRAP 29(a)(4)(E)(iii) requires the disclosure of all earmarked contributions by anyone other than the amicus, counsel to the amicus, and a member of the amicus. A prior member of the Committee referred to this as the sock-puppet rule, dealing with situations where someone is speaking through an amicus. The proposed amendment would make two changes: First, it would create a de minimis exception for earmarked contributions of less than \$100. Second it would retain the member exception, but not apply that member exception unless the person had been a member for the prior 12 months.

The subcommittee is unanimous in recommending final approval of this amendment, with one slight tweak. In order to deal with the possibility that a long-time member has let its membership lapse, the member exception is rephrased to apply to those who first became a member more than 12 months ago.”

A lawyer member stated that she was the minority on the subcommittee. She noted that there will be proposals that should be adopted despite widespread opposition. For example, if there was a real need for judges to require a motion for amicus briefs, that might be appropriate to require despite opposition from lawyers.

But here, there is a high level of opposition, but no significant problem to be solved. Judges will assume, for example, that a trade association will support a party engaged in that trade. Sometimes an amicus filing by a trade association comes as a surprise, but most of the time it is solicited by a party. It is unwise to try to solve something that we don't know is a problem in the face of this level of opposition.

A liaison member stated that he agrees. Many of the commenters disagree about many things but agreed in their opposition to this proposal. The burden is significant and may deter people from participating. The premises underlying the proposal overstates the dangers. The courts of appeals don't get that many amicus briefs. The First Amendment concerns are sincere and worthy of caution. The proposal reflects a more cynical or jaundiced view of the process than is accurate.

The Reporter noted that a witness testified that anyone running a nonprofit would know off the top of their heads anyone who contributed 25% of the revenue; those are the people they go to when they need money.

Judge Bates asked if the commenters were concerned about the 25% percent threshold. The Reporter stated that he asked witnesses whether their objection was that the percentage was too low or whether their objection to disclosure of the financial relationship between a party and an amicus was categorical. He did not think that any witness had a satisfying answer to that question. It appears that they are concerned that this is the camel's nose under the tent and fear any such disclosures now will lead to more extensive disclosures later.

Mr. Freeman stated that the Department of Justice has lots of concerns. An organization might know that someone is a significant contributor, but is it 23% or 26%? Lawyers need to certify and there can be complexity here. That uncertainty can deter amicus filings. The DOJ does not engage in amicus wrangling, but some people do. The Reporter noted that a witness stated that if a lot of organizations join an amicus brief it could be burdensome to get all the necessary information for all of them.

A lawyer member added that amicus wrangling is not necessarily a bad thing. It can prevent duplication. A liaison member asked what's the problem to be addressed. To the extent the concern is that an entity was created for the purpose of an amicus filing, other parts of the proposed rule deal with that. While amici who get lots of funding from a party surely exist, the liaison member doesn't know of any. There is a discrepancy between the 50% threshold in (b)(3) and the 25% threshold in (b)(4). Revenue is harder to determine than legal control; there may be multiple streams of income, and the internal accounting may or may not aggregate those separate streams. Perhaps the threshold in (b)(4) should be raised to 50%.

A judge member stated that no judge in this process has ever said that he or she was hoodwinked by not knowing the information that this provision would

require to be disclosed. The Reporter noted that one judge previously on the Committee had said that if a party made this level of contribution to an amicus, he would want to know about it. The judge agreed but noted that there is a difference between wanting to know and being hoodwinked by not knowing.

A lawyer member noted that she was not terribly impressed by arguments against disclosure by people who would have to make disclosures. It is not surprising that they would oppose disclosure. The point of getting this information is to benefit the public and the judges. It's not about whether the judges have been actually influenced; it is about public trust, that is hurt when such ties are later revealed.

A different lawyer member agreed with prior members that this is a solution in search of a problem. The issue came to the Committee's attention because of elected officials. An academic member noted that amicus practice has evolved enough in the last ten to twenty years and that responding to problems is not the only reason for a rule.

Judge Bates asked if 50% is appropriate for (b)(3), why not for (b)(4)? Mr. Freeman responded that control will always be probative, but contributing a majority of the money in a given year might not be. Attorneys would have to certify; the costs could be high.

The Reporter suggested that the Committee might want to entertain one of three motions; to approve (b)(4) with the 25% threshold, change the threshold to 50%, or eliminate (b)(4). Mr. Freeman moved to strike (b)(4). The motion carried by a vote of five to four, with the chair declining to vote.

