ADVISORY COMMITTEE
ON
APPELLATE RULES

April 3, 2020

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ADVISORY COMMITTEE ON APPELLATE RULES
Meeting of April 3, 2020

Table of Contents

I. Greetings and Background Material

Tab 1A: Committee Roster
Tab 1B: Table of Agenda Items
Tab 1C: Rules Tracking Chart
Tab 1D: Pending Legislation Chart

II. Report on Meeting of the Standing Committee (January 2020)

Tab 2A: Draft minutes of Standing Committee meeting
Tab 2B: March 2020 Report from Standing Committee to Judicial Conference

III. Approval of minutes of October 30, 2019 meeting (**Action Item**)

Tab 3: Draft minutes

IV. Discussion of Matters Published for Public Comment (**Action Item**)

Tab 4A: Memo Regarding Rules 3 & 6, Forms 1 & 2
Tab 4B: Memo Regarding Rule 42
Tab 4C: Excerpt from Published Proposals (pages 7-44)
Tab 4D: Comments Received

V. Discussion of Matters before Subcommittees (**Action Item**)

A. Rule 35 (18-AP-A)

Tab 5A: Subcommittee Report

B. Rule 25 and Railroad Retirement Act (18-AP-E; 18-CV-EE)

Tab 5B: Kocur Memo of December 18, 2018
Tab 5C: Subcommittee Report

C. Decisions on Unbriefed Grounds (19-AP-B)

Tab 5D: AAAL letter of April 26, 2019
Tab 5E: Subcommittee Report

VI. Discussion of Matters before Joint Subcommittees

Electronic Filing Deadline (19-AP-E) and
Finality in Consolidated Cases after *Hall*

Tab 6A: Reporter's Memo
Tab 6B: Cooper Memo

VII. Discussion of Recent Suggestions

A. IFP Standards (19-AP-C)

Tab 7A: Sai suggestion
Tab 7B: Reporter's Memo
Tab 7C: Reporter's Memo of October 3, 2019

B. Use of Titles Rather Than Names (19-AP-G)

Tab 7D: Sai suggestion
Tab 7E: Reporter's Memo

C. Congressional Subpoenas (19-AP-H)

Tab 7F: Wilcon suggestion
Tab 7G: Reporter's Memo

D. Cumulative Finality

Tab 7H: Lammon suggestion (20-AP-A)
Tab 7I: Reporter's Memo

VIII. Review of Impact and Effectiveness of Recent Rule Changes (oral report)

IX. New Business

X. Next meeting: October 20, 2020

TAB 1

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TAB 1A

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ADVISORY COMMITTEE ON APPELLATE RULES

Chair	Reporter
Honorable Michael A. Chagares United States Court of Appeals U.S. Post Office and Courthouse Two Federal Square, Room 357 Newark, NJ 07102-3513	Professor Edward Hartnett Richard J. Hughes Professor of Law Seton Hall University School of Law One Newark Center Newark, NJ 07102

Members	
Honorable Jay S. Bybee United States Court of Appeals Lloyd D. George U.S. Courthouse 333 Las Vegas Boulevard South, Suite 7080 Las Vegas, NV 89101-7065	Honorable Noel J. Francisco* Solicitor General (ex officio) United States Department of Justice 950 Pennsylvania Avenue, N.W. Washington, DC 20530 *Alternate Representative: H. Thomas Byron III, Esq. United States Department of Justice 950 Pennsylvania Ave, N.W. Washington, DC 20530
Honorable Judith L. French Ohio Supreme Court 65 South Front Street Columbus, OH 43215	Honorable Stephen J. Murphy III United States District Court Theodore Levin U.S. Courthouse 231 West Lafayette Boulevard, Room 235 Detroit, MI 48226
Professor Stephen E. Sachs Duke Law School 210 Science Drive Box 90360 Durham, NC 27708-0360	Danielle Spinelli, Esq. Wilmer Cutler Pickering Hale and Dorr LLP 1875 Pennsylvania Avenue, N.W. Washington DC 20006
Honorable Paul J. Watford United States Court of Appeals Richard H. Chambers Building 125 South Grand Avenue, 6th Floor Pasadena, CA 91105-1621	Lisa B. Wright, Esq. Office of the Federal Public Defender 625 Indiana Avenue, NW, Suite 550 Washington, DC 20004

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Atlanta, GA 30303

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Secretary, Standing Committee and Rules Committee Chief Counsel

Rebecca A. Womeldorf
Administrative Office of the U.S. Courts
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Washington, DC 20544

Advisory Committee on Appellate Rules

Members	Position	District/Circuit	Start Date		End Date
Michael A. Chagares Chair	C	Third Circuit	Member: Chair:	2011 2017	---- 2020
Jay S. Bybee	C	Ninth Circuit		2017	2020
Noel Francisco*	DOJ	Washington, DC		----	Open
Judith L. French	JUST	Ohio		2016	2022
Stephen J. Murphy III	D	Michigan (Eastern)		2015	2021
Stephen E. Sachs	ACAD	North Carolina		2016	2022
Danielle Spinelli	ESQ	Washington, DC		2017	2020
Paul J. Watford	C	Ninth Circuit		2018	2021
Lisa B. Wright	ESQ	Assistant Federal Public Defender (Appellate) (DC)		2019	2022
Edward Hartnett Reporter	ACAD	New Jersey		2018	2023

Principal Staff:	Rebecca Womeldorf	202-502-1820
	Bridget Healy	202-502-1820

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* Ex-officio - Solicitor General

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RULES COMMITTEE LIAISON MEMBERS

Liaisons for the Advisory Committee on Appellate Rules	Hon. Frank M. Hull *(Standing)* Hon. Bernice B. Donald *(Bankruptcy)*
Liaison for the Advisory Committee on Bankruptcy Rules	Hon. William J. Kayatta, Jr. *(Standing)*
Liaisons for the Advisory Committee on Civil Rules	Peter D. Keisler, Esq. *(Standing)* Hon. A. Benjamin Goldgar *(Bankruptcy)*
Liaison for the Advisory Committee on Criminal Rules	Hon. Jesse M. Furman *(Standing)*
Liaisons for the Advisory Committee on Evidence Rules	Hon. James C. Dever III *(Criminal)* Hon. Carolyn B. Kuhl *(Standing)* Hon. Sara Lioi *(Civil)*

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TAB 1B

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	FRAP Item	Proposal	Source	Current Status
6	18-AP-B	Rules 35 and 40 – regarding length of responses to petitions for rehearing	Department of Justice	Discussed at 4/18 meeting Proposed draft for publication approved for submission to Standing Committee 4/18 Draft approved for publication by Standing Committee 6/18 Discussed at 10/18 meeting Final approval for submission to Standing Committee 4/19 Approved by Standing Committee 6/19 Approved by Judicial Conference 9/19 Submitted to Supreme Court 10/19
4	16-AP-D	Rule 3(c)(1)(B) and the Merger Rule	Neal Katyal	Discussed at 11/17 meeting and a subcommittee formed Discussed at 4/18 meeting and continued review Discussed at 10/18 meeting and continued review Draft approved for submission to Standing Committee 4/19 Draft approved for publication by Standing Committee 6/19 Discussed at 10/19 meeting
4	17-AP-G	Rule 42(b)–discretionary "may" dismissal of appeal on consent of all parties	Christopher Landau	Discussed at 11/17 meeting and a subcommittee formed Discussed at 4/18 meeting and continued review Discussed at 10/18 meeting and continued review Draft approved for submission to Standing Committee 4/19 Draft approved for publication by Standing Committee 6/19 Discussed at 10/19 meeting
1	18-AP-A	Rules 35 and 40 – Comprehensive review	Department of Justice	Discussed at 4/18 meeting and subcommittee formed Discussed at 10/18 meeting and continued review Discussed at 4/19 meeting and continued review Discussed at 10/19 meeting and continued review

	FRAP Item	Proposal	Source	Current Status
1	18-AP-E	Provide privacy in Railroad Retirement Act cases as in Social Security cases	Railroad Retirement Board	Discussed at 4/19 meeting and subcommittee formed Discussed at 10/19 meeting and continued review
1	19-AP-E	Electronic Filing Deadlines	Hon. Michael Chagares	Discussed at 6/19 meeting of Standing Committee and joint committee formed Discussed at 10/19 meeting
1	19-AP-B	Decisions on Unbriefed Grounds	AAAL	Initial consideration 10/19 and subcommittee formed
1	19-AP-C	IFP Standards	Sai	Initial consideration 10/19
1	19-AP-G	Titles in Official Capacity Actions	Sai	Initial consideration 4/20
1	19-AP-H	Congressional Subpoenas	Wilcon	Initial consideration 4/20
1	20-AP-A	Relation Forward of Notices of Appeal	Lammon	Initial consideration 4/20
0	19-AP-A	Define Good Cause for Extensions	Nico Ratkowski	Initial consideration 10/19 and removed from agenda
0	19-AP-D	Court Calculated Deadlines	Sai	Initial consideration 10/19 and removed from agenda
0	None assigned	Review of rules regarding appendices	Committee	Discussed at 11/17 meeting and a subcommittee formed to review Discussed at 4/18 meeting and removed from agenda Will reconsider in 4/21

0 removed from agenda
1 pending before AC prior to public comment
2 approved by AC and submitted to SC for publication
3 out for public comment
4 pending before AC after public comment
5 final approval by AC and submitted to SC
6 approved by SC
7 approved by SCOTUS

TAB 1C

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Effective December 1, 2019 REA History: no contrary action by Congress; adopted by the Supreme Court and transmitted to Congress (Apr 2019); approved by Judicial Conference (Sept 2018) and transmitted to Supreme Court (Oct 2018)		
Rule	**Summary of Proposal**	**Related or Coordinated Amendments**
AP 3, 13	Changed the word "mail" to "send" or "sends" in both rules, although not in the second sentence of Rule 13.	
AP 26.1, 28, 32	Rule 26.1 amended to change the disclosure requirements, and Rules 28 and 32 amended to change the term "corporate disclosure statement" to "disclosure statement" to match the wording used in amended Rule 26.1.	
AP 25(d)(1)	Eliminated unnecessary proofs of service in light of electronic filing.	
AP 5.21, 26, 32, 39	Technical amendment that removed the term "proof of service."	AP 25
BK 9036	Amended to allow the clerk or any other person to notice or serve registered users by use of the court's electronic filing system and to serve or notice other persons by electronic means that the person consented to in writing.	
BK 4001	Amended to add subdivision (c) governing the process for obtaining post-petition credit in a bankruptcy case, inapplicable to chapter 13 cases.	
BK 6007	Amended subsection (b) to track language of subsection (a) and clarified the procedure for third-party motions brought under § 554(b) of the Bankruptcy Code.	
BK 9037	Amended to add subdivision (h) providing a procedure for redacting personal identifiers in documents that were previously filed without complying with the rule's redaction requirements.	
CR 16.1 (new)	New rule regarding pretrial discovery and disclosure. Subsection (a) requires that, no more than 14 days after the arraignment, the attorneys are to confer and agree on the timing and procedures for disclosure in every case. Subsection (b) emphasizes that the parties may seek a determination or modification from the court to facilitate preparation for trial.	
EV 807	Residual exception to the hearsay rule; clarifies the standard of trustworthiness.	
2254 R 5	Makes clear that petitioner has an absolute right to file a reply.	
2255 R 5	Makes clear that movant has an absolute right to file a reply.	

Revised March 2020

Effective February 19, 2020 The Interim Rules listed below were published for comment in the fall of 2019 outside the normal REA process and approved by the Judicial Conference for distribution to Bankruptcy Courts to be adopted as local rules to conform procedure to changes in the Bankruptcy Code -- adding a subchapter V to chapter 11 -- made by the Small Business Reorganization Act of 2019		
Rule	**Summary of Proposal**	**Related or Coordinated Amendments**
BK 1007	The amendments exclude a small business debtor in subchapter V case from the requirements of the rule.	
BK 1020	The amendments require a small business debtor electing to proceed on the subchapter V to state its intention on the bankruptcy petition or within 14 days after the order for relief is entered.	
BK 2009	2009(a) and (b) are amended to exclude subchapter V debtors and 2009(c) is amended to add subchapter V debtors.	
BK 2012	2012(a) is amended to include chapter V cases in which the debtor is removed as the debtor in possession.	
BK 2015	The rule is revised to describe the duties of a debtor in possession, the trustee, and the debtor in a subchapter V case.	
BK 3010	The rule is amended to include subchapter V cases.	
BK 3011	The rule is amended to include subchapter V cases.	
BK 3014	The rule is amended to provide a deadline for making an election under 1111(b) of the Bankruptcy Code in a subchapter V case.	
BK 3016	The rule is amended to reflect that a disclosure statement is generally not required in a subchapter V case, and that official forms are available for a reorganization plan and - if required by the court - a disclosure statement.	
BK 3017.1	The rule is amended to apply to subchapter V cases where the court has ordered that the provisions of 1125 of the Bankruptcy Code applies.	
BK 3017.2	This is a new rule that fixes dates in subchapter V cases where there is no disclosure statement.	
BK 3018	The rule is amended to take account of the court's authority to set times under Rules 3017.1 and 3017.2 in small business cases and subchapter V cases.	
BK 3019	Subdivision (c) is added to the rule to govern requests to modify a plan after confirmation in a subchapter V case under 1193(b) or (c) of the Bankruptcy Code.	

Revised March 2020

Effective (no earlier than) December 1, 2020 Current Step in REA Process: transmitted to Supreme Court (Oct 2019) REA History: approved by Judicial Conference (Sept 2019); approved by Standing Committee (June 2019); approved by relevant advisory committee (Spring 2019); published for public comment (unless otherwise noted, Aug 2018-Feb 2019); approved by Standing Committee for publication (unless otherwise noted, June 2018)		
Rule	**Summary of Proposal**	**Related or Coordinated Amendments**
AP 35, 40	Proposed amendment clarifies that length limits apply to responses to petitions for rehearing plus minor wording changes.	
BK 2002	Proposed amendment would: (1) require giving notice of the entry of an order confirming a chapter 13 plan; (2) limit the need to provide notice to creditors that do not file timely proofs of claim in chapter 12 and chapter 13 cases; and (3) add a cross-reference in response to the relocation of the provision specifying the deadline for objecting to confirmation of a chapter 13 plan.	
BK 2004	Amends subdivision (c) to refer specifically to electronically stored information and to harmonize its subpoena provisions with the current provisions of Civil Rule 45, which is made applicable in bankruptcy cases by Bankruptcy Rule 9016.	CV 45
BK 8012	Conforms Bankruptcy Rule 8012 to proposed amendments to Appellate Rule 26.1 that were published in Aug 2017.	AP 26.1
BK 8013, 8015, and 8021	Unpublished. Eliminates or qualifiies the term "proof of service" when documents are served through the court's electronic-filing system conforming to pending changes in 2019 to AP Rules 5, 21, 26, 32, and 39.	AP 5, 21, 26, 32, and 39
CV 30	Proposed amendment to subdivision (b)(6), the rule that addresses deposition notices or subpoenas directed to an organization, would require the parties to confer about the matters for examination before or promptly after the notice or subpoena is served. The amendment would also require that a subpoena notify a nonparty organization of its duty to confer and to designate each person who will testify.	
EV 404	Proposed amendment to subdivision (b) would expand the prosecutor's notice obligations by: (1) requiring the prosecutor to "articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose"; (2) deleting the requirement that the prosecutor must disclose only the "general nature" of the bad act; and (3) deleting the requirement that the defendant must request notice. The proposed amendments also replace the phrase "crimes, wrongs, or other acts" with the original "other crimes, wrongs, or acts."	

Revised March 2020

Effective (no earlier than) December 1, 2021 Current Step in REA Process: published for public comment (Aug 2019-Feb 2020) REA History: unless otherwise noted, approved for publication (June 2019)		
Rule	**Summary of Proposal**	**Related or Coordinated Amendments**
AP 3	The proposed amendments to Rule 3 address the relationship between the contents of the notice of appeal and the scope of the appeal. The proposed amendments change the structure of the rule and provide greater clarity, expressly rejecting the *expressio unius* approach, and adding a reference to the merger rule.	AP 6, Forms 1 and 2
AP 6	Conforming amendments to the proposed amendments to Rule 3.	AP 3, Forms 1 and 2
AP 42	The proposed amendment to Rule 42 clarifies the distinction between situations where dismissal is mandated by stipulation of the parties and other situations. The proposed amendment would subdivide Rule 42(b), add appropriate subheadings, and change the word "may" to "must" in new Rule 42(b)(1) for stipulated dismissals. Also, the phrase "no mandate or other process may issue without a court order" is replaced in new (b)(3). A new subsection (C) was added to the rule to clarify that Rule 42 does not alter the legal requirements governing court approval of a settlement, payment, or other consideration.	
AP Forms 1 and 2	Conforming amendments to the proposed amendments to Rule 3, creating Form 1A and Form 1B to provide separate forms for appeals from final judgments and appeals from other orders.	AP 3, 6
BK 2005	The proposed amendment to subsection (c) of the replaces the reference to 18 U.S.C. § 3146(a) and (b), (which was repealed in 1984) with a reference to 18 U.S.C. § 3142 .	
BK 3007	The proposed amendment clarifies that credit unions may be served with an objection claim under the general process set forth in Rule 3007(a)(2)(A) - by first-class mail sent to the person designated on the proof of claim.	
BK 7007.1	The proposed amendment would conform the rule to recent amendments to Rule 8012, and Appellate Rule 26.1.	CV 7.1
BK 9036	The proposed amendment would require high-volumne paper notice recipients (intially designated as recipients of more than 100 court papers notices in calendar month) to sign up for electronic service and noticing, unless the recipient designates a physical mailing address if so authorized by statute.	
CV 7.1	Proposed amendment would: (1) conform Civil Rule 7.1 with pending amendments to Appellate Rule 26.1 and Bankruptcy Rule 8012; and (2) require disclosure of the name and citizenship of each person whose citizenship is attributed to a party for purposes of determining diversity jurisdiction.	AP 26.1, BK 8012

Revised March 2020

TAB 1D

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Pending Legislation that Would Directly or Effectively Amend the Federal Rules
116th Congress

Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Protect the Gig Economy Act of 2019	**H.R. 76** *Sponsor:* Biggs (R-AZ)	CV 23	**Bill Text:** https://www.congress.gov/116/bills/hr76/BILLS-116hr76ih.pdf **Summary (authored by CRS):** This bill amends Rule 23 of the Federal Rules of Civil Procedure to expand the preliminary requirements for class certification in a class action lawsuit to include a new requirement that the claim does not allege misclassification of employees as independent contractors. **Report:** None.	• 1/3/19: Introduced in the House; referred to Judiciary Committee's Subcommittee on the Constitution, Civil Rights, and Civil Justice
Injunctive Authority Clarification Act of 2019	**H.R. 77** *Sponsor:* Biggs (R-AZ) *Co-Sponsors:* Meadows (R-NC) Rose (R-TN) Roy (R-TX) Wright (R-TX)	CV	**Bill Text:** https://www.congress.gov/116/bills/hr77/BILLS-116hr77ih.pdf **Summary (authored by CRS):** This bill prohibits federal courts from issuing injunctive orders that bar enforcement of a federal law or policy against a nonparty, unless the nonparty is represented by a party in a class action lawsuit. **Report:** None.	• 1/3/19: Introduced in the House; referred to Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security • 2/25/20: hearing held by Senate Judiciary Committee on same issue ("Rule by District Judge: the Challenges of Universal Injunctions")
Litigation Funding Transparency Act of 2019	**S. 471** *Sponsor:* Grassley (R-IA) *Co-Sponsors:* Cornyn (R-TX) Sasse (R-NE) Tillis (R-NC)	CV 23	**Bill Text:** https://www.congress.gov/116/bills/s471/BILLS-116s471is.pdf **Summary:** Requires disclosure and oversight of TPLF agreements in MDL's and in "any class action." **Report:** None.	• 2/13/19: Introduced in the Senate; referred to Judiciary Committee

Due Process Protections Act	**S. 1380** *Sponsor:* Sullivan (R-AK) *Co-Sponsor:* Durbin (D-IL)	CR 5	**Bill Text:** https://www.congress.gov/116/bills/s1380/BILLS-116s1380is.pdf **Summary:** This bill would amend Criminal Rule 5 (Initial Appearance) by: 1. redesignating subsection (f) as subsection (g); and 2. inserting after subsection (e) the following: "(f) Reminder Of Prosecutorial Obligation. -- (1) IN GENERAL. -- In all criminal proceedings, on the first scheduled court date when both prosecutor and defense counsel are present, the judge shall issue an oral and written order to prosecution and defense counsel that confirms the disclosure obligation of the prosecutor under Brady v. Maryland, 373 U.S. 83 (1963) and its progeny, and the possible consequences of violating such order under applicable law. (2) FORMATION OF ORDER. -- Each judicial council in which a district court is located shall promulgate a model order for the purpose of paragraph (1) that the court may use as it determines is appropriate." **Report:** None.	• 5/8/19: Introduced in the Senate; referred to Judiciary Committee
Assessing Monetary Influence in the Courts of the United States Act (AMICUS Act)	**S. 1411** *Sponsor:* Whitehouse (D-RI) *Co-Sponsors:* Blumenthal (D-CT) Hirono (D-HI)	AP 29	**Bill Text:** https://www.congress.gov/116/bills/s1411/BILLS-116s1411is.pdf **Summary:** In part, the legislation would require certain amicus curiae to disclose whether counsel for a party authored the brief in whole or in part and whether a party or a party's counsel made a monetary contribution intended to fund the preparation or submission of the brief. **Report:** None.	• 5/9/19: Introduced in the Senate; referred to Judiciary Committee

Back the Blue Act of 2019	**S. 1480** *Sponsor:* Cornyn (R-TX) *Co-Sponsors:* Barrasso (R-WY) Blackburn (R-TN) Blunt (R-MO) Boozman (R-AR) Capito (R-WV) Cassidy (R-LA) Cruz (R-TX) Daines (R-MT) Fischer (R-NE) Hyde-Smith (R-MS) Isakson (R-GA) Perdue (R-GA) Portman (R-OH) Roberts (R-KS) Rubio (R-FL) Tillis (R-NC)	§ 2254 Rule 11	**Bill Text:** https://www.congress.gov/116/bills/s1480/BILLS-116s1480is.pdf **Summary:** Section 4 of the bill is titled "Limitation on Federal Habeas Relief for Murders of Law Enforcement Officers." It adds to § 2254 a new subdivision (j) that would apply to habeas petitions filed by a person in custody for a crime that involved the killing of a public safety officer or judge. Section 4 also amends Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts -- the rule governing certificates of appealability and time to appeal -- by adding the following language to the end of that Rule: "Rule 60(b)(6) of the Federal Rules of Civil Procedure shall not apply to a proceeding under these rules in a case that is described in section 2254(j) of title 28, United States Code." **Report:** None.	• 5/15/19: Introduced in the Senate; referred to Judiciary Committee
	H.R. 5395 *Sponsor:* Bacon (R-NE) *Co-Sponsors:* Graves (R-LA) Johnson (R-OH) Stivers (R-OH)		Identical to Senate bill (see above).	• 12/11/19: introduced in House; referred to Judiciary Committee • 1/30/20: referred to Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security
N/A		CV 26		• 9/26/19: House Judiciary Committee hearing on the topics of PACER, cameras in the courtroom, and sealing court filings

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MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 28, 2020 | Phoenix, AZ

The Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee or Committee) met in Phoenix, Arizona, on January 28, 2020. The following members participated in the meeting:

Judge David G. Campbell, Chair
Judge Jesse M. Furman
Daniel C. Girard, Esq.
Robert J. Giuffra, Jr., Esq.
Judge Frank Mays Hull
Judge William J. Kayatta, Jr.
Peter D. Keisler, Esq.
Professor William K. Kelley
Judge Carolyn B. Kuhl
Judge Gene E.K. Pratter
Elizabeth J. Shapiro, Esq.*
Judge Srikanth Srinivasan
Kosta Stojilkovic, Esq.
Judge Jennifer G. Zipps

*Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division represented the Department of Justice (DOJ) on behalf of the Honorable Jeffrey A. Rosen, Deputy Attorney General.

