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

MEMORANDUM

TO: Hon. James C. Dever III, Chair
Committee on Rules of Practice and Procedure

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

RE: Report of the Advisory Committee on Appellate Rules

DATE: May 11, 2026

I. Introduction

The Advisory Committee on Appellate Rules met on Thursday, April 16, 2026, in Charlotte, North Carolina. The draft minutes from the meeting accompany this report.

The Advisory Committee has several action items for the June 2026 meeting.

It seeks final approval (per Part II of this report) of:

- amendments to Rule 29 concerning amicus briefs, along with conforming amendments to Rule 32 and the Appendix of Length Limits; and

- amendments to Rule 15, concerning premature petitions for review or enforcement of agency orders.

In addition, the Advisory Committee asks the Standing Committee to publish for public comment (per Part III of this report) proposed amendments to Rule 25, as part of the cross-committee project to address electronic filing by self-represented litigants.

Other matters under active consideration (per Part IV of this report) include:

- amending Rule 25 to provide greater protection for Social Security numbers in court filings;
- creating a rule to address intervention on appeal;
- amending Rule 8 to provide limits on administrative stays;
- revising Rule 4 to codify a recent Supreme Court decision on reopening the time to appeal;
- amending various rules to address the treatment of Indian tribes;
- addressing issues concerning uniformity of bar admission practices across the courts of appeals;
- revising Rule 32 to reduce the need for single-sided printing;
- revising Rule 28 to affirmatively authorize the use of introductions in briefs; and
- revising Rule 13 to correct certain issues concerning incurably premature notices of appeal.

II. Items for Final Approval

A. Amicus Briefs—Rules 29 and 32 and Appendix of Length Limits (21-AP-C)

For several years the Advisory Committee has been considering revisions to Rule 29's amicus disclosure requirements.

In September 2025, the Judicial Conference sent to the Supreme Court a package of proposed amendments to Rule 29, together with conforming amendments to Rule 32 and the Appendix of Length Limits. In response to concerns raised by the Executive Committee of the Judicial Conference, as well as two other ambiguities or errors identified in the proposed amendments, the Advisory Committee and the

Standing Committee voted to withdraw the amendment package, following the course pursued in addressing a similar issue in 2018. *See* Agenda Book 166 (Apr. 2026), *reprinting* Letter from Judge James C. Dever III & Judge Allison H. Eid to Scott S. Harris, Clerk of Court, Supreme Court of the United States (Mar. 10, 2026).

The Court chose not to forward to Congress this spring the relevant portions of the amendment package. The Advisory Committee discussed the proposals again at its April meeting, concentrating on three substantive issues and one issue of procedure.

1. New-Member Disclosures

The Executive Committee's concerns focused on a requirement that an organizational amicus disclose certain members who have contributed to funding its amicus brief. Under the current Rule 29, an amicus must disclose whether "a person—other than the amicus curiae, its members, *or its counsel*—contributed money that was intended to fund preparing or submitting the brief" and, if so, must "identif[y] each such person" (emphasis added). The previously proposed amendments would have recodified this requirement in Rule 29(e)(1), limited it to contributions or pledges over $100, and exempted only "the amicus," "its counsel," or "a member of the amicus who first became a member at least 12 months earlier": in other words, requiring that over-$100 contributions or pledges from members of less than one year's standing be disclosed. Another provision, Rule 29(e)(2), would have required that "[i]f 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." (This date-of-creation disclosure would also be required by the proposed Rule 29(a)(4)(F), which states that an amicus brief must include, "if an amicus has existed for less than 12 months, the date the amicus was created.")

The proposed Committee Note had described the provision as an anti-evasion rule, treating new members of an amicus as if they were nonmembers. The cost of such an anti-evasion rule, however, is that an organizational amicus would have to disclose the identities of its contributing new members, which might dissuade either the organization or its new members from participating in filing the brief in the first place. *See NAACP* v. *Alabama*, 357 U.S. 449, 462 (1958) (describing the potential chilling effect of membership disclosures); *Ams. for Prosperity Found.* v. *Bonta*, 594 U.S. 595, 606 (2021) (same); *see also First Choice Women's Res. Ctrs.* v. *Davenport*, — U.S. —, 2026 WL 1153029, at *8 (Apr. 29, 2026) (same).

At its April meeting, the Advisory Committee again considered the new-member disclosure issue, which had previously been the subject of very extensive discussion and public comment. Its consideration included discussion of the extent of the negative reaction to the proposal from the Executive Committee and the public, as well as the unclear extent of the problem it sought to fix. The Advisory Committee

voted 5-1, with one abstention, to remove the requirement of new-member contribution disclosure from the proposal, as shown:

> ~~(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.~~

(A complete copy of the proposed amendments to Rule 29 is attached to this report.)

2. Backup Disclosure Requirements

After the amendment package was submitted to the Court, a potential source of ambiguity was identified with regard to certain backup disclosure requirements. The proposed amendments would have required that an amicus disclose certain types of involvement by a party or its counsel; that "[a]ny such disclosure must name the party or counsel"; and that, "[i]f the party or counsel knows that an amicus has failed to make the required disclosure, the party or counsel must do so."

While the proposed Committee Note anticipated that these references to "such disclosure" or "the required disclosure" only concerned disclosures of a party or counsel's involvement, they might also be thought to be ambiguous. Arguably if a party or counsel knows that an amicus has failed to make a *different* "required disclosure," such as a disclosure of nonmember contributions discussed above, the rule might be read to require the party or counsel to disclose that fact to the court.

After discussing the issue, the Advisory Committee concluded that the narrower interpretation already presupposed by the Committee Note was to be preferred. After considering the advice of the style consultants, the Committee voted without dissent to avoid any ambiguity in "such" by merging the proposed subdivisions (b) and (c) of Rule 29, as well as to avoid any ambiguity in "the required disclosure" by referring more specifically to "the Rule 29(b) disclosure," as shown:

(b) Disclosing a Relationship Between an Amicus and a Party. An amicus brief must:

(1) disclose whether:

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

~~(2)~~(B) a party or its counsel contributed or pledged to contribute money intended to pay for preparing, drafting, or submitting the brief; and

~~(3)~~(C) a party, its counsel, or any combination of parties, their counsel, or both has a majority ownership interest in or majority control of a legal entity submitting the brief; and

(2) if so, name the party or counsel.

~~**(c) Naming the Party or Counsel.** Any such disclosure must name the party or counsel.~~

~~**(d)**~~**(c) Disclosure by the Party or Counsel.** If the party or counsel knows that an amicus has failed to make the ~~required~~ Rule 29(b) disclosure, the party or counsel must do so.

(Again, a complete copy of the proposal is attached to this report.)

3. Appendix of Length Limits

An erroneous cross-reference to Rule 29(a)(5) had not been removed from the proposed Appendix of Length Limits before the amendment package was submitted to the Court. The Advisory Committee voted without dissent to adopt a new version of the Appendix that removed this erroneous cross-reference, along with an unnecessary ellipsis that had been inserted as well. (These changes are not further detailed here but can be seen in the attachment to this report.)

4. Republication

The Advisory Committee also considered whether to submit these revisions for an additional round of public comment. While two of the issues above are stylistic or technical in nature, the first is not. However, the issue of new-member disclosure had been exhaustively discussed by the Advisory Committee and had already been the subject of many public comments.

After considering the issue, the Advisory Committee voted without dissent to recommend that the Standing Committee give final approval without republication to revised versions of the proposed amendments to Rule 29, Rule 32, and the Appendix of Length Limits.

(In preparing the revised versions for the Standing Committee's review, three additional style corrections were made on the advice of the style consultants. First, a previously proposed alteration of the phrase "by leave of court" to "with leave of court" in the proposed Rule 29(a)(2) was reversed: "by leave of court" is the more common phrase and is also used in the proposed Rule 29(e)(2). Second, the requirement to "identify" contributors in the proposed Rule 29(d) was changed to a requirement to "name" contributors, consistently with the proposed Rule 29(a)(4). Third, two erroneous instances of the word "Rules" in Rule 32(g) were corrected to "Rule." Corrected versions of the proposed amendments accompany this report.)

B. Premature Petitions (24-AP-G)

In June 2025, the Standing Committee approved publication of a proposed amendment to remove a potential trap for the unwary in Rule 15.

The "incurably premature" doctrine holds that if a petition to rehear or reconsider an agency decision makes that decision nonreviewable in a court of appeals, then a petition to review or to enforce that agency decision must be dismissed, and a new petition for review must be filed after the agency disposes of the rehearing petition. Rule 4, concerning appeals from district court judgments, used to operate in a similar way with respect to various postjudgment motions. But in 1993, Rule 4 was amended to provide that such a premature notice of appeal becomes effective when the postjudgment motion is decided. The proposal is to do for Rule 15 what was done for Rule 4.

Three public comments were received, all of them broadly supportive of the changes and conveying no specific concerns.

The Advisory Committee made two changes after publication. First, it renumbered the subdivision created by the proposed amendment from 15(d) to 15(f), in the hopes of avoiding confusion among courts and litigants regarding the proposed rule and the current Rule 15(d), often discussed by courts with regard to intervention in agency review proceedings. Second, to avoid attempts to obtain review of orders that are nonfinal for other reasons (unrelated to any pending petition for rehearing or reconsideration), the Advisory Committee added language reaffirming that the order in question must be "otherwise reviewable," as shown:

> ~~(d)~~(f) **Premature Petition or Application.** This subdivision ~~(d)~~(f) applies if a party files a petition for review or an application to enforce after an agency announces or enters ~~its~~ an otherwise reviewable order—but

> before the agency disposes of any petition for rehearing, reopening, or reconsideration that renders the order nonreviewable as to that party. The premature petition or application be-comes effective to seek review or enforcement of the order when the agency disposes of the last such petition for rehearing, reopening, or reconsideration. If a party intends to challenge the disposition of a petition for rehearing, reopening, or reconsideration, the party must file a new or amended petition for review or application to enforce in compliance with this Rule 15.

The Advisory Committee voted without dissent to recommend that the Standing Committee give final approval to the revised version of the proposed amendment to Rule 15 that accompanies this report.

III. Item for Publication

A. Electronic Filing and Service by Self-Represented Parties (21-AP-E)

The Advisory Committee defers to the Consultant to the Standing Committee for the update regarding the joint project on electronic filing and service by self-represented litigants.

IV. Items Under Consideration

A. Privacy (22-AP-E)

The Advisory Committee has been following the cross-committee efforts to improve privacy protections, particularly with regard to the names of minors and to Social Security and other tax ID numbers. In general, the Advisory Committee's approach has been to piggyback on those efforts, incorporating by reference under Rule 25(a)(5) any privacy rules that were applicable in the district court (or else importing the Civil or Criminal Rules as appropriate in other cases). However, the Advisory Committee has also considered implementing additional rules of its own.

At its previous meetings, the Advisory Committee considered a possible amendment to Rule 25(a)(5) that would bar any part of a Social Security or other tax ID number in an appellate filing by a party not under seal—on the theory that, whatever the need for such numbers in other circumstances, there is no need for them in a public appellate filing by the parties. The Advisory Committee decided to wait on the project in order to allow the Standing Committee to consider proposals from all of the advisory committees at the same time. (At the Standing Committee's January 2026 meeting, the question was also raised whether a similar approach should be taken toward the names of minors.)

