Minutes of the Fall Meeting of the

Advisory Committee on the Appellate Rules

October 19, 2023

Washington, DC

Judge Jay Bybee, Chair, Advisory Committee on the Appellate Rules, called the meeting of the Advisory Committee on the Appellate Rules to order on Thursday, October 19, 2023, at approximately 9:00 a.m. EDT.

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

Also present in person were: Judge John D. Bates, Chair, Standing Committee on the Rules of Practice and Procedure; H. Thomas Byron, Secretary to the Standing Committee, Rules Committee Staff (RCS); Alison Bruff, Counsel, RCS; Shelly Cox, Management Analyst; Bridget M. Healy, Counsel, RCS; Zachary Hawari, Rules Law Clerk, RCS; Professor Catherine T. Struve, Reporter, Standing Committee on the Rules of Practice and Procedure; and Professor Edward A. Hartnett, Reporter, Advisory Committee on the Appellate Rules.

Judge Daniel Bress, Member, Advisory Committee on the Bankruptcy Rules and Liaison to the Advisory Committee on the Appellate Rules; Andrew Pincus, 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; Professor Daniel R. Coquillette, Consultant, Standing Committee on the Rules of Practice and Procedure; and Tim Reagan, Federal Judicial Center, attended via Teams.

I. Introduction and Preliminary Matters

Judge Bybee opened the meeting and welcomed everyone, particularly the new members of the Committee, Judge Sidney Thomas, George Hicks, and Linda Coberly, and the new Rules Law Clerk, Zachary Hawari. He noted that Justice Leondra Kruger was unable to attend and was excused. He also welcomed the observers, both those in person and those online. He also gave special thanks to Danielle Spinelli, whose term has expired, for her many contributions.

Judge Bybee stated that Tab 1 of the agenda book included various background materials. He noted that Tab 2 included the minutes and report of the Standing Committee meeting in June of 2023, and called attention to pages 46-53 of the agenda book, which contains the minutes of that meeting that involved the Appellate Rules. He reported that this Advisory Committee brought three action items to the Standing Committee and that all three were approved: Amendments to Rules 35 and 40 (dealing with rehearing) were given final approval, and amendments to Rule 39 (dealing with costs) and to Rule 6 (dealing with bankruptcy appeals) were approved for publication.

II. Approval of the Minutes

The minutes of the March 29, 2023, Advisory Committee meeting (Agenda book page 110) were approved.

III. Discussion of Joint Committee Matters

Professor Struve presented an update regarding two joint committee matters, electronic filing and service for unrepresented parties (Agenda book 132) and establishing an earlier deadline for electronic filings. (Agenda book 152).

A. Unrepresented Parties; Filing and Service

The working group considering the issue of electronic filing and service for unrepresented parties has been focused on both the issue of increasing access to some kind of electronic filing (ECF or an alternative) and the issue of reducing the burden of serving documents (other than process). Interviews with district court employees from nine districts informed the discussion. The consensus of the working group is that there is no need for unrepresented litigants to serve paper copies on other parties because those other parties receive a notice of electronic filing (NEF) once the papers filed by an unrepresented litigant are placed on ECF. Professor Struve is not presenting a sketch of what a rule change implementing this idea would look like at this meeting. That's because the working group is considering a broader revision that would reflect the reality that pretty much everything is being served electronically today. A sketch will follow at a later meeting. As for access to electronic filing, there are varied reactions. One possibility for a national rule would be to require that all districts at least allow for reasonable exceptions to any general bar on electronic filing by unrepresented litigants. The courts of appeals nationally are further along in permitting electronic filing and may not take this approach. Professor Struve asked anyone with suggestions for drafting to send them to her, noting that the true skeptics of broader access are not on this committee.

Mr. Freeman wondered whether the working group was considering the systems that are replacing EM/ECF in some courts, prompting questions about the new systems. Ms. Dwyer stated that they are working on it in the Ninth Circuit. She

added that she doesn't understand the reluctance in some district courts to electronic filing. She noted that they have not had problems with it in the Ninth Circuit.

