Minutes of the Spring 2018 Meeting of the

Advisory Committee on the Appellate Rules

April 6, 2018

Philadelphia, Pennsylvania

Judge Michael A. Chagares, Chair, Advisory Committee on the Appellate Rules, called the meeting of the Advisory Committee on the Appellate Rules to order on Friday, April 6, 2018, at approximately 9:00 a.m., at the James A. Byrne United States Courthouse in Philadelphia, Pennsylvania.

In addition to Judge Chagares, the following members of the Advisory Committee on the Appellate Rules were present: Judge Jay S. Bybee, Justice Judith L. French, Judge Brett M. Kavanaugh, Christopher Landau, Judge Stephen Joseph Murphy III, Professor Stephen E. Sachs, and Danielle Spinelli. Solicitor General Noel Francisco was represented by H. Thomas Byron III.

Also present were Judge David G. Campbell, Chair, Standing Committee on the Rules of Practice and Procedure; Professor Daniel R. Coquillette, Reporter, Standing Committee on the Rules of Practice and Procedure; Shelly Cox, Administrative Specialist, Rules Committee Support Office of the Administrative Office of the U.S. Courts (RCSO); Patricia S. Dodszuweit, Clerk of Court Representative, Advisory Committee on the Appellate Rules; Professor Edward A. Hartnett, Reporter, Advisory Committee on the Appellate Rules; Bridget M. Healy, Attorney Advisor, RCSO; Marie Leary, Research Associate, Advisory Committee on the Appellate Rules; Professor Catherine T. Struve, Associate Reporter, Standing Committee on the Rules of Practice and Procedure; Patrick Tighe, Rules Law Clerk, RCSO; Rebecca A. Womeldorf, Secretary, Standing Committee on the Rules of Practice and Procedure and Rules Committee Officer.

Judge Pamela Pepper, Member, Advisory Committee on the Bankruptcy Rules and Liaison Member, Advisory Committee on the Appellate Rules, participated in part of the meeting by telephone.

I. Introduction

Judge Chagares opened the meeting and greeted everyone. He introduced Edward Hartnett, the new Reporter, and Patricia S. Dodszuweit, the former chief deputy clerk and now the Clerk of United States Court of Appeals for the Third Circuit and Clerk of Court Representative. He thanked Bridget Healy, Shelly Cox, and Rebecca Womeldorf for organizing the meeting. He then briefly reminded everyone of the rule making process under the Rules Enabling Act, and noted that the only amendment

to the Federal Rules of Appellate Procedure that took effect on December 1, 2017, was an amendment to FRAP 4(a)(4)(B) that restored subsection (iii).

II. Approval of the Minutes

The draft minutes of the November 8, 2017, Advisory Committee meeting were corrected to reflect that Kevin Newsom was appointed to the United States Court of Appeals for the Eleventh Circuit, and approved as amended.

III. Discussion Items

A. Proposed Amendments to Rules 3, 13, 26.1, 28, and 32, Published for Public Comment in August 2017, Particularly Proposal to Amend Rule 26.1 to Provide More Information Relevant to Recusal (08-AP-A; 08-AP-R; 11-AP-C)

Judge Chagares noted that there were no public comments on the proposed amendments to Rules 3, 13, 28, and 32, and no member of the Committee had any objection to them. He then opened discussion of the proposed amendment of Rule 26.1, dealing with disclosures designed to help judges decide if they must recuse themselves. This proposed amendment had been published for public comment, and was being considered in light of those comments.

Before turning to the particular proposals, an attorney member asked whether information about third-party funding of litigation showed up anywhere to inform recusal decisions. Judge Campbell noted that this issue was under active consideration by the Civil Rules Committee. Mr. Coquillette noted that the issue was also under consideration by state legislatures and bar associations. Those who oppose requiring disclosure observe that judges would not invest in third-party litigation funders, but a judge member pointed out that their relatives might.

Judge Chagares then turned to 26.1, noting that the version before the Committee had been revised in light of the comments and the input of Ms. Struve and the style consultants. In particular, the published version had a separate subparagraph 26.1(d) dealing with intervenors; for clarity that was folded into a new last sentence of 26.1(a).

Judge Chagares identified a glitch in the version of 26.1(a) in the agenda book (page 125). It refers to any "nongovernmental corporation to a proceeding." The glitch could be fixed by adding the word "party," so that it would read "nongovernmental corporate party to a proceeding." Judge Campbell noted that it could also be fixed by adding the phrase "that is a party," so that it would read "nongovernmental

corporation that is a party to a proceeding." The Committee was content with either phrasing, leaving the matter to coordination with the Committee on Bankruptcy Rules.