Due to the lapse in funding, the Solicitor General or his representative did not attend the October 2025 meeting at which this issue was discussed. At the April 2026 meeting, concerns were communicated from the Department of Justice that reviewing record materials in Social Security appeals to remove such numbers, including sequences of the last four digits only, might prove to be a substantial burden. Other members agreed, or noted variations in the ways in which different courts or institutions whose documents can enter an appellate record choose to anonymize minors' names.

Rather than take any action at this time, the Advisory Committee chose at its April meeting to study the topic further. Given the Appellate Rules' piggybacking approach, this delay will not prevent other committees from revising their own rules, nor will it prevent those revisions from having their appropriate follow-on effects in the courts of appeals.

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

The Advisory Committee continues its work on a new rule governing intervention on appeal. There is currently no Appellate Rule governing intervention, other than Rule 15(d), which sets a deadline but no criteria for intervention in agency cases. In the past, the Advisory Committee has decided not to pursue creating a new rule governing intervention on appeal, fearing that such a rule would invite unmeritorious motions to intervene. However, the Advisory Committee believes that it is worth continuing to draft such a rule.

Here is the working draft:

Rule 12.2. Intervention on Appeal from a District Court

(a) Scope. This rule applies to an appeal from a district court in a civil case. [It does not apply to an appeal in a case under 28 U.S.C. § 2254 or § 2255.]

(b) Intervention Disfavored. The preferred method for a nonparty to be heard is by participating as an amicus curiae under Rule 29. Except as provided in (d) and (e)(1)–(3), intervention under this rule is disfavored and is reserved for exceptional cases.

(c) Motion to Intervene. A nonparty who wishes to intervene must file a motion to intervene in accordance with Rule 27. The motion must:

(1) be filed as soon as is practical after the appeal is docketed;

(2) state whether intervention would affect the subject-matter jurisdiction of the court or of the district court; and

(3) state the grounds for intervening.

(d) Grounds for Mandatory Intervention. The court must permit intervention by a movant who is given a right to intervene by federal statute.

(e) Other Grounds for Intervention. The court may permit intervention:

(1) by the United States, or by a state, to defend the validity of its law or of an action that it or its agency or officer has taken;

(2) by one of its agencies or officers, if legally authorized to defend such law or action and intervention is sought for this purpose;

(3) by the United States, to defend its national-security or foreign-relations interests; or

(4) by any movant who shows:

(A) a compelling reason why intervention was not sought previously or, if it was sought previously, a compelling explanation of how circumstances have changed;

(B) a [legally protected] [legally cognizable] interest that may be affected in the appeal, apart from the precedential effect of a decision, so that:

(i) adjudicating the appeal may, as a practical matter, impair or impede the movant's ability to protect that interest;

(ii) existing parties do not adequately protect the interest; and

(iii) participating as an amicus would insufficiently protect the interest; and

(C) that existing parties will not be unfairly prejudiced.

(f) Effect of Deciding the Motion. If the court grants the motion, the movant becomes a party to the action for all purposes, unless the court orders otherwise. If the court denies the motion, the movant is not precluded from seeking to participate as an amicus under Rule 29.

A few things to note:

- The draft is limited to intervention in appeals from district courts in civil cases and would not apply to agency review proceedings governed by Rule 15(d). While it would apply to appeals from bankruptcy proceedings or from cases in the Tax Court, in which intervention is generally available, it would not apply to criminal appeals, nor to appeals involving the collateral review of criminal cases. (The Advisory Committee is considering the proper handling of other forms of habeas under § 2241.) When the rule would not apply, it would not affirmatively forbid intervention either; rather, it merely would leave intervention in such cases to be governed by preexisting law.

- The Advisory Committee is considering different ways of phrasing the timeliness requirement, as well as different measures to make clear that intervention ordinarily must be sought in the district court and should not be available to most litigants (absent very unusual circumstances) for the first time on appeal.

- The phrasing of "Mandatory Intervention" may be revisited.

- The scope of government intervention is substantially narrower than under Civil Rule 24. These provisions focus on the defense of a law or action's validity or of national-security or foreign-relations interests. In other circumstances (*e.g.*, to defend proprietary interests), governments could intervene in the same manner as private litigants.

- A proposed intervenor must have the sort of legal interest at stake—however phrased—that would support its independent presence as a litigant, and not merely one founded on the precedential effect of a judgment against other litigants, as to which amicus participation is the proper response. The Advisory Committee is considering alternative (and narrower) phrases in place of "may be affected."

C. Administrative Stays (24-AP-L)

The Advisory Committee continues to consider a suggestion to amend Rule 8 to provide limits on administrative stays. The FJC is undertaking research on the subject.

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

If a litigant files a notice of appeal in a civil case after the time for appeal expires, but before its motion to reopen is granted—that is, too late for the ordinary window, but too early for the reopened window—courts had recently disagreed on whether this notice would be effective or else incurably premature. (Often the question arises after the court has construed a single document to serve both as the notice

of appeal and as the motion to reopen.) Requiring a second notice might create a trap for the unwary litigant, who has already filed one notice of appeal and may not realize the need for another.

The Advisory Committee had been considering a suggestion from Chief Judge Sutton to amend Rule 4 to eliminate this trap. In the interim, the Supreme Court decided *Parrish* v. *United States*, which held that the premature notice could be treated as effective upon the reopening of the window, reaffirming that a single document could be construed to serve as both the notice of appeal and the motion to reopen.

The Advisory Committee has considered proposals to codify the rule in *Parrish*. Here is the working draft:

Rule 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.

* * * * *

(6) *Reopening the Time to File an Appeal.*

(A) *Grounds.* The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

~~(A)~~(i) the court finds that the ~~moving party~~ movant did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

~~(B)~~(ii) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the ~~moving party~~ movant receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and

~~(C)~~(iii) the court finds that no party would be prejudiced.

(B) *Effect on a Party Who Has Filed a Notice.* If the movant has filed a notice of appeal—even if that document also serves other purposes—after the time otherwise allowed by these rules but before the court grants the motion to reopen, the

notice becomes effective when the motion to reopen is granted and need not be refiled.

This version differs from previously discussed drafts in two main respects. First, it seeks to avoid any impression that it governs jurisdictional questions directly, focusing only on the time at which a premature filing becomes effective. Second, it does not attempt to specify what criteria an ambiguous document must meet to be construed as a notice of appeal, leaving that question entirely up to the preexisting requirements of Rule 3.

At the April meeting, a number of members expressed concern with the potential awkwardness of the parenthetical em-dashed phrase. The Advisory Committee continues to consider the matter. (Rules suggestion 26-AP-1, addressing the same topic, has been consolidated with this agenda item.)

E. Treatment of Tribes (25-AP-D)

From 2009 to 2012, the Advisory Committee had considered a proposal to categorize Indian tribes as states for the purpose of the Appellate Rules. This suggestion was tabled until 2017 and then not revived. In response to a more recent suggestion, however, the Advisory Committee has chosen to return to the subject.

Unlike the 2009 proposal, the currently pursued approach does not seek across-the-board uniformity in the treatment of states and Indian tribes, as that might produce inappropriate results in areas such as habeas, in which the law governing each is quite different. Rather, it seeks to identify specific provisions under which Indian tribes ought to receive specific attention in the Appellate Rules.

The Advisory Committee is considering which provisions those might be (*e.g.*, rules regarding amicus participation); which entities ought to receive specific attention (*e.g.*, only entities federally recognized as sovereign, or nonsovereigns such as Alaska Native Corporations as well); and what specific revisions ought to be made.

F. Uniform Bar Admission (25-AP-B)

The Advisory Committee continues to consider a suggestion to provide greater uniformity in the treatment of bar admissions across the courts of appeals. Different courts appear to impose very different requirements on attorneys for different purposes: appearances at oral argument, names on briefs, pro hac vice admissions, and so on. Before determining whether any rulemaking is merited on this topic, it will be necessary to determine the extent of variation in current practices. The Advisory Committee is grateful for the assistance of the Rules Committee Staff in this effort.

G. Double-Sided Printing (25-AP-E)

A recent rules suggestion noted that Rule 28 requires briefs and appendices to be printed only on a single side of the page, increasing costs for litigants as compared to double-sided printing, as well as using up more paper and taking up more space in clerks' offices. The Advisory Committee has begun consideration of proposals that might reduce this burden in appropriate circumstances.

H. Introductions to Briefs (25-AP-F)

A recent rules suggestion encouraged amendments to affirmatively authorize the inclusion of introductions in briefs, a common and usually welcome practice that might nonetheless strike litigants as forbidden by a straightforward reading of Rule 28. The Advisory Committee is considering the matter.

I. Tax Court Premature Notices

At the April meeting, an item of new business was raised concerning premature notices of appeal from judgments of the Tax Court. If that court announces a decision before issuing a judgment, and if a party files a notice of appeal during that window, the notice may prove to be incurably premature. While similar mistakes in the district courts are addressed by a provision of Rule 4, delaying the effectiveness of the notice until after the judgment issues, no similar provision is found in the portions of Rule 13 that govern Tax Court appeals. The Advisory Committee is considering the matter.

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

April 16, 2026
Charlotte, NC

Judge Allison Eid, Chair, Advisory Committee on Appellate Rules, called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, April 16, 2026, 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: Andrew Adler, Linda Coberly, Professor Bert Huang, Justice Leondra Kruger, and Judge Carl J. Nichols. The Solicitor General was represented by Mark Freeman, Director of Appellate Staff, Civil Division, Department of Justice. George Hicks attended via Microsoft Teams, as did Judge Sidney Thomas, who joined the meeting after it began. Judge Richard Wesley could not attend.

Also present in person were: Judge James C. Dever III, Chair, Committee on Rules of Practice and Procedure (Standing Committee); Andrew Pincus, Member, Standing Committee and Liaison to the Advisory Committee on Appellate Rules; Judge Daniel Bress, Member, Advisory Committee on Bankruptcy Rules 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 to the Rules Committees, RCS; Sarah Sraders, Counsel to the Rules Committees, RCS; Tim Reagan, Federal Judicial Center (FJC); Judge Robert J. Conrad, Jr., Director, Administrative Office of the U.S. Courts (AOUSC); Professor Edward A. Hartnett, Reporter, Standing Committee; and Professor Stephen E. Sachs, Reporter, Advisory Committee on Appellate Rules.

Professor Catherine T. Struve, Consultant, Standing Committee; Professor Joseph Kimble, Style Consultant, Standing Committee; Shelly Cox, Management Analyst, RCS; and Rakita Johnson, Administrative Analyst, RCS, also attended via Microsoft Teams.

I. Introduction and Preliminary Matters

Judge Eid opened the meeting and welcomed the attendees, including those attending remotely. She thanked the U.S. District Court for the Western District of North Carolina, including Chief Judge Martin Reidinger and Clerk of Court Katie Simon, for hosting the meeting. She also congratulated Professor Sachs, the new Advisory Committee reporter, and Professor Hartnett, the new Standing Committee reporter; wished farewell to Judge Wesley, whose term on the Committee is coming to an end, and thanked him for his work on the Committee's projects; and introduced Judge Conrad.

Ms. Dubay directed attention to the rules tracking chart (Agenda Book 20). She noted that the amendments to Form 4, approved by the Supreme Court, had been transmitted to Congress.

Ms. Sraders referred to the pending legislation chart (Agenda Book 27).