B. Earlier Deadlines (19-AP-E)

Professor Struve thanked Judge Bybee for chairing the joint subcommittee dealing with the suggestion that the midnight deadline for electronic filing be moved to an earlier time than midnight. The Federal Judicial Center conducted two terrific studies compiling data regarding time of filing. In addition to this research, there is a recent development: In July of 2023, the Court of Appeals for the Third Circuit promulgated a local rule establishing a 5:00 p.m. deadline. Taking all this into consideration, the joint subcommittee recommends that no action be taken and that it be disbanded. The Bankruptcy and Civil Rules Committees have removed the suggestions from their agenda. A new and distinct suggestion regarding the deadline for electronic filing in the courts of appeals is later on the agenda.

Judge Bybee noted that the recommendation that the joint subcommittee be disbanded is directed to the Standing Committee. He invited a motion to remove suggestion 19-AP-E from this committee's agenda. That motion was made and approved unanimously. Judge Bybee voiced his approval of this experiment in inter-circuit federalism; we will see how it works out.

C. Social Security Numbers in Court Filings (22-AP-E)

Mr. Byron provided an oral update regarding the suggestion by Senator Wyden that courts require the complete redaction of social security numbers, not simply redaction of all but the last four digits. This poses the most serious issue in bankruptcy, and other advisory committees have to date allowed the Bankruptcy Rules Committee to take the lead. At this point, however, it appears unlikely that the Bankruptcy Rules Committee will propose amendments requiring full redaction, raising the question of whether the value of consistency across the various sets of rules outweighs the value of proposing amendments that would require full redaction in the Civil, Criminal, and Appellate Rules. Because Appellate Rule 25 incorporates the other rules, it is probably not necessary to amend the Appellate Rules.

The Reporter added that he had been unable to imagine an appellate case in which it would be necessary for a publicly filed brief or appendix to include a social security number. He invited committee members to let him know if they imagined such a case. He noted that in the rare case where it might be necessary for the judges to know the social security number, it could be filed under seal.

IV. Discussion of Matters Published for Public Comment

The Reporter provided a report about two matters that have been published in August of 2023 for public comment: proposed amendments to Rule 6 (dealing with bankruptcy appeals) and Rule 39 (dealing with costs). (Agenda book page 165).

No comments have been received yet. The comment period will be open until February of 2024 and comments are likely to be submitted and considered by the relevant subcommittees before the spring meeting. Because Danielle Spinelli's term has expired, a new member of the Bankruptcy Appeals Subcommittee is needed. Judge Bybee appointed George Hicks.

In response to a question from the Reporter, Mr. Byron noted that the Civil Rules Committee briefly considered this Committee's request that Civil Rule 62 be amended to complement the proposed amendment to Appellate Rule 39. On the one hand, there was some skepticism of the need for such an amendment because the issue rarely arises. On the other hand, it was also recognized that even if the issue arises rarely, there is value in making a simple change that is not likely to have adverse unintended consequences. Mr. Byron added that, from his perspective, it would be useful to provide guidance or feedback about why it might be valuable. Judge Bates added that while the issue does seem to be rare, there does seem to be an easy fix. He suggested that it would be helpful for the reporters for the Appellate and Civil Rules Committees to talk further about the need for an amendment.

V. Discussion of Matters Before Subcommittees

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

Judge Bybee presented the report of the amicus disclosure subcommittee. (Agenda book page 168). He noted that we have been working on this for several years and called attention to the minutes of the discussion of the issue at the June 2023 Standing Committee meeting. (Agenda book 49-52). The subcommittee met and had a vigorous and extensive discussion.

The first issue on the table involves working draft Rule 29(b) on page 174 of the agenda book. Draft 29(b)(1) and (b)(2) are basically in the existing rule. Draft 29(b)(3) is new but has not provoked much controversy. Draft 29(b)(4) is new and requires the disclosure of certain contributions by parties to an amicus. The current focus is on the look-back period for determining what needs to be disclosed. Using a 12-month period before the filing of the brief could be burdensome, but using the prior year could miss the very sort of contributions of most concern.

