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

MEMORANDUM

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

FROM: Judge Jay Bybee, Chair
Advisory Committee on Appellate Rules

RE: Report of the Advisory Committee on Appellate Rules

DATE: December 6, 2022

I. Introduction

The Advisory Committee on the Appellate Rules met on Thursday, October 13, 2022, in Washington, D.C. The draft minutes from the meeting are attached to this report.

The Advisory Committee has no action items for the January meeting of the Standing Committee, but it does have several information items.

It is particularly eager to hear thoughts and comments regarding amicus disclosures. (Part II of this report.)

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

- proposed amendments, currently published for public comment, regarding rehearing;
- clarifying the process for challenging the allocation of costs on appeal;
- regularizing the criteria for granting in forma pauperis status and revising Form 4;
- in conjunction with other Advisory Committees, expanding electronic filing by pro se litigants;
- in conjunction with the Bankruptcy Rules Committee, clarifying the process for direct appeals in bankruptcy cases;
- in conjunction with other Advisory Committees, making the deadline for electronic filing earlier than midnight; and
- a new suggestion to require disclosure of third-party litigation funding.

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

- a suggestion, in conjunction with the Civil Rules Committee, amendments to Civil Rules 42 and 54 to respond to the Supreme Court's decision in *Hall v. Hall*, 138 S. Ct. 1118 (2018), which held that consolidated actions retain their separate identity for purposes of appeal; and
- a suggestion to identify the amicus or counsel who triggered the striking of an amicus brief.

II. Amicus Disclosures (21-AP-C; 21-AP-G; 21-AP-H; 22-AP-A)

Prompted by the introduction of the AMICUS Act in 2019, the Advisory Committee has been considering possible amendments to Federal Rule of Appellate Procedure 29 regarding amicus disclosures. It has not yet settled on any proposed amendments. Instead, it has produced working drafts to help guide deliberations.

The current version of Rule 29(a)(4)(E) provides that an amicus curiae—other than the United States, a federal officer or agency, or a State—must include in its brief "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.

The latest working draft, along with particular discussion questions, is set out below as new, separate paragraphs of Rule 29.

Rule 29. Brief of an Amicus Curiae

* * *

(c) **Disclosures of Relationship Between the Amicus and a Party**. Unless the amicus curiae is one listed in the first sentence of Rule 29(a)(2), an amicus brief must include the following disclosures:

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

(2) whether a party or its counsel contributed or pledged to contribute money intended to fund (or intended as compensation for) drafting, preparing, or submitting the brief;

(3) whether a party or its counsel has (or two or more parties or their counsel collectively have) a majority ownership interest in or majority control of a legal entity submitting the brief as an amicus curiae; and

(4) whether a party or its counsel has (or two or more parties or their counsel collectively have) contributed 25% or more of the gross annual revenue of an amicus curiae during the twelve-month period preceding the filing of the amicus brief. Amounts unrelated to the amicus curiae's amicus activities that were received in the form of investments or in commercial transactions in the ordinary course of business may be disregarded.

Discussion notes:

Should the percentage be higher or lower than 25%? Some have argued for a 50% threshold.

Should the lookback period be the current or immediately prior calendar year rather than the twelve-months preceding filing? Current or immediately prior calendar year might be easier to administer, but perhaps not for amici using a different fiscal year. Is one or the other easier to evade?

(d) **Identification; Disclosure by Party.** Any disclosure required by paragraph (c) must identify the name of the party or counsel. If a party is aware that an amicus has failed to make a disclosure about the relationship between the amicus and that party required by paragraph (c), the party must do so.

(e) **Disclosures of Relationship Between the Amicus and a Nonparty**. Unless the amicus curiae is one listed in the first sentence of Rule 29(a)(2), an amicus brief must identify any person—other than the amicus or its counsel—who contributed or pledged to contribute more than $1000 intended to fund (or intended as compensation for) drafting, preparing, or submitting the brief.

Discussion notes:

This working draft requires disclosure of earmarked contributions by nonparty members of an amicus. The current rule exempts contributions by the members of an amicus organization from disclosure. An exception for members allows easy evasion: a contributor can simply become a member. In its First Amendment cases, the Supreme Court has treated members and contributors interchangeably. On the other hand, revealing contributions by members may make disclosure turn on the details of an organization's internal fundraising practices.