Judge Eid noted the draft minutes of the Standing Committee (Agenda Book 41), including those portions regarding the work of the Advisory Committee on Appellate Rules (Agenda Book 46), as well as the portions of the Standing Committee's report to the Judicial Conference regarding the work of the Advisory Committee (Agenda Book 79).

II. Approval of the Minutes

A motion was made and seconded to approve the minutes of the Advisory Committee meeting of October 15, 2025 (Agenda Book 86). The minutes were approved without dissent.

III. Discussion of Joint Committee Matters

A. Electronic Filing and Service by Self-Represented Parties (21-AP-E)

Professor Struve provided a detailed report regarding an ongoing cross-committee project on electronic filing and service for self-represented parties (Agenda Book 103). She thanked the Advisory Committee and its reporters, Mr. Wolpert, the Rules Office, and the Federal Judicial Center for their assistance, and she noted the work of the other Advisory Committees.

As Professor Struve described the project, it has two goals: to expand access by self-represented litigants to the courts' electronic-filing systems, and to reduce the need for paper service on other litigants already receiving the filings electronically.

1. Electronic Filing

The current proposal would flip the default rule on electronic filing via Rule 25(a)(2)(C)(i), so that self-represented litigants would have presumptive access to the court's electronic system, unless prohibited by local rule or court order. Subdivision (ii) would then provide flexibility to courts, affirming that a court could set and enforce reasonable conditions and restrictions on that access—including by denying or revoking access for a particular party—but could not prohibit all self-represented parties from using the system without reasonable exceptions or other electronic means for submitting and receiving papers. (Professor Struve emphasized that this flipped presumption was only enjoyed by self-represented *parties*, rather than other persons who might be before the court; this was the approach pursued by the Civil Rules Committee, and was likely to be pursued by Criminal also, though Bankruptcy had chosen otherwise for bankruptcy-specific reasons.) An optional subdivision (iii), in an appeal from a district court, might extend a party's presumption to a nonparty who had already been permitted to file electronically in the district court, by analogy to Rule 24's treatment of *in forma pauperis* status.[1]

Professor Struve also highlighted language in the draft committee note opining that reasonable exceptions under subdivision (ii) would include a local provision requiring self-represented

[1] Per Agenda Book 116, the text of this draft subdivision (iii) read as follows: "[(iii) Unrepresented Person Permitted to File Electronically in the District Court. In an appeal from a district court, [unless a local rule provides otherwise,] this subdivision (C) concerning an unrepresented party also applies to an unrepresented nonparty who has used the district court's electronic-filing system to file papers in the case and who remains permitted to do so.]"

parties to obtain the court's permission in order to file electronically.[2] By comparison, while some district courts generally allow electronic filing by self-represented parties and others generally forbid it, there is also a middle camp that permits such filing only with the court's permission. The sentence might thus limit the scope of the change from present practice for the courts of appeals, but some might wish for a broader change, and others might be reluctant to place in a committee note an opinion as to the meaning and function of the rule's text (albeit a practice with some precedent). Two committees had already included such language, but over objections.

Professor Struve then halted her presentation of the report so that the Committee could discuss the issue of filing.

Professor Hartnett described the discussions of the other committees. He also noted that, if a committee note's interpretation of a rule is later thought to be incorrect, there is no mechanism by which the committee note could be amended without altering the text of the rule itself, which might need no change. He also questioned how often the issue arises of carrying over permission for self-represented nonparties from the district courts to the courts of appeals—other than (rare) amicus participation in district courts.

Professor Sachs noted certain other reasons why a self-represented nonparty might submit a filing in district court, such as to quash a subpoena or to unseal a document of public interest, and he asked what default rule should govern such cases.

Mr. Freeman asked whether a court of appeals would be aware of permission granted by the district court. (Mr. Wolpert confirmed that it would.) He also raised the issue of whether, given that e-filing decisions are not published, a pro se litigant—or even a represented party—would be able to determine whether the court's permission was being unreasonably withheld in practice, or to meet the applicable burden of proof.

A judge member asked how the practice of granting permission operates in practice. Professor Struve stated that the practice varies widely, often including training requirements. Mr. Reagan described the FJC's research and added that typically, before obtaining permission, a litigant must first complete a training module and pass a test.

A liaison member suggested that such a training process made the permission requirement roughly equivalent to the reasonable conditions courts might impose under subdivision (ii). Professor Struve agreed, but added that a permission requirement was broader and allowed for a less systematic approach.

[2] Per Agenda Book 116, the text of this draft subdivision (ii) read as follows: "(ii) Conditions and Restrictions on Access. A court may set and enforce reasonable conditions and restrictions on unrepresented parties' access to the court's electronic-filing system (including by denying or revoking access for a particular unrepresented party). But the court may not prohibit all unrepresented parties from using the system unless that prohibition includes reasonable exceptions or the court permits the use of another electronic method for filing papers and receiving electronic notice of activity in the party's case."

Per Agenda Book 120, the relevant language in the draft committee note read as follows: "[A local provision requiring unrepresented parties to obtain the court's permission in order to use the court's electronic-filing system [could] [would] count as including reasonable exceptions, so long as such permission is not unreasonably withheld in practice.]"

Mr. Wolpert favored striking the provision carrying over permission for nonparties from the district court, noting that many proceedings (such as sealing documents) involve different concerns at the trial or appellate level; that requiring a motion need not be onerous; and that the requirement gives a clerk's office an opportunity to express concerns regarding litigants with histories of vexatious filings. Judge Dever noted that the Bankruptcy and Civil clerk representatives had expressed similar concerns.

With regard to the bracketed committee note language on self-represented parties' obtaining permission before e-filing, Professor Sachs suggested that the rule language concerning reasonable conditions would provide sufficient protection, and that allowing courts to require permission might in practice restore the prior (unflipped) default. With regard to self-represented nonparties allowed to e-file in district court, he asked whether a motion requirement would be necessary if the motions were rarely denied.

Mr. Freeman noted that some courts of appeals use different e-filing software than the district courts in the same circuit, which might require additional training for the filer before any permission carried over. A liaison member seconded Mr. Freeman's concern. Professor Struve and Professor Sachs noted that the proposed carryover provision allowed for deviations by local rule.

A liaison member suggested that the bracketed committee note language would be very unclear if a permission requirement "could," rather than "would," be permissible. He also noted that the carryover provision meant that nonparties who had e-filed in the district court would enjoy a different status than other nonparties filing for the first time in the court of appeals.

Mr. Wolpert stated that, even if 90 percent of e-filing situations are easy and rule-compliant, the rule should be prepared for the 10 percent of more difficult situations that drain the court's resources. The bracketed committee note language was designed for these cases, and the carryover provision might cause problems in them.

A judicial member agreed with concerns that the permission requirement in the bracketed committee note language might produce ad hoc decisions, asking if it would be helpful to include an express reference to the enforcement of reasonable conditions and restrictions. Mr. Wolpert responded that it would be, but he noted that an undefined category of reasonable conditions might produce disputes with pro se litigants, whereas a permission requirement was very clear. He added that the clerk's offices generally favor e-filing to reduce expenses, but that the carryover provision might increase difficulties, and that the bracketed language would give clerks something to point to in explaining the rules.

A motion was made and seconded to strike the carryover provision. The motion was approved without dissent.

A motion was made to strike the bracketed committee note language, but not seconded.

A liaison member asked whether the bracketed committee note language might refer to the reasonable conditions discussed in the rule. Mr. Wolpert stated that some self-represented litigants occasionally challenge the authority of clerk's offices to apply the rules, and that while he

did not want the exception to swallow the rule, the bracketed committee note language would help clarify this authority.

A judicial member asked whether it would be possible to incorporate the idea of enforcement of reasonable conditions on access into the bracketed committee note language regarding permission, so that such permission could be granted or denied in accordance with those conditions. Professor Sachs suggested the following: "A local provision requiring unrepresented parties to obtain the court's permission in order to use the court's electronic filing system would count as including reasonable exceptions, so long as such permission is granted or withheld in accordance with the reasonable conditions and restrictions on access set by the court."

A liaison member asked whether permission was generally required by the courts of appeals. Mr. Wolpert replied that it was, but that clerk's offices were often authorized to grant such permission, and that they usually did so as a matter of course absent evident concerns. The liaison member endorsed the suggested language.

A motion was made and seconded to adopt the suggested language in place of the bracketed language in the committee note. The motion was adopted by a vote of 6 to 1.

(Responding to a query from Professor Sachs, Judge Eid confirmed that the Committee's deletion of the carryover permission in subdivision (iii) extended to the deletion of the bracketed language in the committee note accompanying that subdivision.)

2. Manner of Service

Professor Struve then turned to the service provisions, as to which she thanked the style consultants for their assistance. She described the major achievement of the draft as dispensing with the requirement of paper service on litigants who would receive copies of paper filings electronically, through a "notice of case activity" (a category encompassing any notice of electronic filing) generated when the clerk's office uploads the paper filing. The draft carried forward a provision that such service would not be effective if the filer learns that it did not reach the person to be served, as well as a provision that a court could retain paper service for certain categories of materials (*e.g.*, sealed papers or case-initiating filings).

Professor Struve also noted a new issue of timing that had arisen: when a delay intervenes between a paper filing's presentation to the court and its uploading to an electronic filing system (thus triggering the notice of case activity), how should the court calculate deadlines relating to service? Language developed in connection with the Criminal Rules Committee's pro se subcommittee—and favored by Civil and Bankruptcy—provided in substance as follows. Deadlines *on* service would be applied with regard to the date on which a paper is filed with the court (meaning that the filer had complied with the required deadline); deadlines running *from* service would be applied with regard to the date on which the electronic notice issues (preserving the full window

of time promised to its recipients). For clarity, particularly for self-represented litigants, a repeated reference to service "by a notice of case activity" had been suggested in brackets.[3]

Mr. Freeman asked how the proposed language would interact with the deadline calculation provisions of Rule 26(c), which extend deadlines in certain circumstances by three extra days. Professor Struve answered that there would be no interaction, as Rule 26(c)'s three-day rule excludes papers served electronically, as any papers served under the new language would be. As a policy matter, moreover, no extra time would be necessary for a deadline calculated from the date on which the electronic notice issued.

A liaison member asked whether a similar deadline-varying provision would be needed for service by other electronic means. Professor Struve stated that it would not. Only service by notice of case activity involved the potential delay of a paper-to-electronic conversion. Moreover, service by other electronic means would still be ineffective should the sender learn it did not reach the person to be served (*e.g.*, in a PACER outage).

A motion was made and seconded to approve the bracketed language. The motion was approved without dissent.

A liaison member asked if the distinction between a self-represented *party* and a self-represented *person* (that is, including nonparties) were clear enough from the rule. Professor Struve suggested an addition to the committee note on Rule 25(a)(2)(C)(i), underlined here: "The reference to an unrepresented 'party,' rather than an unrepresented 'person,' excludes an unrepresented nonparty from its scope; the rule does not grant nonparty nonlawyers any right to use the court's electronic-filing system." No objections were raised.

A motion was made and seconded to approve the package of amendments to Rule 25, as amended, for publication. The motion was approved without dissent.