An attorney member questioned whether the word "proceeding" should be changed to "case," for consistency with Rule 26.1(c). Judge Pepper stated that the Bankruptcy Committee wanted to be sure that the 26.1(c) provision dealing with bankruptcy refer to "case" rather than "proceeding," but that "proceeding" was appropriate for 26.1(a), because there may be proceedings in the courts of appeals that are not cases. Judge Campbell advocated not changing things that don't need changing, and the Committee decided to leave the word "proceeding."

An academic member observed that a proposed intervenor may seek intervention because of a need to protect its interests, but not truly "want" to intervene, and therefore suggested changing the word "wants" to "seeks" in the final sentence of 26.1(a). The Committee agreed, so that the final sentence would read, "The same requirement applied to a nongovernmental corporation that seeks to intervene."

Turning to 26.1(b), dealing with organizational victims in criminal cases, Judge Chagares noted that the only proposed change from the published version was stylistic. Rule 26.1(c), dealing with bankruptcy cases, had a stylistic change from the published version that replaced redundant language with a cross-reference to 26.1(a). In keeping with the wishes of the Bankruptcy Committee, "proceeding" in this subsection was changed to "case," to avoid confusion with the term "adversary proceeding" in bankruptcy cases.

The reporter pointed out that the phrasing of the version of 26.1(d) before the Committee was problematic in that 26.1(d)(3) provided that the "statement must . . . supplement the statement," and suggested it be changed to the "statement must . . . be supplemented." An attorney member noted that a 26.1(d)(2) had a similar problem, in that it provided that the "statement must . . . include the statement," and suggested that it be changed to the "statement must . . . be included."

Turning to the Committee Note, a judge member asked if the word "mainly" was needed, and another judge member suggested striking it. An attorney member pointed to the need to restore the word "of" to the phrase "disclosure of the names of all the debtors." Another attorney member suggested that the phrase "the names of the debtors" should be restored, because the pronoun "they" might be read to refer to "bankruptcy cases," rather than the intended referent "the names of the debtors." Invoking the rule of the last antecedent, a judge member agreed.

As so amended, the Committee agreed to forward the proposed amendment to Rule 26.1 to the Standing Committee.

B. Proposal to Amend Rule 25(d) to Eliminate Unnecessary Proofs of Service in Light of Electronic Filing (and Technical Conforming Amendments to Rules 5, 21, 26, 32, and 39) (11-AP-D)

Judge Chagares explained that this proposal was designed to eliminate unnecessary proofs of service in light of electronic filing. A prior version of this amendment to Rule 25(d) was approved by the Standing Committee and sent to the Supreme Court, but withdrawn in order to take account of the possibility that a document might be filed electronically but still need to be served other than through the court's electronic filing system on a party (e.g., a pro se litigant) who does not participate in electronic filing. The version before the Committee (page 137 of the agenda book) is designed to be consistent with other Rules. It requires that a paper presented for filing must have an acknowledgement or proof of service "if it was served other than through the court's electronic filing system." In response to a question from Judge Campbell, it was confirmed that this version is consistent with the Bankruptcy Rule.

The Committee had no concern with conforming amendments to Rules 5, 21, 39 eliminating references to "proof of service." Judge Campbell raised a concern about the conforming amendment to Rule 26, asking whether the three-day rule should apply to all papers served electronically or only those served through the court's electronic filing system, given that a party might not serve until several days after filing. After several members of the Committee observed that the clock under Rule 26(c) starts upon service, not filing, the Committee agreed that there was no need to change the version of Rule 26(c) as proposed on page 155 of the agenda book. At the suggestion of an academic member of the Committee, the last clause of the Committee Note—which refers to a court's electronic filing system—was deleted.

The Committee approved the elimination of the articles from the list of items in Rule 32(f), and also eliminated the first sentence of the Committee Note referring to proof of service.

Judge Chagares confirmed that the prior reporter had done a global search for "proof of service," so that these are the only needed conforming amendments.

The Committee agreed that these were technical amendments, so that, in its view, there was no need for further public comment.

C. Rule 3(c)(1)(B) and the Merger Rule (16-AP-D)

Professor Sachs reported on behalf of the subcommittee formed to study the designation of the judgment or order appealed from in a notice of appeal. Under the merger doctrine, an appeal from a final judgment brings up interlocutory orders

supporting that judgment. But there is a line of cases in the Eighth Circuit holding that if a notice of appeal specifically mentions some interlocutory orders, in addition to the final judgment, review is limited to the specified orders. That is, a negative inference is drawn that other, unmentioned, orders are not being appealed.

The subcommittee's work led it to other adjacent issues, including the proper handling of a notice of appeal when the district court did not enter a separate judgment. The subcommittee sought to get a sense of the Committee as to the extent of the problem, and whether the focus should be on the narrow issue that prompted the agenda item or on these broader issues.