This working draft also sets a dollar threshold for disclosure of earmarked contributions by nonparties. Should there be a higher dollar threshold for disclosure of earmarked contributions by members compared to nonmembers?

This working draft does not have a provision parallel to (c)(3) or (4) for nonparties. Should it? Whether a contribution is made by a party or by a nonparty, there is an interest in the court knowing who is speaking to help properly weigh the message in the amicus brief. But limiting disclosure of contributions to those that are earmarked for that brief is an important aspect of narrow tailoring.

> And there are additional interests where contributions by parties are involved that do not apply to nonparties: 1) preventing parties from evading limits on the length of briefs, and 2) not misleading a court into thinking that an amicus is more independent of a party than it truly is.

Parties.

The major differences between the current rule and this draft are that the draft would require disclosure of (1) whether a party or its counsel have a majority ownership or control of an amicus, and (2) whether a party or its counsel contributed 25% or more of the revenue of the amicus during the twelve-month period preceding the filing of the amicus brief.

The Advisory Committee has not settled on a contribution percentage that would trigger disclosure. At the October 2022 meeting, one particular concern was that litigants would tend to view whatever threshold was set as a cut-off point beyond which it was not worth filing an amicus brief. That, apparently, is how the current rule operates in practice: Briefs don't get filed if they would require the disclosures called for in the current rule. The concern is that whatever percentage is chosen will send the message that briefs at that threshold will be viewed skeptically and therefore such briefs will rarely be filed.

To the extent this prediction is accurate, the benefits of disclosure must be weighed against the loss of those briefs.

One way that the Advisory Committee is considering dealing with this problem is to require disclosure of contributions in different bands. For example, an amicus would have to disclose that a party made contributions in the range of 20% to 30%, or 30% to 40%, or 40% to 50%, or more than 50%. Such banding could avoid sending that message that briefs above a certain threshold should not be filed. And it could allow different judges to discount briefs based on their own individualized judgment rather than forcing the Advisory Committee to determine a single appropriate threshold for all judges and all briefs.

Another concern is the impact on different kinds of amici. Organizations with a broad funding base would not be hurt, but those with a narrower focus might be.

Nonparties.

The major differences between the current rule and this draft are that the draft would (1) require disclosure of earmarked contributions by members of the amicus, and (2) set a $1000 threshold for earmarked contributions whether by a member or nonmember.

There are competing concerns when considering whether to require disclosure of earmarked contributions by members. On the one hand, an exception for members allows for easy evasion by any contributor who is willing to become a member. On the other hand, failure to have to an exception for members may benefit organizations with more established amicus programs because they raise money from general contributions, while organization with less established amicus programs, and who pass the hat for an amicus brief, would be affected.

One way that the Advisory Committee is considering dealing with this problem is to limit the membership exception to those who have been members for a sufficiently long period of time.

The Advisory Committee has also not decided whether to require disclosure of non-earmarked contributions to an amicus by nonparties, parallel to working draft 29(c)(3) and (4). Without such a provision, many of the concerns raised by the sponsors of the AMICUS Act would remain unaddressed. But required disclosures here would be significant for many organizations, particularly non-business and true advocacy organizations. There is also reason to doubt its efficacy, because a very wealthy funder in the background could create several different shell organizations for each amicus brief.

The Advisory Committee is well aware of First Amendment concerns in this area. Such concerns have informed its separate treatment of parties and nonparties because the government interests in disclosure—as well as the burdens of disclosure—are different. The Advisory Committee is also trying to be precise about the nature of the interests in disclosure, thinking carefully about the difference between (1) the interests in disclosure so that judges are not misled in ways that affect their decisions and (2) the interests in disclosure so that the public is aware of who is behind a brief. And it is paying attention to the burdens caused by disclosure, while seeking to narrowly tailor additional disclosure requirements.

III. Other Matters Under Consideration

A. Rehearing—Rules 35 and 40 (18-AP-A)

In a project that began in 2018, the Advisory Committee has been considering amendments to the procedure for rehearing. In April of 2021, the Advisory Committee approved a draft for submission to the Standing Committee. That draft would have carried forward various oddities in the existing rules that the Advisory Committee was reluctant to change. But at its June 2021 meeting, the Standing Committee remanded the matter, inviting the Advisory Committee to take a bit freer of a hand. In January and June of 2022, the Standing Committee approved a revised approach for publication.