The subcommittee believes that it has found an elegant solution: use the prior fiscal year to determine the disclosure threshold, but the 12-month period before filing the brief to determine what contributions need to be disclosed. An amicus looks

at its revenue for the prior fiscal year, calculates 25% of that amount, and then sees whether a party has contributed more than that amount in the 12 months before filing the brief. Both periods are used, but in different ways. The math is pretty simple, even if it sounds more complicated in the form of a story problem.

A judge member asked whether the term "revenue" adequately captured how nonprofits are funded, raising a concern about whether contributions count as revenue for tax reporting. The Reporter stated that he thought that the term "gross revenue" in the working draft included contributions. A liaison member stated that from an accounting perspective, contributions are revenue and suggested that the Committee Note make clear that this is the sense in which the term is used. A lawyer member said that IRS Form 990 used the term "gross receipts" and that this might be a broader term; it would be helpful to consult tax folks and clarify in the Committee Note. An academic member asked if this excluded endowment income; the Reporter answered that the subcommittee had not thought about that question. Judge Bybee observed that this could vastly increase the denominator, and the academic member added that this would be true for a small number of amici.

A lawyer member asked if the Standing Committee had commented on the question of how prevalent a problem there is, especially with regard to parties. The Reporter stated that the issue of whether there is a sufficient problem to warrant a rule change has been a recurrent issue at every step of the process. A liaison member added that while the problem does not really occur with parties, it would be odd to have a rule that addresses nonparties and not say anything about parties. Judge Bates agreed with the Reporter that the broad question of whether there is a sufficient problem to warrant a rule change has been with us at every step, but not focused exactly the way that the lawyer member did.

A judge member stated that he had raised the question when he first joined the Committee. He found that there was broad agreement that we would not want parties funding an amicus without judges knowing about it, but less broad agreement regarding nonparties. There is a disconnect: There may not be an actual problem with party behavior, but agreement that we should know if it does happen; there may be more of an issue with nonparty behavior, but less agreement about what to do about it. Judge Bates added that the current rule addresses both parties and nonparties.

A judge member stated that he liked the concept of the two different look back periods. The right language needs to be found to cover profits, nonprofits, endowments.

Judge Bybee then turned to a different topic: the relationship between a nonparty and an amicus. The current rule exempts all members of an amicus from the need to disclose earmarked contributions. This opens a loophole: someone can join an amicus at the last minute to avoid disclosure. The current rule also has no dollar threshold; all earmarked contributions by nonmembers must be disclosed.

The draft rule sets a $1000 threshold for disclosure, thereby enabling crowd funding. It also retains the member exception—but limits that exception to those who have been members for at least 12 months, thereby closing the loophole. That approach raises a new issue: What if the amicus is not that old? Rather than subject a new amicus to the 12-month membership requirement, and lose all member protection, a new amicus need not disclose contributing members, but must disclose the date it was created. This dovetails with the new requirement in draft Rule 29(a)(4)(D) to describe the history of an amicus. In response to a question by Judge Bates, Judge Bybee agreed that a trade association that is totally funded by its members would not have to disclose its members.

A lawyer member raised a concern about recently joined members not having the protection of members, noting that a trade association might want broader participation but that what acts as a trigger for some to join is an amicus brief. They might not join in order to fund the brief, but the brief might be what leads them to join the association. The Reporter responded that this draft rule requires the disclosure only of earmarked contributions. A liaison member stated that the draft rule provides a pretty elegant solution to the member problem, avoiding the problem that eliminating the member exclusion would disadvantage certain kinds of organizations that have to pass the hat for amicus briefs. As a drafting matter, it should be "fewer" than 12 months.

A judge member agreed that the approach in the working draft makes sense. An academic member urged further thought to the astro-turfing problem in that founding members are never disclosed. A lawyer member responded that the rule has been limited to earmarked contributions.