The following attended on behalf of the advisory committees:

Advisory Committee on Appellate Rules –
Judge Michael A. Chagares, Chair (by telephone)
Professor Edward Hartnett, Reporter

Advisory Committee on Bankruptcy Rules –
Judge Dennis R. Dow, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Laura Bartell, Associate Reporter

Advisory Committee on Criminal Rules –
Judge Raymond M. Kethledge, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter

Advisory Committee on Civil Rules –
Judge John D. Bates, Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Associate Reporter

Advisory Committee on Evidence Rules –
Judge Debra Ann Livingston, Chair
Professor Liesa L. Richter, Consultant

Others providing support to the Committee included: Professor Catherine T. Struve, the Standing Committee's Reporter (by telephone); Professor Daniel R. Coquillette (by telephone), Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary (by telephone); Bridget Healy (by telephone), Scott Myers, and Julie Wilson, Rules Committee Staff Counsel; Allison A. Bruff, Law Clerk to the Standing Committee; and John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, of the Federal Judicial Center (FJC).

Draft

OPENING BUSINESS

Judge Campbell called the meeting to order and welcomed everyone to Phoenix, Arizona. This meeting is the last for Judge Srikanth Srinivasan, who in a few weeks will become the Chief Judge of the U.S. Court of Appeals for the District of Columbia. Judge Campbell thanked Judge Srinivasan for his contributions as a member of the Committee and wished him well in this new assignment. Judge Campbell welcomed three new members of the Standing Committee: Judge Gene Pratter, Kosta Stojilkovic, and Judge Jennifer Zipps. Judge Campbell also welcomed Judge Raymond Kethledge, who began his tenure as Chair of the Criminal Rules Advisory Committee last October. Judge Campbell noted the addition of a new member of the Rules Committee Staff, Brittany Bunting. Judge Campbell also recognized Julie Wilson, Rules Committee Staff Counsel, for reaching the milestone of 15 years of service with the federal government.

Scott Myers reviewed the status of proposed rules amendments proceeding through each stage of the Rules Enabling Act process and referred members to the tracking chart in the agenda book. The chart includes the rules that went into effect on December 1, 2019. The chart also shows the interim Bankruptcy Rules that have been recommended for adoption as local rules with an effective date of February 19, 2020. Also included are the rules approved by the Judicial Conference in September 2019 and transmitted to the Supreme Court. These rules are set to go into effect on December 1, 2020, provided the Supreme Court approves them and Congress takes no action to the contrary.

Judge Campbell asked the judge members of the Committee if they had occasion in their courts to address new Criminal Rule 16.1, which went into effect on December 1, 2019. No judge member had yet addressed Criminal Rule 16.1. Judge Campbell observed that it would be good to raise awareness about the new Rule. He noted that he had occasion in a recent trial to apply the amended version of Evidence Rule 807, which also took effect last December, and found it much easier to apply than its predecessor. Judge Campbell also noted that the pending amendment to Evidence Rule 404(b) would have been helpful in a recent case, if it had been in effect.

APPROVAL OF THE MINUTES FROM THE PREVIOUS MEETING

Upon motion by a member, seconded by another, and on a voice vote: **The Committee approved the minutes of the June 25, 2019 meeting.**

REPORT ON MULTI-COMMITTEE ITEMS

Judge Chagares, Chair of the Appellate Rules Advisory Committee, reported on the E-Filing Deadline Joint Subcommittee which was formed to analyze whether e-filing deadlines should be earlier than midnight. One key question under study is whether the midnight deadline negatively affects quality of life, particularly for young associates and staff. The subcommittee's consideration of e-filing deadlines is in part inspired by filing rules in Delaware. The rules in Delaware state court were amended effective September 2018 to provide for a 5:00 p.m. (ET) electronic-filing deadline. This accorded with similar local provisions in the District of Delaware that provide for a 6:00 p.m. (ET) electronic-filing deadline. The subcommittee has solicited

comments from the American Bar Association, paralegal and legal assistant associations, and law schools. The first public suggestion on this e-filing proposal voicing support for the proposal was received at 1:48 a.m. on the morning of the Appellate Rules Advisory Committee's fall meeting.

Professor Cooper, Reporter to the Civil Rules Advisory Committee, reported on the Appeal Finality After Consolidation Joint Civil-Appellate Subcommittee. The subcommittee was formed to consider the implications of the Supreme Court's holding in *Hall v. Hall*, 138 S. Ct. 1118 (2018), that consolidation under Civil Rule 42(a) of originally-separate lawsuits does not merge those lawsuits for purposes of 28 U.S.C. § 1291's final-judgment rule. The *Hall v. Hall* Court suggested that, if this holding created any problems, the Rules Enabling Act process would be the right way to address them. Dr. Emery Lee of the Federal Judicial Center is undertaking a deep review of cases filed in 2015-2017. Those cases were filed, but may or may not have gone to final disposition, before the Court's decision in *Hall v. Hall*; it may be necessary to expand the period of study to include cases filed in three subsequent years.

Judge Chagares reported on a proposal, concerning the computation of deadlines, that was considered by the Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules at their respective fall 2019 meetings. The proposal came from Sai, who has submitted helpful rules suggestions over the years. Sai proposed a rule that would require courts to calculate all deadlines and tell the parties the dates of those deadlines. The committees recognized that such a practice would be helpful to litigants, particularly to pro se litigants, but concluded that it would be impracticable, and unduly burdensome, to task the courts with such a duty. Accordingly, the advisory committees have removed this proposal from their agendas.

Professor Hartnett, Reporter to the Appellate Rules Advisory Committee, described the advisory committees' consideration of another suggestion submitted by Sai. The standards for *in forma pauperis* (i.f.p.) status currently vary across districts, and Sai proposes replacing those varying standards with a nationally uniform one. Sai also raised concern about the Administrative Office forms that courts use to gather information bearing on i.f.p. status; Sai argues that some questions on these forms are ambiguous and/or unduly intrusive. After the advisory committees considered this proposal at their fall 2019 meetings, the Civil Rules Committee removed the proposal from its agenda, but the Appellate Rules Committee retained the proposal on its agenda, and the Criminal Rules Committee expressed the intention to follow the other committees' lead on the matter. The Appellate Rules Committee's interest in this item, Professor Hartnett explained, stemmed partly from the fact that – unlike the other sets of national Rules – the Appellate Rules have an official Form (Form 4) dealing with requests to proceed i.f.p. in the courts of appeals. Further, Supreme Court Rule 39 directs that litigants use Form 4 when seeking i.f.p. status in the Supreme Court. A participant asked why the Civil Rules Advisory Committee had removed the item from its agenda. Judge Bates, the Chair of that committee, explained that although the committee recognized the potential problems with the variation in standards for i.f.p. status, it could not see how to establish a workable single standard for 94 districts given the variety of financial circumstances across the districts. But, he noted, the Civil Rules Advisory Committee referred the forms questions raised by Sai to the Administrative Office, the entity that maintains certain district-court forms (including Forms AO 239 and 240 concerning requests for i.f.p. status). Professor Cooper, Reporter to the Civil Rules Advisory Committee, noted that that committee did not have occasion to reach questions relating to the scope limitation set by the Rules Enabling Act

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– i.e., whether rulemaking on eligibility for i.f.p. status would alter substantive rights. Professor Cooper further questioned the feasibility of establishing a nationally uniform i.f.p. standard in light of regional variations in the cost of living.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Campbell prefaced the report by the Bankruptcy Rules Advisory Committee by thanking that committee for its admirably quick action in preparing interim rules and forms to implement the Small Business Reorganization Act of 2019 (SBRA). Judge Dow in turn commended Professor Gibson and Scott Myers, who took the lead in that project; he noted that the courts have already expressed appreciation for the interim rules and forms. Judge Dow and Professors Gibson and Bartell then delivered the report of the committee, which last met on September 26, 2019, in Washington, DC. The Advisory Committee presented one action item and two information items.

Action Item

Official Form Amendments Made to Implement the HAVEN Act. The Honoring American Veterans in Extreme Need Act (HAVEN Act) of 2019 became effective on August 23, 2019. The HAVEN Act was designed to exclude certain benefits paid to veterans or servicemembers (or their family members) from the Bankruptcy Code's definition of "current monthly income." A debtor's "current monthly income" is used in means testing computations to determine the debtor's eligibility for bankruptcy relief. Professor Bartell explained that the HAVEN Act does not affect the Bankruptcy Rules; however, its provisions require changes to three official forms: Official Forms 122A-1 (Chapter 7 Statement of Your Current Monthly Income), 122B (Chapter 11 Statement of Your Current Monthly Income), and 122C-1 (Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period). The Advisory Committee approved the amended forms and recommends that the Standing Committee retroactively approve (and provide notice to the Judicial Conference concerning) the amendments to the three official forms.

Professor Struve, Reporter to the Standing Committee, commended Professor Bartell and Scott Myers for their work on these forms.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to retroactively approve the technical and conforming amendments to Official Forms 122A-1, 122B, and 122C-1, and to provide notice to the Judicial Conference.**

Information Items

Interim Rules and Official Forms to Implement the SBRA. The SBRA will go into effect on February 19, 2020. It creates a new subchapter V of chapter 11 of the Bankruptcy Code and provides an alternative to the current reorganization path for small businesses. Professor Gibson explained that the SBRA requires amendments to a number of Bankruptcy Rules and Forms. Because the SBRA will go into effect before the rules amendments could make it through the full Rules Enabling Act process, the Advisory Committee voted to have the amendments issued as

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interim rules for adoption as local rules or by standing orders in each of the districts. The Advisory Committee modeled its approach on an expedited process followed in 2005 when interim rules were needed to respond to the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

At its fall 2019 meeting, the Advisory Committee discussed the proposed draft interim rules and forms and voted to seek approval for their publication for public comment. (There were some post-meeting revisions to the package, and the Advisory Committee approved those revisions by email vote in October 2019.) The resulting eight proposed interim rules and nine official forms were, in turn, approved for publication by the Standing Committee (by email vote). The package was published for four weeks during October and November 2019. The Advisory Committee received seven relevant comments, which provided helpful suggestions. In response, the Advisory Committee made some revisions to the published package and also approved a few interim changes that had not been published – namely, revisions to four additional rules and the issuance of a new rule. By an email vote that concluded in December 2019, the Advisory Committee unanimously decided to recommend the issuance of thirteen interim rules. It also approved nine new or amended official forms. The Advisory Committee approved the official forms pursuant to its delegated authority from the Judicial Conference to issue conforming or technical official form amendments subject to later approval by the Standing Committee and notice to the Judicial Conference. By email vote in December 2019, the Standing Committee unanimously approved the issuance of the rules as interim rules and approved the promulgation of the forms. Judges Campbell and Dow subsequently requested the Executive Committee of the Judicial Conference to act on an expedited basis on behalf of the Judicial Conference to authorize distribution of the interim rules to the districts for adoption as local rules. The Executive Committee unanimously approved the request. Judges Campbell and Dow sent a memorandum to all chief judges of district courts and bankruptcy courts requesting local adoption of the interim rules to implement the SBRA until rulemaking under the Rules Enabling Act can take place. At its spring 2020 meeting, the Advisory Committee will begin the process for the issuance of permanent rules. Professor Gibson indicated that the Advisory Committee expects to bring to the Standing Committee's June 2020 meeting a request for approval for publication of permanent rules and forms.

Judge Dow commended the efforts of all involved in finalizing interim Bankruptcy Rules to be adopted by the districts as local rules in response to the SBRA.

Bankruptcy Rules Restyling. Professor Bartell remarked that the restyling process is going well. The style consultants have provided drafts of Parts I and II of the Bankruptcy Rules. The Restyling Subcommittee, reporters, and style consultants have exchanged different views on some changes to Part I. Professor Bartell noted that they are close to the point of finalizing Part I. The subcommittee has three meetings scheduled in the next six weeks to discuss the draft of Part II. The subcommittee expects to present final drafts of Parts I and II to the Advisory Committee at its spring 2020 meeting and, if approved, to request permission to publish from the Standing Committee at its mid-year meeting. Professor Bartell commended the style consultants for their wonderful work on these rules. The subcommittee is thrilled with what it is receiving from the style consultants and thinks that everyone involved in bankruptcy practice will be pleased with the restyled rules.

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Judge Campbell noted that the restyling endeavor will be a multiyear effort and has gone very well over the past year. He commended Judge Krieger for her work chairing the subcommittee. Judge Dow thanked the style consultants, Professor Bartell, and Judge Krieger for their work throughout this process. In response to a question about the anticipated publication process, Judge Dow explained that the Advisory Committee intends to seek publication in stages but will hold all restyled rules for final approval and adoption at one time. Judge Dow expects that Parts I and II will be ready to present to the Standing Committee at the Standing Committee's June meeting.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Chagares and Professor Hartnett provided the report of the Appellate Rules Advisory Committee, which last met on October 30, 2019, in Washington, DC. The Advisory Committee presented several information items.

Rule 3 (Appeal as of Right — How Taken) and Conforming Amendments to Rule 6 and Forms 1 and 2. Proposed amendments to Appellate Rules 3 and 6 and Forms 1 and 2 are out for public comment. The Advisory Committee has received few comments thus far. The Advisory Committee has been considering this project since fall 2017, and its work finds new support in the Supreme Court's recent decision in *Garza v. Idaho*, 139 S. Ct. 738 (2019), in which the Court stated that the filing of a notice of appeal should be a simple, non-substantive act. After identifying inconsistencies among different jurisdictions in how notices of appeal are treated, the Advisory Committee proposed rule amendments to reduce inadvertent loss of appellate rights by the unwary. The Advisory Committee expects to seek final approval of the amended rules and forms from the Standing Committee at its mid-year meeting.

Professor Hartnett explained that some litigants have mistakenly believed that they must designate every order they wish to challenge on appeal. The proposed amendment to Appellate Rule 3 would alert readers to the merger principle without trying to codify it. It would also add a provision stating that a notice of appeal encompasses the final judgment as long as it designates "an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties" or an order described in Appellate Rule 4(a)(4)(A) — i.e., an order disposing of the last remaining motion of a type that restarts the time to take a civil appeal. The rule leaves open the ability for litigants to deliberately and expressly limit the scope of the notice of appeal. "Without such an express statement, specific designations do not limit the scope of the notice of appeal." The proposed amendment to Appellate Rule 6 is simply a conforming amendment. The forms amendments reflect, among other things, the distinction between appeals from final judgments and appeals from other appealable orders. Professor Hartnett noted that courts continue to issue decisions that underscore the importance of these amendments. He described a recent decision in which a litigant filed a notice of appeal designating both a specific summary judgment ruling and the final judgment, "as well as any and all rulings by the court." The court concluded that because there had been a specific designation, the notice of appeal did not encompass orders that it did not list.

Professor Hartnett also noted that the Advisory Committee had received two public comments on the proposed amendments — one supportive and one critical. The main critique of

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the proposed amendments stems from the language in proposed Appellate Rule 3(c)(5)(A), which refers to an order that adjudicates "all **remaining** claims and the rights and liabilities of all remaining parties." In contrast, Civil Rule 54(b) omits the word "remaining" and refers to "a judgment adjudicating all the claims and all the parties' rights and liabilities." In the commenter's view, there is not a final judgment until some document is entered that recites the disposition of all claims, not just the remaining claims. The premise of the proposed amendment is contrary to that: once the last remaining claim is resolved, there is a final judgment. The Advisory Committee unanimously supported this approach, which is in accord with leading treatises on federal practice and procedure.

One member inquired as to the purpose behind proposed Rule 3(c)(6), which would allow a litigant to designate a specific part of a judgment or appealable order and expressly exclude others from the scope of the notice of appeal. Professor Hartnett explained that it may sometimes be beneficial for a litigant to limit the scope of their notice of appeal. For example, a litigant may want to appeal an adverse ruling as to one party, without wishing to appeal the court's determinations as to other parties.

Another member asked if the language in subparagraph (5)(A) — "the rights and liabilities of all remaining parties" — creates tension with Civil Rule 58(e), which sets a default rule that an outstanding request for costs and/or fees does not prevent a judgment from becoming final for appeal purposes. The member suggested deleting "the rights and liabilities of all remaining parties" if it is not necessary to the proposed rule. Professor Struve responded that she understood this phrase to be a reference to the language in Civil Rule 54(b) — "the rights and liabilities of fewer than all the parties." Professor Cooper suggested that adding the "remaining" language in Appellate Rule 3(c)(5)(A) has the advantage of making clear that a final judgment need not indicate all claims that may have been previously disposed of. Judge Campbell inquired whether the language "all remaining claims" — without referencing rights and liabilities — would suffice. Professor Hartnett explained that the impetus behind including "rights and liabilities" in the new language was to integrate Appellate Rule 3(c) with Civil Rule 54(b). Professor Cooper noted that "claim" is a word with multiple meanings. He observed that the language in Rule 54(b) has existed for a very long time. It would be better, he suggested, for Rule 3(c) not to emphasize the word "claim" standing alone.

A member raised a related question regarding attorney's fee applications and whether this proposed rule might alter current law under which, as noted, Civil Rule 58(e) sets a default rule that a pending fee application does not prevent a judgment from becoming final for appeal purposes. It was suggested, though, that the same tension currently exists between Civil Rule 58(e) and Civil Rule 54(b). A member noted that Civil Rule 54(b) uses "claims *or* the rights and liabilities" while the proposed language of Appellate Rule 3(c)(5)(A) uses "claims *and* the rights and liabilities." This member suggested that the disjunctive / conjunctive distinction may be significant. Judge Chagares and Professor Hartnett indicated that the Advisory Committee will continue to consider these issues.

Rule 42 (Voluntary Dismissal). Proposed amendments to Rule 42 are out for public comment. Judge Chagares explained that during the restyling of the Appellate Rules, the phrase "may dismiss" replaced the phrase "shall … dismiss[]" in Rule 42(b)'s language addressing the

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dismissal of an appeal on agreement of the parties. The concern addressed by the proposed amendment stems from the apparent discretion the current rule would give to the courts of appeal not to dismiss an appeal despite the parties' agreement that it should be dismissed. The amendment would change the relevant "may dismiss" to "must dismiss" in what would become the Rule's subdivision (b)(1). In addition, the Advisory Committee restructured Rule 42(b) for overall clarity and added a subdivision (c) to clarify that the rule does not alter the legal requirements governing court approval of settlements. The Advisory Committee has received no comments on this proposed rule change and expects to seek final approval from the Standing Committee at its mid-year meeting.

Rules 35 (En Banc Determination) and 40 (Petition for Panel Rehearing). Judge Chagares explained that the Advisory Committee has engaged in a comprehensive review of these two rules. Amendments to Rule 35 and 40 that set length limits for responses to petitions for rehearing are on track to take effect on December 1, 2020, if the Supreme Court approves them and Congress takes no contrary action. Apart from those pending amendments, Judge Chagares noted that while the Advisory Committee has not received any complaints about the rules, small changes to harmonize the two rules may be beneficial if unintended consequences can be avoided. Professor Hartnett noted that the benefits of a rewrite of these rules must be balanced against the risk of disrupting current practice. The Advisory Committee's consideration of further potential amendments has thus narrowed and is presently focused on two items. First, the Advisory Committee seeks to underscore the difference between the standards for en banc and panel rehearing. Second, it is reassessing the interaction between petitions for panel rehearing and petitions for *en banc* rehearing, particularly given that the procedures are governed by two separate rules. A review of local rules and internal operating procedures of various circuits revealed a widespread practice of treating an *en banc* petition as including a request for panel rehearing. The Advisory Committee is also considering ways to ensure that a panel cannot block litigants from seeking rehearing en banc (the concern focuses on instances when a panel makes changes to its decision and states that no further petitions for rehearing en banc will be permitted). A related question concerns whether post-panel-rehearing *en banc* petitions should be limited to instances when the panel changes the substance of its initial decision.

One member expressed a view that a qualifier based on "changes to substance" should not be included in any potential amendments to Rules 35 and 40. Even changes that may seem small and stylistic, he argued, can have big effects. The member emphasized that timely-filed petitions for panel rehearing or rehearing *en banc* affect the time for filing petitions for a writ of certiorari. That makes it especially important for the rules governing rehearing petitions to operate mechanically, so that litigants will be able to forecast reliably whether a rehearing petition will suspend the deadline to petition for certiorari. The same member observed that one proposed addition — the statement in proposed new Rule 35(b)(4) that if the Rule 35(b)(1) criteria for rehearing en banc are not present, "panel rehearing pursuant to Rule 40 may be available" — would be more appropriate in a committee note rather than in rule text. Another member asked if subdivision (b)(5) of the proposal should explicitly limit a second petition for rehearing *en banc* to those petitions that are directed toward the changes made by the panel after the initial petition for rehearing. Professor Hartnett suggested, though, that in a petition after the panel changes its decision, a party might also want to address changes that were requested but not made. For

instance, a panel's revised decision might cite a supervening Supreme Court precedent without sufficiently addressing the import of that new precedent.