Those proposed amendments have been published and the comment period remains open. The early comments received have not led the Advisory Committee to reconsider any aspect of the proposed amendments. It expects to receive more comments and will carefully consider them.

The Advisory Committee expects to present these amendments for final approval in June of 2023.

B. Costs on Appeal—Rule 39 (21-AP-D)

The Advisory Committee is exploring whether any amendments to Federal Rule of Appellate Procedure 39 might be appropriate in light of the Supreme Court's decision in *City of San Antonio v. Hotels.com*, 141 S. Ct. 1628 (2021). There, the Court held that Appellate Rule 39 does not permit a district court to alter a court of appeals' allocation of the costs listed in subdivision (e) of that Rule. The Supreme Court observed that the current rules could specify more clearly the procedure that a party should follow to bring their arguments about costs to the court of appeals. It also noted, without further comment, an argument that the current Rule impermissibly allows for the recovery of costs not listed in 28 U.S.C. § 1920.

The Advisory Committee believes that while costs on appeal are usually modest, one kind of cost—the premium paid for a bond to preserve rights pending appeal (traditionally known as a supersedeas bond)—can be considerable. These bonds are approved by the district court to secure a stay of enforcement of a judgment. For that reason, while the court of appeals allocates which party must pay these costs, the bill of costs that includes the premium paid for a supersedeas bond is filed in the district court.

The Advisory Committee believes that it is close to recommending an amendment for publication and public comment. The latest draft seeks to make clear that, after the court of appeals has initially decided which party or parties must bear the costs (and, if divided, in what percentage), a party may seek reconsideration of that decision by filing a motion in the court of appeals within 14 days after entry of judgment. Additional drafting may seek to reduce possible confusion about how these cost provisions interact with issuance of the mandate.

Here is the latest draft:

Rule 39. Costs

(a) Against Whom Assessed. The following rules apply unless the law provides or the court orders otherwise:

(1) if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise;

(2) if a judgment is affirmed, costs are taxed against the appellant;

(3) if a judgment is reversed, costs are taxed against the appellee;

(4) if a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as the court orders.

(b) Where Applicable; Reconsideration. The assessment of costs under paragraph (a) applies to costs taxable in the court of appeals under paragraph (e) and to costs taxable in district court under paragraph (f). A party may seek reconsideration of the assessment of costs under paragraph (a) by filing a motion in the court of appeals within 14 days after the entry of judgment.

(c)~~(b)~~ Costs For and Against the United States. Costs for or against the United States, its agency, or officer will be assessed under Rule 39(a) only if authorized by law.

(d)~~(c)~~ Costs of Copies. Each court of appeals must, by local rule, fix the maximum rate for taxing the cost of producing necessary copies of a brief or appendix, or copies of records authorized by Rule 30(f). The rate must not exceed that generally charged for such work in the area where the clerk's office is located and should encourage economical methods of copying.

(e)~~(d)~~ Costs on Appeal Taxable in the Court of Appeals; ~~Bill of Costs:~~ Objections; Insertion in Mandate.

(1) A party who wants costs taxed in the court of appeals must—within 14 days after entry of judgment—file with the circuit clerk and serve an itemized and verified bill of costs taxable in the court of appeals.

(2) Objections must be filed within 14 days after service of the bill of costs, unless the court extends the time.

(3) The clerk must prepare and certify an itemized statement of costs for insertion in the mandate, but issuance of the mandate must not be delayed for taxing costs. If the mandate issues before costs are finally

determined, the district clerk must—upon the circuit clerk's request—add the statement of costs, or any amendment of it, to the mandate.

(f) ~~(e)~~ Costs on Appeal Taxable in the District Court. The following costs on appeal are taxable in the district court for the benefit of the party entitled to costs under this rule:

(1) the preparation and transmission of the record;

(2) the reporter's transcript, if needed to determine the appeal;

(3) premiums paid for a bond or other security to preserve rights pending appeal; and

(4) the fee for filing the notice of appeal.

The Advisory Committee believes that this amendment would work best if made in conjunction with an amendment to Civil Rule 62—which already requires the district court to approve the bond or other security before the stay takes effect—requiring that the premium paid for the bond be disclosed before the bond is approved. That way, the prevailing party in the district court would know well in advance the cost it might be facing if the court of appeals reverses. But the Appellate Rules Committee also believes that it is worth pursuing this amendment to Appellate Rule 39 even if the Civil Rules Committee declines to act.