A liaison member observed that an amicus has an incentive to show a broad base so that if, in its self-description, it failed to say anything about how many members it had, that would raise a red flag. He also thought that the $1000 threshold was too high, and perhaps there should be different thresholds for members and nonmembers. A lawyer member agreed that the amount should be lower.

The Reporter asked for suggested dollar amounts. Judge Bates asked how much more disclosure would be captured by drawing a distinction between members and nonmembers and whether it would produce drafting problems in a rule that is already long and complicated. Judge Bybee observed that the draft effectively treats recent members as non-members. A lawyer member suggested $100 or $500 as a threshold.

Judge Bates urged the Committee, when presenting a proposal to the Standing Committee, to address First Amendment concerns as carefully as possible. The Reporter noted that the subcommittee has kept those concerns in mind at every step and agreed that a proposal should be explicit about addressing these concerns.

Judge Bybee then turned to working draft Rule 29(a)(2) which largely follows a recent amendment to the Supreme Court's rules in eliminating the requirement of a motion (or party consent) to the filing of an amicus brief. At the last meeting of this Committee, a concern was raised that allowing an amicus brief to be filed so long as it brings to the court's attention "relevant matter" that the parties did not would run the risk of inviting amicus briefs raising waived or forfeited issues. To meet this concern, the working draft adds the requirement that the matter not only be relevant but that it be "properly considered by the court." The Reporter explained that the idea was to avoid trying to specify in the rule text what was and was not properly considered, but mention things such as waiver, forfeiture, judicial notice, and legislative facts in the Committee Note.

Mr. Freeman said that he was skeptical of the utility of the subcommittee's addition and feared that it would invite motions to strike. He also wondered how it would apply to a classic Brandeis brief. While he has some concerns about the language from the Supreme Court rule ("relevant matter"), he would not add anything further. A lawyer member stated that the subcommittee's language would create more problems than it would resolve and risk weaponizing motions to strike. Judge Bates added that judges might disagree about what is properly considered.

Judge Bybee suggested, as a drafting matter, that (a)(3) might be folded into (a)(2).

A judge member noted that he was late to the game but feared that allowing the filing of amicus briefs without either a motion or consent would force the recusal of lots of judges, particularly at the petition for rehearing en banc stage. He feared that an amicus could target a filing so as to require recusal. Striking the brief later is not a remedy; when a petition for rehearing en banc has been filed, there is no entity to strike the brief. The case is in between the panel and the en banc court and neither is in a position to strike the brief.

Mr. Freeman noted that the existing rule, which permits filing on consent, would seem to present the same problem. The judge member responded that he would prefer to eliminate that option as well, requiring leave of court in all instances, but that consent filing poses less of a problem. He also noted two other kinds of problematic amicus briefs: 1) a letter to the editor style of amicus brief from a concerned citizen and 2) a brief submitted by lawyers for marketing purposes so they can say on their website that their amicus briefs were accepted in various courts.

Mr. Freeman suggested that a distinction could be drawn between the panel stage and the en banc stage. A liaison member agreed, noting that in most circuits the identity of the panel isn't revealed in time to file an amicus brief. The judge member acknowledged that the problem was mostly at the en banc stage, but that it can happen at the panel stage, such as when a panel takes a comeback case.

A different judge member stated that in 20 years he hasn't had a problem at the panel stage, while there have been some at the en banc stage, although not targeted. He preferred the existing rule; there is no trouble; why is there a need to change it?

In response to a question from Mr. Byron, the judge who first raised this concern explained that the real problem is the netherworld: once the court calls for a response to a petition for rehearing en banc, it waits for the en banc vote. A panel would not act on a motion. For that reason, empowering the court to prohibit a filing wouldn't help; there is no entity to do it. The way it works now is that no one acts on the motion until the en banc court is assembled. Then leave can be denied.

Judge Bates noted that it is worthwhile to look at this issue again. There seems to be a difference between the en banc and panel stages. The judge who raised the issue agreed, adding that the only reason to change is conformity to the Supreme Court; there is no great need. It's not a big deal to grant leave, and it would be nice to be able to reject letters to the editor. Ms. Dwyer agreed that the current rule does not present a problem, but there would be a problem with the proposed change. The rest of the proposal is complicated enough; don't change this.