Rule 25 (Filing and Service) and Privacy in Railroad Retirement Act Benefit Cases. In response to a suggestion from the Railroad Retirement Board's General Counsel, the Advisory Committee has been considering whether privacy protections afforded Social Security benefits cases under Civil Rule 5.2(c) and Appellate Rule 25(a)(5) should be extended to Railroad Retirement Act benefits cases. Judge Chagares noted the similarity between Social Security and Railroad Retirement Act benefits programs. Unlike Social Security cases, however, Railroad Retirement Act benefits cases go directly to the courts of appeal on petition for review. The Advisory Committee is considering whether other types of benefits cases likewise go directly to the courts of appeals for review and implicate similar privacy concerns. Professor Hartnett added that the Judicial Conference Committee on Court Administration and Case Management (CACM) has not objected to the Advisory Committee pursuing a possible rules amendment in this context.

A member suggested that this may become a slippery slope; he noted that ERISA and disability claims cases often involve the same kind of private personal information. Judge Campbell responded that the current proposal arose because the Railroad Retirement Board brought the suggestion to the advisory committee's attention. And the likelihood that the Appellate Rules would need to address many similar instances is low, given that the goal here is to address instances where an agency decision in a benefits case goes directly to the court of appeals. (In proceedings where agency review is initiated in the district court, Professor Hartnett observed, the Appellate Rules piggyback on the Civil Rules' privacy approach.)

Another member asked whether the draft language "of a benefits decision of the Railroad Retirement Board" is needed – why not just say "a petition for review under the Railroad Retirement Act"? Civil Rule 5.2(c) applies to "action[s] for benefits under the Social Security Act," but the rule language does not specify "a benefits decision by the Social Security Administration." Professor Hartnett responded that there may be other types of Railroad Retirement Board decisions that are subject to review under the Railroad Retirement Act; he promised to check with the Board's General Counsel.

Another member wondered what systems exist for protecting private information in review proceedings under the Longshore and Harbor Workers' Compensation Act and the Black Lung Act and whether those same systems should also suffice to protect privacy in review proceedings under the Railroad Retirement Act. Professor Hartnett explained that the ordinary mechanism available in any case would be a motion to seal. Railroad Retirement Act benefits cases are distinctive because they are essentially Social Security benefits cases for railroad workers; it would be very hard to address privacy concerns in such cases through standard redaction procedures. Judge Chagares added that the committee had not found any other types of proceedings that are as similar (as Railroad Retirement Act benefits cases are) to Social Security benefits cases.

Professor Bartell expressed concern about adding "privacy" to the draft amendment of Appellate Rule 25(a)(5). She noted that if the rule extended only the "privacy provisions" of Civil Rule 5.2(c)(1) and (2) to Railroad Retirement Act cases, it would raise questions about which parts of Civil Rule 5.2(c) are being incorporated.

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Suggestion Regarding Decision on Grounds Not Argued. The Advisory Committee is considering a suggestion submitted by the American Academy of Appellate Lawyers. This suggestion would require a court of appeals, if contemplating a decision based on grounds not argued, to provide notice and an opportunity to brief that ground. Judge Chagares formed a subcommittee to consider this issue. The threshold question whether this suggestion is appropriate for rulemaking, or more appropriate as a subject of best practices. A member commented that, in addition to the difficulty of defining "grounds not argued," the suggested rule amendment may not accomplish anything that litigants could not already achieve through petitions for rehearing.

Suggestion Regarding "Good Cause" Definition for an Extension of Time to File a Brief. The Advisory Committee received a suggestion to specify criteria for finding "good cause" for an extension of time to file a brief. Judge Chagares noted that the term "good cause" appears multiple times in the Appellate Rules and Civil Rules. The Advisory Committee agreed that a good-cause determination depends on many factors and that no bright-line definition would be desirable. The Advisory Committee removed this item from its agenda.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Bates and Professors Cooper and Marcus provided the report of the Civil Rules Advisory Committee, which last met on October 29, 2019, in Washington, DC. The Advisory Committee presented several information items, including reports on behalf of its Social Security Disability Review and Multidistrict Litigation (MDL) subcommittees.

Information Items

Social Security Review Subcommittee. Judge Bates explained that the subcommittee was formed in response to a suggestion submitted by the Administrative Conference of the United States (ACUS). ACUS proposed the adoption of national rules governing district-court review of Social Security Administration decisions, in order to provide greater uniformity and to recognize the appellate nature of such review. The subcommittee has prepared drafts that illustrate possible alternative approaches that a national rule could take. One approach would create a new rule within the Civil Rules; the other would create a new set of supplemental rules. Each of the draft alternatives is more modest than the original suggestion.

Judge Bates explained that the subcommittee and Advisory Committee have again returned to the initial question: whether to embark on this project, notwithstanding the usual preference for keeping the Rules trans-substantive. Beyond trans-substantivity, there are other competing concerns. Some reasons to create special rules for Social Security cases include the support from ACUS and the Social Security Administration, the modesty of the proposal, a preference for uniformity in procedure across districts, and the volume and uniqueness of Social Security cases. Countervailing considerations (in addition to the concerns about substance-specific rulemaking) include the opposition by plaintiffs' organizations and the DOJ, the likelihood that a national rule would not displace all the variations created by local rules, and a question as to the appropriateness of adopting rule amendments in order to address problems that may relate more closely to the insufficiency of agency funding. Judge Bates also emphasized the trans-substantivity concerns.

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Uniformity in federal procedures is a laudable goal of the Rules Enabling Act. Judge Bates recognized the concern about carving out categories of cases for specific rules and the risk of favoritism that poses. He noted that the subcommittee considered whether rules should be created that focus more broadly on cases that — like Social Security cases — are based on an administrative record. Such a broad undertaking would be difficult to achieve, given the variety of agencies and matters that come to the district court for review.

Professor Coquillette remarked that the Rules Committees have received numerous requests to carve out special rules over the years, and Congress has at times seemed inclined to carve out particular categories like patent cases and class actions for special rules. If the Advisory Committee moves forward with a proposal, Professor Coquillette suggested that it should create a supplemental set of Social Security rules, rather than a new Civil Rule.

A member expressed the view that the Rules Committees picking specific areas and carving out special rules could be problematic; that might be a task to which Congress is better suited. A different member suggested that this issue ties in with broader issues about specialized courts.

Several judge members expressed support for the proposal. There is a gap in the rules with regard to these types of actions, and the proposal would provide a practical solution. Regarding trans-substantivity concerns, one noted that the federal courts already use local rules to create substance-specific rules for special types of cases. Professor Cooper observed that district judges plainly have authority to establish practices that go beyond the Rules Enabling Act's scope in the course of deciding cases. The question of the appropriate scope of local rules is more difficult. 28 U.S.C. § 2071(a) says only that local rules "shall be consistent with" any national rules promulgated under the Rules Enabling Act. Does the fact that varying local rules now address a topic justify the adoption of national rules on that topic?

Judge Campbell observed that this is a unique situation in which a government agency has asked the Rules Committees to address a problem. The subcommittee has done a great job and has identified some possible rules that could address inefficiencies in the current system. This stands as a compelling argument in favor of rulemaking. While trans-substantivity is a countervailing concern, the Rules Committees have already crossed that bridge with respect to, for example, admiralty cases and habeas proceedings. Social security cases constitute a large part of the courts' dockets, and the matter is important to a government agency, and these considerations may outweigh the concerns about substance-specific rulemaking. Judge Campbell also expressed his view that the proposal is even-handed and would simplify procedures for all parties. The main question at present is whether to publish a proposal. Judge Campbell added that he favored publication for comment.

A member echoed Judge Campbell's comments, noting that the presumption against substance-specific rules can be overcome. The opposition by the claimants' bar and DOJ, this member suggested, should not be dispositive here because their reasons for opposition do not go to the heart of the problem. The claimants' side argues that a uniform rule will displease judges. If that is the case, it is unclear how that would disadvantage only claimants. The DOJ cites trans-substantivity concerns. The Rules Committees can decide the trans-substantivity question on their

own. In this member's view, the proposal would be beneficial and streamline the process through modest improvements without favoring either side. Another member agreed.

A different member asked about the feasibility of a pilot project with this proposal. Professor Cooper explained that the DOJ has crafted a model rule and offered it to district courts as a suggested local rule (though this is not a formal pilot project). Further, the subcommittee has sought input from magistrate and district judges on how the rules work in Social Security cases. The general feedback is that the Civil Rules do not fit Social Security cases and that the proposed national rule reflects what judges are already doing and would be helpful. Judge Campbell agreed that the proposal parallels what many districts are already doing.

A judge member voiced support for publishing the proposal for public comment. The same member asked if the subcommittee had considered drafting a best-practices guide instead of a rule amendment. This member also noted that, in her district, magistrate judges are tasked with handling Social Security review proceedings. Judge Bates responded that the subcommittee continues to consider a best-practices approach but that it currently views a rule amendment as preferable. He also observed that the proposed rule would not affect how districts structure the handling of Social Security disability review cases.

Professor Coquillette agreed that the proposal should be published for comment and reiterated his support for the supplemental set of rules instead of a new Civil Rule.

A judge member observed that he shared the general concern over trans-substantivity. Based on the proliferation of local rules related to Social Security cases, however, trans-substantivity does not seem to be as much of a concern. The question then is whether to pursue uniformity by means of a national rule.

Subcommittee on Multidistrict Litigation. Judge Bates stated that the subcommittee has focused primarily on four areas: third-party litigation funding (TPLF); early vetting of claims through the use of plaintiff fact sheets (PFS) and defendant fact sheets (DFS); interlocutory review in MDL cases; and judicial involvement in the settlement process and review.

The Advisory Committee decided to remove TPLF from the subcommittee's agenda (as this phenomenon is not unique to or especially prevalent in MDL cases) and has returned it to the Advisory Committee for monitoring.

The subcommittee continues to study "early vetting" as a tool to winnow unsupportable claims and jump start discovery. The subcommittee has concluded that plaintiff fact sheets — and defense fact sheets, secondarily — are used in virtually all "mega" tort MDLs and in most other large MDL proceedings, particularly personal injury MDLs. Because plaintiff fact sheets take a lot of time to develop, a simpler practice called "census of claims" has emerged. All groups involved think this is a worthwhile approach to examine. While it gathers less information, the census of claims practice seems to serve very valuable purposes. Several transferee judges are using this approach in current MDL proceedings.

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The issue of interlocutory review in MDL proceedings is under active assessment. The subcommittee is considering whether existing procedural mechanisms, chiefly 28 U.S.C. § 1292(b), provide adequate interlocutory appellate review of certain MDL orders. Judge Bates highlighted the subcommittee's study of Judge Furman's order in *In Re: General Motors LLC Ignition Switch Litigation*, No. 14-MD-2543 (SDNY 2019), which granted a party's request for certification of an interlocutory appeal under § 1292(b). Judge Bates explained the difficulty of drafting a rule amendment that would expand options for interlocutory review only to certain kinds of MDLs, or to specific subject matters such as preemption or *Daubert* rulings. The subcommittee continues to consider these questions in the context of possible rule amendments.

The subcommittee also continues to consider the issue of judicial supervision in the MDL settlement process and settlement review. Judge Bates explained that the subcommittee is considering whether this issue is appropriate for rulemaking and whether any such rule should be limited to a certain subset of MDLs. While the academic community has expressed support for greater judicial involvement in MDL settlements, neither the bar nor transferee judges share that position. Judge Bates noted that this is an ongoing effort, and the subcommittee is in the early stages. One member, citing his MDL experience in which courts have been heavily involved, inquired whether there is a need for more judicial involvement in the settlement process. Judge Bates clarified that the subcommittee is looking at non-class-action MDLs where the rules do not offer the same mechanism for judicial involvement as under Civil Rule 23.

A judge member expressed the view that rulemaking may not always be appropriate in the MDL context. It would be difficult to carve out a category of MDL cases to which certain rules should apply. Flexibility in MDLs is preferable to a one-size-fits-all approach. Rather than rulemaking, this member suggested, it would be better to promote best practices through guidance from, for example, the Judicial Panel on Multidistrict Litigation (JPML) and the Manual for Complex Litigation. Of the topics under study, this member suggested, the best candidate for rulemaking would be interlocutory appeals; Section 1292(b) is not a good fit for MDLs.

Another member suggested that this is an area where some rulemaking would be helpful because procedural decisions can have huge substantive implications in MDL proceedings. In this member's experience, large MDLs usually result in settlement. Judicial management and decisions regarding interlocutory appeal have a massive impact on the outcome. As to addressing judicial involvement in the settlement process, however, this member suggested a need for caution.

A different member emphasized that in the mass tort MDL context, Civil Rule 23 brings with it a lot of jurisprudence that gives some backbone as to the roles of lead attorneys. The American Law Institute's project on aggregate litigation provides guidance on what ethical obligations lead attorneys have regarding settlement when representing large groups of clients. This member agreed with the earlier comment that some of these issues go beyond the role of procedure and may not be appropriate for rulemaking. In addition, creating a rule for interlocutory review in MDL proceedings may prolong these cases even further. This would cause practical concerns for clients.

A member noted that, in his experience in the Second Circuit, requests for interlocutory review under § 1292(b) are rarely granted. He asked how different courts are treating these

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requests. Professor Marcus explained that the difficulty is finding all the cases in which these requests are made but denied. Judge Bates added that the subcommittee hears anecdotally that certain circuits never grant § 1292(b) requests, but clear data are not readily available to support or contradict these comments. A judge member noted that his research revealed little as far as cases dealing with when it is appropriate to grant § 1292(b) requests in MDL cases.

Another judge member commented that the JPML makes available a very fine body of resources for case management. She asked whether the JPML has a view regarding the need for rulemaking. Regarding interlocutory appeals, this member noted that added delay presents a real concern from a case management perspective.

Rule 4(c)(3) – Service by the U.S. Marshals Service. Professor Cooper explained that present language in Civil Rule 4(c)(3) creates an ambiguity by stating both "the court may order" service by a marshal at the plaintiff's request and "[t]he court must so order if the plaintiff" has i.f.p. status. One plausible interpretation is that if a plaintiff is granted i.f.p. status, then the court must order service by a marshal. A second interpretation is that the court's obligation to order service by a marshal is contingent on the plaintiff making a motion. If the rule were amended to remove the ambiguity, the amended rule could adopt either of these approaches, or it could instead adopt a different approach that would direct service by a marshal on behalf of any i.f.p. litigant even when the court does not order the marshals to effect service. The Advisory Committee is in discussions with the U.S. Marshals Service and the Administrative Office regarding possible solutions.

Judge Campbell stated that the staff attorneys in his court confirmed that 100% of prisoner pro se complaints that survive initial screening by the court under 28 U.S.C. § 1915A are served by a marshal, and about 50% of non-prisoner pro se cases are served by a marshal. In the other 50% of non-prisoner pro se cases, Judge Campbell noted that the plaintiffs effect service by other means. This suggests that there is a significant portion of cases where the marshals are not needed.

Rule 12(a) – Filing Times and Statutes. Judge Bates explained that the Advisory Committee has begun looking at Civil Rule 12(a), which sets the time to serve a responsive pleading. The general provision under paragraph (1) — setting the presumptive time at 21 days — includes the qualifying statement: "Unless another time is specified by this rule or a federal statute[.]" The Advisory Committee is considering whether the same qualifier should be added to paragraphs (2) and (3), which apply to the United States and its officers or employees. Judge Bates noted that the Freedom of Information Act sets a 30-day response time, which may apply to cases otherwise governed by Rule 12(a)(2). The Advisory Committee will discuss this issue more in-depth at its spring meeting.

Matters Removed from the Agenda. Judge Bates identified items that the Advisory Committee removed from its agenda after consideration. These items relate to expert witness fees in discovery, proportionality under Rule 26, clear offers under Rule 68, and a proposal that Rule 4(d) be amended to address the practice of "snap removal."

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Livingston and Professor Richter provided the report of the Evidence Rules Advisory Committee, which last met on October 25, 2019, in Nashville, Tennessee. The Advisory Committee presented three information items.

Rule 702 – Admission of Expert Testimony. The Advisory Committee has been examining Evidence Rule 702, following a 2016 report which raised concerns about methods used nationwide for forensic feature-comparison evidence. The report by the President's Council of Advisors on Science and Technology (PCAST) recommended the preparation of a committee note to Rule 702 that would guide judges as to the admissibility of forensic feature-comparison expert testimony. The Advisory Committee convened a symposium in October 2017 to discuss the PCAST report and related *Daubert* issues. It has continued to discuss potential rule amendments at subsequent Advisory Committee meetings. At its fall 2019 meeting, the Advisory Committee concluded that creating a free-standing rule governing forensic evidence would be inadvisable because such a rule would overlap problematically with Rule 702. Judge Livingston noted that the Advisory Committee is exploring judicial and legal education options on this issue and the Committee's Reporter is working with the FJC and Duke and Fordham Law Schools to organize judicial-education programming.

The Advisory Committee is continuing to consider a possible amendment that would add an element to Rule 702 to address the problem of experts overstating opinions. Prior to its fall meeting, the Advisory Committee convened a group of judges from around the country for a mini-conference at Vanderbilt University. The panel provided helpful comments about *Daubert* best practices and potential Rule 702 amendments on overstatement in expert opinions. At its spring 2020 meeting, the Advisory Committee will decide whether to move forward with proposed amendments or to put further consideration of Rule 702 on hold. The DOJ has suggested that the Advisory Committee take the position of "watchful waiting" and permit the DOJ to continue its work in this area and to allow its internal changes to percolate through the courts. Judge Livingston noted that the Evidence Rules Committee is working in tandem with the Criminal Rules Committee (which has been developing amendments to Criminal Rule 16 concerning expert disclosures).

Rule 106 – Rule of Completeness. The Advisory Committee received a proposal to amend Rule 106 to provide that a completing statement is admissible over a hearsay objection and to provide that the rule covers oral statements as well as written or recorded statements. Judge Livingston noted that most courts already permit completing oral statements, but under Rule 611 rather than Rule 106. Judge Livingston observed that the original committee note to Rule 106 stated that the rule was limited to writings and recorded statements only "for practical reasons." Those "practical reasons" might concern situations where completing oral statements are made by different declarants. Another practical concern is disrupting the order of proof in a case.

Judge Livingston explained that the hearsay issue presents the strongest reason for a rule amendment. The Sixth Circuit has a published opinion holding that in order to complete a statement under Rule 106, the completing portion of the statement must also be admissible under the hearsay rules. The Advisory Committee is considering whether and how the Evidence Rules

should allow these completing oral statements to come in as evidence. Some Advisory Committee members have taken the position that a rule amendment should, in effect, create a new hearsay exception, such that the completing portion of a statement comes in for its truth. Others took the position that a completing oral statement should come in for completeness, but not its truth unless it satisfies one of the hearsay exceptions. The Advisory Committee will continue to consider this matter at its next meeting.

Rule 615 – Excluding Witnesses. The Advisory Committee is considering a potential amendment to Evidence Rule 615, which provides that a judge may *sua sponte* — or must, upon request — exclude witnesses from a trial or hearing. Professor Richter noted that sequestration orders under Rule 615 tend to be short, and the brevity of these orders, as reflected in transcripts, creates uncertainty about their scope. For example, such orders may be interpreted as only requiring witnesses to physically leave the courtroom. On the other hand, they may extend beyond physical sequestration and regulate behavior and communications by witnesses outside the courtroom. The Advisory Committee identified a conflict in federal case law regarding these interpretations. Some courts say that for a Rule 615 order's scope to extend beyond physical sequestration, a judge's order must explicitly state that external communications are to be limited. Most courts, however, say that it is implicit in the Rule — and thus covered in vague orders — that sequestration extends beyond physical presence in the courtroom. Without specificity in a Rule 615 order, the Advisory Committee is concerned that witnesses will not have notice that the court intends to bar external communications.

The Advisory Committee has identified possible alternative rule amendments to address the issue of the scope of Rule 615 orders. At this point, the Advisory Committee is still considering whether any amendment is appropriate; it will continue to explore these possibilities at its spring meeting.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Kethledge and Professors Beale and King presented the report of the Criminal Rules Advisory Committee, which met on September 24, 2019, in Philadelphia, Pennsylvania. The Advisory Committee presented three information items.

Rule 16 – Discovery Concerning Expert Reports and Testimony. The Advisory Committee's draft amendments to Criminal Rule 16 seek to improve the specificity and timeliness of expert disclosures. The Advisory Committee undertook this project following public suggestions that Rule 16 be amended to track more closely the Civil Rule 26 approach to expert disclosures. The Advisory Committee has held two informational sessions in the past two years. Following these sessions, the Advisory Committee identified the main problems with Criminal Rule 16: timing of the disclosure, and disclosures that are too cursory and vague to allow the parties to adequately prepare for trial. The reporters and Rule 16 Subcommittee developed a proposal to address these problems. At its fall 2019 meeting, the Advisory Committee discussed and refined the draft amendments, and unanimously approved them and a proposed committee note.

Judge Kethledge summarized the Advisory Committee's main points of discussion and debate. First, the Advisory Committee debated whether a numerical or functional deadline for

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disclosure would be preferable. The Advisory Committee decided a functional standard — "sufficiently before trial to provide a fair opportunity for" each party to meet the opponent's evidence — was appropriate because a one-size-fits-all approach does not work well in this context. The rule requires the district court to specify a deadline using this standard. Second, the Advisory Committee considered whether to term the disclosed document something other than a "summary" (as the current Rule calls it). The Advisory Committee elected to eschew the terms "summary" and "report" and instead to focus on the verb "disclose" – thus allowing the amended provisions to speak for themselves regarding required content of the disclosure. The proposed amendments would add to the list of required contents "a complete statement of all opinions" that the party will elicit in its case-in-chief.

While the proposal would not require the witness to prepare the document to be disclosed under Rule 16, it would require that the witness review and sign the document. Judge Kethledge explained that this provision serves an impeachment function. Judge Kethledge noted some of the concerns expressed by the DOJ about the proposal. For the signing requirement, the Department indicated that it does not always have control over the expert witness and may face difficulty getting the witness to sign; the draft includes an option for the disclosing party to "state[] in the disclosure why it could not obtain the witness's signature through reasonable efforts."

Judge Kethledge emphasized the deliberative process undertaken by the Rule 16 Subcommittee and the full Advisory Committee in developing this proposal. He commended those involved for contributing constructively and in good faith. The Advisory Committee's proposal is a product of a fairly delicate compromise. He explained that the Advisory Committee is confident that this proposed amendment would improve practice in criminal cases and allow expert testimony to be more effectively tested than it is at present.