The Advisory Committee expects to present amendments for approval for publication and public comment in June of 2023.

C. IFP Status Standards—Form 4 (19-AP-C; 20-AP-D; 21-AP-B)

The Advisory Committee has been considering suggestions to establish more consistent criteria for granting IFP status and to revise the FRAP Form 4 to be less intrusive. It focused its attention on the one aspect of the issue that is clearly within the purview of the Advisory Committee, Form 4. Form 4 is a form adopted through the Rules Enabling Act, not a form created by the Administrative Office.

Based on informal information gathering about IFP practice in the courts of appeals, the Advisory Committee thinks that IFP status is rarely denied because the applicant has too much wealth or income and that Form 4 could be substantially simplified while still providing the courts of appeals with enough detail to decide whether to grant IFP status.

Attached to this report is a draft of a revised Form 4, drawing upon existing and proposed forms created for similar purposes. This draft was revised after consultation with senior staff attorneys in the circuits.

In reviewing this working draft, the Standing Committee should bear in mind the governing statute. The statute, as amended by the Prison Litigation Reform Act, makes little sense. It provides, in relevant part, that:

> any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by 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.

28 U.S.C. § 1915. It switches, mid-sentence, from referring to a "person" who submits an affidavit to "such prisoner" whose assets must be stated in the affidavit and then back again to the "person" who is unable to pay fees. To make sense of this provision, courts have generally read it to require any *person* seeking IFP status to submit a statement of all assets such *person* possesses, even if the person is not a prisoner.

The draft Form 4 contains the question, "What is the total value of all your assets (such as bank accounts, investments, market value of car or house)?" It does not, however, require applicants to separately state each asset. It also does not require inclusion of spousal assets because the Advisory Committee tends to think that the intrusiveness of questions about a spouse outweighed their benefit—particularly because spousal information seemed unlikely to make a difference to the indigency determination.

The Advisory Committee is not yet seeking publication and public comment, That's because Supreme Court Rule 39.1 calls for the use of Appellate Form 4 by applicants for IFP status in the Supreme Court, and the Advisory Committee thinks it appropriate to confer informally with the Clerk of the Supreme Court before recommending publication.

D. Electronic Filing by Pro Se Litigants (Joint Project)

Multiple Advisory Committees have been considering amending their respective rules to more broadly allow electronic filing by pro se litigants. Extensive research by the FJC suggests that the courts of appeals are more receptive to electronic filing by unrepresented litigants than are trial courts.

This greater receptivity may be the result of the much smaller number of filings in a case in the courts of appeals. It may also be due to the practice in the courts of appeals regarding the filing of case-initiating documents: even when filed by attorneys, these documents do not open a case in CM/ECF, but instead lead to a case that is opened by the court staff.

The Advisory Committee is open to the possibility of flipping the presumption and allowing pro se litigants to file electronically unless precluded by the court. It is certainly open to lifting the requirement that pro se litigants serve paper copies of documents on electronic filers, even though the pro se litigant's filing will be scanned and uploaded into ECF, thereby prompting electronic service on electronic filers.

It is also open to the possibility of taking the lead in this area, making such changes before other Advisory Committee do so. But it appreciates that there is also value in continuing to have the various sets of rules evolve in tandem.

E. Direct Appeals in Bankruptcy

The Advisory Committee on the Federal Rules of Bankruptcy Procedure is proposing to amend Bankruptcy Rule 8006(g) to clarify that any party may request permission to appeal directly to the court of appeals. A question arose about how this process fits with Federal Rule of Appellate Procedure 5, which governs appeals by permission. Appellate Rule 5 seems to envision that the party seeking leave to appeal is the appellant.

In order to make the process of direct appeals in bankruptcy fit better with the Federal Rules of Appellate Procedure, the Appellate Rules Committee is considering an amendment to Federal Rule of Appellate Procedure 6, which governs appeals in bankruptcy.

Some background may be helpful. Under 28 U.S.C. § 158, appeals from bankruptcy courts are usually heard by either a district court or a bankruptcy appellate panel, perhaps followed by an appeal from those courts to a court of appeals. But in certain circumstances, an appeal can be taken directly from a bankruptcy court to a court of appeals. 28 U.S.C. § 158(d)(2). Such direct appeals to a court of appeals require both certification by the appropriate lower court and authorization by the court of appeals.

