Minutes of the Spring 2022 Meeting of the

Advisory Committee on the Appellate Rules

March 30, 2022

San Diego, California

Judge Jay Bybee, Chair, Advisory Committee on the Appellate Rules, called the meeting of the Advisory Committee on the Appellate Rules to order on Wednesday, March 30, 2022, at 9:00 a.m. PDT.

In addition to Judge Bybee, the following members of the Advisory Committee on the Appellate Rules were present in person: Justice Leondra R. Kruger, Judge Carl J. Nichols, Judge Paul J. Watford, and Lisa Wright. Solicitor General Elizabeth Prelogar was represented by H. Thomas Byron III, Senior Appellate Counsel, Department of Justice. Professor Stephen E. Sachs, Danielle Spinelli, and Judge Richard C. Wesley attended via Teams.

Also present in person were: Judge Frank Hull, Member, Standing Committee on the Rules of Practice and Procedure, and Liaison to the Advisory Committee on the Appellate Rules; Molly Dwyer, Clerk of Court Representative, Advisory Committee on the Appellate Rules; Bridget M. Healy, Acting Chief Counsel, Rules Committee Staff (RCS); Brittany Bunting, Administrative Analyst, RCS; Burton DeWitt, Rules Law Clerk, RCS; Professor Edward A. Hartnett, Reporter, Advisory Committee on the Appellate Rules; and Professor Catherine T. Struve, Reporter, Standing Committee on the Rules of Practice and Procedure.

Judge John D. Bates, Chair, Standing Committee on the Rules of Practice and Procedure; Professor Daniel R. Coquillette, Consultant, Standing Committee on the Rules of Practice and Procedure; Daniel J. Capra, Reporter, Advisory Committee on Evidence Rules; Marie Leary, Counsel, Federal Judicial Center; and S. Scott Myers, Counsel, RCS attended via Teams.

I. Introduction

Judge Bybee opened the meeting and welcomed everyone. He expressed appreciation both to those who were in person and those who were participating remotely, voicing hope that we would be able to see them in person in the future. He invited those participating in the meeting to introduce themselves and thanked members of the public for attending.

Burton DeWitt, the Rules Law Clerk, discussed the legislative tracker (Agenda book page 26), and added that a new version of the Amicus Act had been introduced.

One significant change in the latest version is that it no longer has a threshold of three amicus briefs to trigger its coverage.

II. Report on Meeting of the Standing Committee

Judge Bybee called attention to the draft minutes of the January Standing Committee meeting and the report of the Standing Committee to the Judicial Conference. (Agenda book page 34).

III. Approval of the Minutes

The Reporter noted two typos in the draft minutes of the October 7, 2021, Advisory Committee meeting. (Agenda book page 90). With those corrected, the minutes were approved.

IV. Discussion of Matters for Final Approval

CARES Act. Judge Bybee presented the report of the CARES Act subcommittee. (Agenda book page 101). This large-scale project, undertaken across advisory committees in response to the enactment by Congress of the CARES Act, resulted in proposed amendments to Rule 2 and Rule 4. These proposed amendments were published for public comment.

We received six comments. Two were supportive. The others did not lead the subcommittee to recommend any changes to the Rules as published.

A comment submitted by the Chief Deputy Clerk for the Tenth Circuit raised issues that the subcommittee had previously identified. The subcommittee was pleased that this thoughtful comment did not reveal issues that had been overlooked.

Judge Bybee invited discussion. Professor Struve stated that the Civil Rules Committee had approved Emergency Civil Rule 87, with some minor changes to the Committee Note and the deletion of some bracketed language.

A motion to approve the proposed amendments to Rule 2 and Rule 4, and to recommend that the Standing Committee give final approval to them, was approved without opposition.

Juneteenth. The Reporter presented a report concerning Juneteenth. (Agenda book page 123). A new law, effective June of 2021, created a new federal holiday, Juneteenth National Independence Day, June 19. Rule 26 should be amended to reflect this new holiday. There is no need for public notice and comment.

A motion to approve the proposed amendment to Rule 26, and to recommend that the Standing Committee give final approval to that amendment, was approved without opposition.

V. Discussion of Matter Approved for Public Comment

Rules 35 and 40. Judge Bybee presented an update concerning the proposed amendments to Rules 35 and 40. He explained that these proposed amendments would consolidate the provisions dealing with panel rehearing and rehearing en banc, eliminate duplication, and transfer the provisions of Rule 35 to Rule 40. He stated that the Standing Committee had accepted these amendments with minor changes, and thanked Professor Sachs for his work on this project.

The Reporter added that the Standing Committee had approved these proposed amendments for publication and public comment, including conforming amendments to Rule 32(g) and the Appendix of Length Limits. But after this approval, Professor Struve discovered that an additional conforming amendment should be made to the third bullet point in the Appendix of Length Limits to delete Rule 35. (Agenda book page 130).