A liaison member noted that there is a difference between filing an amicus brief in the Supreme Court and in the court of appeals. In the Supreme Court, the brief must be printed. That speed bump does not exist in the court of appeals.

The judge who raised the issue emphasized the need, at the minimum, to leave the existing procedure at the rehearing stage.

Judge Bybee then stated that the subcommittee had considered whether to address amicus briefs at other stages, such as stay applications, but decided not to do so. Mr. Freeman noted that this consideration was in response to his comment at the last meeting and that he does not disagree with the subcommittee's conclusion. Mr. Byron asked if the subcommittee had considered amicus briefs after a petition for rehearing en banc is granted; the Reporter answered no. A lawyer member noted that if the rule is not going to address amicus briefs at the stay stage, it should not address amicus briefs after rehearing en banc is granted. Judge Bybee agreed that we should not start down the road of all permutations.

The amicus subcommittee also needs a new member because of the departure of Danielle Spinelli. Judge Bybee appointed Linda Coberly.

The Committee then took a short break before resuming at approximately 11:00 a.m.

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

Mr. Freeman presented the report of the intervention on appeal subcommittee. (Agenda book page 177). He thanked the Reporter for the memo and draft rule, which provides a good basis for discussion.

Mr. Freeman explained that the problem is that there is no existing Federal Rule of Appellate Procedure governing intervention on appeal, unlike the Federal Rules of Civil Procedure which treat intervention as of right and permissive intervention separately in Civil Rule 24. FRAP 15(d) refers to intervention on appeal obliquely but provides no standard. In the absence of a governing Federal Rule of Appellate Procedure, most courts reason by analogy to Civil Rule 24. But the analogy is imperfect. Plus, Civil Rule 24 is ambiguous in key respects, particularly regarding what "interests" are sufficient to support intervention. There is a wide variety of views. If we tracked Rule 24, we would duplicate that ambiguity.

Why address this issue now? The Supreme Court has specifically noted that no Appellate Rule governs intervention on appeal. Twice in recent years it has granted cert to address intervention on appeal, but both cases mooted out for different reasons. An academic brief filed in the *Mayorkas* case suggested rule making and included a list of items that rule makers might consider.

The philosophy of the subcommittee is to avoid encouraging circumvention of district court discretion or the standard of review, to not replicate the ambiguity of Civil Rule 24, and to track the existing gestalt of court of appeals decisions. Those decisions, going back to the 1962 *McKenna* decision in the Fifth Circuit, speak at a high level of generality, reserving intervention on appeal to exceptional cases for imperative reasons. A rule could usefully provide more content.

Mr. Freeman then turned to the working draft on page 182 of the agenda book. It is not clear where a new rule governing intervention should go; the working draft numbers it Rule 7.1, placing it with other rules governing preliminary stages. It is designed to narrowly permit intervention on appeal without replicating the ambiguity in Civil Rule 24 or taking a position on the proper interpretation of Civil Rule 24.

Draft Rule 7.1(a) makes intervention as a party disfavored, preferring amicus status. It requires that a motion to intervene be filed promptly, show that the requirements of (b) are met, and explain the movant's legal interest required by (c). Rule 7.1(b) tracks some of the requirements in Civil Rules 19 and 24; it also requires that intervention not create a problem with diversity jurisdiction under section 1367. Rule 7.1(c) addresses what interests support intervention and draws from an article written by Professor Caleb Nelson, an article that was addressed to intervention in district court. Rule 7.1(c)(3) and (4) address the most traditional interests: claiming an interest in property and situations where a claim is being litigated on behalf of the

proposed intervenor in a representative capacity. Rule 7.1(c)(1) and (2) are more different; a proposed intervenor cannot rely simply on the precedential effect of a decision but must have an existing claim or defense or contingent claim. Rule 7.1(d) contains special provisions for governments, permitting intervention to defend a law or government action, and permitting agencies or officers to do so where authorized by law. These intervenors need not comply with the other provisions of the Rule, except as to timeliness. Rule 7.1(e) permits the court to transfer the motion to the district court to address contested factual issues and provides that if the court grants the motion to intervene, the intervenor becomes a party for all purposes, unless the court orders otherwise. Finally, it makes clear that denial of intervention does not preclude the filing of an amicus brief.