B. Privacy (22-AP-E; 24-AP-B; 24-AP-C; 25-AP-C)

Professor Sachs presented a report on a cross-committee project on privacy (Agenda Book 148), designed to shield information such as Social Security and tax ID numbers or the names of minors. In general, this Committee's approach has been to allow the Bankruptcy, Civil, and Criminal Rules Committees to set their own privacy rules and to incorporate those rules by reference. At the October meeting, an amendment was discussed that would require full redaction of Social Security and tax ID numbers in unsealed appellate filings (even when, for example, the information was permitted to appear in a filing in the district court), on the argument that appellate filings would rarely need such information to appear, and could be sealed if they did. The requirement would not apply to a clerk or agency that merely passes on a record to the court.

He also noted two additional issues. First, at the January meeting of the Standing Committee, a question had arisen of whether similar protection, over and above the other committees' rules,

[3] Per Agenda Book 118, the relevant provision read: "(B) For Service by a Notice of Case Activity. For any service deadlines, service by a notice of case activity is complete as of the date of filing. For any deadlines that run from the date of service, service [by a notice of case activity] is complete as of the notice's date."

should be given for the names of minors in appellate filings. Second, among the matters discussed in a recent rules suggestion (26-AP-2), though submitted too recently to be included in the Agenda Book, was the question whether a district court's order providing for public access to certain materials should, by default, carry over to the court of appeals.

Mr. Freeman asked whether this proposal would reflect a new obligation to redact information in an appendix that gathers already-filed documents. He noted that it might be a significant burden, as appendices are often assembled at the last minute; that different parts of an agency record might be submitted, and in different forms (such as an excerpt of record); that courts vary significantly as to the materials that may or must be included in an appendix; and that attorneys would then bear the burden of ensuring on every single page that no prohibited information appears. Professor Sachs confirmed that this would be required by the proposal.

An attorney member noted that different courts redact minors' names differently (*e.g.*, by initials or by pseudonyms), and that requiring a single approach on appeal, including for material drawn from state-court records, could introduce complications. Professor Sachs noted that the other committees were moving toward pseudonyms, and that it might be possible for a previous method of redaction to carry over on appeal. The attorney member added that, when the caption of a case includes a minor's initials, it might be very labor-intensive to replace such references and would provide little privacy benefit, notwithstanding the importance of the issue.

A liaison member noted that minors' names are much more commonly found in appendices—for example, in IDEA or immigration cases—than are Social Security or tax ID numbers. Mr. Wolpert agreed.

A judicial member asked whether a problem had been identified of minors' names commonly appearing in appellate filings. Professor Sachs was uncertain, noting that the issue had been raised at the Standing Committee meeting and was now passed on to the Committee.

Professor Hartnett noted that, because the initial concern regarding Social Security numbers had been limited in scope, no subcommittee process had been undertaken.

Mr. Freeman stated that the Department of Justice often litigates Social Security cases in which a claimant's appeal might include such numbers, which are found throughout the agency record. While there may be a technological fix, the burden appeared substantial. He also noted that the Solicitor General had not attended the October meeting due to the lapse in funding, and that it might be necessary to undertake further review.

Mr. Reagan described an FJC study that found several thousand unredacted Social Security numbers in district-court filings, as well as a few hundred in appellate filings, all of them located in the record on appeal.

An attorney member suggested that different rules might be appropriate for appellate briefs, for appendices, and for excerpts of record, given the degree of preparation usually required for each.

Mr. Freeman noted that different courts have highly variable requirements with regard to appendices and excerpts of record. He also noted that it may be very difficult to identify which four-number sequences in an administrative record are the last four digits of Social Security numbers requiring redaction.

Professor Sachs asked whether it would pose any difficulties for the Committee to consider the matter at greater length before sending proposed language to the Standing Committee. While the Committee had thought the language acceptable at its last meeting, different rules for briefs or appendices might be necessary. Moreover, Judge Dever had pointed out that under the Civil Rules filers waive privacy protections by including their own information in unsealed filings, but the proposed language made no provision for such waiver.

Professor Hartnett stated that it would not cause a problem, as the Appellate Rule currently piggybacks on other rules, so retaining that current rule would not prevent other committees from revising their own. The Committee had previously delayed its own proposal to allow other committees to catch up and produce their own language, but it would now be holding back. While the Standing Committee tends to prefer to deal with related proposals together, his instinct was that it would prefer a proposal that was fully baked to one that was not.

Ms. Dubay noted that the proposal to use pseudonyms for minors' names had originally been made by the Department of Justice to the Criminal Rules Committee, and that Civil and Bankruptcy were in agreement on that approach. She agreed, however, that the current piggyback rule would not prevent those committees from going forward with their own amendments.

Mr. Freeman reiterated the potential burden of redaction, particularly with regard to Social Security cases, that the Department of Justice had been unable to raise at the October meeting.

Professor Hartnett noted that the Committee had chosen to proceed without a subcommittee, and he suggested that it try to avoid doing so in the future, even for matters that might appear uncontroversial.

Professor Sachs suggested the appointment of a subcommittee.

Judge Eid appointed a subcommittee on the issue, consisting of Mr. Adler, Ms. Coberly, and Mr. Freeman. No further action was taken.

IV. Discussion of Matters Published for Public Comment

A. Amicus Disclosures (21-AP-C)

Professor Sachs presented a report on the amicus disclosure amendments (Agenda Book 153). He identified two issues for the Committee to decide: which changes, if any, it would recommend to be made to the amendments as previously proposed, and whether additional public comment would be necessary on such changes.

The first possible change concerned organizational amici and the disclosure of new members. The argument in favor of disclosure was that a funder might disguise its involvement in an amicus brief by joining an existing group and then immediately helping it to fund and prepare the brief under the group's name. The argument against disclosure was that new and old members both enjoy privacy rights, and that, per concerns expressed in cases like *NAACP* v. *Alabama*, entities might be chilled from submitting amicus briefs if they were required to disclose their members (even only their new members). Some groups form specifically for the purpose of influencing public debate on an emergent issue, or in response to a pending case, and therefore many names might have to be disclosed. These considerations had been debated extensively, and possible language had been identified to implement them (Agenda Book 155–57).

A second possible change concerned a backup requirement for disclosure. Under the proposed Rule 29(b), an amicus that has a party or counsel help fund or author the brief would have to disclose that fact. The proposed Rule 29(c) requires naming the party and counsel, and the proposed Rule 29(d) requires that, if the amicus fails to make "the required disclosure," the party or counsel must do so. However, "the required disclosure" might be read either to extend only to the participation disclosure under Rule 29(b), or also to the required Rule 29(e) disclosure of a relationship between the amicus and a nonparty. On the one hand, if a party knows that a relationship ought to have been disclosed and had not been, the court should find out. On the other hand, beyond generic duties of candor to the court, the Appellate Rules do not generally require a party or counsel to report on another's failure in its disclosure obligations (*e.g.*, an incomplete Rule 26.1 corporate disclosure statement). The committee note appears to presume that only the Rule 29(b) disclosure was intended.

The third issue was an unnecessary and mistaken cross-reference to Rule 29(a)(5) in the Appendix of Length Limits.

1. New Member Disclosures

Judge Eid began the discussion with the new member provision.

An attorney member asked if any more information were available on the concerns expressed about this provision by the Executive Committee of the Judicial Conference. Judge Eid confirmed that the available information had been put in her letter with Judge Dever to the Clerk of the Supreme Court (Agenda Book 166).

Judge Dever added that the Executive Committee was chaired by Chief Judge Sutton, who had chaired the Standing Committee, and included Chief Judge Chagares, who had chaired this Committee. He also noted the dueling concerns discussed in the report of evasion and of privacy, as reflected by cases such as *NAACP* v. *Alabama* and *Americans for Prosperity Foundation* v. *Bonta*.

Another attorney member, noting that a new rules suggestion by the U.S. Chamber of Commerce (26-AP-3) had commented on the report, asked if the report had become public through its inclusion in the Agenda Book. Professor Sachs confirmed that it had. The rules suggestion had

been submitted too recently to be included in the Agenda Book and so had been circulated to the Committee.

Ms. Dubay noted that these issues had been discussed at great length, and that the new element was the import of the Executive Committee's views. Judge Eid summarized the discussion in her letter with Judge Dever of the Executive Committee's objections to the new member proposal. Judge Dever added that, in light of these objections and the other concerns discussed in the Agenda Book, the Committee had attempted to follow the same procedure as in 2018, when a proposal already submitted to the Court was withdrawn, revised, and resubmitted to the Standing Committee.

Mr. Freeman asked if the Court had acted on the request to withdraw. Judge Eid and Judge Dever confirmed that it had, and that these amendments had not been in the package submitted to Congress.

A judicial member noted that the Committee had discussed the merits of the proposals a great deal. Given the very negative reaction to the proposal, and given the unclear extent of the problem it sought to fix, he was inclined to adopt the recommended edits. Mr. Freeman agreed.

A motion was made and seconded to adopt the recommended edits to the proposed Rule 29(e). The motion was adopted by a vote of five to one, with one abstention.

2. Backup Requirement for Disclosure

Judge Eid then turned the discussion to the backup requirements for disclosure in the proposed Rule 29(c)–(d).

Professor Sachs noted that the Committee had one substantive and one stylistic issue to consider. He began with the substantive issue: whether, under (d), a party or counsel should be obliged to inform the court only about an amicus's failure to make 29(b) disclosures regarding that party or counsel—as the committee note suggests—or whether it should have a broader obligation to inform the court if 29(e) disclosures are not made.

A judicial member agreed that it seemed to contemplate the 29(b) disclosure only. No objection was heard.

Professor Sachs then turned to the stylistic issue of how to refer to the Rule 29(b) disclosure. He presented a suggestion received from the style consultants to merge (b) and (c) and to renumber accordingly.[4]

[4] The suggestion was as follows (with additions underlined and deleted text struck through), with appropriate renumbering elsewhere in the rule text and committee note:

(b) Disclosing a Relationship Between an Amicus and a Party. An amicus brief must:
(1) disclose whether:
~~(1)~~(A) a party or its counsel authored the brief in whole or in part;
~~(2)~~(B) a party or its counsel contributed or pledged to contribute money intended to pay for preparing, drafting, or submitting the brief; and
~~(3)~~(C) a party, its counsel, or any combination of parties, their counsel, or both has a majority ownership interest in or majority control of a legal entity submitting the brief; and

Professor Kimble thanked the Committee for the opportunity to attend. He stated that unnecessary cross-references are disfavored as an inconvenience to readers; mentioning Rule 29(b) can make it more difficult for the reader to understand that the reference is to the immediately preceding provision. He suggested that "such" created no ambiguity because it could only refer backwards, to an antecedent. He also thought that merging (b) and (c) would also be an effective response to any ambiguity.

A judicial member, approving of the merger of (b) and (c), asked whether a similar cross-reference issue would arise in the next provision (originally (d)). Professor Kimble stated that it would.

An attorney member suggested "the above disclosure." Professor Kimble demurred, stating that the full rule number was more specific, but that in his view it was unnecessary.

The attorney member asked whether the ambiguity concern had come from the Standing Committee. Professor Sachs stated that he had raised the issue with this Committee upon encountering the language for the first time, and that his only concern was that the reference be unambiguous.

An academic member recommended keeping the reference to "Rule 29(b)" in the original (d), as suggested in the memorandum. No objection was made.

A motion was made and seconded to adopt Rule 29 with the suggested amendments, including the merger of 29(b)–(c). The motion was adopted without dissent.