Because the Standing Committee has already approved the rest of the proposed amendments for publication, and publication will not take place until August of 2022, this correction can be made prior to publication.

The Advisory Committee approved, without opposition, recommending that the Standing Committee publish this change as part of the publication of the proposed amendments.

VI. Discussion of Matters Before Subcommittees

A. Amicus Disclosures

Danielle Spinelli presented the report of the amicus subcommittee. (Agenda book page 158). She noted that the Committee had discussed this issue at length at the last two meetings. The AMICUS Act has been reintroduced in Congress, with some changes from the prior version.

She explained that current Rule 29(a)(4)(E) requires disclosure 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.

There are concerns about this Rule and its Supreme Court counterpart. One concern is that it is too easy to evade the purpose of the disclosure rule by funneling money to an amicus indirectly, without earmarking the money for a particular brief. Another concern is that the current disclosure rule doesn't adequately reveal who is paying for an amicus brief. Some critics worry that the rule allows anonymous advocacy without disclosure of who is behind the brief. Prior detailed discussions at the last two meeting have sought to elicit the thoughts of the full Committee on these issues.

The new memo in the agenda book is shorter than the prior memos. It sets out language to facilitate discussion and to obtain more guidance from the full Committee. The language in the report is not a recommendation by the subcommittee. Ms. Spinelli invited the Reporter and other members of the subcommittee to jump in as she turned to a discussion of the language in the agenda book.

She first noted that the language separates disclosure of the relationship between the amicus and a party from disclosure of the relationship between the amicus and a nonparty. The current rule does not draw this distinction. But the purpose of disclosure in each situation—and the potential concerns in each situation—are different. The comment to the existing rule describes the purpose of the rule as to parties as not allowing a party effectively to have another brief. That isn't a concern with nonparties.

The Reporter directed the Committee's attention to 29(c)(3) of the discussion draft, which would call for disclosure of whether a party is a member of the amicus, and invited discussion.

A judge member asked whether there is any evidence or empirical data to suggest that there is a real problem. Ms. Spinelli responded that the current agenda book does not include everything from prior agenda books. The proponents of the AMICUS Act point to anecdotal evidence in the Supreme Court, including underlying connections between a party and an amicus and between amici that were not disclosed. Correspondence with the Clerk of the Supreme Court with some anecdotal evidence was also included in prior agenda books. There is a legitimate concern about evasion.

A different judge member said that knowing that a party is merely a member of an amicus is not helpful on its own. There is a good reason to compel disclosure if

the information is valuable, but not if it isn't useful. Unlike the draft language in 29(c)(4) and (5), the draft language in (c)(3) should be deleted.

An academic member agreed that (c)(3)—the provision that would call for disclosure of whether a party is a member of the amicus—should be deleted. Knowing that someone is a member doesn't tell us much about their influence on an amicus. For example, knowing that someone is a member of the Sierra Club tells us little about their influence. But disclosure does impose substantial costs, hurting unpopular groups and chilling speech.

And what counts as a problem? People disagree. We know what the Cato Institute says; do we need to know who funds it? The threshold for disclosure should be very high. There are two interests furthered by disclosure: knowing whether a party has control over an amicus and knowing whether an amicus is speaking for itself. Cato would blow its credibility if it filed any brief that came with a $20 bill attached, simply providing a fee for service. Even if someone donates lots of money to Cato, the brief is still from the organization. Not only (c)(3), but also (c)(5)—which would require disclosure of contributions above a 10% level—should be deleted.

Ms. Spinelli suggested that if a disclosure would not be helpful to judges, it shouldn't be required. Judge Bybee wondered whether there might be disclosures that could aid judges in making ethical decisions. A judge member pointed out that at this point we are focused on the relationship between a party and an amicus, and a judge would already know who the parties are.

There did not appear to be support for (c)(3). Discussion then turned to (c)(4).

Ms. Spinelli stated that (c)(4) is drafted to address the ability to evade disclosure requirements that are limited to earmarked contributions. As currently drafted for discussion purposes, it is quite different than the 3% threshold of the AMICUS Act. Instead, this draft focuses on the ability of a party to control the amicus, and therefore refers to a 50% or greater ownership or control. In response to a question from Judge Bybee, an academic member explained that the draft focuses on voting power. Who is the amicus owned by? Whose orders must it follow? Who can tell the amicus what to file? If less than 50%, the person might have lots of influence, but it is the amicus speaking for itself.

In response to another question by Judge Bybee, Danielle Spinelli noted that the discussion draft covers the situation where two or more parties collectively control an amicus.