Professor Beale added that the proposal will bring Criminal Rule 16 closer to Civil Rule 26 but she emphasized that criminal practice is different. Professor Beale explained the differences in pre-trial disclosures and discovery between civil and criminal practice. The goal of the proposed amendment is to allow the parties adequate time and opportunity to prepare for trial, and the proposal provides the necessary flexibility for that in the criminal context. Thus, the Advisory Committee drew on certain aspects of Civil Rule 26 but tailored the proposal for criminal practice. Professor King noted that the proposal limits the required disclosure to the expert opinions that will be elicited in the party's case-in-chief. This reflects special constitutional concerns in criminal cases.

The DOJ representative commented on the Advisory Committee's excellent process that took into account the Department's concerns and input and reached a consensus proposal agreeable to everyone.

A judge member inquired whether the "reasonable efforts" standard for obtaining the expert witness's signature could be clarified. Professor Beale responded that the committee note, which will be considered again at the Advisory Committee's spring meeting, could address this issue.

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Professor Marcus commented that the proposal's duty to supplement the disclosure may cause problems, based on experience with a similar provision under the Civil Rules. Professor King responded that Criminal Rule 16(c) contains a continuing duty to disclose.

Judge Campbell asked what the defendant's "case-in-chief" refers to under the proposed Rule 16(b)(1)(C)(i). Professor Beale explained that "case-in-chief," as it applies to the defense, is when the defense puts on its own witnesses after the government rests. The current rule uses "case-in-chief" in several places – with respect to discovery obligations of both the government and the defense – but not with respect to the defense's expert witness disclosure obligations. Instead, under current subsection (b)(1)(C), the defense must disclose expert witnesses it intends to use as evidence at trial. The Advisory Committee was concerned that the absence of the restricting language "case-in-chief" in subsection (b)(1)(C) might inadvertently require the defendant to disclose *more* than the government. Professor Beale emphasized that it was the Advisory Committee's goal to make the party's obligations both parallel and reciprocal.

Judge Campbell expressed concern about adding the "case-in-chief" language to the defense's expert disclosure obligations. In his view, neither the current rule nor the proposed amendment make the disclosure obligations equal. He pointed out that adding the "case-in-chief" language to the defendant's disclosure obligations could be interpreted as expanding the disclosure obligation to all expert witnesses the defense intends to use, including any rebuttal experts. In contrast, it is not clear that the government would be obligated to disclose rebuttal expert witnesses.

Professor Beale explained that the issue of unequal disclosure standards has not been coming up in practice. She suggested that the language is worth looking at again but added that there may be concern about opening up the disclosure requirements to encompass more than "case-in-chief." Judge Kethledge noted that it is hard to find the right phrase; one possibility might be "disclose every witness you will use." Judge Campbell responded that this is what the rule already requires of the defendant, but not of the government; the Rule, he stressed, should be even-handed.

A member raised the question about the risk of one party trying to game the system under this proposal by under-disclosing and later supplementing. This member highlighted the door-shutting aspect of the Civil Rule 26 approach. The reporters responded that this potential issue had not been raised in any discussions and would be beneficial to address with the Advisory Committee.

A judge member commented that the defendant's "case-in-chief" language already existed in subdivision (b) and that there are practical reasons to use that term. Because a defendant has no obligation to preview his or her defense before trial, the government may not know what expert witnesses it needs for rebuttal. The same situation can arise where a defendant needs to call an expert witness in sur rebuttal. This member suggested that this is a reason to use parallel language and refer to "case-in-chief." Professor King explained that even though the proposal is reciprocal, it is situated within the larger context of various defense rights, including the protection against self-incrimination.

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Another member remarked that the duty to supplement expert disclosures under Civil Rule 26 is critical to prevent trial by ambush. The member observed that this concern may not carry over to criminal practice to the same degree.

Professor King asked the Standing Committee members whether it makes sense to close the door on a criminal defendant's ability to supplement when the defendant identifies an additional expert witness during and because of an issue that arises at trial. She noted as a backdrop that the defendant has no duty to put on a defense at all.

Judge Campbell emphasized the tension present in criminal practice: there is an interest in avoiding sandbagging, but the system also must preserve the defendant's rights.

Professor Beale acknowledged these concerns. She reiterated that practitioners have not been reporting problems with delayed supplementation or parties gaming the system. Unlike with new Criminal Rule 16.1, there was no push to add an explicit good-faith element to the duty to supplement in this proposal. Judge Kethledge added that the Advisory Committee developed this proposal with the approach of limiting its efforts to actual, existing problems and building a consensus around them, rather than focusing on speculative problems.

Task Force on Protecting Cooperators. Judge Kethledge noted that the Task Force, chaired by Judge Lewis Kaplan, has made its recommendations, which related primarily to changes in the CM/ECF system and changes to Bureau of Prisons operations and policies. Some of the recommendations are proving challenging and expensive to implement.

In Forma Pauperis Status Suggestion. Judge Kethledge explained that the Advisory Committee chose not to pursue the suggestion regarding i.f.p. status because eligibility under the Criminal Justice Act involves different standards. The Advisory Committee would be interested in being involved with this multi-committee item, if it continues, as far as i.f.p. status relates to habeas cases.

OTHER COMMITTEE BUSINESS

Legislative Report. Julie Wilson delivered the legislative report and directed the Committee to the tracking chart in the agenda book. The chief legislative development concerning the rules committees is the SBRA, which was discussed previously. Along with CACM and the Office of Legislative Affairs, the Rules Committee Staff provided support to Judge Audrey Fleissig and Judge Richard Story last fall when they testified before the House Judiciary Committee's Subcommittee on Courts, Intellectual Property, and the Internet. The hearing and their testimony primarily focused on sealing of court records, cameras in federal courts, and access to the Public Access to Court Electronic Records (PACER) database. Representative Nadler recently introduced H.R. 5645, the "Eyes on the Courts Act of 2020." The bill would provide for media coverage of all federal appellate proceedings, including Supreme Court proceedings. A Sunshine in Litigation Act bill will likely be reintroduced. The Rules Committee Staff will continue to monitor any legislation introduced that would directly or effectively amend the federal rules.

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Judiciary Strategic Planning. Ms. Wilson reported on the *Strategic Plan for the Federal Judiciary*, which sets out the core values of the federal judiciary and strategies for realizing those values. The *Plan* is updated every five years, and 2020 is an update year. Ms. Wilson directed the members to the agenda book containing an update from Judge Campbell on the *Plan* and the Rules Committees' work. Discussion was invited; Judge Campbell will continue to communicate with the Judiciary's Planning Officer regarding updates to the *Plan.*

CONCLUDING REMARKS

Before adjourning the meeting, Judge Campbell thanked the Committee's members and other attendees for their preparation and contributions to the discussion. The Committee will next meet in Washington, DC. on June 23, 2020.

Respectfully submitted,

Rebecca A. Womeldorf
Secretary, Standing Committee

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Agenda E-19 (Summary)
Rules
March 2020

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

This report is submitted for the record and includes information on the following for the Judicial Conference:

- Federal Rules of Appellate Procedure .... pp. 2-3
- Federal Rules of Bankruptcy Procedure .... pp. 3-7
- Federal Rules of Civil Procedure .... pp. 7-10
- Federal Rules of Criminal Procedure .... pp. 10-12
- Federal Rules of Evidence .... pp. 12-14
- Other Items .... p. 14

NOTICE
NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE CONFERENCE ITSELF.

Agenda E-19
Rules
March 2020

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on January 28, 2020. All members participated.

Representing the advisory committees were Judge Michael A. Chagares, Chair (by telephone), and Professor Edward Hartnett, Reporter, Advisory Committee on Appellate Rules; Judge Dennis Dow, Chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura Bartell, Associate Reporter, Advisory Committee on Bankruptcy Rules; Judge John D. Bates, Chair, Professor Edward H. Cooper, Reporter, and Professor Richard L. Marcus, Associate Reporter, Advisory Committee on Civil Rules; Judge Raymond M. Kethledge, Chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, Advisory Committee on Criminal Rules; and Judge Debra Ann Livingston, Chair, Advisory Committee on Evidence Rules.

Also participating in the meeting were Professor Catherine T. Struve (by telephone), the Standing Committee's Reporter; Professor Daniel R. Coquillette (by telephone), Professor Bryan A. Garner and Professor Joseph Kimble, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary (by telephone); Bridget Healy (by telephone), Scott Myers and Julie Wilson, Rules Committee Staff Counsel; Allison Bruff, Law Clerk to the Standing Committee; Professor Liesa Richter, consultant to the Advisory Committee on

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Evidence Rules; John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, of the Federal Judicial Center (FJC).

Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, represented the Department of Justice (DOJ) on behalf of Deputy Attorney General Jeffrey A. Rosen.

In addition to its general business, including a review of pending rules amendments in different stages of the Rules Enabling Act process and pending legislation affecting the rules, the Committee received and responded to reports from the five rules advisory committees and two joint subcommittees, and discussed an action item regarding judiciary strategic planning.

FEDERAL RULES OF APPELLATE PROCEDURE

The Advisory Committee on Appellate Rules presented no action items.

Information Items

The Advisory Committee met on October 30, 2019. Discussion items included: the rules and forms published for public comment in August 2019; potential amendments to Rules 25, 35, and 40; a suggestion that parties be given notice and an opportunity to respond if a decision will rest on grounds not argued; and the standard for in forma pauperis participation in appellate cases.

Rule 25

The Advisory Committee continued its discussion of potential amendments to Rule 25(a)(5) to ensure privacy protections in Railroad Retirement Act cases. A proposed rule amendment will be considered at the spring meeting.

Rules 35 and 40

Amendments to Rule 35 (En Banc Determination) and Rule 40 (Petition for Panel Hearing) imposing length limits on responses to a petition for rehearing have been approved by

the Conference and submitted to the Supreme Court for its consideration, with a potential effective date of December 1, 2020. Beyond these specific pending amendments, the Advisory Committee continued to consider a suggestion that Rules 35 and 40 be revised comprehensively to make the two rules dealing with rehearing petitions more consistent, but has been dissuaded from doing so given the absence of a demonstrated problem calling for such a comprehensive solution, as well as potential unintended consequences and the general disruption of significant rules amendments. The Advisory Committee will continue to discuss more limited amendments to Rule 35 that would clarify the relationship between petitions for panel rehearing and rehearing en banc.

Finally, the Advisory Committee determined to retain on its agenda a suggestion that parties be given notice and an opportunity to respond if a decision may be based on grounds not argued. The Advisory Committee will also continue to consider in forma pauperis standards in appellate cases.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

The Advisory Committee on Bankruptcy Rules presented no action items.

Information Items

The Advisory Committee met on September 26, 2019. The bulk of the agenda concerned responses to two recently enacted laws and an update on the restyling of the Bankruptcy Rules.

Response to Enactment of the Honoring American Veterans in Extreme Need Act of 2019: Notice of Amendments to Official Forms 122A-1, 122B, and 122C-1

In response to the Honoring American Veterans in Extreme Need Act of 2019 (HAVEN Act, Pub. L. No. 116-52, 133 Stat, 1076), which became effective on August 23, 2019, the Advisory Committee approved amendments to Official Forms 122A-1 (Chapter 7 Statement of Your Current Monthly Income), 122B (Chapter 11 Statement of Your Current Monthly Income), and 122C-1 (Chapter 13 Statement of Your Current Monthly Income and Calculation of

Commitment Period). It submitted the amendments for retroactive approval by the Standing Committee, and for notice to the Judicial Conference.[1]

The HAVEN Act amends the definition of "current monthly income" in Title 11, U.S. Code, § 101(10A) to exclude:

> any monthly compensation, pension, pay, annuity, or allowance paid under title 10, 37, or 38 in connection with a disability, combat-related injury or disability, or death of a member of the uniformed services, except that any retired pay excluded under this subclause shall include retired pay paid under chapter 61 of title 10 only to the extent that such retired pay exceeds the amount of retired pay to which the debtor would otherwise be entitled if retired under any provision of title 10 other than chapter 61 of that title.

The exclusions set forth in the HAVEN Act's amended definition of "current monthly income" supplement the current income exclusions for social security benefits, payments to victims of war crimes or crimes against humanity, and payments to victims of terrorism. The HAVEN Act also limits the inclusion of certain pension and retirement income.

To address the statutory change, at its September 26, 2019 meeting, the Advisory Committee approved conforming changes to lines 9 and 10 of Official Forms 122A-1, 122B, and 122C-1. The revised forms were posted on the judiciary's website on October 1, 2019. The Standing Committee approved the changes and now provides notice to the Judicial Conference. The revised forms are set forth in Appendix A.

<u>Response to the Enactment of the Small Business Reorganization Act of 2019: Distribution of Interim Bankruptcy Rules; Notice of Amendments to Official Forms 101, 201, 309E1, 309E2 (new), 309F1, 309F2 (new), 314, 315, and 425A</u>

The Small Business Reorganization Act of 2019 (SBRA, Pub. L. No. 116-54, 133 Stat. 1079) creates a new subchapter V of chapter 11 for the reorganization of small business debtors, which will become effective February 19, 2020. The enactment of the SBRA requires

[1] Because the HAVEN Act went into effect immediately upon enactment, the Advisory Committee voted to change the relevant forms pursuant to the authority granted by the Judicial Conference to the Advisory Committee to enact changes to Official Forms subject to subsequent approval by the Standing Committee and notice to the Judicial Conference (JCUS-MAR 16, p. 24).

amendments to several bankruptcy rules and forms. Because the SBRA will take effect long before the rulemaking process can run its course, the Advisory Committee voted to issue needed rule amendments as interim rules for adoption by each judicial district. In addition, the Advisory Committee recommended amended and new forms pursuant to the authority delegated to make conforming and technical amendments to Official Forms (JCUS-MAR 16, p. 24).

The Advisory Committee's proposed interim rules and form changes were published for comment for four weeks starting in mid-October 2019. As a result of the comments received, a subcommittee of the Advisory Committee recommended changes to several of the published rules and forms, changes to four rules that were not published for public comment, and promulgation of a new rule.

By email vote concluding on December 4, 2019, the Advisory Committee voted unanimously to seek the issuance of 13 interim rules, and it approved nine new or amended forms as Official Forms pursuant to the Advisory Committee's delegated authority from the Judicial Conference (JCUS-MAR 16, p. 24). By email vote concluding on December 13, 2019, the Standing Committee unanimously approved the Advisory Committee's proposed interim rules and Official Form changes required to respond to SBRA. This report constitutes notice to the Judicial Conference of amendments to Official Forms 101 (Voluntary Petition for Non-Individuals Filing for Bankruptcy), 201 (Voluntary Petition for Individuals Filing for Bankruptcy), 309E1 (For Individuals or Joint Debtors), 309E2 (For Individuals or Joint Debtors under Subchapter V) (new), 309F1 (For Corporations or Partnerships), 309F2 (For Corporations or Partnerships under Subchapter V) (new), 314 (Class [ ] Ballot for Accepting or Rejecting Plan of Reorganization), 315 (Order Confirming Plan), and 425A (Plan of Reorganization for Small Business Under Chapter 11). The revised forms are set forth in Appendix B.

Following the Standing Committee's approval, the chairs of the Standing Committee and the Advisory Committee requested the Executive Committee of the Judicial Conference to act on an expedited basis on behalf of the Judicial Conference to authorize distribution of Interim Rules of Bankruptcy Procedure 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3017.2, 3018, and 3019 to the courts so that they can be adopted locally to facilitate uniformity in practice until the Bankruptcy Rules can be revised in accordance with the Rules Enabling Act. On December 16, 2019, the Executive Committee approved the requests as submitted.

The chairs of the Standing Committee and the Advisory Committee sent an explanatory memorandum to all chief judges of the district and bankruptcy courts on December 19, 2019. The memorandum included a copy of the interim rules and requested that they be adopted locally to implement the SBRA until rulemaking under the Rules Enabling Act can take place.

A copy of the December 19 memorandum and the Advisory Committee's December 5 Report to the Standing Committee are included in Appendix B. The interim rules and amended forms are also posted on the judiciary's website.

At its spring 2020 meeting, the Advisory Committee will consider the issuance of permanent rules to comply with the SBRA and anticipates seeking the Standing Committee's approval at its June 2020 meeting to publish the rules and forms for public comment in August 2020.[2]

Bankruptcy Rules Restyling

The Advisory Committee also reported on the progress of the work of its Restyling Subcommittee in restyling the Bankruptcy Rules. The Advisory Committee anticipates that

[2] Although the Official Forms have been officially promulgated pursuant to the Advisory Committee's delegated authority from the Judicial Conference to issue conforming Official Form amendments, the Advisory Committee intends to publish them again under the regular procedure to ensure full opportunity for public comment.

restyled versions of the 1000 and 2000 series of rules will be ready for publication for public comment this summer, subject to the Standing Committee's approval at its June 2020 meeting.

FEDERAL RULES OF CIVIL PROCEDURE

The Advisory Committee on Civil Rules presented no action items.

Information Items

The Advisory Committee met on October 29, 2019. In addition to its regular business, the Advisory Committee heard testimony from one witness regarding the proposed amendment to Rule 7.1 addressing disclosure statements, which was published for public comment in August 2019. The proposed amendment to Rule 7.1 remains out for public comment, and the Advisory Committee plans to consider the draft rule and anticipates seeking final approval from the Standing Committee at its June 2020 meeting. The Committee discussed a suggestion regarding service by the U.S. Marshals Service for in forma pauperis cases. In addition, the Committee received updates on the work of a joint Civil-Appellate subcommittee and two subcommittees tasked with long-term projects involving possible rules for social security disability cases and multidistrict litigation (MDL) cases.

Service by U.S. Marshals for In Forma Pauperis Cases

At the January 2019 Standing Committee meeting, a member raised an ambiguity in the meaning of Rule 4(c)(3), the rule addressing service by the U.S. Marshals Service for in forma pauperis cases. The rule states that "[a]t the plaintiff's request, the court *may* order that service be made" by a marshal and that the court "*must* so order" if the plaintiff is proceeding *in forma pauperis* (emphasis added). The ambiguity lies in the word "must" – when is it that the court "must" order service? The two sentences could be read together to mean that the court must order service by a marshal only if the plaintiff has requested it. Or the second sentence could be read independently to require marshal service even if the plaintiff does not make a request. The

ambiguity appears to be an unintended result of changes made as part of the 2007 restyling of the Civil Rules.

According to the U.S. Marshals Service, service practices for in forma pauperis cases vary across districts. Greater uniformity would be welcome, as would reducing service burdens on the Marshals Service. While it is not clear that a rule change would accomplish either goal, the Advisory Committee is exploring amendment options that would resolve the identified ambiguity. The Advisory Committee will continue to gather information on current practices and possible improvements in consultation with the U.S. Marshals Service.

Appeal Finality After Consolidation Joint Civil-Appellate Subcommittee

As previously reported, a joint subcommittee of the Advisory Committees on Civil and Appellate Rules is considering whether either or both rule sets should be amended to address the effect of consolidating initially separate cases on the "final judgment rule". The impetus for this project is *Hall v. Hall*, 138 S. Ct. 1118 (2018). In *Hall*, the petitioner argued that two individual cases consolidated under Civil Rule 42(a) should be regarded as one case, with the result that a judgment in one case would not be considered "final" until all of the consolidated cases are resolved. *Id.* at 1124. The Court disagreed, holding that individual cases consolidated under Civil Rule 42(a) for some or all purposes at the trial level retain their separate identities for purposes of final judgment appeals. *Id.* at 1131. The Court concluded by suggesting that if "our holding in this case were to give rise to practical problems for district courts and litigants, the appropriate Federal Rules Advisory Committees would certainly remain free to take the matter up and recommend revisions accordingly." *Id.*

Given the invitation from the Court, the subcommittee was formed to gather information as to whether any "practical problems" have arisen post-*Hall*. As a first step, the subcommittee is working with the FJC to gather data about consolidation practices. The FJC's study will

initially include actions filed in 2015-2017 and may eventually include post-2017 actions. The subcommittee will not consider any rule amendments until the research is concluded.

Social Security Disability Review Subcommittee

The Social Security Disability Review Subcommittee continues its work considering a suggestion by the Administrative Conference of the United States (ACUS) that the Judicial Conference develop uniform procedural rules for cases in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g).

The subcommittee continues to work on a preliminary draft Rule 71.2 for discussion purposes. The subcommittee made the initial decision to include the rule within the existing Civil Rules framework with the goal of obtaining a uniform national procedure. Some members at the Advisory Committee's October 2019 meeting expressed concern that including subject-specific rules within the Civil Rules conflicts with the principle that the Civil Rules are intended to be rules of general applicability, i.e., "transubstantive." The DOJ has expressed concern about the precedent of adopting specific rules for one special category of administrative cases. The subcommittee has drafted a standalone set of supplemental rules to be considered as an alternative to including a rule within the existing Civil Rules.

The subcommittee will continue to gather feedback on the draft Rule 71.2, the supplemental rules and, of course, the broader question of whether rulemaking would resolve the issues identified in the initial ACUS suggestion. The subcommittee plans to decide whether pursuit of a rule is advisable and to recommend an approach at the Advisory Committee's April 2020 meeting.

MDL Subcommittee

The MDL Subcommittee was formed in November 2017 to consider several suggestions from the bar that specific rules be developed for MDL proceedings. Since its inception, the subcommittee has engaged in a substantial amount of fact gathering, with valuable assistance from the Judicial Panel on Multidistrict Litigation and the FJC. Subcommittee members continue to gather information and feedback by participating in conferences hosted by different constituencies, including MDL transferee judges.

The MDL Subcommittee has considered a long list of topics and narrowed that list over time. At the October 2019 meeting, the subcommittee reported its conclusion that third-party litigation financing (TPLF) issues did not seem particular to multidistrict litigation and in fact appear more pronounced in other types of litigation. For that reason, the subcommittee recommended removing TPLF issues from the list of topics on which to focus. Given the growing and evolving importance of TPLF, the Advisory Committee agreed with the subcommittee's recommendation that the Advisory Committee continue to monitor developments in TPLF. The MDL Subcommittee's continued work now focuses on three areas:

a. Use of plaintiff fact sheets and defendant fact sheets to organize large personal injury MDL proceedings and to "jump start" discovery;

b. Interlocutory appellate review of some district court orders in MDL proceedings; and

c. Settlement review, attorney's fees, and common benefit funds.

FEDERAL RULES OF CRIMINAL PROCEDURE

The Advisory Committee on Criminal Rules presented no action items.