Professor Struve pointed out that there is a great deal of confusion in this area, including the proper handling of appeals from post-judgment orders where the party is really seeking review of the underlying prior order, and appeals from an initial order but not an order denying reconsideration (or vice versa). It is nonetheless quite challenging to draft a rule that fixes these problems without creating new ones.

An attorney member stated that the line of cases in the Eighth Circuit is problematic and somewhat terrifying, because clients often question whether a simple notice of appeal from a final judgment is enough, and seek to have particular orders mentioned to make sure they are covered. Looking under this rock, however, revealed lots of other problems. Judge Chagares noted that in all his years on the bench, he had seen a problem regarding the order designated only once.

A judge member asked whether this was a jurisdictional matter that could only be handled by Congress. Several members of the Committee responded that issues involving the content of the notice of appeal, as opposed to the time for appeal, were not jurisdictional. Professor Sachs suggested that one approach might be to broadly authorize amendments to notices of appeal, but that allowing amendments out of time might raise jurisdictional and supersession issues.

An attorney member stated that the current Rule, which tells the reader to "designate the judgment, order, or part thereof being appealed," is very ambiguous. It is written to cover both appeals from final judgments and appeals from interlocutory orders, and gives no indication that an appeal from a final judgment brings up prior interlocutory orders. It invites the inexperienced lawyer to list everything. But a rule cannot explain the entire merger doctrine. A different attorney member suggested that a Rule could state that an appeal from a final judgment brings up the final judgment and all interlocutory orders, but Professor Struve noted that the merger doctrine doesn't cover all prior orders. Professor Sachs raised the question of whether the merger doctrine also applies when an appeal is properly taken from an interlocutory order.

A judge member suggested that, from the appellee's perspective, it would be good to know what is actually being appealed. Attorney members noted that the question of what issues will be raised on appeal is addressed in subsequent filings.

The reporter suggested that perhaps the Rule should call on the appellant to designate simply the *appealable* judgment or order, leaving to the merger doctrine the question of what issues are *reviewable* on appeal from that appealable judgment or order.

As for the question of whether to address the broader issues or only the narrow issues, and even whether a rogue line of cases in one circuit justifies a Rule change, Judge Chagares reminded the Committee that upending an established Rule, at times, can cause more confusion than clarity. Justice French agreed to join the subcommittee.

D. Improving Appendices

Judges Chagares observed that a subcommittee had been formed to look into the problem of appendices being too long and including much irrelevant information. But changes in technology may solve the problem.

Ms. Dodszuweit stated that the Clerks recommend waiting. The technology is changing quickly, and electronic appendices, with briefs that cite to the electronic record of the district court, will make for a great shift in how appendices are done.

A judge member noted that the biggest problem is duplication. An attorney member reminisced about appendices that ran 20,000 pages, but that current practice of a proof brief, with an appendix that includes what is actually cited, avoids that problem.

Judge Campbell stated that trial exhibits are not placed on the electronic docket, but are frequently put in electronic form for use of the jury. Perhaps they should be put on the electronic docket.

The Committee decided to remove this matter from the agenda, but revisit it in three years.

E. Dismissals under Rule 42(b) (17-AP-G)

Mr. Landau reported for the subcommittee examining Rule 42(b), which provides that a circuit clerk "may" dismiss an appeal on the filing of a stipulation signed by all parties. Some cases, relying on the word "may," hold that the court has discretion to deny the dismissal, particularly if the court fears strategic behavior. The

parallel Supreme Court Rule (Rule 46.1), by contrast, uses the word "will" rather than "may." The discretion found in Rule 42(b) can make settlement difficult, because the client lacks certainty, and may result in a court improperly issuing an advisory opinion.

A judge member asked whether there was ever a legitimate reason to not dismiss. The reporter asked whether laws that require judicial approval of settlements, such as the Tunney Act, apply to settlements on appeal. Others raised the possibility of class actions. Judge Campbell stated that class actions are dealt with in forthcoming Civil Rules.

An attorney member stated that some judges are concerned with what appear to be conflicts of interest between attorneys with institutional interests who want to flush a case after oral argument and the client who is being sold out. Mr. Coquillette stated that such a lawyer would be violating lots of rules of professional conduct, and that there are other remedies for such behavior. Judge Kozinski once wrote a dissent contending that an attorney with an institutional interest was giving up on a case with no gain to the client in return, prompting an attorney member to ask how the judge could know that there was no gain in return.

The subcommittee will continue its examination.

F. Rule 29 Blanket Consent to Amicus Briefs (17-AP-F)

Professor Sachs presented a proposal, modelled on the Supreme Court rules, to amend Rule 29 to allow parties to file blanket consent to amicus briefs. A blanket consent procedure would reduce the burden on amici and parties in seeking and providing individualized consent, and perhaps on the court deciding motions if consent is not obtained in time. Mr. Byron noted that there are some cases in which the Department of Justice has to respond to many emails seeking consent, and this amendment would help a little, but that the emails are not much of a burden so that it isn't really needed.