A judge member stated that (c)(4) by itself is unobjectionable but is less valuable than (c)(5). It is important to follow the money. Stopping with (c)(4) would not be enough. There is a need for something like (c)(5). That provides a better sense of how independent the amicus is from a party.

Judge Bybee asked what (c)(4) is designed to accomplish. Disqualify an amicus? Discourage an amicus?

Danielle Spinelli explained that the draft, like the current rule, is only about disclosure. A party can write part of the brief of an amicus so long as that is disclosed. Because such a disclosure would lead a court to give an amicus brief less weight, it's not likely to be filed. No one submits a brief with a disclosure like that, but the rule operates to discourage it rather than forbid it.

The Reporter noted that the subcommittee had looked without success for a specific number in other bodies of law that are concerned about control. From what the subcommittee has found so far, those other bodies of law use standards rather than fixed numbers to take account of situations where one person owns (say) 40% and no one else has more than 2%.

An academic member spoke against (c)(5). There is a difference between voting control and making contributions. When a party makes contributions to an amicus, the amicus is still speaking on its own behalf, not simply providing a fee for service. The party may be funding other organizations and making contributions because the party agrees with those organizations. If there is to be a provision like (c)(5), the percentage should be something like 50%. If it's anything lower than that, so that 50% to 90% is coming from other sources, the amicus may be pleased to receive the contribution, but is not simply acting as a cat's paw.

The academic member added that the discussion draft adds "or intended as compensation for" to (c)(2), and that a lawyer's duty of candor deals with a wink-wink, nudge-nudge contribution. If the contribution is simply a regular contribution, for example, by an airline to an airline trade association, disclosure may lead to the trade association not filing; as a matter of its internal politics, the trade association may not want to tell members what other members have contributed. Given the *AFP* case, we should be mindful that the Supreme Court may not endorse (c)(5), even at the 10% level. The contribution may be made because of the views that the amicus already has, and the value of such a disclosure does not outweigh the chilling effect.

A judge member said that, with regard to parties, he wants to know if a party made a substantial contribution. He is not worried about the First Amendment here. While 10% is too low, 50% is too high. The question is to what extent is the entity independent.

Mr. Byron suggested that it might be useful to think about what kinds of connections between a party and an amicus might be useful for judges to know. He doesn't know the universe of possible connections.

Ms. Spinelli stated that the Committee rejected the idea of using a standard at the last meeting, concluding that we need a rule that is clear and easy to apply, even though it will be under-inclusive.

Judge Bybee invited suggestions for other percentages. A judge suggested 25%, noting that's substantial: I would want to know that in deciding the weight to give the brief. The judge added that 33% would be fine, too. Judge Bybee noted that a group might have only 4 members.

Mr. Byron suggested aligning (c)(4) with (c)(5), questioning whether there is a meaningful difference between the two that would call for different percentages.

An academic member stated that he had similar concerns with (c)(4) and (c)(5). Actual voting control is quite different from substantial influence. Even with substantial influence, the brief really is coming from the organization and not the party. And others may control an organization even if a party gives lots of money. If others own 75%, they control whether a brief is filed or not. Such disclosure is more intrusive and less informative. It is harder to justify a particular number for (c)(5).

Another judge found himself extraordinarily ambivalent. In his experience, it's not common to have lots of amici in the courts of appeals. In some cases, both sides recruit as many as they can, including groups of law professors formed just for the particular appeal. He is skeptical of the value; the focus is on the Supreme Court. The focus of the proposed legislation is informing the public, not just the court. Whose voices are speaking? There is something to be said for that. An industry association can be expected to take sides. Level of ownership may not be enough. A 25% contribution is pretty significant; the executive director of the amicus may not want to tick off that contributor. It's legitimate to know that. The devil is in the details. A percentage is better than a reasonable person standard.

The question is whether it is worth it. He sees it strongly on the party side, going back to the original idea of evading page limits. There might be constitutional problems with 10%. Maybe 25%?

Judge Bybee asked if the discussion had provided enough guidance for the subcommittee. Ms. Spinelli stated that her understanding was that (c)(3) should be dropped, and the rest of (c) refined. She added that the question remains whether the game is worth the candle.

A judge member noted that the project is not for naught, and it can inform the Supreme Court.

A liaison judge raised questions about "control" in (c)(4). That's too hard to define; take it out and leave the simple "ownership." She is totally ambivalent; there

isn't a problem. She assumes that amici are not independent and that there is coordination.

In response to a question, Ms. Spinelli stated that the 10% figure was drawn from the corporate disclosure rule but just as a place to begin discussion; there is no real substantive relationship between the two.

Judge Bates observed that if "control" were eliminated then the provision would not apply to organizations such as trade associations that don't have owners.