3. Appendix of Length Limits

Professor Hartnett noted that the ellipsis in the proposed amendment, after the heading and before the first sentence (Agenda Book 161, line 4), was unnecessary as nothing was omitted. Professor Sachs concurred.

A motion was made and seconded to eliminate the ellipsis. The motion was adopted without dissent.

4. Public Comment

Professor Sachs suggested that the change to the Appendix of Length Limits was a technical amendment not requiring recirculation for public comment. The same was likely true of the amendments regarding Rule 29(b) and the backup disclosure requirement, as the committee note already envisioned the same substantive scope for the requirement. The real question was whether public comment was necessary for the changes with regard to new members of organizational amici. He suggested that it was not, as the issues had been exhaustively discussed and were already the subject of many public comments.

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(2) if so, name the party or counsel.
~~(c) Naming the Party or Counsel. Any such Rule 29(b) disclosure must name the party or counsel.~~

A judicial member agreed with the analysis in the memorandum. No objections were heard.

A motion was made and seconded to recommend the proposed amendments to Rule 29, Rule 32, and the Appendix of Length Limits, as revised, to the Standing Committee for adoption without republication. The motion was adopted without dissent.

B. Premature Petitions (24-AP-G)

Professor Huang presented a subcommittee report on the treatment of premature petitions (Agenda Book 208). The proposed amendment, following certain provisions of Rule 4, is designed to remove a trap for the unwary in filing an incurably premature petition for review or application to enforce an agency order.

Professor Huang reported that the public comments were few and positive, and that the subcommittee had suggested a simplified numbering of the amendment, adding it at the end of the existing Rule 15 as 15(f) rather than inserting it as 15(d) and renumbering the remaining subdivisions. The existing Rule 15(d), on intervention in agency review, is often cited and its numbering is familiar to litigants.

Mr. Freeman expressed the Department of Justice's support for the amendment in general. He raised a potential ambiguity concerning the phrase "its order." Some agencies have internal bureaus that enter provisional orders; such an order becomes final if not appealed within the agency, with a statutory exhaustion requirement requiring an internal appeal before judicial review. In such a case a petition for review in a court of appeals might be incurably premature, but in a different sense than the proposed amendment envisioned, because the order was not otherwise reviewable in the absence of a petition for rehearing.

Professor Sachs suggested a revision to the first sentence of the proposed amendment to address this concern, together with revised language for the committee note citing a case in which this concern had arisen.[5] Mr. Freeman described the case as an effective illustration of this concern.

A motion was made and seconded to adopt the suggested revisions. The motion was adopted without dissent.

Professor Kimble raised the issue of renumbering subdivisions. He argued that the Committee should take a long view: while changing the numbering of existing subdivisions may be a temporary inconvenience, committing to preserving their numbering would tie the Committee's hands over time and prevent more logical and consistent ordering of the rules. He suggested that the

[5] The suggested revision to the first sentence of the rule text was as follows (with additions underlined and deleted text struck through): "(f) Premature Petition or Application. This subdivision (f) applies if a party files a petition for review or an application to enforce after an agency announces or enters ~~its~~ an otherwise reviewable order—but before the agency disposes of any petition for rehearing, reopening, or reconsideration that renders the order nonreviewable as to that party."

The suggested addition to the committee note was as follows: "Nor does it encompass circumstances when an agency order may be nonreviewable, or a petition for review may be premature, for any reason other than the pendency of a petition for rehearing, reopening, or reconsideration—for example, when the agency's proceedings have not yet culminated in a judicially reviewable order. *See, e.g.*, *Alabama Power Co. v. FCC*, 311 F.3d 1357, 1366 (11th Cir. 2002)."

Committee's focus should be on the rules as a whole, rather than on the individual subdivision being changed.

Professor Sachs noted that, in the restyling process, certain highly familiar rule numbers (*e.g.*, Civil Rule 12(b)(6)) were preserved. While Rule 15(d) was not on that level, it was already out of order with respect to the filing-fee provisions of Rule 15(e). Fifty appellate cases already discuss Rule 15(d), a high number for a relatively unknown subdivision, and it would take some time for litigants to realize that these discussions referred to something else. The considerations for a general restyling might be different than those applicable to an individual amendment.

Mr. Freeman recognized the benefit of logical consistency, but he argued that a saving provision for a small number of petitions would not be anomalous at the end of a rule. Moreover, the intervention project referred extensively to the existing Rule 15(d).

A liaison member seconded this concern. He added that identifying a renumbered section was a burden on courts, and that this burden did not diminish over time, because the existing precedents would retain their references to the old numbering.

An attorney member distinguished the considerations relevant to a wholesale reorganization from those relevant to an individual amendment.

A motion was made and seconded to forward the subcommittee's proposal, as revised, to the Standing Committee. The motion was adopted without dissent. Judge Eid thanked the subcommittee and Professor Kimble for their work.

V. Discussion of Matters Before Subcommittees

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

Judge Nichols presented a subcommittee report on reopening the time to appeal (Agenda Book 239). Another trap for the unwary can be presented when a litigant files a notice of appeal after the time for appeal expires, but before its motion to reopen is granted. A subcommittee had been formed to consider the issue. The Supreme Court then held in *Parrish* v. *United States* that such a notice may be timely, and also that a single document can serve both as the motion to reopen the time to appeal and as the notice of appeal for that reopened window. In response, the subcommittee suggested language at the October meeting to codify *Parrish*.

Since that meeting, the subcommittee had focused on three issues. First, it had chosen not to describe the substance of what makes a document an effective notice of appeal, leaving that question to be settled by Rule 3. Second, it had sought to avoid any impression that its proposal directly governed jurisdiction, rather than merely specifying the time at which a filed notice becomes effective. Third, it sought to accommodate a circumstance in which multiple parties might seek to appeal, clarifying that the timeliness rule applied only to the movant's notice.

Professor Sachs noted that the rule suggestion from Devin N. Wesenberg (26-AP-1), to be discussed later, supported such a proposal.

A liaison member asked about the structure of the proposal's main sentence, asking whether the parenthetical material between em-dashes—"even if that document also serves other purposes"—should instead be placed at the end of the sentence. Professor Sachs stated that one difficulty courts encounter is that the document that serves as a notice of appeal may not be captioned as such, and so it may be useful to signal that fact early on in the rule text.

A judicial member seconded the concern about the sentence's complexity and asked if it could be divided into two. A liaison member asked if the parenthetical phrase were necessary, or whether the point could be made in the committee note. Professor Sachs stated that the courts of appeals had disagreed on whether a document could be the notice of appeal and a motion to reopen at one and the same time; though *Parrish* answered in the affirmative, a codification might want to address the issue in the rule text.

Judge Nichols noted that the committee note did reiterate the point, and also that a two-sentence approach had been attempted previously.

Mr. Freeman asked whether the focus should be on a document that serves the purpose of a notice of appeal. Professor Sachs suggested that this might not communicate the affirmative codification of *Parrish*'s rule that documents could serve multiple purposes at once.

An academic member suggested that the matter be considered further, as *Parrish* had eliminated any time pressure; wording suggestions could be sent to the subcommittee. Professor Sachs agreed. At Judge Eid's suggestion, no further action was taken.

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

Professor Sachs presented a subcommittee report on intervention on appeal. As the Supreme Court had noted in *Cameron* v. *EMW Women's Surgical Center*, there is no general rule on intervention on appeal from a district court, and the courts of appeals have largely been proceeding by analogy to Rule 24 of the Civil Rules.

Subdivision (a) describes the scope of the rule, determining when intervention would be governed by this rule or by preexisting law. Civil cases are already governed by Rule 24 and should likely be covered. Criminal cases do not generally have intervention, but nonparties sometimes appear in various ways: victims with statutory rights, subpoena targets who move to quash, persons asking for documents of public interest to be unsealed, and so on. The current language would not apply to criminal cases, and there is some question of how to categorize cases under 28 U.S.C. §§ 2254 and 2255. (Agency review proceedings are already addressed in Rule 15(d).) Different sets of the Appellate Rules apply in bankruptcy and Tax Court appeals; intervention at the trial level is possible in each, and the proposal's application to each could be specified through its choice of rule number.

Subdivision (b) describes intervention as disfavored (in cases involving neither mandatory nor government intervention), placing the description early in the text to dissuade unmeritorious requests. Subdivision (c) requires intervention to be by motion, which must be filed early (given the circumstances facing the party), state the grounds for intervention (to avoid a negative inference

from Civil Rule 24), and describe intervention's effect on subject-matter jurisdiction, both as to the court and the district court (so as to place the question before the court, without attempting to answer it in advance—a putative intervenor might even wish to secure dismissal under Civil Rule 19(b)).

Subdivisions (d)–(e) set out grounds for intervention. Under subdivision (d), intervention would be permitted if a federal statute confers a right to intervene. (Statute-conferred discretion would be exercised on the other grounds supplied.) Subdivision (e)(1)–(3) address intervention by governments (which could also employ the general rules for intervention, discussed below). A U.S. or state government could intervene to defend the validity of a law or action that it or its agency or officer had taken; this is narrower than the equivalent Civil Rules provision, which applies in other cases construing a law or action. A legally authorized agency or officer could do the same, and the United States could intervene to defend its national security and foreign relations interests.

Subdivision (e)(4) sets out the generic rule for permissive intervention. It would require the movant to show a compelling reason why intervention was not sought previously (or how things had changed). It would also require the movant to have an interest—whether "legally protected" or "legally cognizable"—at stake. This interest must be distinct from the precedential effect of a decision (a topic for an amicus) and must satisfy the Civil Rule 24 categories of impairment, inadequate protection by existing parties, absence of prejudice, and so on.

Finally, subdivision (f) makes clear that a granted motion would ordinarily make the movant a party for all purposes, and that a denied motion doesn't preclude amicus participation, to nudge failed intervenors toward that course.

Mr. Freeman stated that the Department of Justice had been working on the issue for a long time. Its traditional concern was that a rule on intervention would only encourage more intervention. But the expansion of intervention practice in the courts had persuaded it that a rule was merited. While the government had never had difficulty intervening to defend the constitutionality of legislation, the courts' analogies to Civil Rule 24 (as described in *Cameron*) had produced widely varying rules in practice, and the Department thought it better at this point to adopt a rule that made clear that intervention on appeal was a different beast from intervention in a district court. With respect to the Tax Court in particular, his tax appellate colleagues could not remember a case involving intervention for the first time on appeal, but they thought the same rules should apply in Tax Court appeals as in tax controversies appealed from a district court or from the Court of Federal Claims. He therefore proposed denominating the proposal as Rule 12.2, so that it would apply as a matter of course (under Rule 14) to Tax Court appeals as well.

A liaison member agreed but asked whether the existence of a rule would indeed invite more motions to intervene—in consumer class action cases, commercial cases, and others. A client might wish to be involved in a case, though the party didn't appear in the district court, and they might not be dissuaded by the language of "disfavored." (Mr. Freeman agreed that rehearing petitions are also disfavored, but everyone files them.) The liaison member added that resolving the motions to intervene might require fact development that could be addressed through discovery in district court but not easily on appeal. He worried that intervention would become a regular

practice, and that once an intervenor enters, a party might seek remand to assert additional claims or defenses, complicating matters further.