Significantly, the question under § 158(d)(2) is not whether an appeal will be heard at all. If the appropriate lower court does not certify a direct appeal, or the court of appeals does not authorize a direct appeal, the appeal will simply be heard by the district court or bankruptcy appellate panel. For that reason, it makes sense for Bankruptcy Rule 8006(g) to be revised to clarify that any party to the appeal may

file a request that the court of appeals authorize a direct appeal. The Bankruptcy Rules Committee views this as clarification of existing law, not a change in the law.

Here is the proposed amendment to Bankruptcy Rule 8006(g):

> **(g) Request** After Certification **for** ~~Leave to Take a Direct Appeal to~~ **a Court of Appeals** To Authorize a Direct Appeal~~After Certification~~**.** Within 30 days after the certification has become effective under (a), any party to the appeal may ask the court of appeals to authorize a direct appeal by filing a petition ~~a request for leave to take a direct appeal to a court of appeals must be~~ filed with the circuit clerk in accordance with Fed. R. App. P. 6(c).

This change helps to reveal that Appellate Rule 5 is an awkward fit for direct appeals in bankruptcy cases. In other appeals which require the permission of the court of appeals, the question is whether an appeal will be allowed at all. In that context, the party seeking permission to appeal is the appellant. Those are the kinds of cases on which Appellate Rule 5 is focused.

The problem, from an appellate perspective, is that Appellate Rule 5 is aimed at appeals that can be taken only by permission—that is, whether the appeal can be taken at that time at all—while Bankruptcy Rule 8006 and § 158(d)(2) are about which court will hear an appeal.

To create a better fit, the draft below would amend Appellate Rule 6(c) to provide additional procedures specifically designed for direct appeals under § 158(d)(2).

The draft below would also add new provisions applicable to direct appeals. These new provisions would:

> (a) permit any party to the appeal to petition the court of appeals to authorize a direct appeal;
>
> (b) require the inclusion of a copy of the notice of appeal, the certificate, and any decision on a motion under Bankruptcy Rule 8004;[1]

[1] Some bankruptcy orders are appeal as of right. 28 U.S.C. § 158 (a)(1) and (2). Others are appealable only with leave of court. 28 U.S.C. § 158 (a)(3). Bankruptcy Rule 8004 governs the process for seeking leave to appeal under § 158(a)(3). If the appeal for which some party seeks direct review in the court of appeals is not appealable as of right, but is appealable only with leave of court under § 158(a)(3), any decision on a

(c) specify how time is calculated; and

(d) specify which court may require an appellant to file a bond or provide other security for costs on appeal under Rule 7.

Here is the draft of Appellate Rule 6:

Rule 6. Appeal in a Bankruptcy Case

(a) Appeal From a Judgment, Order, or Decree of a District Court Exercising Original Jurisdiction in a Bankruptcy Case. An appeal to a court of appeals from a final judgment, order, or decree of a district court exercising jurisdiction under 28 U.S.C. § 1334 is taken as any other civil appeal under these rules.

(b) Appeal From a Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel Exercising Appellate Jurisdiction in a Bankruptcy Case.

(1) **Applicability of Other Rules.** These rules apply to an appeal to a court of appeals under 28 U.S.C. § 158(d)(1) from a final judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction under 28 U.S.C. § 158(a) or (b), but with these qualifications:

(A) Rules 4(a)(4), 4(b), 9, 10, 11, 12(c), 13–20, 22–23, and 24(b) do not apply;

(B) the reference in Rule 3(c) to "Forms 1A and 1B in the Appendix of Forms" must be read as a reference to Form 5; and

(C) when the appeal is from a bankruptcy appellate panel, "district court," as used in any applicable rule, means "bankruptcy appellate panel"; and

(D) in Rule 12.1, "district court" includes a bankruptcy court or bankruptcy appellate panel.

(2) **Additional Rules.** In addition to the rules made applicable by Rule 6(b)(1), the following rules apply:

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motion seeking such leave to appeal must be included when seeking permission for a direct appeal to the court of appeals.

(A) **Motion for Rehearing.**

(i) If a timely motion for rehearing under Bankruptcy Rule 8022 is filed, the time to appeal for all parties runs from the entry of the order disposing of the motion. A notice of appeal filed after the district court or bankruptcy appellate panel announces or enters a judgment, order, or decree—but before disposition of the motion for rehearing—becomes effective when the order disposing of the motion for rehearing is entered.