A judge member suggested focusing on voting rights. An academic member suggested focusing on legal control. At the 50% level of control, a party can create a house amicus, not a real amicus.

After a short break, the Committee turned to 29(d) of the discussion draft.

Ms. Spinelli began by noting that 29(d) deals with disclosure of the relationship between an amicus and a nonparty. The discussion draft of 29(d)(1), like the discussion draft 29(c)(1), would extend the existing disclosure of earmarked contributions to those that are intended as compensation for an amicus brief. The existing rule reaches earmarked contributions by nonparties but excludes members of the amicus from this disclosure requirement. One question is whether this member exclusion should be retained, as the discussion draft does.

The Reporter added that one advantage of placing disclosures regarding parties in 29(c) and disclosures regarding nonparties in 29(d) is that it makes clear that the membership exclusion does not apply to parties. A party who makes earmarked contributions must disclose those contributions, even if the party is also a member of the amicus.

Ms. Spinelli posed the question: focusing solely on nonparties, should the rule require that members of the amicus who make earmarked contributions be disclosed?

A lawyer member noted the Supreme Court case where a crowd-funded amicus brief was rejected because of small dollar earmarked anonymous contributions. An exception for members of an amicus opens the opportunity of evasion by turning contributors into members.

An academic member said that the worry is about an external mouthpiece. An organization speaks for its members; they are the people that Cato represents. An organization can go to its members, or vice versa. If done in house, it really is the organization speaking to the court. The exception for members should stay in.

Ms. Spinelli posed another question: what is the interest in requiring an amicus to disclose who paid for the brief if the person was not a party? The existing

rule does require such disclosure. Is there a sufficient interest in having that information that it outweighs the concerns, including constitutional concerns, with requiring disclosure? The interests and concerns are not the same for parties and nonparties.

Everything revolves around this issue of whether to meaningfully expand nonparty disclosure. Yes: the court should know who is advocating before it. No: amici are advocating on behalf of themselves, and we don't typically require disclosure of members in light of First Amendment concerns.

A judge stated that he is not a fan of (d)(2) or (d)(3) in the discussion draft. But he would remove the exception for members from (d)(1). If there is a specific funder, he'd want to know who it is. He doesn't see a First Amendment problem where funds earmarked for a particular brief are at issue. Judges are entitled to know.

An academic member asked what do you do with an organization that hits up members for individual projects? Disclose that Joe Schmo responded to the call for contributions for this brief? If it's an outside funder, there is a need to disclose. But if there is a membership appeal to file the brief and the rule requires disclosure of all members who responded, even if it doesn't violate the First Amendment, people will be reluctant to file briefs because they won't want to have to say who they asked in this membership appeal.

Mr. Byron noted that if the concern is that non-members could evade the rule by becoming members, he is less worried about that than about the chilling effect.

A judge stated that he is not too worried about a Red Cross amicus brief. Perhaps some measurement of the amount is needed. A disclosure that 100 people each gave $1000 is meaningless.

A different judge responded that there is a lot of power in crowdfunding, and it will be more common. Yet another judge asked what others thought about a 50% threshold for nonparty disclosure.

One judge responded that he wants to know whose voice is carrying the day; who is the specific person I'm listening to? The issue of crowdfunding is not necessarily implicated by the member issue. Ms. Spinelli agreed that crowdfunding presents a different issue.

An academic member asked how much difference in interest there is likely to be between the amicus and the funder? How much will anyone learn from a disclosure that Bob Barker funded a brief for PETA? In some instances, disclosure might be useful. But not in the mine run of cases. And disclosure may be very significant to donors. Consider a hot button issue in which FAIR is involved. The court knows what

the organization is and what it is saying. The risk of being bamboozled is quite low. If disclosure isn't crucial, don't require it.

A judge responded that the concern is with someone paying for *this* brief, not supporting the organization broadly.

The academic member replied that this depends on the details of how an organization does its fundraising, project by project or more generally. Compare this to a stranger showing up with a bag of cash.

Ms. Spinelli invited other judges to speak; perhaps some threshold would be appropriate?

One judge stated that while he understood the competing view, he was more inclined to the view expressed by the academic member. Disclosures would not do a lot of work for him, and he would worry about the collateral consequences.

Another judge member noted that there are two different motivating rationales involved. The first is that a membership exception allows for easy evasion: become a member. There may not be a practical solution for that. The second is that an amicus might be a mouthpiece for an undisclosed person. Based on the amicus briefs I get, I have a similar perspective as the judge who just spoke. Yet another issue, one that may be too difficult to deal with, is the concern that an individual might find multiple amicus briefs.

A judge suggested requiring disclosure if a person or entity funded more than one amicus brief (or more than *x* number of amicus briefs). An academic member stated that one difficulty with such an approach is that the disclosure comes from the amicus, and no one amicus may know this information.