The Reporter then directed attention to subdivision (e) on page 205 of the agenda book. The subcommittee recommends a slight revision of the member exception to deal with the situation of a lapsed member. As rephrased, it would continue the member exception but limit that exception to those members who first became a member more than 12 months earlier. The corresponding passage of the Committee Note is on page 211 of the agenda book. It was suggested that the phrase should be "at least" 12 months instead of "more than" 12 months.

A liaison member noted that there was a lot of confusion in the comments about this provision and people misread it. A different liaison member asked what the problem is that needs to be addressed. The Reporter stated that there are two changes in the proposed amendment. One is to limit the member exception; otherwise, the requirement that earmarked contributions be disclosed can be evaded by becoming a member upon making the earmarked contribution. Under the existing rule, if a nonmember wants to fund an amicus brief by an organization and do so anonymously, he can do so as long as he becomes a member. Under the proposed rule, he would be told that if he wants to make a contribution earmarked for the brief that would have to be disclosed, but if he wanted to make a contribution to the general funds, that

would not have to be disclosed. The second is to allow for de minimis earmarked contributions by setting a disclosure threshold of more than a \$100. It seems that many of the critics of the proposed rule did not know that the existing rule requires the disclosure of earmarked contributions of any amount (other than by the amicus, its counsel, or its members).

A judge member stated that this is a modest tweak to an existing rule. It reduces the burden on crowd funding an amicus brief, and it does not allow evasion of an existing requirement. It's a good change.

A lawyer member agreed but thought that the phrasing makes the rule harder to understand. The Reporter noted that the current phrasing emerged from style. An academic member suggested that subdivision (e) be drafted in a more reticulated way. Rather than do so from the floor, the Reporter agreed to come up with a suggested revision over lunch.

A liaison member asked whether the word "helpful" was needed in line 25 on page 200. He also raised the issue of what has to be in the brief, suggesting that the Committee Note state how the disclosure requirements can be satisfied if there is nothing to be disclosed. The Reporter stated that a prior committee member had made a point of wanting the rule to require the brief to include a statement tracking the disclosure requirement. A lawyer member observed that, as phrased in the agenda book (page 204-05), subdivision (b) requires a brief to "disclose whether"—thus requiring an affirmative statement—while (c), (d), and (e), are phrase so that nothing need be said unless they apply.

Professor Struve, invoking the ghost of Appellate Rules Committee past, stated that this would be a change from the existing rule and that the Committee had previously made a point of requiring a brief to "state whether." The reason is the lawyer must make an affirmative statement and is not simply overlooking the requirement. An academic member suggested changing subdivision (e) to make this clear.

The Committee took a lunch break from approximately 12:05 until approximately 1:05.

Upon resuming, the Reporter presented what he had drafted over lunch in accordance with the Committee's guidance.

In subdivision (a)(3)(B), the provision was simplified to read, "the reason the brief serves the purpose set forth in Rule 29(a)(2)."

The Committee Note to subdivision (e) on page 211 of the agenda book was revised to refer to "those who first became members of the amicus at least 12 months earlier."

Subdivision (e), dealing with earmarked contributions, was rephrased to read as follows:

(e) Disclosing a Relationship Between an Amicus and a Nonparty.

(1) An amicus brief must disclose whether any person contributed or pledged to contribute more than \$100 intended to pay for preparing, drafting, or submitting the brief and, if so, must identify each such person. But disclosure is not required if the person is

- the amicus,
- its counsel, or
- a member of the amicus who first became a member at least 12 months earlier.

(2) If an amicus has existed for less than 12 months, an amicus brief need not disclose contributing members but must disclose the date the amicus was created.

With subdivision (e), like subdivision (b) phrased as “disclose whether,” discussion turned to the length of such disclosures and excluding them from the word count of the brief. One suggestion was that the disclosure itself could be short, the response was that the practice is to use the full language. The key is not to make the disclosure short; it is to not have it count against the word limit. There is some uncertainty whether the existing disclosure counts or not.

Working with the proposed text projected on a screen, the Committee worked to revise the text to make clear that the disclosures would not be counted. It decided to refer to “the disclosure statement” required by the Rule rather than the “disclosures” required by the rule. This was designed to trigger Rule 32(f)’s exclusion of “disclosure statement” from the length limit.

Judge Bates asked a different question, whether “intended to pay” was necessary. Professor Struve noted that the phrase is in the current rule, and some readers might view the change as substantive.

The Committee then discussed the proper order of the required contents of an amicus brief under FRAP 29(a)(4). As published, the amicus disclosure requirements were listed after the description of the amicus. But this location in a brief is after the pages included in the length count begin. To facilitate word counts, proposed FRAP 29(a)(4)(F) was moved earlier in the text to be FRAP 29(a)(4)(B), immediately after any corporate disclosure statement required by FRAP 29(a)(4)(A).