Information Item

The Advisory Committee met on September 24, 2019. The meeting focused on a proposed draft amendment to Rule 16 that would expand the scope of expert discovery. The scope of discovery in criminal cases has been a recurrent topic on the Advisory Committee's

agenda for decades. Most recently, the Rule 16 Subcommittee was formed to consider suggestions from two district judges to expand pretrial disclosure of expert testimony in criminal cases under Rule 16 to more closely parallel the expert disclosure requirements in Civil Rule 26. At the Advisory Committee's October 2018 meeting, the DOJ updated the Advisory Committee on its development and implementation of policies governing disclosure of forensic and non-forensic evidence. The Rule 16 Subcommittee subsequently convened a miniconference in May 2019 to explore the issue with stakeholders. Participants included defense attorneys, prosecutors, and DOJ representatives who have extensive personal experience with pretrial disclosures and the use of experts in criminal cases. Participants were asked to identify any concerns or problems with the current Rule 16 and to provide suggestions for improving the rule.

While the DOJ representatives reported no problems with the current rule, the defense attorneys identified two problems: (1) the lack of a timing requirement; and (2) the lack of detail in the disclosures provided by prosecutors. Participants discussed ways to improve the current rule to address these identified concerns.

Based on the feedback, the Rule 16 Subcommittee drafted a proposed amendment that addressed the timing and contents of expert disclosures while leaving unchanged the reciprocal structure of the current rule. First, the proposed amendment provides that the court "must" set a time for the government and defendant to make their disclosures of expert testimony to the opposing party. That time must be "sufficiently before trial to provide a fair opportunity for each party to meet" the other side's expert evidence. Second, the proposed amendment lists what must be disclosed in place of the now-deleted phrase "written summary."

After thorough discussion at the October 2019 meeting, the Advisory Committee unanimously approved the draft amendment in concept. The Rule 16 Subcommittee continues to refine the draft rule and accompanying committee note and will present the final draft to the

Advisory Committee at the May 5, 2020 meeting. The Advisory Committee plans to seek approval to publish the proposed amendment in August 2020.

FEDERAL RULES OF EVIDENCE

The Advisory Committee on Evidence Rules presented no action items.

Information Items

The Advisory Committee met on October 25, 2019. That morning, the Advisory Committee held a miniconference on best practices for judicial management of *Daubert* issues. The afternoon meeting agenda included a debrief of the miniconference, as well as discussion of ongoing projects involving possible amendments to Rules 106, 615, and 702.

Miniconference on Best Practices in Managing *Daubert* Issues

The miniconference involved an exchange of ideas among Advisory Committee members and an invited panel regarding *Daubert* motions and hearings, including the questions about the interplay between *Daubert* and Rule 702. The panel included five federal judges who have authored important *Daubert* opinions and who have extensive experience in managing *Daubert* proceedings, as well as a law professor who has written extensively in this area.

Rule 702

Following the miniconference, the Advisory Committee continued the discussion, noting that its consideration of these issues began with the Advisory Committee's symposium on forensics and *Daubert* held in October 2017. The Advisory Committee formed a Rule 702 Subcommittee to consider possible treatment of forensics, as well as the weight/admissibility question described below.

The Advisory Committee has heard extensively from the DOJ about its current efforts to regulate the testimony of its forensic experts. The Advisory Committee continues to consider a possible amendment addressing overstatement of expert opinions, especially directed toward

forensic experts. The current draft being considered by the Advisory Committee provides that "if the expert's principles and methods produce quantifiable results, the expert does not claim a degree of confidence unsupported by the results." At its next meeting on May 8, 2020, the Advisory Committee plans to consider whether to seek approval to publish for public comment a proposed amendment to Rule 702.

Rule 106

The Advisory Committee continues its consideration of various alternatives for an amendment to Rule 106, which provides that when a party presents a writing or recorded statement, the opposing party may insist on introduction of all or part of a writing or recorded statement that ought in fairness to be considered as well. One option is to clarify that the completing statement should be admissible over a hearsay objection because it is properly offered to provide context to the initially proffered statement. Another option is to state that the hearsay rule should not bar the completing statement, but that it should be up to the court to determine whether it is admissible for context or more broadly as proof of a fact. The final consideration will be whether to allow unrecorded oral statements to be admissible for completion, or rather to leave it to parties to seek admission of such statements under other principles, such as the court's power under Rule 611(a) to exercise control over evidence. The Advisory Committee plans to consider at its May 8, 2020 meeting whether to recommend a proposed amendment to Rule 106 for public comment.

Rule 615

Finally, the Advisory Committee continues to consider a rule amendment to address problems identified in the case law and reported to the Advisory Committee regarding the scope of a Rule 615 order, regarding excluding witnesses. The Advisory Committee plans to consider

whether to recommend a proposed amendment to Rule 615 for public comment at its May 8, 2020 meeting.

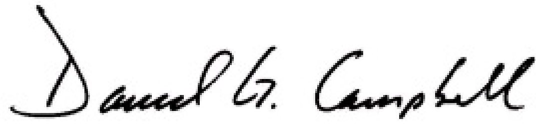
OTHER ITEMS

The Standing Committee's agenda included two additional information items and one action item. First, the Committee heard the report of the E-filing Deadline Joint Subcommittee, the subcommittee formed to consider a suggestion that the electronic filing deadlines in the federal rules be rolled back from midnight to an earlier time of day, such as when the clerk's office closes in the court's respective time zone. The subcommittee's membership includes members of each of the rules committees as well as a representative from the DOJ. The subcommittee's work is in the early stage and it will report its progress at the June 2020 meeting.

Second, the Committee was briefed on the status of legislation introduced in the 116th Congress that would directly or effectively amend a federal rule of procedure.

Third, at the request of Judge Carl E. Stewart, Judiciary Planning Coordinator, the Committee discussed whether there were any changes it believed should be considered for inclusion in the 2020-2025 *Strategic Plan for the Federal Judiciary* (*Strategic Plan*). It is the Committee's view that, while committed to supporting the *Strategic Plan*, its work is very specific – evaluating and improving the already-existing rules and procedures for federal courts – and often does not involve the broader issues that concern the Judicial Conference and the strategic planning process. With this reality in mind, the Committee did not identify any specific additional rules-related suggestions but authorized the Chair to convey to Judge Stewart ongoing rules initiatives that should support the *Strategic Plan*.

Respectfully submitted,



David G. Campbell, Chair

Jesse M. Furman	Carolyn B. Kuhl
Daniel C. Girard	Gene E.K. Pratter
Robert J. Giuffra Jr.	Jeffrey A. Rosen
Frank Mays Hull	Srikanth Srinivasan
William J. Kayatta, Jr.	Kosta Stojilkovic
Peter D. Keisler	Jennifer G. Zipps
William K. Kelley	

Appendix A – Official Bankruptcy Forms (form changes made to implement the HAVEN Act)
Appendix B – Memoranda, Interim Bankruptcy Rules, and Official Bankruptcy Forms regarding implementation of the SBRA

TAB 3

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Minutes of the Fall 2019 Meeting of the

Advisory Committee on the Appellate Rules

October 30, 2019

Washington, DC

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 Wednesday, October 30, 2019, at 9:00 a.m., at the Thurgood Marshall Federal Judiciary Building in Washington, DC.

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 Stephen Joseph Murphy III, Professor Stephen E. Sachs, Danielle Spinelli, and Lisa B. Wright. Solicitor General Noel Francisco was represented by Thomas Byron, Assistant Director of Appellate Staff, Department of Justice.

Also present were: Judge David G. Campbell, Chair, Standing Committee on the Rules of Practice and Procedure; Judge Bernice Donald, Member, Advisory Committee on the Bankruptcy Rules, and Liaison Member, Advisory Committee on the Appellate Rules; Patricia S. Dodszuweit, Clerk of Court Representative, Advisory Committee on the Appellate Rules; Rebecca A. Womeldorf, Secretary, Standing Committee on the Rules of Practice and Procedure and Rules Committee Chief Counsel; Bridget M. Healy, Attorney Advisor, Rules Committee Staff (RCS); Shelly Cox, Administrative Analyst, RCS; Alison Bruff, Rules Law Clerk, RCS; Professor Edward A. Hartnett, Reporter, Advisory Committee on the Appellate Rules; Professor Catherine T. Struve, Reporter, Standing Committee on the Rules of Practice and Procedure; and Professor Daniel R. Coquillette, Consultant, Standing Committee on the Rules of Practice and Procedure.

I. Introduction

Judge Chagares opened the meeting and greeted everyone, particularly Lisa Wright of the Federal Defenders Office in DC, a new member of the Committee, and Circuit Judge Bernice Donald of the Sixth Circuit, the new Bankruptcy liaison. He thanked Rebecca Womeldorf, Shelly Cox, and the whole Rules team for organizing the meeting and the dinner the night before. He congratulated Chris Landau on his appointment as ambassador to Mexico, and noted his excellent work for the Committee during his time as a member.

II. Report on Status of Proposed Amendments and Legislation

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Judge Chagares reported that the proposed amendments to Rules 3, 5, 13, 21, 25, 26, 26.1, 28, 32, and 39 are on track to take effect on December 1, 2019, barring Congressional action. These proposed amendments mostly reflect the move to electronic filing and the resulting reduced need for proof of service. In addition, the proposed amendment to Rule 26.1 changes the disclosure requirements of that Rule.

He also reported that the proposed amendments to Rules 35 and 40 are on track to take effect on December 1, 2020. They have been approved by the Judicial Conference and sent to the Supreme Court for its consideration. These proposed amendments impose length limits on responses to petitions for rehearing and unify terminology.

Judge Chagares then called attention to the proposed AMICUS Act, S. 1441, mentioned in the agenda book on page 36. That legislation would require disclosures from certain amici. Rebecca Womeldorf reported that it did not seem to have much traction at the moment, but appeared to be the kind of legislation that could move quickly after the next election. The Committee discussed how this differed from current Appellate Rule 29 and Supreme Court Rule 37. The current rules focus on disclosure of funding the brief itself. The proposed legislation, on the other hand, would generally require that those who submit three or more amicus briefs in a year disclose information about their own sources of funding. In particular, disclosure would be required of the name of any person who contributed 3 percent or more of the filer's revenue or more than $100,000. Committee members wondered how many organizations this would affect, and how it might apply to trade associations and churches, and suggested the formation of a subcommittee. Professor Coquillette agreed that this was the kind of bill that once it moved, could move fast, and agreed with the suggestion that a subcommittee be formed. Judge Chagares appointed a subcommittee to deal with amicus disclosures, consisting of Professor Sachs, Ms. Spinelli, and Ms. Wright. He noted that, as usual, he and the Reporter would serve on the subcommittee ex officio.

III. Approval of the Minutes

The draft minutes of the April 5, 2019, Advisory Committee meeting were approved.

IV. Discussion of Matters Published for Public Comment (16-AP-D and 17-AP-G)

Judge Chagares noted that proposed amendments to Rules 3, 6, 42, and Forms 1 and 2 were published for public comment. The Standing Committee made no substantive change to this Committee's proposals regarding Rules 3, 6, and Forms 1 and 2. As for Rule 42, the Standing Committee moved to the

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text something that this Committee had left to the Note: a statement that the Rule does not alter legal requirements governing court approval of settlements and the like.

No one requested to be heard at a hearing on these amendments that would have been held in conjunction with this meeting. There will be another opportunity to request to be heard at a hearing in January in Phoenix.

No comments were received regarding Rule 42. Two were received regarding Rule 3, one favorable, one critical. Judge Chagares asked the Reporter to discuss the critical response.

The Reporter first noted for the Committee the stylistic change that the Standing Committee had made to Rule 3—changing romanettes to a dash—so the Committee members would be clear about how the proposal published for public comment differed from the version approved by this Committee. He also noted that a third comment had been received since the publication of the agenda book, but that it was addressed to transparency in bankruptcy proceedings and had nothing to do with these proposals.

Turning to the critical comment submitted by Michael Rosman, the Reporter explained that the critique was based on Mr. Rosman's interpretation of Civil Rule 54(b). Under his reading of that Rule, a district court is obligated to enter a separate document that lists all of the claims in the action and what has become of them. That is, if a district court disposes of part of a case under Rule 12(b)(6), and then some years later disposes of the rest of the case, the district court has to enter a document that recites not just the disposition of those remaining claims, but that recites the disposition of the earlier part of the case as well. Until that is done, in Mr. Rosman's view, there is no final appealable judgment because there is no decision that adjudicates "all the claims and all the parties' rights and liabilities." He emphasizes that Civil Rule 54 does not say "all the remaining claims," but "all the claims." By contrast, the proposed amendment to Rule 3 does refer to "all remaining claims and the rights and liabilities of all remaining parties."

The Reporter noted that Mr. Rosman's interpretation is not how Rule 54 is generally understood, including by major treatise writers. Instead, it is generally understood that when a decision disposes of all remaining claims of all remaining parties to a case, that is a final judgment. The Reporter emphasized that if Mr. Rosman is right, we would have a real problem with the proposed Rule and need to rethink it. No member of the Committee expressed agreement with Mr. Rosman's interpretation, and no member of the Committee suggested any changes to the proposed amendments as published.

V. Discussion of Matters Before Subcommittees

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A. Proposed Amendments to Rules 35 and 40 (18-AP–A)

Thomas Byron presented the subcommittee's report regarding its ongoing review of Rules 35 and 40. (Agenda Book page 177). He explained that the consideration of Rules 35 and 40 had begun with making provision for the length of responses, and that review uncovered the small difference between one rule calling that document a "response," and the other calling it an "answer." That review also uncovered lots of other differences between the two rules, traceable to the historic treatment that permitted parties to petition for panel rehearing, but only suggest rehearing en banc.

The subcommittee undertook a comprehensive review, and considered aligning Rules 35 and 40 with each other, or both with Rule 21. It also considered revising Rule 35 to apply solely to initial hearing en banc and Rule 40 to apply to both kinds of rehearing. But based on the guidance of this Committee, the subcommittee is not proposing any of these changes.

Instead, there are four ideas still on the table:

(1) any panel member may request a poll of the full court

(2) a panel may treat a petition for rehearing en banc as a petition for panel rehearing

(3) if the panel changes its decision, ensure that it can't block access to the full court

(4) encourage the readers of Rule 35 to look to Rule 40 as a reminder that panel rehearing may be available when the standards for rehearing en banc are not met

The subcommittee looked to local rules, internal operating procedures, and the like to see how the various circuits handle these matters.

(1) Although many circuits allow all panel members to request a poll, not all circuits allow visiting and senior judges to do so. The subcommittee abandoned this idea, leaving it to local rules.

(2) Petitions for panel rehearing are generally considered lesser-included requests when rehearing en banc is sought. Most circuits say that, and panel rehearing is available sua sponte, so this is essentially codifying existing practice. The subcommittee considered and rejected expressly stating that this is limited to relief that the panel has the authority to grant, reasoning that the members of the panel know that they cannot grant relief that only the full court can grant.

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(3) Ensuring that a panel cannot block access to the full court was a major concern expressed at the last meeting.

(4) A provision reminding readers that panel rehearing might be available if the criteria for rehearing en banc is not met fits well with the explicit statement that a petition for rehearing en banc may be treated as a petition for panel rehearing.

At the last meeting, members of the Committee were concerned with ensuring that a panel cannot block access to the full court. Sometimes a panel will make changes to its decision and state that no further petitions for rehearing en banc will be permitted. The subcommittee thinks that most likely these statements are based on an accurate assessment, obtained from a formal or informal poll of their colleagues, that a petition for rehearing en banc would be futile. But the subcommittee proposed making clear that if the panel makes a substantive change, a party can petition for rehearing.

Judge Chagares stated that it was unfair to box in the parties. If they are still not satisfied, they should have a right to complain to the full court.

An academic member thanked the subcommittee for its great work, while noting continuing support for a more extensive reshuffling of Rules 35 and 40. But he had a visceral negative reaction to the language "changes the substance of its decision." Why not allow a new petition whenever the panel amends its decision? Perhaps a rule similar to the omnibus motion provision in the civil rules [Civil Rule 12(g)] should be added so that parties cannot file a new petition on grounds omitted from the first petition. Perhaps the amendment would be better placed in Rule 40.

Ms. Dodszuweit stated that sometimes there are orders amending opinions that make minor changes, such as fixing typos. Those can be distinguished from grants of panel rehearing with subsequent opinion. Judge Chagares noted that an order amending an opinion might change one case name, or add the name of an associate who worked on the case.

Mr. Byron observed that there isn't a uniform practice across the circuits regarding whether the petition is "granted" when changes are made, or regarding the distinction between an order amending an opinion and issuing a new opinion.

An academic member contended that a minor change to an opinion should not bar access to the full court. The party may be complaining that the panel did not go far enough in making changes.

The Reporter agreed with Mr. Byron about the disuniformity in practice, and stated that he probably agreed with the academic member's point that it would be

wrong to limit the ability to file a new petition to situations where the panel made a substantive change. The subcommittee didn't want to invite new petitions when the names of cited cases were fixed, but if the petition argued that the panel's decision was inconsistent with a new Supreme Court decision, and the panel simply fixed the name of a cited case, that shouldn't block access to the full court. An academic member built an example: what if the change the panel made was simply to add a citation to the new Supreme Court decision?

A judge member stated that there shouldn't be repeated petitions for panel rehearing. Professor Coquillette stated that the rule should explicitly state that it is limited to a new petition for rehearing en banc. An academic member questioned why a subsequent petition for panel rehearing should be barred if the panel changes its decision. Professor Coquillette emphasized that the rule should be explicit: if a new petition for panel rehearing is permitted, the rule should say so. An academic member suggested placement in Rule 40(a).

Mr. Byron expressed concern about dragging out the issuance of the mandate, and creating uncertainty with the possibility of repeated petitions for panel rehearing. Judge Chagares worried about finality.

A judge member suggested that the term "substance" would invite second order disputes about whether a particular change was substantive. One way a court of appeals can deal with this is for the panel to decide, when it makes a change, whether the change is sufficiently minor (e.g., correcting typos) and, if so, state that no further petitions are permitted.

Professor Struve pointed out that, in regard to whether further chances to petition are permitted we are talking about establishing the default rule. Rule 2 allows suspension of the Rules in particular cases.

An academic member suggested that other language could be added to deal with the mandate issue.

The Reporter suggested that it might be best to limit the Rule to new petitions for rehearing en banc, leaving the rare case in which a second petition for panel rehearing might be appropriate to Rule 2, such as where a party files a motion for leave to file a second petition for panel rehearing.

The subcommittee will continue to work on the proposal, taking this discussion into account. Professor Sachs was added to the subcommittee.

B. Proposed Amendment to Rule 25 in Railroad Retirement Act Cases (18-AP–E, 18-CV-EE)

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Judge Chagares presented the subcommittee's report regarding privacy in Railroad Retirement Act cases. (Agenda Book page 197). He explained that this project began with a request from the General Counsel of the Railroad Retirement Board to treat Railroad Retirement Act benefit cases the same way the Social Security Act cases are treated in terms of electronic access. Civil Rule 5.2 limits remote electronic access (but not at the courthouse access) in Social Security cases. Appellate Rule 25 follows Civil Rule 5.2 in such cases.

While Social Security appeals go to the district courts, Railroad Retirement Act appeals go directly to the courts of appeals. For that reason, this Committee is dealing with the issue. The Committee on Court Administration and Case Management has no objection to this Committee going forward.

Research identified two other statutory schemes that might warrant similar treatment, the Black Lung Act and the Longshore and Harbor Workers' Compensation Act. The subcommittee considered including those as well.

Mr. Byron explained that he has reached out to people in the Department of Labor about including the Longshore Act and Black Lung Act, and found hesitation to include proceedings under those statutes because of differences in the administrative processes under those Acts compared to the Railroad Retirement Act. For that reason, the subcommittee did not include them.

The Reporter added that he had spoken to an attorney at the Railroad Retirement Board and confirmed that most of the time that a Railroad Retirement Act case is filed in the district court it is because a pro se litigant filed in the wrong court. Occasionally, someone will claim entitlement to benefits under both the Railroad Retirement Act and Social Security Act, and argue that the district court has jurisdiction to hear them together. The Railroad Retirement Board argues against that position. Sometimes, there may be a class action type claim filed in the district court; these would typically not involve review of an administrative record. Disability cases involve lots of medical records. But even retirement cases have sensitive information: the file identifier is a Social Security number, and it can be difficult to redact Social Security numbers from wage records and still have those records be meaningful. The Board also administers unemployment insurance, but does not seek to have such cases covered by the proposed rule.

The Reporter also noted that he consulted with Ed Cooper, the Reporter for the Civil Rules Committee, who suggested that instead of referring to the "limitations on" electronic access, it might be better to refer to something like "provisions for." The Reporter suggested "provisions governing," and a judge member suggested simply "provisions on."

At Judge Chagares' request, Ms. Dodszuweit had sought out lawyers who practice in this area. She found five, and none objected to this proposal.

Professor Coquillette asked if there would be any administrative difficulties implementing this proposal. Ms. Dodszuweit said that there wouldn't be; the technology is in place and all that would be necessary would be an additional CM/ECF coding so that it happened automatically. And there are so few such cases, it wouldn't be a problem for clerks. Ms. Womeldorf stated that she would provide specific notice to the people who implement CM/ECF.

Mr. Byron asked if the hybrid Social Security / Railroad Retirement Act cases would be covered. The Reporter said that they would, explaining that his reason for mentioning those cases was not because they needed special coverage, but because the premise of our action here is that Railroad Retirement Act cases do not go to the districts courts, so he wanted to alert the Committee to rare instances where such a case might be filed in a district court.

Professor Struve asked why the proposal referred to Civil Rule 5.2(c)(1) and (c)(2) rather than simply 5.2(c)—which would include the opening phrase "Unless the court orders otherwise"—and suggested referring to "proceedings" for review rather than "a petition" for review. The Reporter responded that referring to 5.2(c) as a whole could be read to bring with it the limitation to Social Security and immigration cases, and that the word "petition" was used to be parallel to other Federal Rules of Appellate Procedure. Professor Struve added that Rule 2 makes unnecessary the provision specifically mentioning the power of the court to order otherwise.

The subcommittee will continue its work, taking into account this discussion.

VI. Discussion of Matters Before Joint Subcommittees

A. Study of Earlier Deadline for Electronic Filing (19-AP–E)

Judge Chagares described his proposal to study the possibility of rolling back electronic filing deadlines from midnight to some earlier time, such as the time of closing of the clerk's office. He recounted his memories of the old days of rushing to get a filing to the court before the clerk's office closed. Reasons to roll back the time include: the negative effect of midnight deadlines on the quality of life of lawyers and staff; increasing the usefulness to district judges of daily filing reports, fairness to pro se litigants who might not be able to electronically file, and avoidance of sandbagging by those who wait until midnight even when the filings are ready to go well before then. On the other hand, with lawyers working in multiple time zones, an earlier filing deadline might create problems, and some lawyers might prefer the flexibility (for example), of being able to finish documents and file them after getting their kids to bed.