Judge Bates asked if the reason the Committee previously decided against creating such a rule was the risk of unintended consequences. Mr. Freeman stated that his recollection was that there was a fear that a rule would encourage more motions to intervene. He noted that the government was internally riven because some still have that fear. Mr. Byron added that the genie is out of the bottle; the Supreme Court has granted cert on the issue.

Professor Struve thanked the subcommittee and the Reporter for sorting through the questions. She thought it made sense to decouple intervention on appeal from Civil Rule 24, but also thought that the Committee Note should make clear that someone is better off trying in the district court and appealing rather than simply seek to intervene on appeal. An analogy could be made to the need to seek a stay in the district court before seeking one in the court of appeals. She also suggested that federally recognized Indian tribes be included in 7.1(d); the definition of "state" in FRAP 1(b) does not include tribes.

Judge Bates asked if a motion transferred to the district court under 7.1(e) would be governed by FRAP 7.1 and not Civil Rule 24. Mr. Freeman said yes and added that there is a mandate issue to be addressed.

A liaison member echoed prior comments that this is a terrific effort to identify the issues. He stated that the language in Rule 7.1(c) is difficult to parse and wants it to be clear that where a private party saw no need to appeal because it was fully represented by the government but then this was no longer true, intervention would be permitted.

A different liaison member asked what was meant by the provision in Rule 7.1(e) that intervention would be for all purposes unless the court orders otherwise. Mr. Freeman stated that it preserved the discretion of the court to allow intervention for a limited purpose, such where a party's interest is limited to an injunction (and not damages) or to a constitutional issue (but not a statutory issue). The Reporter added that it is designed to establish a clear default rule that, unless the court orders otherwise, intervention on appeal carries over to the case on remand.

Mr. Freeman turned to the issue raised by the liaison member about changes in the government's position. He observed that most recent cases are like that, but they aren't the only ones. It is commonplace for the favored party in an administrative proceeding to intervene on appeal to defend the agency action. Are the standards in (c) adequate for that situation, or do we need different standards in such cases? Timeliness may be different under different statutory schemes. In addition, there are also some statutes that mandate intervention, such as 35 U.S.C. § 143. Language should be added like intervention as of right under Civil Rule 24(a). There are also situations where foreign sovereigns are sued, and the United States intervenes to protect the foreign policy interests of the United States. If a new rule is created, we need to be aware of this.

A judge member asked what is meant by "promptly" in Rule 7.1(a). Mr. Freeman responded that there were two notions of timeliness in the working draft. Rule 7.1(a) focused on timeliness from the docketing of the appeal; Rule 7.1(b)(1) focused on timeliness in the overall litigation. The judge member suggested specifying a specific time after a specific event, such as 30 days after docketing or 7 days after the principal brief. It shouldn't be allowed so late that it would enable someone to intervene after the panel decision in order to petition for cert independent of the parties. A liaison member suggested that timeliness could be measured from a change in circumstances. An academic member suggested after both briefs are filed. A lawyer member suggested that timeliness is captured by (b)(1) and that (a)(1) may not be needed. Another lawyer member agreed that (b)(1) can do some work and noted that Civil Rule 24 has a timeliness requirement. Perhaps it can run from the moment when one's rights are not being protected. And perhaps an end date rather than a start date is necessary, such as in no event after oral argument so that someone can't intervene just to petition for cert.