Ms. Spinelli stated that more thought needs to be given to (d)(1) and suggested moving the discussion to (d)(2) and (d)(3). These are essentially similar to (c)(4) and (c)(5). Discussion draft (d)(2), like (c)(4), uses a 50% threshold. But (d)(2) uses a 40% threshold compared to the 10% threshold in (c)(5).

Two committee members have already said no to (d)(2) and (d)(3). These provisions go toward an issue that another committee member raised: getting a better understanding of who is behind the briefs and whether someone is single handedly creating what looks like a broad array of amicus briefs, but without earmarking contributions.

A lawyer member said that the interest goes beyond knowing. Cases where these entanglements have come to light gives the appearance of judges tolerating it and being hoodwinked. It erodes faith and trust in the judiciary.

Mr. Byron asked whether the disqualification rules require recusal based on anything that could be captured by these disclosures. Are there unidentified conflicts of interest? Ms. Spinelli stated that the subcommittee had not thought about that take on the issue.

An academic member stated that it's not clear what the disqualification rules require. If a judge owns stock in a company and that company submits an amicus brief does that require disqualification? If the company took out an ad in the New York Times it wouldn't require disqualification. There is some interest in informing the court, but submitting a brief is not a proper occasion for the public to get information it would like to know. Disclosure would not be required before an Op-Ed. How can one get at coordination without a much broader disclosure rule? Something perfectly legitimate—funding 18 animal rights cases—may look nefarious in hindsight. How can this be done without unnecessary disclosures?

Judge Bybee asked where this left us on (d)(2) and (d)(3). Ms. Spinelli stated that no one was really advocating for them. She suggested adding judges to the subcommittee.

Judge Bybee said that the discussion draft was useful so the Committee had something to shoot at. He thought the suggestion of adding judges was a good one and added three judges to the subcommittee. [This suggestion was reconsidered later to avoid the risk of a subcommittee that constituted a quorum of the full Committee.]

The Reporter stated that one point raised in the subcommittee report had not been discussed. One less intrusive way to deal with some of the concerns might be *caveat lector*: perhaps courts should be skeptical of amicus briefs that do not provide enough information to warrant trust.

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

Danielle Spinelli presented the report of the amicus subcommittee regarding a suggestion made by Dean Morrison. (Agenda book page 205). She explained that Rule 29(a)(2) permits a court to prohibit an amicus brief or strike it if the brief would result in a judge's disqualification. It is not clear what the standards for recusal based on an amicus brief are. Dean Morrison suggests that guidelines be developed. The subcommittee does not think that this is within the purview of this Committee.

Judge Bybee asked the Clerk of Court representative if she ever sees this. She replied that it happens occasionally, mostly at the en banc stage.

A liaison member stated that the test of recusal regarding an amicus is multifactored. The Code of Conduct Committee struggles with it. There are no bright lines. It is wise for this Committee to avoid.

A judge member noted that there was also a separate proposal submitted about this issue. The Reporter described that proposal, which was submitted after the agenda book had been prepared. The Reporters Committee for Freedom of the Press suggests that when a court prohibits or strikes an amicus brief under Rule 29(a)(2) that the court identify the amicus or counsel that would cause disqualification.

Judge Bybee noted that such identification might make it possible to reverse engineer to determine the judge who would be disqualified. A liaison member stated that this was for the Code of Conduct Committee; there is no requirement that judges give reasons when recusing. A judge member stated that the proposal doesn't call on anyone to state the reason for the recusal. It doesn't call for the identification of the judge, just the reason for the rejection. Someone invests time and resources into an amicus brief, and the court strikes the brief because of 1 of 500 lawyers at a firm. This proposal doesn't step on the Code of Conduct Committee. The liaison member replied that it is a backdoor way to get reasons for recusal articulated.

Mr. Byron asked if a judge's recusal list is public. Ms. Dwyer said no. The Code of Conduct Committee is considering more transparent ways, but that may take years. The annual financial statement will be more available. Mr. Byron said that will go a long way to deal with this issue. Presumably counsel know about family relationships.

Judge Bybee referred this new proposal to the amicus subcommittee, noting that a suggestion had been made to add judges to that subcommittee.

Judge Bates cautioned that before the subcommittee meets, its size should be considered. [As noted earlier, for this reason, Judge Bybee reconsidered the expansion of the subcommittee.]

C. Costs on Appeal—Rule 39 (21-AP-D)

Judge Nichols presented the report of the subcommittee on costs on appeal. (Agenda book page 213). He began by noting the basic operation of Rule 39(a), which provides the default rule for allocating costs on appeal. Rule 39(d) deals with costs that are taxed in the court of appeals; Rule 39(e) deals with costs taxed in the district court. Rule 39(e)(3) provides that the premium paid for a bond to preserve rights pending appeal is taxable in the district court because it arises out of activity in the district court. The bond is approved in the district court in order to get a stay of the district court judgment pending appeal.