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A cross-committee subcommittee has been formed to study the issue. Diversity in multiple dimensions was sought on the committee, including geographic and style of practice. The FJC is looking at deadlines across the country, including Delaware, which has adopted an earlier deadline. Information being sought includes when clerks' offices actually close, what opportunity there is for after-hours filings, who actually files at late hours, and the extent to which pro se litigants may file electronically. The ABA and other membership organizations have been asked to comment.

A judge member stated that the Ohio Supreme Court is looking at this issue from the other end. Currently, electronically filing must be done by 5:00 p.m., a deadline originally imposed so that staff was available to deal with problems. Now, some lawyers are caught unaware, thinking that they have until midnight. Time zone differences complicate matters.

A lawyer member noted that his memory of the old days included going to the after hours drop box late at night, and that pro se litigants still do. Mr. Byron had a similar recollection of routinely going to a drop box at night. He added that we would have to be careful about interaction with the mail box rule, recalling routinely taking taxis to a mail box with a midnight pick up.

Another lawyer member similarly recalled using late night drop boxes, and stated that a 5:00 p.m. filing deadline would be much more stressful and make life much more difficult for associates. Clients drive things, and it is good to have time to deal with finishing a filing after the client goes home.

Ms. Womeldorf stated that she had received a comment by email (sent at 1:48 a.m.) strongly supporting the proposal, noting that it would improve quality of life, and pointing to litigants who play chicken with simultaneous filings by waiting until the last minute to file.

Ms. Dodszuweit reported that the idea was floated at a clerk's meeting and was uniformly opposed.

A judge member suggested closing the filing window from 8:00 p.m. on a weekday until 6:00 a.m. the next day, so that lawyers who are on trial can come to court refreshed the next day.

Professor Coquillette recalled that he thought his career was over years ago when he missed the 5:00 p.m. filing deadline, until he learned from the clerk that the time stamp wasn't changed until 9:00 a.m. the next day, so that he would be okay if he got it there at 8:50 a.m.

Judge Chagares noted that individual judges can set particular times in orders. A lawyer member said litigants comply with such orders issued in particular

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situations, but that a general rule that applied in ordinary situations and established an electronic filing deadline tied to the closing time of each clerk's office would be a problem because litigants would have to check the closing time of various clerk's offices.

Mr. Byron observed that when time is of the essence, as in stay motions, a schedule is worked out that gets materials to the judges in time.

An academic member noted that sometimes the day might be filled with meetings, so that the night is the only time to focus on getting the filing done. He also recalled making filings at the last FedEx drop off box, and urged care regarding the interaction with the mailbox rule in order to avoid opening up discrepancies that would create incentives as to whether to seek to file electronically or not.

A lawyer member pointed out that one can file electronically from home, so that it is not necessary to keep staff members working late.

Judge Chagares reiterated that all that is happening now is a study of the issue.

B. Finality in Consolidated Cases (no number assigned)

Judge Bybee presented a report regarding the work of the joint Civil / Appellate Committee considering the issue of finality in consolidated cases. When cases are consolidated, and all of the issues in one such case are resolved, can (and must) an immediate appeal be taken? This question produced a four-way split among the circuits prior to the Supreme Court decision in *Hall v. Hall*, 138 S. Ct. 1118 (2018). In *Hall*, the Supreme Court decided that the consolidated actions retain their separate identity so that an immediate appeal is available. The Supreme Court noted that if this is problematic, it could be changed by rule, and almost invited rulemaking.

In addition to the problem of possible lost appellate rights if litigants do not realize that they need to appeal, there is also a potential for inefficiency in the courts of appeals dealing with related issues in multiple appeals. Moreover, there is an issue involving litigants who relied on circuit precedent rejected by *Hall*.

Emery Lee of the FJC is undertaking a study of how large a problem there might be. So far, he has found that the number of consolidated cases were underestimated, and that approximately 3% of civil cases are consolidated—not including MDL cases. That suggests there might be 8,500 to 25,000 non-MDL cases consolidated each year.

The joint subcommittee is also looking at academic literature in the area, and may propose a rule that would allow for delayed appealability, with a district judge empowered to dispatch cases for appeal.

The Reporter added that even if the statistics do not reveal a large problem, there may nevertheless be a large problem. He suspects that cases in which one consolidated case has reached a final judgment (and is therefore appealable under *Hall*) are frequently overlooked by both litigants and courts, that it is problematic to have a jurisdictional rule (to be enforced sua sponte) that is difficult to detect, and that the problem is compounded if additional claims or parties are added after consolidation. Moreover, there may well be cases that are consolidated in the district of filing prior to being transferred to an MDL district.

Judge Bybee added that he believes that most of the members of the joint subcommittee are convinced that some rule fix is needed.

VII. Discussion of Recent Suggestions

A. Specifying "Good Cause" For an Extension of Time to File a Brief (19-AP-A)

The Reporter explained that a lawyer who was quite sure that the government did not have good cause for an extension it received had submitted a suggestion to specify criteria for good cause. The Reported noted that "good cause" is a common term in the Federal Rules, and seemed to be designed for case-specific determinations.

A judge member stated that if a request for an extension fails to state a reason, it should be denied, but if it states a legally sufficient reason, one shouldn't try to get behind the lawyer's statement to test its veracity.

Judge Campbell added that there are some instances where case law has developed careful definitions of "good cause" under particular rules, notably Civil Rule 16 and its valuable Committee Note. He would hate to see some generic definition of "good cause" that would upset this case law.

The Committee, without dissent, agreed to remove this item from its agenda.

B. Decision on Grounds Not Argued (19-AP-B)

Judge Chagares stated that the American Academy of Appellate Lawyers (AAAL) had submitted a suggestion that if a court of appeals is contemplating a decision based on grounds not argued it allow briefing on that ground. They noted that at their Fall 2017 meeting most of their members reported having received decisions on unargued grounds. Judge Chagares was at this meeting, and saw the

polling. He also recalled it happening to him when in practice, and noted it drives people crazy. The AAAL has been working on this for a while, and put effort into it. The concern is real, although it is unclear whether it is appropriate for a rule, or perhaps just a letter to the circuits.

A subcommittee was appointed, consisting of Mr. Byron, Judge Murphy, Justice French, and Judge Donald.

An academic member suggested that the matter might be dealt with in the rehearing rules, as a potential ground for rehearing.

A judge member wondered whether it was appropriate for rulemaking, and whether there was any doubt that judges shouldn't do it? A liaison judge noted that there are times when such issues arise, and the parties are asked to brief the issue. Judge Chagares noted that he had been criticized merely for citing an out-of-circuit decision that the parties had not cited.

A judge member stated that if the panel confers after argument and the parties just missed it, the court still has to get the law right. Judge Campbell added that district judges have to decide matters that have not been briefed well and never will be briefed well. He'd hate to see a rule that would require matters to be revisited. An academic member suggested that supplemental briefing might be encouraged, without creating a new ground for error.

C. IFP Standards (19-AP-C)

The Reporter stated that Sai had submitted a suggestion for rulemaking to deal with various problems in the granting of in forma pauperis status. A recent Yale Law Journal article shows that there are wide disparities across the various districts. One major question is whether the matter is appropriate for rulemaking under the Rules Enabling Act. Administrative agencies commonly promulgate regulations that interpret and implement statutory provisions, but that isn't the way the Rules Enabling Act is generally thought to work.

The Supreme Court decision in *Adkins v. E.I. Dupont de Nemours & Co.,* 335 U.S. 331 (1948), interpreted the IFP statute, 28 U.S.C. § 1915, and explained that a person who would wind up on public assistance if denied IFP status is sufficiently poor to be granted IFP status. Based on that decision, it might appear reasonable to provide that a person who is on public assistance is thereby entitled to IFP status. But the statute as amended requires a "prisoner" to submit an affidavit listing all assets, and the word "prisoner" is broadly understood to be a scrivener's error that should be read as "person."

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Judge Campbell stated that this proposal was also considered by other Committees, particularly Civil. It appeared unanimous that IFP status is appropriately granted based on case-specific decisions, considering that the cost of living varies drastically from place to place. In addition, prisons handle prisoner accounts in various ways. Civil decided not to pursue this matter, thinking it best addressed by the Committee on Court Administration and Case Management. Civil is not asking CACM to do anything, but is sending its minutes and the Yale Law Journal article to CACM for its consideration.

Ms. Womeldorf added that the discussion at the Criminal Rules Committee was similar.

Professor Coquillette stated that there is a real problem, particularly with the growing number of pro se litigants, but that this is not for the Rules Committees. Various members noted that 40 percent or more of their courts' caseload now involves pro se litigants.

The Reporter added that there may be an aspect unique to the Appellate Rules here. The official forms have been largely eliminated in the Civil Rules, with the exception of the forms for waiver of service in Civil Rule 4. The IFP forms available for use in district court proceedings are AO forms.

By contrast, the Appellate Rules still have official forms as part of the Appellate Rules. When someone seeks leave to pursue an appeal IFP, Appellate Rule 24 requires the use of Appellate Form 4. Moreover, Supreme Court Rule 39 requires that a party seeking IFP status in the Supreme Court must use Appellate Form 4. If the AO changes the forms used in the district court, this Committee might want to reconsider whether to continue to have its own form. It is not clear why it is necessary to have a different form for appeals, especially considering that IFP status on appeal is first sought in the district court.

Ms. Dodszuweit pointed out that there are also original proceedings in the courts of appeals for which IFP status can be sought.

An academic member stated that this is incredibly important, and suggested a joint committee to consult with CACM. He recalled how little guidance there was regarding IFP status, including whether statements should be accepted as true. Uniformity is needed, perhaps a default rule, or a few easy to apply rules such as those suggested in the Yale article. He suggested that there was room for rulemaking, given that the statute says that a court "may" grant IFP status. He urged that the matter remain on the agenda in some form.

A lawyer member was struck by how complex Appellate Form 4 is compared to the form used for appointing counsel under the Criminal Justice Act. A lot of judicial resources seem to go into fighting over rather small amounts of money.

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Judge Chagares noted that any decision regarding the creation of a joint committee would be up to the Standing Committee. The matter will stay on the Committee's agenda, the Reporters will remain in touch with each other, and we will send our comments to CACM.

D. Court Calculated Deadlines (19-AP-D)

Sai also submitted a suggestion that courts calculate deadlines and provide the information to the parties so the parties can rely on them.

Ms. Dodszuweit stated that this would be extremely labor intensive and difficult, and incomprehensible in cases with more than two parties. Some software applications in the future will have some capacity to generate case-by-case deadlines, but at least until then, there simply isn't the budget or personnel.

Judge Campbell stated that the Bankruptcy, Civil, and Criminal Committees all had the same reaction. Sai has pointed to a real problem for pro se litigants, but there isn't an easy fix. It would be an enormous burden on the clerks' offices or the judge's staff. Plus, there is a risk of being misleading because there are some deadlines that are fixed as a matter of jurisdiction even if a court provides a litigant with incorrect information.

There was some discussion of whether deadlines that CM/ECF generates automatically could be made available, but even this is impractical because there are case to case variables and these deadlines are sometimes wrong.

An academic member added that what Sai has proposed would be immensely valuable, but would require funding commensurate with that value.

The Committee agreed, without dissent, to remove this matter from its agenda.

VIII. New Business and Updates on Other Matters

Judge Campbell noted major projects in other Advisory Committees:

The Bankruptcy Committee is continuing to work on restyling.

The Criminal Rules Committee is considering requiring greater disclosure of expert reports, similar to what is required in civil cases.

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The Evidence Rules Committee is working on forensic expert evidence and Evidence Rule 702, in an effort to make *Daubert* more effective and better describe the court's gatekeeping function. One concern is not having experts overstate the level of confidence. The Committee is also looking at extending the rule of completeness to oral statements, and the interaction of this rule with the hearsay rule. It is also looking at the exclusion of witnesses, and whether that rule should apply outside the courtroom.

The Civil Rules Committee is primarily focused on two issues. The first is whether to create MDL-specific rules. MDL cases comprise some 40% of the entire civil docket. There may be an impact on the Appellate Rules Committee, because one important issue is whether to make interlocutory appeals more widely available. On the one hand, there are some rulings that, if decided one way, would end the case, but if decided the other way, would impose tremendous settlement pressure. On the other hand, if interlocutory appeals were allowed more broadly, and not decided promptly, and the district court proceedings paused pending appeal, MDLs would become unmanageable The second is whether to create special rules governing appeals in Social Security cases. Over 17,000 such appeals are filed every year. The matter should not affect the Appellate Rules Committee.

Judge Chagares invited discussion of possible new matters for the Committee's consideration, and, in particular, matters that would promote the just, speedy, and inexpensive resolution of cases. None were immediately forthcoming, although one judge member stated that the new civil rules in Ohio were modeled on the federal rules, particularly the proportionality requirement for discovery.

IX. Adjournment

Judge Chagares again thanked Ms. Womeldorf and her team, including Shelly Cox, for organizing the dinner and the meeting, and the members of the Committee for their participation. He announced that the next meeting would be held on April 3, 2020, in Palm Beach, Florida.

The Committee adjourned at approximately 11:45 a.m.

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To: Advisory Committee on the Federal Rules of Appellate Procedure

From: FRAP 3 Subcommittee

Date: March 6, 2020

Re: FRAP 3 & 6, Forms 1 & 2

Proposed amendments to FRAP 3 & 6, as well as Forms 1 & 2, have been published for public comment. The proposed amendments to Rule 6 and Forms 1 & 2 are conforming amendments; accordingly, this memo focuses on Rule 3.

The subcommittee has considered comments made at the January meeting of the Standing Committee and public comments that have been submitted. It has reached consensus on all but two issues. Those two issues are: (1) whether to preserve a party's ability to designate only part of a judgment or order in a notice of appeal, and (2) whether to add a provision to deal with a notice of appeal, filed after final judgment, that designates a prior non-appealable order rather than the final judgment itself.

Here is the proposed text of Rule 3 as published:

Rule 3. Appeal as of Right—How Taken

* * * * *

(c) Contents of the Notice of Appeal.

(1) The notice of appeal must:

(A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as ''all plaintiffs,'' ''the defendants,'' ''the plaintiffs A, B, et al.,'' or ''all defendants except X'';

(B) designate the judgment~~,~~—or the appealable order—from which the appeal is taken~~, or part thereof being appealed~~; and

(C) name the court to which the appeal is taken.

(2) A pro se notice of appeal is considered filed on behalf of the signer and the signer's spouse and minor children (if they are parties), unless the notice clearly indicates otherwise.

(3) In a class action, whether or not the class has been certified, the notice of appeal is sufficient if it names one person qualified to bring the appeal as representative of the class.

(4) The notice of appeal encompasses all orders that merge for purposes of appeal into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal.

(5) In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates:

(A) an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties; or

(B) an order described in Rule 4(a)(4)(A).

(6) An appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited. Without such an express statement, specific designations do not limit the scope of the notice of appeal.

~~(4)~~ (7) An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice.

~~(5)~~ (8) Forms 1A and 1B in the Appendix of Forms are ~~is a~~ suggested forms of ~~a~~ notices of appeal.

* * * * *

At the last meeting of the Advisory Committee, the Committee considered a critical comment submitted by Michael Rosman. His critique is largely based on his interpretation of Civil Rule 54(b). Under his reading of that Rule, a district court is obligated to enter a separate document that lists all of the claims in the action and what has become of them. That is, if a district court disposes of part of a case under Civil Rule 12(b)(6), and then some years later disposes of the rest of the case, the district court has to enter a document that recites not just the disposition of those remaining claims, but that recites the disposition of the earlier part of the case as well. Until that is done, in Mr. Rosman's view, there is no final appealable judgment because there is no decision that adjudicates "all the claims and all the parties' rights and liabilities." He emphasizes that Civil Rule 54 does not say "all the remaining claims," but "all the claims." By contrast, the proposed amendment to Rule 3 does refer to "all remaining claims and the rights and liabilities of all remaining parties." No member of the Advisory Committee has expressed agreement with Mr. Rosman's interpretation.

This critique was highlighted at the meeting of the Standing Committee. It was emphasized that if Mr. Rosman is right, we would have a real problem with the proposed Rule and need to rethink it. No member of the Standing Committee voiced agreement with the critique. The subcommittee sees no reason to revisit this issue.

Attorney's Fees

One member of the Standing Committee, however, did raise a concern about whether the proposal would create problems in cases where there are motions for attorney's fees.

Proposed FRAP 3(c)(5) provides:

> In a civil case, a notice of appeal encompasses the final judgment . . . if the notice designates:
>
> > (A) an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties; . . . .

Civil Rule 54(d)(2)(A) provides:

> A claim for attorney's fees . . . must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages.

Civil Rule 58(e) provides:

> Ordinarily, the entry of judgment may not be delayed . . . in order to . . . award fees.

The worry is evidently whether the proposed rule might inadvertently change the existing practice that treats a judgment as final even though attorney's fees have not yet been decided. If attorney's fees count as one of the "remaining claims" or one of the "rights and liabilities" of a remaining party, might the proposed rule suggest that a judgment isn't final until attorney's fees are decided, or that an appeal from an order adjudicating attorney's fees will always encompass the underlying final judgment?

One idea floated at the Standing Committee was to delete the phrase "rights and liabilities" from the proposal so that it would refer only to "an order that adjudicates all remaining claims of all remaining parties." The idea seemed to be that perhaps attorney's fees might be a "right" or a "liability" but not a "claim." That phrase in the proposed Appellate Rule was drawn from the Civil Rule 54(b), and Ed Cooper explained the value of the broader phrase in the Civil Rule, particularly in multiple party cases.

Another member of the Standing Committee noted that Civil Rule 54(b) uses the conjunction "or"—"any order . . . that adjudicates fewer than all the claims *or* the rights and liabilities of fewer than all the parties does not end the action . . . "—while proposed FRAP 3 uses the conjunction "and"—"an order that adjudicates all remaining claims *and* the rights and liabilities of all remaining parties."

The subcommittee does not recommend that either suggestion be adopted.

And v. Or. It is true that Civil Rule 54(b), when describing the kind of order that "does not end the action as to any of the claims or parties," uses the conjunction "or." But the end of Civil Rule 54(b) refers to "the entry of a judgment adjudicating all the claims *and* all the parties' rights and liabilities." It is the latter kind of order that the proposed Rule 3 is concerned with: one that adjudicates all remaining claims *and* the rights and liabilities of all remaining parties.

Rights and Liabilities. Deleting the phrase "rights and liabilities" would undermine the connection between the proposed amendment to Rule 3 and existing Civil Rule 54(b). The point of this subsection of the proposed rule is precisely to make that connection, so that a notice of appeal that designates the kind of order described at the end of Rule 54(b) encompasses the final judgment. Moreover, deleting the phrase wouldn't solve the concern. That's because Civil Rule 54(d)(2)(A) refers to a "claim" for attorney's fees. If attorney's fees count as a "claim," we are right back to the original problem. It is better to admit that the word "claim" means different things in different contexts. For example, it is clear that the word "claim" means something quite different for purposes of Civil Rule 12(b)(6) than it does for purposes of claim preclusion.

The subcommittee suggests that the concern raised at the Standing Committee be addressed by adding to the Committee Note a statement that the amendment does not change the principle established in the leading Supreme Court decisions addressing how requests for attorney's fees affect finality.

In *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202-03 (1988), the Court held that "Courts and litigants are best served by the bright-line rule . . . that a decision on the merits is a 'final decision' for purposes of § 1291 whether or not there remains for adjudication a request for attorney's fees attributable to the case." And in *Ray Haluch Gravel Co. v. Cent. Pension Fund of Int'l Union of Operating Eng'rs & Participating Emp'rs*, 571 U.S. 177, 179 (2014), the Court held that it makes no difference whether "the unresolved claim for attorney's fees is based on a contract rather than, or in addition to, a statute." In short, "[w]hether the claim for attorney's fees is based on a statute, a contract, or both, the pendency of a ruling on an award for fees and costs does not prevent, as a general rule, the merits judgment from becoming final for purposes of appeal." *Id.*[1] Both decisions turned on a pragmatic interpretation of the final judgment rule, not the text of Civil Rule 54(b).

But what is the relationship between these two decisions and Civil Rule 54(b)? That is, could someone argue—relying on the last sentence of 54(b)—that attorney's fees are "claims" or "rights and liabilities" and therefore if fees have not been adjudicated, the action has not ended as to any of the claims? If so, there could be a risk of a similar argument under proposed Appellate Rule 3: Someone could argue that an order that adjudicates fees is one that adjudicates the last remaining "claims" and "rights and liabilities of all remaining parties," and therefore an appeal from the denial of fees brings up the underlying merits judgment.

[1] "[T]he situation would differ if a party brought a freestanding contract action asserting an entitlement to fees incurred in an effort to collect payments that were not themselves the subject of the litigation." *Ray Haluch*, 571 U.S. at 190. Such a claim would not be for fees "attributable to the case" currently being litigated.

We are aware of no case in which a court has faced this argument, presumably because such reasoning would be inconsistent with the holdings in *Ray Haluch* and *Budinich*.

These cases can be reconciled with Civil Rule 54(b) by treating attorney's fees incurred in the action itself as collateral and neither "claims" nor "rights and liabilities of the parties" within the meaning of 54(b). As the Court put it in *Budinich*:

> As a general matter, at least, we think it indisputable that a claim for attorney's fees is not part of the merits of the action to which the fees pertain. Such an award does not remedy the injury giving rise to the action, and indeed is often available to the party defending against the action.

Budinich, 486 U.S. at 200. *See White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 451 (1982) ("a request for attorney's fees under § 1988 raises legal issues collateral to the main cause of action"); *Sprague v. Ticonic Nat. Bank*, 307 U.S. 161, 170 (1939) (observing that a petition for attorney's fees in equity is "an independent proceeding supplemental to the original proceeding and not a request for a modification of the original decree").

This reading also coheres with the first sentence of Civil Rule 58(e), which provides, "Ordinarily, the entry of judgment may not be delayed . . . in order to . . . award fees."