Judge Bybee asked about a case where a party orally argues an appeal and then withdraws? The lawyer member responded that, apart from FRAP 28(j), parties are done after oral argument. There is no need for a new view from appellees once an appeal is argued. For appellants, existing rules govern dismissal of appeals. Mr. Freeman suggested that there has to be something about what triggers the time, such as the first time that an Act of Congress is called into question. A judge member wondered how this worked with being a party for all purposes: If someone intervenes right before argument, do they have the right to file a brief and participate in oral argument? Mr. Freeman stated that an intervenor should be a party for all purposes: cert, remand, discovery. The burdens of party status have to come along with the benefits. An academic member suggested flipping the default, so that an intervenor was a party only for the specific purposes designated by the court.

Judge Bates wondered if there was a reason (c)(1) includes defenses but (c)(2) does not. He also suggested that "the legality of" in (d) is superfluous.

Mr. Freeman noted that (c) is dense and hard to track. Perhaps it would be better to look at circumstances in which courts of appeals have permitted intervention and describe them. He added that the focus seems to be on civil cases, not criminal cases; perhaps that should be explicit. There might be cases, such as a federal prosecution for a state offense, where intervention might be appropriate.

A liaison member wondered about the consequences of (e) if intervention on appeal is allowed for an interlocutory appeal. Mr. Byron suggested that the "legality of" provision of (d) could be viewed as a corollary to the statutory power to intervene to defend the constitutionality of a statute. [28 U.S.C. § 2403(b).] Mr. Freeman suggested that Civil Rule 24 tracks it more closely.

The Reporter observed that (d) leaves to the underlying federal or state law who is empowered to defend its law, and that Judge Bates may be right that the phrase "legality of" is redundant. He added that (e) sets a default rule, leaving the court of appeals with discretion to limit the scope of the intervention. Mr. Freeman emphasized that intervention should carry over: An intervenor is bound by the judgment and should be subject to discovery. A lawyer member added that this helps maintain the distinction between an amicus and an intervening party.

A judge member stated that the working draft correctly incentivizes seeking intervention as early as possible or warranted, so readers will see that they can't sit on their rights and then seek to intervene because they would not be able to satisfy the new rule. In response to a question from the Reporter, this judge member stated that the benefit of a new rule would outweigh the cost of more motions.

Judge Bybee asked if anyone thought that the project was not worth pursuing. A lawyer member said that clients ask about intervention on appeal and there needs to be some guidance. It would be very useful to put some stakes in the ground and establish a high bar. Mr. Freeman said that it depends on how we work through some of these issues. Rule 7.1(c) is the hardest. It is drawn from Professor Nelson's article but may not work in the court of appeals. It would be a big mistake to encourage more intervention. What happens in an APA case involving an agency rule? If the challenge to a rule wins, then there may be a case against the government if its new rule comes out the other way. Does (c) mean that advocacy groups on both sides can intervene? The lawyer member added that the introduction could be sharper, and (b) made clearer whether all seven items must be shown and, if so, whether allowing intervention remains discretionary. And if it does remain discretionary, does (c) have to be so granular?

A judge member observed that Rule 7.1 would in some respects be more prescriptive than Civil Rule 24 and wondered whether district judges might look to it with regard to Civil Rule 24. Mr. Freeman emphasized that we are not looking to take a view about how Civil Rule 24 should operate in district court.

A different judge member suggested that the Committee Note indicate that a motion to intervene be made as soon as possible because of the effect on the parties, especially after briefing. A liaison member suggested that a new rule might encourage people to file motions out of an abundance of caution because they could at least say that they tried. He acknowledged, as a judge member noted, that people have always had the ability to move to intervene, but worried that there may be more pressure to do so. The judge member suggested framing the new rule as recognizing that this has always been allowed, that it isn't creating a new mechanism but codifying and clarifying an existing one. In response to a question by Judge Bybee about intervention in the Supreme Court, the Reporter stated that while there was intervention in original cases in the Supreme Court, he did not recall one way or the other about intervention in other cases. A lawyer member recalled that it may have happened in rare circumstances.

The Committee took a lunch break of approximately one-half hour.