In *Hotels.com*, discussed at page 215 of the agenda book, the Supreme Court held that a district court cannot reallocate the costs under Rule 39. The Court relied on both the text of the Rule and the idea that the court of appeals should decide who really prevailed on appeal. The Court also noted that the current rules could be clearer.

The subcommittee investigated how big a deal this is. After polling the circuit clerks, it seems that disputes about costs on appeal do not arise often. But the costs for a bond can be quite high. If a plaintiff obtains a $100 million judgment, and a defendant pays $1 million for a bond to stay enforcement of that judgment and prevails on appeal, the plaintiff doesn't want to pay that million dollars.

Three points of background. First, the mandate of the court of appeals is not delayed for the taxation of costs. Second, the bill of costs for costs taxable in the district court is filed in the district court. Third, by the time a bill of costs is filed in the district court, the time to seek rehearing in the court of appeals is long gone.

A judge noted that a plaintiff can see this coming and do something about it.

Judge Nichols agreed but noted that the Supreme Court said that the mechanism to do so can be clearer. And the worry is that a prevailing plaintiff in the district court may not know how much the premium was; nothing requires disclosure. For that reason, the subcommittee recommends a joint amendment.

First the Appellate Rules would make clearer that a party can file a motion seeking reallocation of the costs. But what if the party doesn't really know what the costs were? It's anomalous to ask the court of appeals to reallocate the costs without knowing what the costs are.

For that reason, the second step would be an amendment to Civil Rule 62. That Rule currently requires the district court to approve the bond and could be amended to also require disclosure of the costs of the bond. That way, when the district court approves the bond, everyone knows the premium that the prevailing party in the district court might eat if the judgment is reversed—so the loser in the court of appeals can seek reallocation of costs.

The subcommittee considered providing for a motion in the court of appeals to reallocate costs after the bill of costs is filed in the district court. But at that point the mandate has already issued.

The subcommittee's approach makes clear what is already true, but in a context where parties know. This requires only a modest edit to Appellate Rule 39(a) to make express what is currently true. Its proposal is contingent on an amendment to Civil Rule 62 that increases transparency.

The Reporter added that the plan would be to hold the Appellate Rule amendment until we see what the Civil Rules Committee thinks.

A judge member asked if the court of appeals could allocate the cost of the premium in some way other than 50/50. Judge Nichols responded that a court of

appeals could allocate the cost between the parties anywhere from 0 to 100 percent. Or it could direct the district court to deal with the allocation issue.

A judge member asked why there was a need to coordinate with Civil. Judge Nichols responded that while we could amend Appellate Rule 39(a) without any change to the Civil Rules, there is no immediate problem, no need to rush, so no harm with dealing with both together. Mr. Byron added that sophisticated litigants negotiate when the district court is considering approval of the bond, but some plaintiffs may not recognize the risk. A coordinated effort is a good goal that can avoid surprising outcomes.

A judge member stated that Judge Nichols had done a great job and seconded his views. It should be usual for counsel to talk to each other. The issue doesn't arise often, but there is some case law that sends the issue back to the district court. This is a simple practical fix that depends on a fix to the Civil Rules. Two or three motions a year isn't much, but it can be a lot of dough. There is no urgency.

An academic member stated that the subcommittee had done a terrific job. It's a good idea even if Civil doesn't act. Judge Nichols said that he didn't disagree.

Judge Nichols then turned to the last part of the subcommittee memo. (Agenda book page 219). The proposal we have been discussing assumes that it is lawful to tax the premium for a bond as a cost at all. The Solicitor General sent an email last night suggesting that this is a difficult question; the Solicitor General appears to take a different view than that of the Seventh Circuit and Wright & Miller. A footnote in *Hotels.com* notes but does not consider the argument that a Rule cannot shift costs other than those authorized by 28 U.S.C. § 1920. This is a very difficult substantive question; we can do these amendments without taking a position on the underlying question. The Solicitor General is not suggesting that we take up this issue right now. It is not crystal clear that the Seventh Circuit is right. If the Committee decided to eliminate (e)(3), the issue is irrelevant. Or we can stay with the current plan and do nothing more regarding the question of authorization.

Professor Struve raised a question about timing. Perhaps a party should be able to seek this relief until the mandate has issued. Judge Nichols responded that the subcommittee set the same 14-day deadline for a motion to reallocate costs as the existing rule uses for a party to file a bill of costs in the court of appeals.