(ii) If a party intends to challenge the order disposing of the motion—or the alteration or amendment of a judgment, order, or decree upon the motion—then the party, in compliance with Rules 3(c) and 6(b)(1)(B), must file a notice of appeal or amended notice of appeal. The notice or amended notice must be filed within the time prescribed by Rule 4—excluding Rules 4(a)(4) and 4(b)—measured from the entry of the order disposing of the motion.

(iii) No additional fee is required to file an amended notice.

(B) **The record on appeal.**

(i) Within 14 days after filing the notice of appeal, the appellant must file with the clerk possessing the record assembled in accordance with Bankruptcy Rule 8009—and serve on the appellee—a statement of the issues to be presented on appeal and a designation of the record to be certified and made available to the circuit clerk.

(ii) An appellee who believes that other parts of the record are necessary must, within 14 days after being served with the appellant's designation, file with the clerk and serve on the appellant a designation of additional parts to be included.

(iii) The record on appeal consists of:

- the redesignated record as provided above;
- the proceedings in the district court or bankruptcy appellate panel; and
- a certified copy of the docket entries prepared by the clerk under Rule 3(d).

(C) **Making the Record Available.**

(i) When the record is complete, the district clerk or bankruptcy-appellate-panel clerk must number the documents constituting the record and promptly make it available to the circuit clerk. If the clerk makes the record available in paper form, the clerk will not send documents of unusual bulk or weight, physical exhibits other than documents, or other parts of the record designated for omission by local rule of the court of appeals, unless directed to do so by a party or the circuit clerk. If unusually bulky or heavy exhibits are to be made available in paper form, a party must arrange with the clerks in advance for their transportation and receipt.

(ii) All parties must do whatever else is necessary to enable the clerk to assemble and forward the record. The court of appeals may provide by rule or order that a certified copy of the docket entries be sent in place of the redesignated record, but any party may request at any time during the pendency of the appeal that the redesignated record be sent.

(D) **Filing the record**

When the district clerk or bankruptcy-appellate-panel clerk has made the record available, the circuit clerk must note that fact on the docket. The date noted on the docket serves as the filing date of the record. The circuit clerk must immediately notify all parties of the filing date.

(c) Direct Appeal ~~Review~~ by Permission Under 28 U.S.C. § 158(d)(2).

(1) **Applicability of Other Rules.** These rules apply to a direct appeal by permission under 28 U.S.C. § 158(d)(2), but with these qualifications:

(A) Rules 3–4, 5(a)(3), 5(d), 6(a), 6(b), 8(a), 8(c), 9–12, 13–20, 22–23, and 24(b) do not apply; and

(B) as used in any applicable rule, "district court" or "district clerk" includes—to the extent appropriate—a bankruptcy court or bankruptcy appellate panel or its clerk~~; and~~

~~(C) the reference to "Rules 11 and 12(c)" in Rule 5(d)(3) must be read as a reference to Rules 6(c)(2)(B) and (C)~~.

(2) **Additional Rules.** In addition, the following rules apply:

(A) Petition to Authorize a Direct Appeal. After the notice of appeal has been filed in the bankruptcy court and a certification under 28 U.S.C. § 158(d) has been filed in the appropriate court under Bankruptcy Rule 8006(b), any party to the appeal may petition the court of appeals to authorize a direct appeal.

(B) **Content**. The petition must include the material required by Rule 5(b), a copy of the notice of appeal, and a copy of the certificate under § 158(d). If the appeal to the district court or bankruptcy appellate panel is not as of right under 28 U.S.C. § 158(a)(1) or (2) but requires leave of court under § 158(a)(3), the petition must also include a copy of any decision on a motion under Bankruptcy Rule 8004.

(C) **Calculating Time**. The date when an authorization is entered serves as the date of the notice of appeal for calculating time under these rules.

(D) **Bond for Costs on Appeal**. The court in which the certificate under 28 U.S.C. § 158(d) was filed may require an appellant to file a bond or provide other security for costs on appeal under Rule 7.

(E) ~~(A) The~~ **Record on Appeal**. Bankruptcy Rule 8009 governs the record on appeal.

~~(B)~~ (F) **Completing and Making the Record Available.** Bankruptcy Rule 8010 governs completing the record and making it available.