After the lunch break, the Reporter sought to gauge the Committee's view of the status of the amicus project. Coming into this meeting, he had hoped that we would be on track to ask the Standing Committee, at its June 2024 meeting, to publish a proposed rule for public comment. Today's meeting raised some questions, including about the right term to use to measure revenue and how to deal with endowment income. Assuming we can resolve those issues, is it possible to seek publication in 2024? A judge member responded that conceptually there is no real concern, that it's a matter of getting the technical questions right, and that we are still on track.

Judge Bybee confirmed that, with regard to intervention on appeal, the subcommittee had sufficient guidance from the Committee to do further work in the spring.

VI. Discussion of Recent Suggestions

A. Contempt Procedures (23-AP-D)

The Reporter presented a suggestion by Joshua Carback to create a new Appellate Rule 42 to deal with contempt procedures. (Agenda book page 187). This suggestion is a small part of a large proposal to reform contempt procedures that involves statutory changes as well as amendment to the Federal Rules of Bankruptcy Procedure, Civil Procedure, and Criminal Procedure. The proposed Federal Rule of Appellate Procedure would simply piggyback on the Civil and Criminal Rules.

The memo in the Agenda book suggests tabling this suggestion pending action by other Advisory Committees. The Civil Rules Committee removed the item from its agenda, so perhaps this Committee would consider doing so as well. The Committee

decided, without objection, to retain the suggestion on its agenda pending action by other Advisory Committees.

B. Nationwide Filing Deadline (23-AP-F)

The Reporter presented a suggestion by Howard Bashman to establish a nationwide filing deadline of 5:00 p.m. to restore uniformity among courts of appeals. Alternatively, he suggests that the Committee examine the authority of the Court of Appeals for the Third Circuit to have established a 5:00 p.m. deadline in that circuit or recommend that it reinstate the midnight deadline. While this is closely related to the matter discussed earlier that had been handled by a joint subcommittee, it is possible that the Advisory Committee might want to take different action on this suggestion.

A judge member stated that the Third Circuit is entitled to do what it wants. It wouldn't work in the Ninth Circuit with its five time zones. Judge Bates noted that Judge Chagares (the Chief Circuit Judge in the Third Circuit) agreed that it would not work for the Ninth Circuit.

The Committee, without dissent, voted to remove the suggestion from the agenda.

C. Civil Rule 11 (23-AP-G)

The Reporter presented a suggestion by Andrew Straw, who disagrees with a passage contained in the Spring 2023 agenda book of the Civil Rules Committee. (Agenda book page 226). It is not clear what he wants this Committee to do.

Judge Bates suggested that perhaps he envisions this Committee as having appellate review power over the Civil Rules Committee.

The Committee, without dissent, voted to remove the suggestion from the agenda.

D. Record in Agency Cases—Rule 17 (23-AP-H)

The Reporter presented a suggestion by Thomas Dougherty, who suggests the Rule 17 be amended to require an agency, if it cites a page of its record in a brief, to file the pages of the full section or titled portion containing that page, as well as any pages that are cross-referenced on that cited page. (Agenda book page 231). Such a rule would require the inclusion of completely unnecessary material. In addition, it is not clear why the existing rule—which requires that any part of the record must be sent to the court if the court or a party so requests—is inadequate.

The Committee, without dissent, voted to remove the suggestion from the agenda.

VII. Review of Impact and Effectiveness of Recent Rule Changes

Judge Bybee directed the Committee's attention to a table of recent amendments to the Appellate Rules. (Agenda book page 236). He called for any comments or concerns about these recent amendments. The Committee did not raise any particular concerns, but Professor Struve noted that there is some case law praising the new Rule 3.

VIII. New Business

Judge Bybee asked if anyone had anything else to raise for the Committee. No one did.

IX. Adjournment

Judge Bybee announced that the next meeting will be held on April 10, 2024, with the location to be determined.

He thanked everyone, noting that at every meeting he says that a lot of people with a lot of important things to do have put in a lot of time to prepare and participate. Even small changes to court rules can make significant improvements. If we can make such improvements, our time is well worth it.

The Committee adjourned at approximately 1:20 p.m.