These changes were adopted by consensus, except for the last one, which was adopted by a vote of seven to one.

The Committee then voted unanimously to give its final approval to the proposed amendments to FRAP 29, as amended at this meeting, along with conforming amendments to FRAP 32(g) and the appendix of length limits.

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

Lisa Wright presented the report of the Form 4 subcommittee. (Agenda book page 812). The revised Form 4 that the subcommittee recommends for final approval is greatly simplified. It is designed to provide courts with the information they need while omitting what is not needed. The witnesses and written comments were generally supportive. Sai pressed for more fundamental changes, but the subcommittee thought some of them were addressed to the IFP statute itself.

Professor Judith Resnick and students at Yale Law School viewed it as a great leap forward. They suggested some changes, some of which have been adopted. Plus, there have been tweaks by the style consultants. The National Association of Criminal Defense Lawyers suggested some changes to deal with CJA counsel, but the subcommittee concluded that if a party has appointed counsel, that appointed counsel can deal with it; it is better to keep this form simpler for those without counsel.

After correcting one typo on page 816 (an extra “are” in the first paragraph after the table), the Committee unanimously gave its final approval to Form 4.

V. Discussion of Matters Before Subcommittees

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

The Reporter presented the report of the intervention on appeal subcommittee. (Agenda book page 829). The Federal Judicial Center is conducting extensive research into motions to intervene in the courts of appeals. The subcommittee decided to await the results of that research before further proceeding. Best practices call for not providing an interim report at this stage of the research. More information is expected at the fall meeting.

B. Reopening Time to Appeal (24-AP-M)

The Reporter presented the report of the reopening time to appeal subcommittee. (Agenda book page 831). At the last meeting, a subcommittee was appointed to consider a suggestion from Chief Judge Sutton regarding Rule 4, echoed by Judge Gregory, that the Committee look into reopening the time to appeal under Rule 4(a)(6).

Since then, the Supreme Court granted certification in *Parrish*, the case in which Judge Gregory voiced his suggestion. In opposing certification, the Solicitor General noted the appointment of this subcommittee. Particularly because the Supreme Court granted certification, fully aware that this Committee was looking into the question, the subcommittee decided to await the decision in *Parrish* before proceeding further.

C. Administrative Stays (24-AP-L)

Mr. Freeman presented the report of the administrative stays subcommittee. Under FRAP 8, a court of appeals can stay a district court order pending appeal. First, one asks the district court, then the court of appeals. This process is fairly well understood and determines the status of a district court order while the appeal plays out, which can be a year or more.

An administrative stay addresses what happens pending the briefing on a motion to stay. That takes some time, sometimes two weeks or more just to brief the stay motion. What is the status of the district court's injunction during that period? The issue does not arise often, but it does with some frequency in his cases, especially when there is a change in administration. The subcommittee, following common usage, uses the "stay," but the issue also includes injunctions pending appeal and vacatur of prior orders.

Will Havemann of Hogan Lovells, and previously in Mr. Freeman's office, suggested that rulemaking address administrative stays. In the case that prompted the suggestion, the Court of Appeals for the Fifth Circuit granted an administrative stay and referred the motion for a stay pending appeal to the merits panel. That administrative stay remained in effect without a finding of likelihood of success on the merits, or irreparable harm, etc. The Supreme Court declined to rule because the Court of Appeals had not yet ruled on the stay application. Justice Barret and Justice Kavanaugh said that an administrative stay should last no longer than necessary to make an intelligent decision on the motion for a stay pending appeal.

The subcommittee does not suggest codifying the standards for granting an administrative stay, but it does suggest making clear what an administrative stay is for and its duration. The proposed text with Committee Note begins on page 839 of the agenda book. How it would fit with the rest of FRAP 8 is shown on page 839. The proposed rule describes an administrative order as one temporarily providing the relief mentioned in FRAP 8(a)(1), calls for it to last no longer than necessary for the court to make an informed decision, and provides that can last no longer than 14 days. It largely tracks Will Havemann's proposal.

A big question is whether 14 days is right. It is sort of modeled on Civil Rule 65, which allows for a TRO to be in place for 14 days, subject to 14-day extension. The subcommittee considered 7 plus 7, and 14 plus 14; it could use some feedback on this.