Under this approach, there is no need to change the text of the proposed amendment to FRAP 3 to deal with the issue raised at the Standing Committee meeting. Instead, it would be enough to add a statement in the Committee Note that the amendment does not change the principle established in *Ray Haluch* and *Budinich*:

> The amendment does not change the principle established in *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202-03 (1988), that "a decision on the merits is a 'final decision' for purposes of § 1291 whether or not there remains for adjudication a request for attorney's fees attributable to the case." *See also Ray Haluch Gravel Co. v. Cent. Pension Fund of Int'l Union of Operating Eng'rs & Participating Emp'rs*, 571 U.S. 177, 179 (2014) ("Whether the claim for attorney's fees is based on a statute, a contract, or both, the pendency of a ruling on an award for fees and costs does not prevent, as a general rule, the merits judgment from becoming final for purposes of appeal.").

A related issue involving attorney's fees is that Civil Rule 58(e) permits a district court, if a timely motion for attorney's fees has been filed, to "order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59"—so long as it acts "before a notice of appeal has been filed and become effective." As the Supreme Court has explained, the point is to "provide a means to avoid a piecemeal approach . . . where circumstances warrant delaying the time to appeal":

> Rule 58(e), in turn, provides that the entry of judgment ordinarily may not be delayed, nor may the time for appeal be extended, in order to tax costs or award fees. This accords with *Budinich* and confirms the general practice of treating fees

> and costs as collateral for finality purposes. Having recognized this premise, Rule 58(e) further provides that if a timely motion for attorney's fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and become effective to order that the motion have the same effect as a timely motion under Rule 59 for purposes of Federal Rule of Appellate Procedure 4(a)(4). This delays the running of the time to file an appeal until the entry of the order disposing of the fee motion. Rule 4(a)(4)(A)(iii).

Ray Haluch, 571 U.S. at 187.

The question that then arises is whether the proposed Appellate Rule 3(c)(5)(B) covers a timely motion for attorney's fees that the district court orders to "have the same effect" under FRAP 4(a)(4) as a timely motion under Civil Rule 59.

The subcommittee believes that it does. Such a motion is "described in" Rule 4(a)(4)(A) because FRAP 4(a)(4)(A)(iii) refers to a motion "for attorney's fees . . . if the district court extends the time to appeal under [Civil] Rule 58." Although Civil Rule 58 doesn't expressly refer to extending the time to appeal, Civil Rule 58(e) lets a district court order that such a motion have the "same effect" under Rule 4(a)(4) as a timely motion under Civil Rule 59. The effect of such an order can be understood as implicitly extending the time to appeal, and FRAP 4(a)(4)(A)(iii) appears to be a reference to this Civil Rule 58(e) power.

The result is that if a district court properly enters an order that a timely motion for attorney's fees has "the same effect" under FRAP 4(a)(4) as a timely motion under Civil Rule 59, and a party files a notice of appeal from the order disposing of the motion for attorney's fees, that appeal brings up for review the underlying judgment.

Suggested Simplification

Professor Bryan Lammon of Toledo Law supports the proposed amendments as "important and necessary," but suggests simplification. He suggest that, instead of proposed (c)(4) and (c)(5), simply adding to the end of (c)(1) the sentence, "Unless the notice states otherwise, the designation of a judgment or order does not affect the scope of appellate review."

The subcommittee does not recommend that this suggestion be adopted. It seems to go both too far and not far enough: too far, in that it would seem to make the designation irrelevant; not far enough, in that it is not obvious that it would overcome the *expressio unius* rationale.

Abandoning the Project

Judge Steven Colloton suggests abandoning the project: "this looks like a situation in which it could be wise to leave well enough alone." He notes that "if an appellant wishes to designate every order in the case, or merely to preserve its options, then it is usually simple to do so." "Rule 3(c) need not presume that lawyers are incapable of carrying out this task if it is consistent with their true intent." He contends that "Decisions limiting the scope of a notice of appeal based on the appellant's manifested intent are faithful to the text of the current rule," pointing to cases from

every circuit (written by illustrious judges) going back to at least 1973. If the project goes forward, he asks that the "pejorative phrase" "traps for the unwary" be deleted from the commentary.

No doubt some of the decisions limiting the scope of the appeal can be understood as faithful applications of a rule calling on appellants to designate "the judgment, order, or part thereof being appealed." But if faithful applications of the existing rule lead to the many conflicting decisions reflected in the Rules Clerk's memo, the rule itself needs changing. *See also O'Brien v. Town of Bellingham*, 943 F.3d 514, 526 (1st Cir. 2019) (notice of appeal "from the Court's ruling allowing the defendants' Motion for Summary Judgment entered on June 27, 2018, and the Court's Judgment dismissing the instant matter also entered on June 27, 2018, as well as any and all rulings by the Court" insufficient to obtain review of prior ruling).

More generally, Judge Colloton states:

> Lawyers who are appellate specialists, retained after a notice of appeal is filed, understandably may prefer a different rule that permits an appellant to change its intent after the time for filing a notice of appeal has expired. Such a rule would allow latecoming appellate lawyers to search the record for potential claims of error that the appellant did not intend to raise when it filed the notice of appeal. But facilitating an appellant's ability to change its intent, outside the time for noticing an appeal, is not a sound reason to amend Rule 3(c).

By contrast, the National Association of Criminal Defense Lawyers (NACDL) "supports these amendments, which are of particular importance in criminal cases," explaining:

> The attorney who has this responsibility [to file the notice of appeal] may not be the attorney who will be handling the appeal, may likewise not be the same attorney who handled the plea or trial, and in many cases will not be in a position at that time to know what issues or issues would be available or fruitful to advance on appeal.

Significantly, the Supreme Court has recently stated:

> It is also important to consider what it means—and does not mean—for trial counsel to file a notice of appeal.
>
> "Filing such a notice is a purely ministerial task that imposes no great burden on counsel." It typically takes place during a compressed window: 42 days in Idaho, for example, and just 14 days in federal court. By the time this window has closed, the defendant likely will not yet have important documents from the trial court, such as transcripts of key proceedings, and may well be in custody, making communication with counsel difficult. And because some defendants receive new counsel for their appeals, the lawyer responsible for deciding which appellate claims to raise may not yet even be involved in the case.

> Filing requirements reflect that claims are, accordingly, likely to be ill defined or unknown at this stage. In the federal system, for example, a notice of appeal need only identify who is appealing; what "judgment, order, or part thereof" is being appealed; and "the court to which the appeal is taken." Generally speaking, state requirements are similarly nonsubstantive.
>
> A notice of appeal also fits within a broader division of labor between defendants and their attorneys. While "the accused has the ultimate authority" to decide whether to "take an appeal," the choice of what specific arguments to make within that appeal belongs to appellate counsel. In other words, filing a notice of appeal is, generally speaking, a simple, nonsubstantive act that is within the defendant's prerogative.

Garza v. Idaho, 139 S. Ct. 738, 745–46 (2019) (footnotes and citations omitted).

For these reasons, the subcommittee recommends against adopting Judge Colloton's suggestion of leaving well enough alone. Nor does the subcommittee view the phrase "trap for the unwary" as reflecting pejoratively either on the rule makers or the rule interpreters. As Black's Law Dictionary states: "A trap can exist even if it was not designed or intended to catch or entrap anything." Definition of *trap* (11th ed. 2019).

Designating Only Part of a Judgment or Order in a Notice of Appeal

Rule 3(c)(1)(B) currently permits a party to designate "the judgment, order, or part thereof being appealed." Believing that the phrase "or part thereof" has contributed to the problem of confusing the judgment or appealable order with the issues sought to be reviewed on appeal, the proposed amendment deletes that phrase. But in order to preserve the ability of a party to limit the scope of a notice of appeal by deliberate choice, proposed Rule 3(c)(6) provides, "An appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited. Without such an express statement, specific designations do not limit the scope of the notice of appeal."

At the last meeting, some members of the Committee thought it would be better not to include a provision allowing for a limitation of the scope of a notice of appeal, thinking it better to leave any such limitation to the briefing stage. At the January meeting of the Standing Committee, a member asked a question along the same lines.

And the Council of Appellate Lawyers of the American Bar Association—which describes itself as "the only nationwide bench-bar organization devoted to appellate practice"—has submitted a comment making the same suggestion. The Council is concerned that proposed 3(c)(6) may give rise to strategic attempts to limit the jurisdiction of the court of appeals, particularly when cross-appeals are involved. It supports leaving the narrowing of the issues on appeal to the briefing.

The Association of the Bar of the City of New York supports the proposed amendments, but offers what it views as a minor edit to clarify that FRAP 3(c)(6) operates as an exception to

3(c)(4). It suggests adding the phrase, "Except as otherwise provided pursuant to Rule (3)(c)(6)," at the beginning of 3(c)(4). While the operation of proposed (c)(6) may be sufficiently clear that this phrase is not necessary, the comment does illustrate some tension between proposed (c)(4) and (c)(6).

These repeated concerns leave at least one member of the subcommittee inclined to delete proposed (c)(6) and add the following sentence to the end of proposed (c)(4): "Specific designations do not limit the scope of the notice of appeal."

On the other hand, the proposed (c)(6) may be of particular use in multi-party cases, enabling an appellant to assure a party that no challenge is being raised as to that party. Eliminating (c)(6) might upset settlement agreements, in which a defendant might have agreed not to appeal a judgment's award of damages to Plaintiff 1 but is still free to appeal the same judgment's award of damages to Plaintiff 2. It might also interfere with the district court's ability to reconsider or modify existing rulings if a particular order does multiple things, of which some may be appealable, some may be unappealable, and some may be uncertain.

On this view, eliminating "part thereof," and not providing for it via 3(c)(6), would be a significant change from existing law. From this perspective, it would be more sound to review the issue in a few years than to eliminate 3(c)(6) now—especially because, if the existing rule were easy to abuse, we ought to be seeing abuses of it. Moreover, the current proposal doesn't appear to give cause for the Council's worries regarding cross-appeals. Rule 4(a)(3) and 4(b)(1) give other parties additional time to file a notice after a timely notice of appeal, but they don't limit such cross-appeals to the same *part* of the judgment or order referenced in the initial notice. Worries about cross-appeals might be addressed by mentioning in the Committee Note that the proposal doesn't alter existing law regarding cross-appeals.

Both options are presented to the full Committee for consideration.

Creating a New Trap for the Unwary?

Judge Colloton also raises a different concern. He wonders whether the proposed rule might create its own trap for the unwary. Suppose a party waits until final judgment, but instead of designating the final judgment (or the final judgment and some interlocutory order or orders) designates *only* an interlocutory order in the notice of appeal. If FRAP 3(c)(1)(B) requires that either a final judgment or an appealable order be designated, will the notice be effective?

Perhaps the existing version of proposed (c)(6) covers this situation. A notice of appeal filed after a final judgment that designates only a prior nonappealable decision that merged into the judgment might be understood as designating part of a judgment; if it doesn't expressly say that the notice is so limited, it does not limit the scope of the notice of appeal, and therefore might well be understood to bring up the whole judgment. But the proposed (c)(6) doesn't exactly say that.

Perhaps this could be left to a future project, and handled in conjunction with the question of "cumulative finality" addressed in new agenda item 20-AP-A. Or it might be dealt with by an addition to what would become Rule 3(c)(7):

> An appeal must not be dismissed for informality of form or title of the notice of appeal, ~~or~~ for failure to name a party whose intent to appeal is otherwise clear from the notice, or for failure to properly designate the judgment or appealable order if the intent to appeal from the judgment or appealable order is otherwise clear from the notice.

Expanding the Project

Professor Lammon suggests amending FRAP 4(a)(4)(B)(ii) as well, so that it would be unnecessary to file a notice of appeal (or an amended notice of appeal) from an order denying a FRAP 4(a)(4)(A) motion. That would mean that a notice of appeal would suffice not only to appeal the judgment that was initially announced or entered before the notice of appeal was filed, but also to appeal from an order that had not yet even been announced at the time of the notice of appeal. Whatever the merits of such an approach, it is sufficiently distant from the problems addressed in the published proposal that the subcommittee recommends not adding it at this stage of the process. It can be considered in conjunction with new agenda item 20-AP-A.

NACDL suggests that the principle of proposed 3(c)(5) be expanded to criminal cases. It acknowledges that the limitation of the proposed rule to civil cases is understandable when considering the bulk of criminal appeals. But it suggests that a parallel issue can arise in some appeals in criminal cases, such as a collateral order appeal of a detention order or a double jeopardy appeal.

The subcommittee believes that attempting to expand this aspect of the proposal to include criminal cases would require additional study and republication. NACDL does not suggest that there is a significant problem in criminal cases that needs attention. Its major concern is that the proposed amendment might lead some courts, including courts with existing precedent in accord with the proposed amendment but not limited to civil cases, to use an *expressio unius* rationale to conclude that a notice of appeal in a criminal case must identify both the underlying order and the order denying reconsideration. This concern could be handled in the Committee Note by observing that this subsection of the rule does not address criminal cases, but leaves criminal cases to existing case law.[2]

Alternatively, the existing project could be delayed until these matters are also addressed, but no member of the subcommittee advocates that way of proceeding.

---

[2] NACDL also suggests stylistic changes to the Forms, but the subcommittee is content to leave such style changes to the style consultants.

Here is a version of proposed Rule 3 and Committee Note, with alternatives in brackets:

Rule 3. Appeal as of Right—How Taken

* * * * *

(c) Contents of the Notice of Appeal.

(1) The notice of appeal must:

(A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as ''all plaintiffs,'' ''the defendants,'' ''the plaintiffs A, B, et al.,'' or ''all defendants except X'';

(B) designate the judgment, ~~,~~—or the appealable order—from which the appeal is taken~~, or part thereof being appealed~~; and

(C) name the court to which the appeal is taken.

(2) A pro se notice of appeal is considered filed on behalf of the signer and the signer's spouse and minor children (if they are parties), unless the notice clearly indicates otherwise.

(3) In a class action, whether or not the class has been certified, the notice of appeal is sufficient if it names one person qualified to bring the appeal as representative of the class.

(4) The notice of appeal encompasses all orders that merge for purposes of appeal into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal. [Specific designations do not limit the scope of the notice of appeal.]

(5) In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates:

(A) an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties; or

(B) an order described in Rule 4(a)(4)(A).

[(6) An appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited. Without such an express statement, specific designations do not limit the scope of the notice of appeal.]

~~(4)~~ (7) An appeal must not be dismissed for informality of form or title of the notice of appeal, [~~or~~] for failure to name a party whose intent to appeal is otherwise clear from the notice [,or for failure to properly designate the judgment or appealable order if the intent to appeal from the judgment or appealable order is otherwise clear from the notice].

~~(5)~~ (8) Forms 1A and 1B in the Appendix of Forms are ~~is a~~ suggested forms of ~~a~~ notices of appeal.

* * * * *

Committee Note

The notice of appeal is supposed to be a simple document that provides notice that a party is appealing and invokes the jurisdiction of the court of appeals. It therefore must state who is appealing, what is being appealed, and to what court the appeal is being taken. It is the role of the briefs, not the notice of appeal, to focus and limit the issues on appeal.

Because the jurisdiction of the court of appeals is established by statute, an appeal can be taken only from those district court decisions from which Congress has authorized an appeal. In most instances, that is the final judgment, see, e.g., 28 U.S.C. § 1291, but some other orders are considered final within the meaning of 28 U.S.C. § 1291, and some interlocutory orders are themselves appealable. See, e.g., 28 U.S.C. § 1292. Accordingly, Rule 3(c)(1) currently requires that the notice of appeal "designate the judgment, order, or part thereof being appealed." The judgment or order to be designated is the one serving as the basis of the court's appellate jurisdiction and from which time limits are calculated.

However, some have interpreted this language as an invitation, if not a requirement, to designate each and every order of the district court that the appellant may wish to challenge on appeal. Such an interpretation overlooks a key distinction between the judgment or order on appeal—the one serving as the basis of the court's appellate jurisdiction and from which time limits are calculated—and the various orders or decisions that may be reviewed on appeal because they merge into the judgment or order on appeal. Designation of the final judgment confers appellate jurisdiction over prior interlocutory orders that merge into the final judgment. The merger principle is a corollary of the final judgment rule: a party cannot appeal from most interlocutory orders, but must await final judgment, and only then obtain review of interlocutory orders on appeal from the final judgment.

In an effort to avoid the misconception that it is necessary or appropriate to designate each and every order of the district court that the appellant may wish to challenge on appeal, Rule 3(c)(1) is amended to require the designation of "the judgment—or the appealable order—from which the appeal is taken"—and the phrase "or part thereof" is deleted. In most cases, because of the merger principle,

it is appropriate to designate only the judgment. In other cases, particularly where an appeal from an interlocutory order is authorized, the notice of appeal must designate that appealable order.

Whether due to misunderstanding or a misguided attempt at caution, some notices of appeal designate both the judgment and some particular order that the appellant wishes to challenge on appeal. A number of courts, using an *expressio unius* rationale, have held that such a designation of a particular order limits the scope of the notice of appeal to the particular order, and prevents the appellant from challenging other orders that would otherwise be reviewable, under the merger principle, on appeal from the final judgment. These decisions create a trap for the unwary.

[However, there are circumstances in which an appellant may deliberately choose to limit the scope of the notice of appeal, and it is desirable to enable the appellant to convey this deliberate choice to the other parties.]

To alert readers to the merger principle, a new provision is added to Rule 3(c): "The notice of appeal encompasses all orders that merge for purposes of appeal into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal." The general merger rule can be stated simply: an appeal from a final judgment permits review of all rulings that led up to the judgment. Because this general rule is subject to some exceptions and complications, the amendment does not attempt to codify the merger principle but instead leaves its details to case law.

The amendment does not change the principle established in *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202-03 (1988), that "a decision on the merits is a 'final decision' for purposes of § 1291 whether or not there remains for adjudication a request for attorney's fees attributable to the case." *See also Ray Haluch Gravel Co. v. Cent. Pension Fund of Int'l Union of Operating Eng'rs & Participating Emp'rs*, 571 U.S. 177, 179 (2014) ("Whether the claim for attorney's fees is based on a statute, a contract, or both, the pendency of a ruling on an award for fees and costs does not prevent, as a general rule, the merits judgment from becoming final for purposes of appeal.").

[To remove the trap for the unwary, while enabling deliberate limitations of the notice of appeal, another new provision is added to Rule 3(c): "An appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited. Without such an express statement, specific designations do not limit the scope of the notice of appeal."]

[To remove the trap for the unwary, another new provision is added to Rule 3(c): "Specific designations do not limit the scope of the notice of appeal."]

A related problem arises when a case is decided by a series of orders, sometimes separated by a year or more. For example, some claims might be dismissed for failure to state a claim under F.R.Civ.P. 12(b)(6), and then, after a considerable period for discovery, summary judgment under F.R.Civ.P. 56 is granted in favor of the defendant on the remaining claims. That second order, because it resolves all of the remaining claims, is a final judgment, and an appeal from that final judgment confers jurisdiction to review the earlier F.R.Civ.P. 12(b)(6) dismissal. But if a notice of appeal describes the second order, not as a final judgment, but as an order granting summary judgment, some courts would limit appellate review to the summary judgment and refuse to consider a challenge to the earlier F.R.Civ.P. 12(b)(6) dismissal. Similarly, if the district court complies with the separate document requirement of F.R.Civ.P. 58, and enters both an order granting summary judgment as to the remaining claims and a separate document denying all relief, but the notice of appeal designates the order granting summary judgment rather than the separate document, some courts would likewise limit appellate review to the summary judgment and refuse to consider a challenge to the earlier F.R.Civ.P. 12(b)(6) dismissal. This creates a trap for all but the most wary, because at the time that the district court issues the order disposing of all remaining claims, a litigant may not know whether the district court will ever enter the separate document required by F.R.Civ.P. 58.

To remove this trap, a new provision is added to Rule 3(c): "In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates . . . an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties."

Frequently, a party who is aggrieved by a final judgment will make a motion in the district court instead of filing a notice of appeal. Rule 4(a)(4) permits a party who makes certain motions to await disposition of those motions before appealing. But some courts treat a notice of appeal that designates only the order disposing of such a motion as limited to that order, rather than bringing the final judgment before the court of appeals for review. (Again, such an appeal might be brought before or after the judgment is set out in a separate document under F.R.Civ.P. 58.) To reduce the unintended loss of appellate rights in this situation, a new provision is added to Rule 3(c): "In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates . . . an order described in Rule 4(a)(4)(A)." This amendment does not alter the requirement of Rule 4(a)(4)(B)(ii) (requiring a notice of appeal or an amended notice of appeal if a party intends to challenge an order disposing of certain motions).

[These two provisions are limited to civil cases. Similar issues may arise in a small number of criminal cases, but no inference should be drawn about how such issues should be handled in criminal cases.]

[On occasion, a party may file a notice of appeal after final judgment but designate only a prior nonappealable decision that merged into that judgment. To deal with this situation, existing Rule 3(c)(4) is amended to provide that an appeal must not be dismissed for failure to properly designate the judgment or appealable order if the intent to appeal from the judgment or appealable order is otherwise clear from the notice.]

Thes~~se~~ new provisions are added as Rules 3(c)(4), 3(c)(5), and 3(c)(6), with the existing Rules 3(c)(4) and 3(c)(5) renumbered. In addition, to reflect these changes to the Rule, Form 1 is replaced by Forms 1A and 1B, and Form 2 is amended.

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TAB 4B

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To: Advisory Committee on the Federal Rules of Appellate Procedure

From: FRAP 42 Subcommittee

Date: March 12, 2020

Re: Proposed Amendments to FRAP 42

Proposed amendments to FRAP 42 have been published for public comment. Here is the proposed text as published:

Rule 42. Voluntary Dismissal

* * * * *

(b) Dismissal in the Court of Appeals.

(1) Stipulated Dismissal. The circuit clerk ~~may~~ must dismiss a docketed appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any court fees that are due. ~~But no mandate or other process may issue without a court order.~~

(2) Appellant's Motion to Dismiss. An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court.

(3) Other Relief. A court order is required for any relief beyond the mere dismissal of an appeal—including approving a settlement, vacating an action of the district court or an administrative agency, or remanding the case to either of them.

(c) Court Approval. This Rule 42 does not alter the legal requirements governing court approval of a settlement, payment, or other consideration.

* * * * *

We have received two formal comments on this proposal.

The Association of the Bar of the City of New York suggests two additions to proposed Rule 42(b)(3). First, it suggests that the phrase "setting aside or enforcing an administrative agency order" be added to the list of examples of the kinds of actions that require a court order. Second, it suggests that the phrase "if provided by applicable statute" be added to the end of the subsection. The resulting rule would read:

> **(3) Other Relief**. A court order is required for any relief beyond the mere dismissal of an appeal—including approving a settlement, vacating an action of the district court or an administrative agency, setting aside or enforcing an administrative agency order, or remanding the case to either of them, if provided by applicable statute.