Mr. Freeman noted that he had shared such concerns, but that in his view, the real barriers to appellate intervention were not the language of disfavor but the timeliness constraint and the exclusion of precedential effect as an interest justifying intervention. He added that the end of nationwide injunctions in *Trump* v. *CASA* had reduced demand for appellate intervention: if an injunction in litigation between *A* and *B* might affect a nonparty, it would be more plausible that this party had a right to speak on appeal. He also reiterated that the existing practice, involving analogies to Rule 24, was worth fixing.

An attorney member asked whether the language requiring filing as soon as is practical could be replaced with a more rigid time constraint (*X* days after the notice, etc.), as those who really would have a legitimate interest in appellate intervention might be more likely to have their ducks in a row beforehand. He agreed with Mr. Freeman that all the circuits were currently saying different things.

Mr. Freeman appreciated the suggestion, but he noted that the legitimate basis for intervention might not appear until later in the case.

A liaison member asked whether the FJC had studied intervention on appeal. Mr. Reagan described its research (October 2025 Agenda Book 234). He noted that many attempts at intervention involved new officials who had recently taken office.

Professor Sachs noted that the committee had considered other ways to phrase the time requirement, such as "the earliest practicable time," but did not want to suggest a single date for all parties. While perhaps it could be made party-relative ("the earliest practicable time for the movant"), sometimes a party who ought to have been notified in the district court, as under Civil Rule 12(b)(7), jumps in as soon as possible.

Mr. Freeman pointed out that parties may be able to learn of the case from outside sources, and that the rule requires a compelling reason why intervention was not sought earlier.

An attorney member asked why the nonparty "may," rather than "must," file a motion, and whether the new standards might have an impact on the practice of intervention in agency review under Rule 15(d).

Professor Sachs suggested that Rule 15(d) might be a good topic for future review. He added that subdivision (a) limited the proposal's scope to appeals from district courts, and that Rule 15(d) needed a broader standard for intervention, as it may be the first time that parties on different sides of an agency's decision would appear in an Article III court. He also stated that "may" clarified that nonparties were not required to file motions to intervene.

An attorney member suggested the phrase "a nonparty who wishes to intervene must file"; no objection was raised.

Mr. Freeman suggested adding language to subdivision (a) that intervention in agency review proceedings was governed by Rule 15(d). Professor Sachs seconded that suggestion.

A motion was made and seconded to redenominate the proposal as Rule 12.2. The motion was adopted without dissent.

An attorney member asked whether the rule would apply in cases arising under 28 U.S.C. § 2241. Mr. Freeman seconded that concern, which arises in immigration and national security habeas cases, and suggested that intervention in such cases would be unusual. Professor Hartnett added that the availability of class actions in habeas cases was also a live issue; Mr. Freeman agreed. Professor Hartnett stated that § 2241 cases typically did not involve a prior judgment, and might be more likely to involve multiple persons' interests. Mr. Freeman added that in at least two circuits, condition-of-confinement claims involving the Bureau of Prisons are litigated under § 2241. The attorney member noted that many good-time credit cases are litigated under that provision also (with which Mr. Freeman agreed), asking whether that fact counseled in favor of their inclusion or exclusion.

Professor Sachs described the issues concerning criminal cases as follows. On the one hand, to the extent that there is no general provision for intervention in a criminal case, it would be odd to provide one on appeal. On the other hand, there may be very few cases in which a criminal case would create a legally cognizable interest for a nonparty (*cf. Gilmore* v. *Utah*)—although, to avoid inviting such motions, perhaps such cases should be carved out of the rule entirely. He noted that the proposal as framed would not apply to § 2241 proceedings initiated in the court of appeals, but rather only those appealed from a district court.

Mr. Freeman described § 2255 cases as functionally criminal cases, involving collateral review of federal criminal convictions, but stated that § 2254 cases are litigated functionally as civil cases, potentially requiring a carveout that would not be needed for § 2255. Professor Sachs asked whether mentioning § 2254 only could create a negative inference; Mr. Freeman expressed ambivalence.

A liaison member stated that, if the rule does permit appellate intervention, it should be tight enough to ensure that intervention occurs only in a limited category of cases. Some cases are easy to adjudicate, either one way or the other (federal requests to defend the constitutionality of a law, random filings by uninvolved litigants). But a middle group of cases, involving sophisticated parties in commercial, bankruptcy, or class action cases, among others, might argue that their interests "may" be affected. An attorney may advise a client that it has the option to file such a motion and might wish to do so as a protective matter. The liaison member worried that it may become a regular part of appellate practice for sophisticated parties who will want to say that they tried, even if the motion failed. Professor Sachs suggested that "may" reflected uncertainty: a litigant's interest might be affected only by an adverse ruling from the court, not by a favorable one; the liaison member suggested that appellate intervention was sufficiently extraordinary that a stronger statement was necessary.

Another liaison member suggested that becoming a party for all purposes would be sufficient to dissuade a sophisticated private party from wishing to intervene, and that only a party with a

real interest in the case would do so. He also suggested that the rule might require that, if the court decides in a particular manner, it will affect the party's interest.

An attorney member agreed with the latter point, adding that, if an intervenor becomes a party for all purposes, it would be bound by the judgment, and if it wishes to reserve the right not to be bound it should participate as an amicus.

Professor Sachs suggested that the subcommittee work on language to implement this suggestion, as well as to note the exclusion of cases governed by Rule 15(d).

Mr. Freeman asked whether the phrase "mandatory" was appropriate, suggesting that the subcommittee revisit it.

A liaison member asked whether, if intervention had been sought "previously," that could only have occurred in the district court, from which an unsuccessful intervenor could have appealed. Professor Hartnett noted that a new reason for intervention could have arisen since.

An academic member asked about the choice between "legally protected" and "legally cognizable," and whether the intent was to import the standing caselaw surrounding those phrases. (Professor Sachs suggested that this was the intent; an intervenor ought to have the sort of interest that would support its own presence as a party.) The academic member asked whether that was sufficiently clear from the committee note, but was indifferent as to the choice between the terms.

Professor Sachs noted that "protected" often suggests victory on the merits, whereas "cognizable" allows for uncertainty on that point.

Mr. Freeman noted that some cases distinguish "cognizable" from "protected" based on the litigant's presence within the zone of interest protected by a statute: a nanny whose employer was unlawfully fired, and thus loses employment too, has an interest supporting Article III standing but is not within the zone of interest.

An academic member noted that *Cameron* uses the word "protect," drawn from Civil Rule 24, and "legally cognizable" in a different context.

Professor Sachs noted that the subcommittee's difficulty with the "protected"/"cognizable" choice had been the lack of any strong preference one way or the other. Judge Eid suggested that the Committee lacked any strong preference also.

Mr. Freeman suggested that the committee note might wish not to cross-reference Civil Rule 24 as prominently, so as to avoid any inference of importing its substantive standards. An academic member agreed that unnecessary parallelism should be avoided.

A liaison member asked whether parties had a statutory right to intervene in a court of appeals, and whether they should be subject to timeliness requirements. Mr. Freeman suggested that the current draft would so subject them (and Professor Sachs agreed, based on the requirements imposed on a motion), but added that the subcommittee should consider how to make that requirement more clear.

Another liaison member noted that, however the rules are drafted, it would be necessary to allow for proper examination of the intervenor's legal interest.

Mr. Freeman added that recent litigation in the Supreme Court had focused on disputed questions of timeliness. He also suggested that the committee note clarify the relevance of *Cameron* to the subjects addressed by subdivision (e)(2). No further action was taken.

C. Administrative Stays (24-AP-L)

Professor Sachs presented a report on administrative stays (Agenda Book 237). The subcommittee appointed on the issue had not been asked to meet, awaiting the FJC's research on the question, which continues apace.

D. Treatment of Tribes (25-AP-D)

Professor Huang presented a subcommittee report on the treatment of Indian tribes (Agenda Book 244). The issue had been considered extensively fifteen years earlier, but it had been put on hold in 2012 and revisited but not revived in 2017.

He emphasized two questions: whether the rules should be amended to specifically address the status of tribes, and, if so, which Indian tribes should be included. As he described, some provisions in the rules refer to the federal and state governments. As domestic non-state sovereigns, tribes might be treated analogously to state sovereigns; or they might be analogous to foreign sovereigns. (He noted that Alaska Native Corporations are not sovereign but might raise similar issues of self-determination.)

In addition, he raised the question whether the matter should be addressed on a cross-committee basis, as well as whether tribes should be included wholesale within the definition of "states" or on a more specific basis within appropriate rules.

Mr. Freeman asked why the question had been tabled earlier. Professor Huang stated that the answer was not clear, but that there had been no agreement on the proper treatment. Judge Eid agreed that there had been no consensus, with both strong support and strong opposition.

A liaison member asked whether the prior discussion had centered on the all-or-nothing approach or the provision-by-provision approach. Judge Eid answered that it had been all-or-nothing.

An attorney member suggested that the all-or-nothing approach raised philosophical and political questions that a provision-by-provision approach avoided. (Professor Sachs noted that Judge Wesley, who could not attend, had expressed his view in favor of the latter; some rule provisions regarding states, such as those concerning habeas, might not fit the legal circumstances of tribes.)

Judge Dever noted that the Department of Justice had supported a change to Evidence Rule 902(1) to include tribal documents within the category of domestic public documents, although

opposition had been expressed in the criminal defense community, and that the issue had been extensively discussed. No further action was taken.

VI. Discussion of Other Rules Suggestions

A. Uniform Bar Admission (25-AP-B)

Professor Sachs presented a report on uniform bar admission (Agenda Book 248), responding to a suggestion from the National Women's Law Center to standardize bar admission across the courts of appeals. The suggestion had been discussed at the October meeting, but no action had been taken, and it had been retained on the agenda.

He suggested that further research might be helpful on the various courts' current practices regarding admission, listing of names on a filing, pro hac vice admission, participation in oral argument, and so on. This research might be an appropriate task for the Rules Law Clerk, once that position were no longer vacant. (Ms. Dubay stated that a law clerk and a general counsel intern might soon be hired.)

Judge Eid agreed that it would be helpful to see how diverse the rules currently are. An attorney member seconded that view.

Professor Hartnett noted that the cross-committee project with regard to the district courts had chosen to take no action on the matter.

Mr. Freeman noted that the Department of Justice had frequently encountered variation among courts of appeals on a number of questions, including whether attorneys appearing ex officio (such as the Attorney General) must file personal appearances. He offered to provide already-compiled information to the researchers.

An attorney member stated that in the Seventh Circuit, multiple separate corporate disclosure statements were required from everyone appearing on the brief.

No further action was taken.

B. Double-Sided Printing (25-AP-E)

Professor Sachs presented a report (Agenda Book 250) on a rules suggestion from Paula Anthony concerning the current requirements of single-sided printing (Agenda Book 252). Single-sided printing doubles the amount of paper used and increases costs for litigants; moreover, many judges read documents electronically. However, printing on both sides of the page might create bleed or raise other issues; in the Supreme Court, where double-sided printing is permitted, the paper must be of sufficiently high weight to make bleed unlikely.

An attorney member argued that, while he had initially considered the issue a minor one, he now saw considerable merit in the proposal, to reduce the cost of printing and the size of briefs.

Mr. Wolpert stated that, while his office would welcome a fifty percent reduction in the volume of paper, he worried that individual courts and chambers preferences might produce too much variation. He added that the issue of bleed was not from the printer, but from the pens used to comment on filings.