At the time of the subcommittee meeting, 14 days seemed perfectly fair; now it seems like a long time. The expectation is that a time limit would be treated the way TROs are now: if a TRO runs over, it is treated as an appealable preliminary injunction; if an administrative stay runs over, it would be treated as a grant of a stay pending appeal, enabling SCOTUS review. The idea is to avoid the situation where one can't get a ruling from the Supreme Court because there is no ruling from the court of appeals.

Judge Bates wondered whether 14 days is a little long, compared with the rigid standards applicable to TROs. He also asked about empowering a single circuit judge to grant relief.

Mr. Freeman responded that the power of a single judge is in the existing rule, just as a single justice of the Supreme Court can grant a stay. In his twenty years, he has never seen it and doesn't feel strongly. But if there is an instantaneous need, it could be useful. Or the matter can just be left to internal procedure of the courts of appeals.

Judge Bates asked about the opinion of Justice Sotomayor and Justice Jackson, which emphasized maintaining the status quo. Mr. Freeman explained that their focus on the status quo in that case might have been an artifact of what the United States was saying in that case. There are all kinds of fights about what counts as the status quo. If the district court grants a preliminary injunction, and the court of appeals grants a stay, what is the status quo? It is sometimes said that an injunction requires a higher standard, but this doesn't hold true across all cases.

Judge Bates asked about requiring reasoning. Mr. Freeman responded that most courts do not issue written opinions, at least beyond 1 sentence. Requiring reasoning pushes an administrative stay to look more like a stay pending appeal.

Judge Bates asked about whether there is a need to do to the district court for an administrative stay, as there is for a stay pending appeal; what about jurisdiction? Mr. Freeman responded that he didn't think there was any effect on jurisdiction; Griggs doesn't apply to stay motions. The proposed amendment would not affect at all the obligation in FRAP 8(a)(1) to seek relief in the district court first.

A judge member said that 14 days is not realistic as an absolute cap in all cases and all circuits. Sometimes a court of appeals has to wait for the record, or the briefing; sometimes it takes 6 months to get the record. Leave it to each court whether to allow one judge to grant a stay or whether to require three. A 14-day limit causes more trouble than it is worth. It would be okay to require that the order itself state a timeline. Sometimes the parties don't care if the stay is in effect 1 month or 4 months.

A liaison member stated that not having a time limit defeats the purpose of the rule. It's okay to allow an administrative stay without reasoning. And if the

parties agree to a longer stay, that's fine. We could simply add "unless parties agree otherwise." Or we set a timeframe of 7 or 14 days and allow for 7 or 14 more for good cause.

The judge responded that there is often no urgency. Less than 1% of cases go to the Supreme Court; we should manage our docket.

Mr. Freeman responded that this is very helpful. If the record is not available, that's on the appellant. If the appellant can't put on its case for a stay, then deny the stay. It doesn't matter in a lot of cases but matters a lot in some cases. Not all courts are as good about this as in the Ninth Circuit.

Judge Bates suggested that without a time limit, we play into the same problem that the Supreme Court was troubled about. The other judge responded that the order can set its own time limit; we try not be cute about it.

In response to a point raised by an academic member, Mr. Freeman suggested that the rule, like Civil Rule 65, shouldn't say that an administrative stay that lasts too long is a grant of a stay pending appeal, but rather leave it to the higher court to find appellate jurisdiction at that point.

A judge asked, if the parties don't object, what's the problem? Mr. Freeman agreed in that situation, but there are others where the parties are in a bind creating a classic rules problem: A party is aggrieved but can't do anything. The TRO parallel enables the party to seek further review.

A liaison member suggested that ordinary cases be decoupled from high profile cases. The Supreme Court has put everyone on notice. Is a rule needed, or just await developments.

Judge Bates asked if it was contemplated that an administrative order would issue only after the filing of a notice of appeal? Generally, yes, although an administrative order pending mandamus is possible. How about without a request from a party? Yes, courts can do it, not trying to stop them. But there has to be some stay motion in order for there to be an administrative stay granted. Mr. Wolpert added that the Court of Appeals for the Tenth Circuit uses administrative stays sparingly and never without a stay motion.

A judge member raised the example of a criminal defendant granted immediate release by the district court. The government seeks a stay pending appeal, but there is no transcript available. It seeks an administrative stay pending the receipt of the transcript. It will probably be more than 14 days to get the transcript. At least there must be a good cause ability to extend past 14 days. Mr. Freeman again noted that this is helpful and thanked the judge. We need to think about immigration cases and

criminal cases. An academic member suggested that the time period begin upon receipt of the record.