An academic member asked about the relationship between these two 14-day rules. Judge Nichols stated that (d)(1) addresses costs that are taxed in the court of appeals; that bill of costs has to be filed within 14 days after entry of judgment in the court of appeals. Here, we are talking about costs that are taxable in the district court under (e). The academic member suggested that perhaps the new provision belonged in (e). Judge Nichols stated that not a lot of thought had been given to the placement question.

The Reporter stated that Rule 39(a) governs the allocation of all costs, both those taxed in the district court and in the court of appeals. Judge Nichols observed that the court of appeals could set a different allocation for different costs, particularly a different allocation for the premium for a bond than for other costs.

A judge member suggested a separate provision.

The Reporter stated that Rule 39(a) deals with allocation, while (d) and (e) deal with calculation. Mr. Byron suggested framing the provision more broadly because, as the issue is more in the public eye, more might come to light, so we shouldn't say that they are off the table.

The academic member thought that the explanation of the distinction between allocation and calculation made sense. He suggested that the deadline for a motion for reallocation be filed either 28 days after judgment or 14 days after the bill of costs is filed under (d)(1), whichever is later. That way, a party knows whatever is on the table.

Judge Nichols asked whether the Committee agreed that we should not take up the underlying question of the authority to tax the costs of a bond at all. A judge member agreed, and no one disagreed.

Judge Nichols said that the subcommittee would resume its work, including dealing with the issue of placement of the new provision.

The Committee then took a break for lunch.

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

After Judge Bybee thanked the Rules staff for putting together a lovely lunch, Lisa Wright provided the report of the IFP subcommittee. (Agenda book page 223). She explained that the subcommittee has been looking into IFP status and Form 4, particularly ways to make Form 4 less intrusive.

The underlying statute, 28 U.S.C. § 1915, had been interpreted to permit a barebones affidavit, but subsequent forms called for more detail. As amended by the Prison Litigation Reform Act, the statute now authorizes IFP status for a "person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor," switching midsentence from "person," to "such prisoner," and back to "person."

This is not just an issue for the Appellate Rules; the Supreme Court Rules incorporate Form 4 of the Appellate Rules. The district courts, on the other hand, use AO Forms. The CJA-23 used in criminal cases is simpler than Form 4.

Sai made suggestions to multiple committees regarding the standards for IFP status and the forms used. Civil decided not to pursue uniform standards. Criminal expressed some interest, particularly regarding habeas cases. This Committee has been most active because Form 4 is promulgated under the Rules Enabling Act. It is not clear that the Rules Enabling Act can be used to establish standards for IFP status. The subcommittee has focused on Form 4.

The existing Form 4 is extremely detailed, asking for items such as laundry and dry-cleaning expenses. Lisa Fitzgerald from the Ninth Circuit Clerk's Office sent around a request for information to counterparts in other circuits and got a great response. It appears that IFP status is rarely denied by courts of appeals because of insufficient indigency. It is denied far more often for frivolity. That's a reason to make the required statement of reasons more prominent on the form. Most cases aren't close; the forms have lots of zeros. There is no uniform standard. The forms are more detailed than needed. Perhaps something like CJA-23, or something in between the existing Form 4 and CJA-23. One circuit noted that it sometimes looks at whether particular expenses, such as entertainment, are excessive.

The subcommittee considered some threshold questions that if the applicant answered yes, the rest of the form would not need to be completed. But by making the rest of the form simple enough, there was no need for this. The draft form (Agenda book page 226) asks questions about means-tested programs (keyed to federal poverty guidelines) and does not seek spousal information. Sai's points are generally well taken.

There is a question whether asking, as the draft form does, "What are your total assets?" is sufficient to comply with the statute. Perhaps some big-ticket items should be broken out.

In response to a question from Judge Bybee, Ms. Wright stated that the subcommittee tried to come up with a form that provided the information that courts actually use without being so intrusive.

An academic member stated that this was great, and he was glad to see less detail. He wondered why information about the household was not sought. He also suggested a more aggressive view of rulemaking authority under 2072 to formalize standards that are informally applied so people know what they are.

Ms. Wright responded that the idea was to focus on the individual applicant and not assume that other money in the household is available. Sai is particularly concerned about questions about a spouse and the idea that one spouse has to fund litigation by the other. The public assistance questions get at the notice issue.

In response to a question by Judge Bybee, Ms. Dwyer stated that she has never seen a close case; it's rare for the form to show anything. Staff attorneys provide recommendations to panels; judges get the underlying forms only if they ask.

Mr. Byron asked if there are forms better than Form 4 that are currently used. Ms. Wright stated that lots of courts do use Form 4. Ms. Dwyer added that the draft is like the Ninth Circuit form and would help. Form 4 is available to the public and is unnecessarily revealing.