Mr. Freeman stated that the issue was bound up with the larger question of whether courts might use entirely electronic filings. Some circuits vary in this, as well as on whether appendices or briefs might be double-sided. He thought that any rule would be a transitional one, as all-electronic filing would soon be in place.

Mr. Wolpert noted that the Tenth Circuit rarely orders paper copies of records or appendices, but it frequently orders paper copies of briefs.

Professor Sachs noted that the suggestion could be set aside and then returned to after a set period of time. He also noted that there was little argument for single-sided printing of appendices, and a change could save money for litigants and shelf space for clerk's offices.

An attorney member expressed surprise that appendices might be required to be printed single-sided. (Another attorney member concurred.)

A liaison member suggested that it might be worthwhile to informally focus-group the question with judges. A judicial member agreed and expressed comfort with double-sided briefs. Another liaison member described a wide range of practice, with some judges operating entirely with electronic copies.

Professor Sachs conveyed Professor Hartnett's interpretation that Rule 32(b) incorporated for appendices Rule 32(a)(1)(A)'s requirement for briefs of single-sided printing.

Judge Thomas stated that the problem was with pro se materials, which were harder to scan if double-sided.

Judge Eid asked if it were possible to survey judges informally. Professor Sachs suggested that a subcommittee could help in directing inquiries. Judge Eid appointed a subcommittee on the topic, consisting of Mr. Hicks, Mr. Freeman, and Mr. Wolpert. No further action was taken.

C. Introductions to Briefs (25-AP-F)

Professor Sachs presented a report (Agenda Book 255) on a rules suggestion from Judges Newsom and Pryor concerning introductions to briefs (Agenda Book 259). Under Rule 28(a), an appellant's brief must contain, under appropriate headings and in the order indicated, certain elements that do *not* include an introduction. Litigants often do include introductions nonetheless, which Judges Newsom and Pryor described as a helpful practice; but some litigants may be scared off by the absence of a provision in the rule permitting introductions. Professor Sachs noted various ways of addressing this, whether by adding a separate Rule 28(d) on introductions (as proposed by Judges Newsom and Pryor) or by adding an additional but optional element to the

list. He suggested appointing a subcommittee to discuss the local rules on the question and the proper response.

A liaison member noted that he typically includes an introduction and had never seen a brief bounced for that reason. He did not consider it a major issue, but thought that, if introductions were included, they should be placed before the jurisdictional statement.

An attorney member identified as a passionate supporter of introductions and agreed that inexperienced advocates might hesitate to include them, given their absence from the rule. At least one circuit requires a one-page summary of the case that functions as an introduction.

Mr. Freeman agreed that the Department of Justice included introductions in almost every brief and had never experienced any difficulty. He agreed that it should not come after the jurisdictional statement.

Judge Eid appointed a subcommittee on the topic, consisting of Mr. Adler, Ms. Coberly, and Mr. Pincus. No further action was taken.

D. Reopening Time to Appeal Suggestion (26-AP-1)

Professor Sachs presented a report (Agenda Book 262) on a rules suggestion from Devin N. Wesenberg on reopening the time to appeal (Agenda Book 264). As mentioned above, this suggestion was in the nature of a comment on the Committee's efforts on an earlier agenda item (24-AP-M), and he proposed consolidating this agenda item with that. Judge Eid consolidated the agenda items.

VII. New Business

Mr. Freeman identified an item of new business. In discussing intervention with his Tax Division colleagues, he had learned that certain problems of incurably premature notices of appeal, corrected for appeals from district courts by existing provisions of Rule 4, are not corrected in Tax Court appeals under Rule 13. He stated that this presents a practical problem for the Tax Court, which will often announce a decision before it enters a final opinion, unwittingly creating a trap for the unwary when litigants file the notice of appeal in between.

Professor Sachs suggested appointing a subcommittee on the topic.

Judge Eid appointed a subcommittee on the topic, consisting of Professor Huang, Mr. Freeman, and Mr. Pincus. No further action was taken.

Judge Eid disbanded the Amicus, Bankruptcy Appeals, Costs on Appeal, and IFP Form 4 subcommittees, all currently listed as inactive (Agenda Book 9). She thanked the participants and announced that the next meeting of the Committee would take place in Washington, D.C., on October 6, 2026.

The meeting was adjourned at 2:37 p.m.

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

Rule 15. Review or Enforcement of an Agency Order—How Obtained; Intervention

* * * * *

(f) Premature Petition or Application. This subdivision (f) applies if a party files a petition for review or an application to enforce after an agency announces or enters an otherwise reviewable order—but before the agency disposes of any petition for rehearing, reopening, or reconsideration that renders the order nonreviewable as to that party. The premature petition or application becomes effective to seek review or enforcement of the order when the agency disposes of the last such petition for rehearing, reopening, or reconsideration. If a party intends to challenge the disposition of a petition for

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

rehearing, reopening, or reconsideration, the party must file a new or amended petition for review or application to enforce in compliance with this Rule 15.

Committee Note

Subdivision (f). Subdivision (f) is new. It is designed to eliminate a procedural trap. Some circuits hold that petitions for review of agency orders that have been rendered nonreviewable by the filing of a petition for rehearing (or similar petition) are "incurably premature," meaning that they do not ripen or become valid after the agency disposes of the rehearing petition. *See, e.g., Nat'l Ass'n of Immigration Judges v. Fed. Labor Relations Auth.*, 77 F.4th 1132, 1139 (D.C. Cir. 2023); *Aeromar, C. Por A. v. Dept. of Transp.*, 767 F.2d 1491, 1493 (11th Cir. 1985) (relying on the pre-1993 treatment of notices of appeal and applying the "same principle" to review of agency action). In these circuits, if a party aggrieved by an agency action does not file a second timely petition for review after the petition for rehearing is denied by the agency, that party will find itself out of time: Its first petition for review will be dismissed as premature, and the deadline for filing a second petition for review will have passed. Subdivision (f) removes this trap.

It is modeled after Rule 4(a)(4)(B)(i), as amended in 1993, and is intended to align the treatment of premature petitions for review of agency orders with the treatment of premature notices of appeal. Recognizing that while review of district court orders is generally case based, *see* Fed. R. Civ. P. 54, review of administrative orders is generally party based, subdivision (f) refers to an order that is made

"nonreviewable as to that party" by a petition for rehearing, reopening, or reconsideration.

Subdivision (f) does not address whether or when the filing of a petition for rehearing, reopening, or reconsideration renders an agency order nonreviewable as to a party. That is left to the wide variety of statutes, regulations, and judicial decisions that govern agencies and appeals from agency decisions. Rather, subdivision (f) provides that when, under governing law, an agency order is nonreviewable as to a particular party because of the filing of a petition for rehearing, reopening, or reconsideration, a premature petition for review or application to enforce that order will be held in abeyance and become effective when the agency disposes of the last such petition—that is, the last petition that renders the order nonreviewable as to that party.

As with appeals in civil cases, *see* Rule 4(a)(4)(B)(ii), the premature petition becomes effective to review the original decision, but a party intending to challenge the disposition of a petition for rehearing, reopening, or reconsideration must file a new or amended petition for review or application to enforce.

Changes Made After Publication and Comment

In addition to a stylistic change, subdivision (f) was edited to clarify that it does not encompass circumstances when an agency order may be nonreviewable, or a petition for review may be premature, for any reason other than the pendency of a petition for rehearing, reopening, or reconsideration—for example, when the agency's proceedings have not yet culminated in a judicially reviewable order. *See, e.g.*, *Alabama Power Co. v. FCC*, 311 F.3d 1357, 1366 (11th Cir. 2002).

Summary of Public Comment

Cesar Alvan - expressed support for the amendments as preventing the needless dismissal of early petitions and avoiding the need to file duplicative petitions. He particularly appreciated the requirement of a new petition to challenge a rehearing decision as promoting clarity.

Kaitlin Skow - supported the proposed amendments. In her view, they remove a burden on unrepresented petitioners without adding any significant burden on the agency or the courts.

International Attestations, LLC - referenced the amendments only briefly but approved of them as avoiding a potential trap.

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

Rule 29. Brief of an Amicus Curiae

(a) During Initial Consideration of a Case on the Merits.

(1) **Applicability**. This Rule 29(a) governs amicus curiae filings during a court's initial consideration of a case on the merits.

(2) **Purpose; When Permitted.** An amicus brief that brings to the court's attention relevant matter not already brought to its attention by the parties may help the court. An amicus brief that does not serve this purpose burdens the court, and its filing is disfavored. The United States ~~or~~, its officer or agency, or a state may file an amicus brief without the

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

consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing~~, but a court of appeals~~. The court may prohibit ~~the filing of~~ or ~~may~~ strike an amicus brief that would result in a judge's disqualification.

(3) **Motion for Leave to File.** A ~~The~~ motion for leave to file must be accompanied by the proposed brief and state:

(A) the movant's interest; and

(B) the reason ~~why an amicus~~ the brief ~~is desirable and why~~ serves the purpose set forth in Rule 29(a)(2) ~~the matters asserted are relevant to the disposition of the case~~.

(4) **Contents and Form**. An amicus brief must comply with Rule 32. ~~In addition to the~~

~~requirements of Rule 32,~~ T~~t~~he cover must ~~identify~~ name the party or parties supported and indicate whether the brief supports affirmance or reversal. ~~An amicus~~ The brief need not comply with Rule 28, but it must include the following:

(A) if the amicus ~~curiae~~ is a corporation, a disclosure statement like that required of parties by Rule 26.1;

(B) unless the amicus is the United States, its officer or agency, or a state, the disclosure statement required by Rules 29(b), (c), and (e);

~~(B)~~(C) a table of contents, with page references;

~~(C)~~(D) a table of authorities—cases (alphabetically arranged), statutes, and other authorities, ~~with~~

~~references to~~ together with the pages ~~of the brief~~ where they are cited;

~~(D)~~(E) a concise ~~statement~~ description of the identity, history, experience, and interests of the amicus ~~curiae~~, ~~its interest in the case, and the source of its authority to file~~ together with an explanation of how the brief and the perspective of the amicus will help the court;

(F) if an amicus has existed for less than 12 months, the date the amicus was created;

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

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

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

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

~~(F)~~(G) an argument, which may be preceded by a summary ~~and which~~ but need not include a statement of the applicable standard of review; and

~~(G)~~(H) a certificate of compliance under Rule 32(g)(1)~~, if length is computed using a word or line limit~~.

(5) **Length**. Except ~~by~~ with the court's permission, an amicus brief must not exceed 6,500 words ~~may be no more than one-half the maximum length authorized by these rules for a party's principal brief. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief~~.

(6) **Time for Filing**. An amicus ~~curiae~~ must file its brief~~, accompanied by a motion for filing when necessary,~~ no later than 7 days after the principal brief of the party being supported is filed. An amicus ~~curiae~~ that does not support either party must file its brief no later than 7 days after the appellant's or petitioner's principal brief is filed. The ~~A~~ court may grant leave for later filing, specifying the time within which an opposing party may answer.

(7) **Reply Brief**. An amicus may not file a reply brief except with the court's permission. ~~Except by the court's permission, an amicus curiae may not file a reply brief.~~

(8) **Oral Argument**. An amicus ~~curiae~~ may participate in oral argument only with the court's permission.