Ms. Dodszuweit reported that there were about 100 cases in the past five years in the Court of Appeals for the Third Circuit with even one amicus brief. She also reported that, under current practice, if the Clerk were to receive a blanket consent letter, it would be noted on the docket and the Clerk would act in accordance with it.

In light of the very different amicus practice in the Supreme Court compared to the courts of appeals, the Committee decided to take this matter off the agenda, with thanks to Professor Sachs for raising the issue.

G. Costs on Appeal

This matter had previously been referred to the Civil Rules Committee for feedback. Judge Chagares reported that the Civil Rules Committee asked this Committee to wait to see how the proposed amendment to Fed. R. Civ. P. 23(e)(5) works.

Accordingly, the Committee decided to remove the matter from its agenda.

H. Supreme Court Decision in *Hall v. Hall*

The reporter presented a discussion of the recent Supreme Court decision in *Hall v. Hall*, 138 S. Ct. 1118 (2018), which held that cases consolidated under Fed. R. Civ. P. 42(a) retain their separate identities at least to the extent that final decision in one is immediately appealable. The reporter noted that this decision might raise efficiency concerns in the courts of appeals, by permitting separate appeals that deal with the same underlying controversy, and might raise trap-for-the-unwary concerns for parties in consolidated cases who do not appeal when there is a final judgment in one of consolidated cases but instead wait until all of the consolidated cases are resolved.

The Committee decided that this matter is appropriately handled by the Civil Rules Committee, while some members suggested keeping an eye on the trap-for the-unwary concern and looking to see if the provisions of the Appellate Rules regarding consolidation of appeals present any similar issues.

I. Length of Answers/Responses to Petitions Under Rules 35 and 40 (18-AP-A and 18-AP-B)

Mr. Byron presented a proposal to add length limitations to the answers/responses to petitions for rehearing and rehearing en banc under Rules 35 and 40. He noted that experienced practitioners understand that the length limitations for the petitions themselves apply, but that it would be good to have this stated in the Rules themselves.

Judge Chagares noted that the draft before the Committee offered two alternative phrasings. As for Rule 35, the Committee opted for "The length limitations in Rule 35(b)(2) apply to a response." As for Rule 40, the Committee opted for "The requirements of Rule 40(b) apply to a response to a petition for panel rehearing."

A judge member noted that his court always puts a length limitation in the order permitting the filing. Mr. Byron responded that not all courts of appeals do so.

Mr. Byron added that it might be appropriate to undertake a more comprehensive review of Rules 35 and 40, perhaps drawing on the different structure of Rule 21.

The reporter presented a second issue. Rule 35 uses the term "response," while Rule 40 uses the term "answer." He suggested that Rule 40 be changed to "response," pointing to Black's Law Dictionary definitions of the two terms. Ms. Dodszuweit suggested that Rule 35 be changed to "answer," pointing to the use of "answer" in other Rules to designate a document filed only with the Court's permission in response to a petition. The reporter noted that the Supreme Court Rules use the term "response" for a document filed only with the Court's permission in response to a petition, and that Fed. R. App. P. 32(c)(2) refers to "a petition for panel rehearing and a petition for hearing or rehearing en banc, and any response to such a petition."

The Committee opted for the word "response" in both the Rule and the Committee Note, and deleted some unnecessary words in the proposed Note. Despite some concerns about the proposed Note stating that the Advisory Committee changed the language for stylistic reasons, the Committee decided to leave in that language—which was modelled on language from the Restyling Project—pending review by the style consultants. (18-AP-A).

The Committee also decided to pursue a more general study of Rules 35 and 40, and Danielle Spinelli was added to the subcommittee. (18-AP-B).

IV. New Matters

Judge Chagares invited discussion of possible new matters for the Committee's consideration, and, in particular, matters that would increase efficiency and promote the just, speedy, and inexpensive resolution of cases. Mr. Landau noted that the Supreme Court had distinguished between the statutory time for appeal (which is jurisdictional) and more stringent time limits in the Federal Rules of Appellate Procedure (which are not jurisdictional). *Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13 (2017). He suggested that the Committee might want to align the Rule with the statute, correcting for divergence that had occurred over time.

A subcommittee was formed, consisting of Mr. Landau, Judge Kavanaugh, and Judge Chagares.

V. Adjournment

Judge Chagares thanked Ms. Womeldorf and her staff for organizing the dinner and the meeting. He announced that the next meeting would be held on October 26, 2018, in Washington, DC.

The Committee adjourned at approximately 12:30 p.m.