~~(C)~~ (G) **Stay~~s~~ Pending Appeal**. Bankruptcy Rule 8007 applies to a stay~~s~~ pending appeal.

~~(D)~~ (H) **Duties of the Circuit Clerk**. When the bankruptcy clerk has made the record available, the circuit clerk must note that fact on the docket. The date noted on the docket serves as the filing date of the record. The circuit clerk must immediately notify all parties of the filing date.

~~(E)~~ (I) **Filing a Representation Statement**. Unless the court of appeals designates another time, within 14 days after entry of the order granting permission to appeal, each ~~the~~ attorney who sought permission must file a statement with the circuit clerk naming the parties that the attorney represents on appeal.

Committee Note

This amendment is made in conjunction with an amendment to Bankruptcy Rule 8006(g).

In the ordinary case, decisions by bankruptcy courts are appealable to either the district court or a bankruptcy appellate panel, perhaps followed by an appeal from those courts to the court of appeals. But in certain circumstances, the appeal can be taken directly from a bankruptcy court to a court of appeals. 28 U.S.C. § 158(d)(2). Such direct appeals to a court of appeals require both certification by the appropriate lower court and authorization by the court of appeals.

In other appeals which require the permission of the court of appeals, the question is whether an appeal will be allowed at all. Appellate Rule 5 governs such petitions for permission to appeal. But in the context of 28 U.S.C. § 158(d)(2), the question is not whether there will be an appeal, but only whether that appeal will be heard by the court of appeals—as opposed to the district court or bankruptcy appellate panel. Accordingly, Bankruptcy Rule 8006(g) is revised to clarify that any party to the appeal may file a request that a court of appeals authorize a direct appeal.

These features of direct appeals under § 158(d)(2) make Appellate Rule 5 an awkward fit. To create a better fit, Appellate Rule 6(c) is revised to specify further procedures specifically designed for direct appeals under § 158(d)(2). New provisions (a) permit any party to the appeal to petition the court of appeals to authorize a direct appeal; (b) require the inclusion of a copy of the notice of appeal, the certificate, and any decision on a motion under Bankruptcy Rule 8004; (c) specify how time is calculated; and (d) specify which court may require an appellant to file a bond or provide other security for costs on appeal under Rule 7.

The Advisory Committee intends to seek approval for publication and public in June of 2023, after a subcommittee closely examines this draft.

F. Midnight Deadline for Time of Filing (19-AP-E)

Considerable research has now been completed to help inform the joint subcommittee considering whether the deadline for electronic filing should be moved to some time prior to midnight. The joint subcommittee needs to be reconstituted to evaluate that research.

G. Disclosure of Third-Party Litigation Funding (22-AP-C)

The Advisory Committee is considering a new suggestion that Appellate Rule 26.1 be amended to require the disclosure of a non-party that has a financial stake in the outcome of an appellate case. There are third-party litigation funders who make non-recourse investments in litigation and the suggested amendment would require their disclosure.

The Civil Rules Committee has been considering this issue for some time, and the Appellate Rules Committee decided to hold this matter until its spring meeting, pending consultation with the Civil Rules Committee.

V. Items Removed from the Advisory Committee Agenda

A. Appeals in Consolidated Cases

In 2018, the Supreme Court decided that consolidated actions retain their separate identity for purposes of appeal and invited rulemaking if that holding caused practical problems. *Hall v. Hall,* 138 S. Ct. 1118 (2018), A Joint Civil-Appellate Subcommittee has been considering possible amendments to Civil Rules 42 and 54 in response. Extensive empirical research by the FJC convinced the Joint Subcommittee that there was not a sufficient problem to warrant a rule amendment.

The Appellate Rules Committee accepted this conclusion and removed the suggestion from its agenda.

B. Striking Amicus Brief; Identifying Triggering Person (22-AP-B)

The Advisory Committee considered a new suggestion related to amicus briefs and disqualification. Rule 29 allows a court to refuse to file an amicus brief or to strike an amicus brief if the brief would cause a judge to be disqualified. The suggestion is that, when this happens, the court should identify each amicus or counsel that would cause the disqualification.

Because the basis for disqualification varies over time, the Advisory Committee had doubts about the usefulness of such a provision. Moreover, the Advisory Committee feared that such disclosures could be reverse engineered to determine which judges would have been disqualified and why, thereby running the risk of manipulation designed to create disqualification.

For these reasons, the Advisory Committee removed the suggestion from its agenda.