Professor Struve said that she really liked the idea of the first three questions but noted that Medicaid is called by different names in different states.

Judge Bybee said that the plan from here was to ask the clerks again and consult with the Supreme Court. Ms. Wright stated that an old agenda book indicated that a prior Clerk of the Supreme Court, General Suter, wanted more details in the form. Perhaps the pendulum has swung.

Judge Bybee asked if there was any effect on the Civil Rules. Professor Struve responded that no coordination with the Civil Rules Committee was required, but Supreme Court Rule 39 incorporates Appellate Form 4.

The Reporter asked whether the Committee thought it was generally a good idea. He clarified that after circling back to the Circuit Clerks, it would be necessary to check with the Supreme Court Clerk before moving forward. Ms. Dwyer added that the senior staff attorneys would be the appropriate people to consult.

Judge Bybee confirmed that all of the subcommittee chairs have enough information from the Committee.

VII. Discussion of Matters Before Joint Subcommittees

The Reporter stated that he had nothing new to report regarding (1) the joint subcommittee considering the midnight deadline for electronic filing, and (2) the joint subcommittee considering the final judgment rule in consolidated actions. (Agenda book page 230).

The Reporter did have an update on the project regarding electronic filing by pro se litigants that is currently being addressed by the reporters acting jointly. The Federal Judicial Center provided the reporters with a draft report that is not yet ready for publication but will eventually be published. The draft report makes several important distinctions:

1) case initiation compared to subsequent filings;

2) filing via ECF compared to other kinds of electronic submission;

3) submissions by prisoners compared to others;

4) distinctions among appeals, civil cases, criminal cases, and bankruptcy cases.

The FJC survey reveals that some courts of appeals generally permit pro se litigants to use ECF, and all do at least sometimes. In general, courts that have allowed ECF filing find that the reality is better than their fears.

There is a question whether the matter of electronic submission is best handled by rules or something else, such as CACM, shared templates, and shared software.

Another issue is the requirement of service on those who are using ECF. Since the submissions by a non-ECF filer are placed on ECF by the clerk's office, an ECF user gets served via ECF. Is there a need for other service?

In response to a question about the distinction between case initiation and subsequent filings, the Reporter noted a concern with making it too easy to file new cases. Professor Struve noted that even with lawyers there are problems with electronic case initiation and if the process is begun but not completed, there can be a docket number with no case, making it look like a sealed case is in the system.

Professor Struve alerted the Committee to an issue that may require coordination with the Bankruptcy Rules Committee. In some cases, appeals can go directly from a bankruptcy court to a court of appeals. The Bankruptcy Rules Committee is looking to make clear that when such an appeal is certified as permitted under 28 U.S.C. § 158(d)(2) any party may ask the court of appeals to authorize the appeal. That approach does not fit neatly with Appellate Rule 5. A lawyer member said that she does lots of bankruptcy appeals and that while the idea sounds weird at first blush, it is not a terrible idea.

VIII. Discussion of Recent Suggestions

The Reporter noted that three comments have been received regarding amicus disclosures. (21-AP-G; 21-AP-H; 22-AP-A). Because there has not yet been a proposal published for public comment, these comments have been docketed as new suggestions. The amicus subcommittee treated these comments as intended, and they were referred to that subcommittee.

In addition, another new suggestion was received after the publication of the agenda book. (22-AP-B). This new suggestion came up earlier in the meeting in connection with the discussion of amicus briefs and disqualification; the suggestion is that when an amicus brief is not allowed to be filed or is struck under Rule 29, the court identify each amicus or counsel that would cause the disqualification.

IX. Review of Impact and Effectiveness of Recent Rule Changes

The Reporter stated that Judge Chagares had added this as a regular item on the agenda. For this meeting, the agenda book contains a table of amendments to the Appellate Rules that have taken effect since 2018. (Agenda book page 236). The Committee did not raise any particular concerns.

X. New Business

The Reporter stated that Professor Sachs had suggested that the Committee be alerted to the recent Supreme Court decision, *Cameron v. EMW Women's Surgical Center*. In that opinion, the Supreme Court observed that there is no Appellate Rule dealing with intervention on appeal. Professor Struve noted that the Committee had looked into this issue in 2010 but did not move forward; it may be time to think about it again. Other members agreed. Judge Bybee asked Professor Struve to circulate the material from that prior consideration.

XI. Adjournment

Judge Bybee thanked the participants, both in person and on camera, and acknowledged how valuable everyone's time is. But gaps and ambiguities in the Rules can impose litigation costs on parties. If we can save these costs on the American people, we've done our job.

The next meeting will be held on October 13, 2022, in Washington D.C. Judge Bybee hopes to see everyone there.

The Committee adjourned at approximately 2:10 p.m.