(b) Disclosing a Relationship Between an Amicus and a Party. An amicus brief must:

(1) disclose whether:

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

(B) a party or its counsel contributed or pledged to contribute money intended to pay for preparing, drafting, or submitting the brief; and

(C) a party, its counsel, or any combination of parties, their counsel,

or both has a majority ownership interest in or majority control of a legal entity submitting the brief; and

(2) if so, name the party or counsel.

(c) Disclosure by the Party or Counsel. If the party or counsel knows that an amicus has failed to make the Rule 29(b) disclosure, the party or counsel must do so.

(d) Disclosing a Relationship Between an Amicus and a Nonparty. 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 name each such person. But disclosure is not required if the person is:

- the amicus;
- its counsel; or
- a member of the amicus.

~~(b)~~(e) **During Consideration of Whether to Grant Rehearing.**

(1) **Applicability**. ~~This Rule 29(b)~~ Rules 29(a)-(d) governs amicus ~~filings~~ briefs filed during a court's consideration of whether to grant panel rehearing or rehearing en banc, except as provided in this Rule 29(e), and unless a local rule or order in a case provides otherwise.

(2) **When Permitted.** The United States, ~~or~~ its officer or agency, or a state may file an amicus brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court. The motion for leave must comply with Rule 29(a)(3).

(3) ~~**Motion for Leave to File.** Rule 29(a)(3) applies to a motion for leave.~~

~~(4)~~ **~~Contents, Form, and~~ Length**. ~~Rule 29(a)(4) applies to the amicus brief.~~ An amicus ~~The~~ brief must not exceed 2,600 words.

~~(5)~~(4) **Time for Filing**. An amicus ~~curiae~~ supporting ~~the~~ a petition for rehearing or supporting neither party must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the petition is filed. An amicus ~~curiae~~ opposing the petition must file its brief, accompanied by a motion for filing when necessary, no later than the date set by the court for ~~the~~ a response.

Committee Note

The amendments to Rule 29 make changes to the procedure for filing amicus briefs, including to the disclosure requirements.

The amendments seek primarily to provide the courts and the public with more information about an amicus curiae. Throughout its consideration of possible

amendments, the Advisory Committee has carefully considered the relevant First Amendment interests.

Some have suggested that information about an amicus is unnecessary because the only thing that matters about an amicus brief is the merits of the legal arguments in that brief. At times, however, courts do consider the identity and perspective of an amicus to be relevant. For that reason, the Committee thinks that some disclosures about an amicus are important to promote the integrity of court processes and rules.

Careful attention to the various interests and the need to avoid unjustified burdens is reflected throughout these amendments. For example, the amendment treats disclosures about the relationship between a party and an amicus differently than disclosures about the relationship between a nonparty and an amicus. While the public interest in knowing about an amicus—in order to evaluate its arguments and a court's consideration of those arguments—is relevant in both situations, there is an additional interest in disclosing the relationship between a party and an amicus: the court's interest in evaluating whether an amicus is serving as a mouthpiece for a party, thereby evading limits imposed on parties in our adversary system and misleading the court about the independence of an amicus. Moreover, the burden on an amicus of disclosing a relationship with a party is much lower than having to disclose a relationship with nonparties. Disclosing a relationship with a party requires an amicus to check its records (and perhaps make a disclosure) regarding only the limited number of persons who are parties to the case. Disclosing a relationship with a nonparty would, by contrast, require an amicus to check its records (and perhaps make a disclosure) regarding the much larger universe of all persons who are not parties to the case.

To take another example, the amendment treats contributions by a nonparty that are earmarked for a particular brief differently than general contributions by a nonparty to an amicus. People may make contributions to organizations for a host of reasons, including reasons that have nothing to do with filing amicus briefs. Requiring the disclosure of non-earmarked contributions provides less useful information for those who seek to evaluate a brief and imposes far greater burdens on contributors.

Subdivision (a). The amendment to Rule 29(a)(2) adds a statement of the purpose of an amicus brief: to bring to the court's attention relevant matter not already brought to its attention by the parties that may help the court. By contrast, if an amicus curiae brief adds nothing to the parties' briefs, it is a burden rather than a help. Where feasible, avoiding redundancy among amicus briefs can also be helpful.

The amendment to Rule 29(a)(4) expands the required statement regarding the identity of an amicus and its interest in the case and requires "a concise description of the identity, history, experience, and interests of the amicus, together with an explanation of how the brief and the perspective of the amicus will help the court." The amendment calls for this broader disclosure to help the court and the public evaluate the likely reliability and helpfulness of an amicus, particularly those with anodyne or potentially misleading names. It also requires that the amicus explain how the brief and the perspective of the amicus will further the goal of helping the court. Rule 29(a)(4)(F) is new. It requires an amicus that has existed for less than 12 months to state the date of its creation, helping identify amici that may have been created for the purpose of this litigation. Subsequent provisions are re-lettered.

Existing disclosure requirements about the relationship between the amicus and both parties and nonparties are removed from subdivision (a) and placed in separate subdivisions, one dealing with parties (subdivision (b)) and one dealing with nonparties (subdivision (d)).

Rule 29(a)(5) is amended to directly impose a word limit on amicus briefs, replacing the provision that establishes length limits for amicus briefs as a fraction of the length limits for parties. This results in removing the option to rely on a page count rather than a word count. This change enables Rule 29(a)(4)(H) (formerly 29(a)(4)(G)) to be simplified and require a certification of compliance under Rule 32(g)(1) in all amicus briefs.

Subdivision (b). Subdivision (b) dealing with disclosure of the relationship between the amicus and a party is new, but it draws on existing Rule 29(a)(4)(E). Because of the important interest in knowing whether a party has significant influence or control of an amicus, these disclosures are more far reaching than those involving nonparties, which are addressed in (d).

Rule 29(b)(1)(A) carries forward the existing requirement that authorship of an amicus brief by a party or its counsel must be disclosed.

Rule 29(b)(1)(B) carries forward the existing requirement that money contributed by a party or party's counsel that was intended to fund the preparation or submission of the brief must be disclosed. But in an effort to counteract the possibility of an amicus interpreting the existing rule narrowly, the amendment explicitly refers to "preparing, drafting, or submitting the brief," thereby making clear that it applies to every stage of the process.

Subdivision (b)(1)(C) is new. It requires disclosure of whether a party, its counsel, or any combination of parties or counsel either has a majority ownership interest in or majority control of an amicus. If a party has such control over an amicus, it is in a position to control the content of an amicus brief. If undisclosed, the court and the public may be misled about the independence of an amicus from a party, and a party may be able to effectively exceed the limitations otherwise imposed on parties.

Subdivision (b)(2) requires that any disclosure required by subdivision (b)(1) name the party or counsel. This builds upon the requirement in current Rule 29(a)(4)(E)(iii) that certain persons who make earmarked contributions be identified.

Subdivision (c). Subdivision (c) is new. It operates as a backstop to the disclosure requirements of (b): If the amicus fails to make a required disclosure, and the party or counsel knows it, the party or counsel must make the disclosure.

Subdivision (d). Subdivision (d) focuses on the relationship between the amicus and a nonparty. It makes several changes to the existing Rule 29(a)(4)(E)(iii), which currently requires the disclosure of any contribution earmarked for a brief, no matter how small, by anyone other than the amicus itself, its members, or its counsel. Earmarked contributions run the risk that the amicus is being used as a paid mouthpiece by the contributor. Knowing about earmarked contributions helps courts and the public evaluate the arguments and information in the amicus brief by providing information about possible reasons for the filing other than those explained by the amicus itself.

The Committee considered requiring the disclosure of nonparties who make any significant contributions to an

amicus, whether earmarked or not. But it decided against doing so because of the burdens it could impose on amici and their contributors, even when the reason for the contribution had nothing to do with the brief. Instead, it retained the focus of the existing rule on earmarked contributions.

The Committee considered eliminating the member exception because that exception allows for easy evasion: simply become a member at the time of making an earmarked contribution. But it decided against doing so because members speak through an amicus and an amicus generally speaks for its members. In addition, eliminating the member exception threatened to place an unfair burden on amici who do not budget in advance for amicus briefs (and therefore have to "pass the hat" when the need to file an amicus brief arises) compared to other amici who may file amicus briefs more frequently (and therefore can budget in advance and fund them from general revenue). Without a member exception, the latter (generally larger) amici would not have to disclose, but the former (generally smaller) amici would have to disclose.

Rather than eliminate the member exception for organizations, the amendment protects members from disclosure. But Rule 29(a)(4)(F) requires an amicus that has existed for less than 12 months to disclose the date of its creation. This requirement works in conjunction with the expanded disclosure requirement of Rule 29(a)(4)(E) to reveal an amicus that may have been created for purposes of particular litigation or is less established and broadly-based than its name might suggest. Unless adequately explained, a court and the public might choose to discount the views of such an amicus.

The amendment also provides a $100 threshold for the disclosure requirement. Under the existing rule, a non-member of an amicus who contributes any amount, no matter how small, that is earmarked for a particular brief must be disclosed. This can hamper crowdfunding of amicus briefs while providing little useful information to the courts or the public. Contributions of $100 or less are unlikely to run the risk that an amicus is being used as a mouthpiece for others.

Subdivision (e). Subdivision (e) retains most of the content of existing subdivision (b) and governs amicus briefs at the rehearing stage. It is revised to largely incorporate by reference the provision applicable to amicus briefs at the initial consideration of the case. Rule 29(e)(1) makes Rule 29(a) through (d) applicable, except as provided in the rest of Rule 29(e) or if a local rule or order in a particular case provides otherwise. As a result, duplicative provisions are eliminated.

Changes Made Upon Further Consideration. In addition to stylistic changes to the Rule, two changes were made to the text of the proposed Rule 29(d). First, a provision was deleted that would have limited the exemption from disclosure of earmarked contributions by an amicus's members to those who first became members more than 12 months prior to the filing of the brief. The requirement to disclose earmarked contributions to an organization by its new members would have enhanced the understanding of the court, but it also could have interfered with the privacy of that organization and of its members, who might have been chilled from contributing to an organization's amicus brief if they were required to announce their membership to the public. Second, an accompanying provision that would have limited this now-deleted requirement—exempting organizations that themselves had been created within the previous 12 months—was deleted as unnecessary.

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

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

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(g) Certificate of Compliance.

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

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

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

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

Committee Note

Rule 32(g) is amended for style and to conform to amendments to Rule 29.

Appendix:
Length Limits Stated in the
Federal Rules of Appellate Procedure[1]

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

* * * * *

- For the limits in Rules 28.1~~, 29(a)(5),~~ and 32:
  - You may use the word limit or page limit, regardless of how you produce the document; or
  - You may use the line limit if you type or print your document with a monospaced typeface. A typeface is monospaced when each character occupies the same amount of horizontal space.

	Rule	Document type	Word limit	Page limit	Line limit

* * * * *

Amicus briefs	29(a)(5)	○ Amicus brief during initial consideration ~~of case~~ on merits	~~One-half the length set by the Appellate Rules for a party's principal brief~~ 6,500	~~One-half the length set by the Appellate Rules for a party's principal brief~~ Not applicable	~~One-half the length set by the Appellate Rules for a party's principal brief~~ Not applicable
	29~~(b)(4)~~(f)(3)	○ Amicus brief during consideration of whether to grant rehearing	2,600	Not applicable	Not applicable

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