Professor Struve suggested that the impact of the proposed rule in criminal cases should be explored, including the interaction with Criminal Rule 38. A judge member raised agency cases. Mr. Freeman responded that there is a separate rule, FRAP 18, for agency cases, and the issue doesn't seem to come up there (although maybe in immigration). The judge stated that there are lots of requests for a stay of removal. Judge Bates noted that if the proposed rule is ultimately in place, the implication might be that it couldn't be done in agency cases. Mr. Freeman responded that no such negative inference was intended.

It became clear that the Committee was not prepared to recommend publication at this stage. The subcommittee will continue its work.

D. Rule 15 (24-AP-G)

Professor Huang presented the report of the Rule 15 subcommittee. (Agenda book page 841). The subcommittee is considering a suggestion to fix a potential trap for the unwary in Rule 15. The "incurably premature" doctrine holds that if a motion to reconsider an agency decision makes that decision unreviewable in the court of appeals, then the original petition to review that agency decision effectively disappears and a new one is necessary.

The basic idea of the suggestion is to align Rule 15 with Rule 4. At the last meeting, two tasks were left to be done. First, Judge Eid was going to check in with the D.C. Circuit to see if the judges remained opposed to the idea. Second, the subcommittee would continue drafting.

Judge Eid stated that she had raised this issue at the Standing Committee meeting and that Judge Millett said that she would check with her colleagues. Judge Millett reports that there is no large opposition at this point. Technological innovations have alleviated the concerns that were raised when the issue was raised in the past. Judges may wind up with some concerns about particulars of the proposal.

Professor Huang explained that the subcommittee's proposal builds on the prior proposal from 2000, plus the feedback from the D.C. Circuit judges back then. It is designed to reflect the party-specific nature of administrative review, in contrast to the usually case-specific nature of civil appeals. It aligns with FRAP 4, and clarifies that, as with civil appeals, if a party wants to challenge the result of agency reconsideration, a new or amended petition is required. The subcommittee chose not to attempt to align with the multicircuit review statute.

In accordance with a suggestion from Professor Struve, the phrase “to review or seek enforcement” on page 843, line 9, should be changed to “to seek review or enforcement.”

Professor Struve added that ellipses are needed at the end to avoid accidental deletion of the rest of the rule. The Reporter agreed and added that existing (d) and (e) would be re-lettered.

The question arose whether the phrase “or application to enforce” was needed in the last sentence. The Reporter couldn’t think of a situation where it would be needed, but Judge Bates noted that it was safer at this stage to keep it in.

The Reporter asked if it was sufficiently clear that the use of the word “such” in line 10 on page 843 refers to a petition that “renders that order nonreviewable as to that party.” Committee members responded yes, with one noting that it needs to be read twice, but then it is clear.

The Committee decided to move the discussion of what the amendment is designed to do from the third paragraph to the first paragraph of the Committee Note. means that the 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.

Mr. Freeman suggested that the word “timely” be added to line 5, so that only a timely petition would be entitled to the benefit of the amended rule. Several members of the Committee were troubled by the idea of describing a petition as both premature (too early) and untimely (too late) particularly since the proposed rule operates in a party-specific way. Mr. Freeman’s motion to require that a petition be otherwise timely failed for want of a second.

The Committee unanimously decided to ask the Standing Committee to publish the proposed amendment (as amended at this meeting) for public comment.

VI. Discussion of Recent Suggestion

The Reporter presented a recent suggestion from Jack Metzler regarding the calculation of time. (Agenda book page 849). He suggests that FRAP 26(a)(1)(B) be amended to not count weekends. He is concerned about gamesmanship: counsel can deliberately file a motion on Friday so that the ten-day period for responses covers two weekends, reducing the number of workdays available.

A central feature of the massive time computation project was to count days as days. The Reporter would be loath to undo that. The time project usually chose multiples of 7, but for motions it went from 8 days to 10 days. If the Committee does

anything here, it could consider shortening the time to 7 days or lengthening the time to 14 days. Or it could leave well enough alone.

A motion to remove the item from the agenda was approved unanimously.

VII. Review of Impact and Effectiveness of Recent Rule Changes

The Reporter directed the Committee's attention to a table of recent amendments to the Appellate Rules. (Agenda book page 855). This matter is placed on the agenda to provide an opportunity to discuss whether anybody has noticed things that have gone well or gone poorly with our amendments. No one raised any concerns.

VIII. New Business

No member of the Committee raised new business.

X. Adjournment

Judge Bates announced that this was his last meeting of the Appellate Rules Committee because his term as chair of the Standing Committee is expiring. Everyone congratulated and thanked Judge Bates for his leadership.

Judge Eid announced that the next meeting will be held on October 15, 2025, in Washington, D.C.

The Committee adjourned at approximately 4:00 p.m.