The City Bar observes that there is continuing litigation, particularly involving the SEC, regarding whether a court of appeals is authorized to remand an action, or whether the proper remedy for some unlawful agency actions is to set aside that action. It is concerned that the proper resolution of this dispute turns on a matter of substantive law, beyond the scope of the Rules Enabling Act, and "should not be prejudged in a Rules Amendment."

The point might have some force if the proposed Rule 42(b)(3) either purported to be exhaustive or purported to authorize courts of appeals to take actions by order that are not otherwise authorized by law. But neither is true.

The proposed Rule does not purport to contain an exhaustive list of everything a court of appeals might do by order. The list begins with the word "including" and, to take the most obvious omissions from an exhaustive list, it doesn't mention affirming or reversing.

Nor does the proposed Rule purport to authorize courts to issue any orders that they are not already authorized to issue. Instead, the function of proposed Rule 42(b)(3) is simply to limit the actions that parties can insist upon based solely on the parties' agreement. Just as the proposed Rule does not purport to establish the circumstances in which a court of appeals is legally authorized to approve a settlement or vacate an action of a district court—or affirm or reverse a district court—so, too, it does not purport to establish the circumstances in which a court of appeals is legally authorized to remand a case—or set aside or enforce an agency order. It does not "prejudge" anything, but instead leaves the court's authority in these matters untouched. Perhaps something further could be added to the Note, but even that seems unnecessary for this point.

For these reasons, the subcommittee recommends that no change be made in response to this comment.

The National Association of Criminal Defense Lawyers (NACDL) has also submitted a comment on proposed Rule 42(b). It finds the proposal "well taken," but suggests that two sentences should be added to protect criminal defendants from inappropriate dismissals by counsel:

> In a criminal case, the court must not dismiss a defendant's appeal unless satisfied that the appellant personally has approved the motion to dismiss with full knowledge of the right being waived and the consequences of the dismissal. A written consent to the dismissal signed and affirmed by the appellant personally, articulating the nature of the right being waived and the consequences of that waiver, must be included with any motion of the appellant to dismiss a defendant's direct criminal appeal.

NACDL observes that this requirement "would be consistent with current practice in many but not all of the Circuits."

The Federal Rules of Appellate Procedure do not generally address the particular responsibilities that counsel owe to criminal defendants, leaving that to other bodies of law. For example, Rule 3 does not discuss the responsibility of counsel to file a notice of appeal when requested by a criminal defendant, and Rule 28 does not discuss *Anders* briefs. At least absent some reason to think that there is a significant problem of defense counsel inappropriately dismissing appeals, this does not seem like the place to start. And if it is the place to start, it would require more study and probably require republication to add such a provision at this point in the process.

For these reasons, the subcommittee recommends that no change be made in response to this comment.

Further reflection on a drafting suggestion made in connection with the January meeting of the Standing Committee does lead the subcommittee to suggest a minor revision to proposed Rule 42(b)(3): rephrasing it to eliminate the word "mere" and make clear that it applies only to dismissals under Rule 42(b) itself. As revised, it would read:

> **(3) Other Relief.** A court order is required for any relief under Rule 42(b)(1) or (2) beyond the dismissal of an appeal—including approving a settlement, vacating an action of the district court or an administrative agency, or remanding the case to either of them.

The relevant sentence of the Committee Note would also be changed to reflect this rephrasing:

> The amendment replaces old terminology and clarifies that any relief under Rule 42(b)(1) or (2) beyond the dismissal of an appeal—including approving a settlement, vacating, or remanding—requires a court order.

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TAB 4C

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, DC 20544

DAVID G. CAMPBELL
CHAIR

REBECCA A. WOMELDORF
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

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BANKRUPTCY RULES

JOHN D. BATES
CIVIL RULES

DONALD W. MOLLOY
CRIMINAL RULES

DEBRA ANN LIVINGSTON
EVIDENCE RULES

MEMORANDUM

TO: Hon. David G. Campbell, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Michael A. Chagares, Chair
Advisory Committee on Appellate Rules

RE: Report of the Advisory Committee on Appellate Rules

DATE: May 31, 2019 (revised June 25, 2019)[1]

I. Introduction

The Advisory Committee on the Appellate Rules met on Friday, April 5, 2019, in San Antonio, Texas. * * * * *

The Committee also approved proposed amendments for which it seeks approval for publication. One group of proposed amendments relates to the contents of notices of appeal (Rules 3 and 6; Forms 1 and 2). Another proposed amendment deals with agreed dismissals (Rule 42). These are discussed in Part III of this report.

* * * * *

[1] Revisions incorporate edits to proposed Rules 3 and 42 made at the June 25, 2019 meeting of the Committee on Rules of Practice and Procedure.

III. Action Items for Approval for Publication

The Committee seeks approval for publication of proposed amendments to Rules 3 and 6, Forms 1 and 2, and Rule 42.

A. Rule 3(c)—Contents of Notices of Appeal

The Committee has been considering a possible amendment to Rule 3, dealing with the contents of notices of appeal, since the fall of 2017 when a letter from Neal Katyal and Sean Marotta brought to the Committee's attention a troubling line of cases in one circuit. That line of cases, using an expressio unius rationale, would treat a notice of appeal from a final judgment that mentioned one interlocutory order but not others as limiting the appeal to that order, rather than reaching all of the interlocutory orders that merged into the judgment.

Research conducted since that time has revealed that the problem is not confined to a single circuit, but instead that there is substantial confusion both across and within circuits. In addition to a number of decisions that used an expressio unius rationale like the one pointed to in the Katyal and Marotta letter, there are also numerous decisions that would treat a notice of appeal that designated an order that disposed of all remaining claims in a case as limited to the claims disposed of in that order.

Moreover, there have also been cases holding that an appeal that designates an order denying a motion for reconsideration does not bring up for review the underlying judgment sought to be reconsidered.

The Supreme Court has recently described filing a notice of appeal as "generally speaking, a simple, nonsubstantive act," and observed that filing requirements for notices of appeal "reflect that claims are . . . likely to be ill defined or unknown" at the time of filing. *Garza v. Idaho*, 139 S. Ct. 738, 745-46 (2019).

The Committee's goal in proposing the amendments is fully in accord with *Garza*: to reduce the inadvertent loss of appellate rights caused by the phrasing of a notice of appeal.

Rule 3(c)(1)(B) currently requires that a notice of appeal "designate the judgment, order, or part thereof being appealed." The judgment or order to be designated is the one serving as the basis of the court's appellate jurisdiction and from which time limits are calculated. But some interpret this language as an invitation, if not a requirement, to designate each and every order of the district court that the appellant may wish to challenge on appeal. Such an interpretation overlooks a key distinction between the judgment or order on appeal—the one serving as the basis of the court's appellate jurisdiction and from which time limits are calculated—and the various

orders or decisions that may be reviewed on appeal because they merge into the judgment or order on appeal.

The Committee considered various ways to make this point clearer. It settled on four interrelated changes to Rule 3(c)(1)(B). First, to highlight that the distinction between the ordinary case in which an appeal is taken from the final judgment from the less-common case in which an appeal is taken from some other order, the term "judgment" and the term "order" are separated by a dash. Second, to clarify that the kind of order that is to be designated in the latter situation is one that can serve as the basis of the court's appellate jurisdiction, the word "appealable" is added before the word "order." Third, to clarify that the judgment or order to be designated is the one serving as the basis of the court's appellate jurisdiction, the phrase "from which the appeal is taken" replaces the phrase "being appealed." Finally, the phrase "part thereof" is deleted because the Advisory Committee viewed this phrase as contributing to the problem.

Reflecting these changes to Rule 3(c)(1)(B), the Committee also proposes that Form 1 be replaced by Form 1A (dealing with an appeal from a final judgment) and Form 1B (dealing with an appeal from an appealable order), and that a conforming change be made to Form 2 (dealing with an appeal from the Tax Court).

The Committee considered an alternative that would have avoided adding the word "appealable" before the word "order," and instead would have added the phrase "that supports appellate jurisdiction," after the word "order." It concluded that "appealable order" was clearer and more straightforward than "order that supports appellate jurisdiction."

Designation of the final judgment confers appellate jurisdiction over prior interlocutory orders that merge into the final judgment. The merger principle is a corollary of the final judgment rule: a party cannot appeal from most interlocutory orders, but must await final judgment, and only then obtain review of interlocutory orders on appeal from the final judgment.

The Committee considered writing the merger principle into the text of the Rule. But even though the general merger principle can be stated simply—an appeal from a final judgment permits review of all rulings that led up to the judgment—there are exceptions and complications to the general principle. Because of these exceptions and complications, as well as reluctance to stymie future developments, the Committee decided against attempting to codify the merger principle. Instead, the proposed amendment would call attention to the merger principle in the text of the Rule, by adding a new Rule 3(c)(4):

> (4) The notice of appeal encompasses all orders that merge for purposes of appeal into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal.

The Committee Note, however, would state the general merger rule.

To avoid the inadvertent loss of appellate rights where an appellant designates (1) an order that disposes of all remaining claims in a case, or (2) an order denying a motion for reconsideration, the proposed amendment would add a new Rule 3(c)(5):

> (5) In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates:
>
> > (A) an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties; or
> >
> > (B) an order described in Rule 4(a)(4)(A).

The phrasing of proposed subsection (A) draws on Civil Rule 54(b), while proposed subsection (B) relies on a cross-reference to the kinds of motions that restart the time for filing a notice of appeal.

The Committee wrestled with the question of whether to authorize an appellant to expressly limit the notice of appeal. On the one hand, in an adversary system, litigants shouldn't be required to appeal more than they choose, particularly in cases involving multiple claims and multiple parties. In addition, a single document may decide multiple motions, and include some decisions (such as granting a preliminary injunction) that are appealable and some decisions (such as setting a discovery schedule) that are not. On the other hand, any limiting work could be left to the briefs. Plus, more explicit attention in the Rules to the possibility of a limited notice of appeal might lead to strategic attempts to limit the jurisdiction of the court of appeals.

The Committee settled on language that did not speak of limiting the "appeal" or "scope of the appeal," but instead on the following, to be added as a new subsection (6):

> (6) An appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited. Without such an express statement, specific designations do not limit the scope of the notice of appeal.

If these competing concerns were resolved the other way, the final clause—"specific designations do not limit the scope of the notice of appeal"—could be added as a separate sentence to proposed new subsection (4).

A conforming amendment to Rule 6, which governs appeals in bankruptcy cases, would replace the cross-reference to "Form 1" with a cross-reference to "Forms 1A and 1B." The Committee consulted with the Advisory Committee on the Bankruptcy Rules; no objection or other concern was raised.

The Committee also consulted with Chief Judge Maurice B. Foley of the Tax Court. He responded that neither the proposed amendments to Rule 3(c), nor the proposed amendments to Form 2 would create problems with appeals from the Tax Court.

Federal Rule of Appellate Procedure 3

* * *

(c) Contents of the Notice of Appeal.

(1) The notice of appeal must:

(A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X";

(B) designate the judgment,—or the appealable order—from which the appeal is taken~~, or part thereof being appe~~aled; and

(C) name the court to which the appeal is taken.

(2) A pro se notice of appeal is considered filed on behalf of the signer and the signer's spouse and minor children (if they are parties), unless the notice clearly indicates otherwise.

(3) In a class action, whether or not the class has been certified, the notice of appeal is sufficient if it names one person qualified to bring the appeal as representative of the class.

(4) The notice of appeal encompasses all orders that merge for purposes of appeal into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal.

(5) In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates:

(A) an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties; or

(B) an order described in Rule 4(a)(4)(A).

(6) An appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited. Without such an express statement, specific designations do not limit the scope of the notice of appeal.

~~(4)~~ (7) An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice.

~~(5)~~ (8) Forms 1A and 1B in the Appendix of Forms are ~~is a~~ suggested forms of ~~a~~ notices of appeal.

* * *

Committee Note

The notice of appeal is supposed to be a simple document that provides notice that a party is appealing and invokes the jurisdiction of the court of appeals. It therefore must state who is appealing, what is being appealed, and to what court the appeal is being taken. It is the role of the briefs, not the notice of appeal, to focus and limit the issues on appeal.

Because the jurisdiction of the court of appeals is established by statute, an appeal can be taken only from those district court decisions from which Congress has authorized an appeal. In most instances, that is the final judgment, see, e.g., 28 U.S.C. § 1291, but some other orders are considered final within the meaning of 28 U.S.C. § 1291, and some interlocutory orders are themselves appealable. See, e.g., 28 U.S.C. § 1292. Accordingly, Rule 3(c)(1) currently requires that the notice of appeal "designate the judgment, order, or part thereof being appealed." The judgment or order to be designated is the one serving as the basis of the court's appellate jurisdiction and from which time limits are calculated.

However, some have interpreted this language as an invitation, if not a requirement, to designate each and every order of the district court that the appellant may wish to challenge on appeal. Such an interpretation overlooks a key distinction between the judgment or order on appeal—the one serving as the basis of the court's appellate jurisdiction and from which time limits are calculated—and the various orders or decisions that may be reviewed on

appeal because they merge into the judgment or order on appeal. Designation of the final judgment confers appellate jurisdiction over prior interlocutory orders that merge into the final judgment. The merger principle is a corollary of the final judgment rule: a party cannot appeal from most interlocutory orders, but must await final judgment, and only then obtain review of interlocutory orders on appeal from the final judgment.

In an effort to avoid the misconception that it is necessary or appropriate to designate each and every order of the district court that the appellant may wish to challenge on appeal, Rule 3(c)(1) is amended to require the designation of "the judgment—or the appealable order—from which the appeal is taken"—and the phrase "or part thereof" is deleted. In most cases, because of the merger principle, it is appropriate to designate only the judgment. In other cases, particularly where an appeal from an interlocutory order is authorized, the notice of appeal must designate that appealable order.

Whether due to misunderstanding or a misguided attempt at caution, some notices of appeal designate both the judgment and some particular order that the appellant wishes to challenge on appeal. A number of courts, using an *expressio unius* rationale, have held that such a designation of a particular order limits the scope of the notice of appeal to the particular order, and prevents the appellant from challenging other orders that would otherwise be reviewable, under the merger principle, on appeal from the final judgment. These decisions create a trap for the unwary.

However, there are circumstances in which an appellant may deliberately choose to limit the scope of the notice of appeal, and it is desirable to enable the appellant to convey this deliberate choice to the other parties.

To alert readers to the merger principle, a new provision is added to Rule 3(c): "The notice of appeal encompasses all orders that merge for purposes of appeal into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal." The general merger rule can be stated simply: an appeal from a final judgment permits review of all rulings that led up to the judgment. Because this general rule is subject to some exceptions and complications, the amendment does not attempt to codify the merger principle but instead leaves its details to case law.

To remove the trap for the unwary, while enabling deliberate limitations of the notice of appeal, another new provision is added to Rule 3(c): "An appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited. Without such an express statement, specific designations do not limit the scope of the notice of appeal."

A related problem arises when a case is decided by a series of orders, sometimes separated by a year or more. For example, some claims might be dismissed for failure to state a claim under F.R.Civ.P. 12(b)(6), and then, after a considerable period for discovery, summary judgment under F.R.Civ.P. 56 is granted in favor of the defendant on the remaining claims. That second order, because it resolves all of the remaining claims, is a final judgment, and an

appeal from that final judgment confers jurisdiction to review the earlier F.R.Civ.P. 12(b)(6) dismissal. But if a notice of appeal describes the second order, not as a final judgment, but as an order granting summary judgment, some courts would limit appellate review to the summary judgment and refuse to consider a challenge to the earlier F.R.Civ.P. 12(b)(6) dismissal. Similarly, if the district court complies with the separate document requirement of F.R.Civ.P. 58, and enters both an order granting summary judgment as to the remaining claims and a separate document denying all relief, but the notice of appeal designates the order granting summary judgment rather than the separate document, some courts would likewise limit appellate review to the summary judgment and refuse to consider a challenge to the earlier F.R.Civ.P. 12(b)(6) dismissal. This creates a trap for all but the most wary, because at the time that the district court issues the order disposing of all remaining claims, a litigant may not know whether the district court will ever enter the separate document required by F.R.Civ.P. 58.

To remove this trap, a new provision is added to Rule 3(c): "In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates . . . an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties."

Frequently, a party who is aggrieved by a final judgment will make a motion in the district court instead of filing a notice of appeal. Rule 4(a)(4) permits a party who makes certain motions to await disposition of those motions before appealing. But some courts treat a notice of appeal that

designates only the order disposing of such a motion as limited to that order, rather than bringing the final judgment before the court of appeals for review. (Again, such an appeal might be brought before or after the judgment is set out in a separate document under F.R.Civ.P. 58.) To reduce the unintended loss of appellate rights in this situation, a new provision is added to Rule 3(c): "In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates . . . an order described in Rule 4(a)(4)(A)." This amendment does not alter the requirement of Rule 4(a)(4)(B)(ii) (requiring a notice of appeal or an amended notice of appeal if a party intends to challenge an order disposing of certain motions).

These new provisions are added as Rules 3(c)(4), 3(c)(5), and 3(c)(6), with the existing Rules 3(c)(4) and 3(c)(5) renumbered. In addition, to reflect these changes to the Rule, Form 1 is replaced by Forms 1A and 1B, and Form 2 is amended.

Federal Rule of Appellate Procedure 6

* * *

(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;

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

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

* * *

Committee Note

The amendment replaces "Form 1" with "Forms 1A and 1B" to conform to the amendment to Rule 3(c).

Form 1A

Notice of Appeal to a Court of Appeals From a Judgment ~~or Order~~ of a District Court.

United States District Court for the __________
District of __________
File Number __________

A.B., Plaintiff v. C.D., Defendant	Notice of Appeal

Notice is hereby given that ___(~~here~~ name all parties taking the appeal)__, (plaintiffs) (defendants) in the above named case,* ~~hereby~~ appeal to the United States Court of Appeals for the _______ Circuit ~~(~~from the final judgment ~~) (from an order (describing it))~~ entered in this action on the _______ day of _______, 20___.

(s) ________________________________
Attorney for ______________________
Address:_________________________

[***Note to inmate filers:*** *If you are an inmate confined in an institution and you seek the timing benefit of Fed. R. App. P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing) and file that declaration along with this Notice of Appeal.*]

* See Rule 3(c) for permissible ways of identifying appellants.

Form 1B

Notice of Appeal to a Court of Appeals From ~~a Judgment or~~ an Appealable Order of a District Court.

United States District Court for the __________
District of __________
File Number __________

A.B., Plaintiff v. C.D., Defendant	Notice of Appeal

Notice is hereby given that ___(~~here~~ name all parties taking the appeal)__, (plaintiffs) (defendants) in the above named case,* ~~hereby~~ appeal to the United States Court of Appeals for the _______ Circuit ~~(from the final judgment) (~~ from ~~an~~ the order ___ (describ~~ing~~e the order ~~it~~) ~~)~~ entered in this action on the _______ day of _______, 20___.

(s) ________________________________
Attorney for ______________________
Address:_________________________

[***Note to inmate filers:*** *If you are an inmate confined in an institution and you seek the timing benefit of Fed. R. App. P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing) and file that declaration along with this Notice of Appeal.*]

* *See* Rule 3(c) for permissible ways of identifying appellants.

Form 2

Notice of Appeal to a Court of Appeals From a Decision of the United States Tax Court

UNITED STATES TAX COURT
Washington, D.C.

A.B., Petitioner v. Commissioner of Internal Revenue, Respondent	Docket No. _______

Notice of Appeal

Notice is hereby given that ______ (~~here~~ name all parties taking the appeal[2])_____ ~~hereby~~ appeal to the United States Court of Appeals for the _____ Circuit from ~~(that part of)~~ the decision of this court entered in the above captioned proceeding on the _____ day of ______, 20__ (relating to _________).

(s) ________________________________
Counsel for ______________________
Address:_________________________

B. Rule 42(b)—Agreed Dismissals

The Committee proposes amending Rule 42(b) to require the circuit clerk to dismiss an appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any court fees that are due. The current Rule gives a discretionary power to dismiss by using the word "may." Prior to restyling, the word

[2] *See* Rule 3(c) for permissible ways of identifying appellants.

"may" was "shall"; the Committee now proposes replacing the word "may" with the word "must." Mandatory dismissal is also the approach of Supreme Court Rule 46.

To clarify the distinction between situations where dismissal is mandated by stipulation of the parties and other situations, the proposed amendment would subdivide Rule 42(b) and add appropriate subheadings.

The current Rule provides that "no mandate or other process may issue without a court order." Modern readers find this phrasing cryptic, and it has produced some difficulty for circuit clerks who have taken to issuing orders in lieu of mandates when appeals are dismissed in order to make clear that jurisdiction over the case is being returned to the district court. Members of the Committee debated whether a mandate is necessary when, for example, an appeal from a preliminary injunction is dismissed. These problems are avoided by replacing this language and instead stating directly in a new subsection (b)(3): "A court order is required for any relief beyond the mere dismissal of an appeal—including approving a settlement, vacating an action of the district court or an administrative agency, or remanding the case to either of them." A new subsection (c) was added to the rule to clarify that Rule 42 does not alter the legal requirements governing court approval of a settlement, payment, or other consideration.

The Committee considered requiring a "judicial order" or "action by a judge" rather than a "court order," but opted for "court order" rather than upset the practice in the Ninth Circuit of delegating some dismissal power to mediators and the Appellate Commissioner.

The Committee also considered deleting the examples of orders beyond mere dismissals, but decided to include them because they were useful illustrations, particularly in light of the decision in *United States Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 29 (1994) (holding that "mootness by reason of settlement does not justify vacatur of a judgment").

* * * * *

The Committee considered adding a provision dealing with petitions for review and applications to enforce agency orders, but concluded that it was sufficient to state in the Committee Note that Rule 20 makes Rule 42(b) applicable to petitions for review and applications to enforce an agency order and that "appeal" should be understood to include a petition for review or application to enforce an agency order.

Federal Rule of Appellate Procedure 42

*** * ***

(b) Dismissal in the Court of Appeals.

(1) Stipulated Dismissal. The circuit clerk ~~may~~ must dismiss a docketed appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any court fees that are due. ~~But no mandate or other process may issue without a court order.~~

(2) Appellant's Motion to Dismiss. An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court.

(3) Other Relief. A court order is required for any relief beyond the mere dismissal of an appeal—including approving a settlement, vacating an action of the district court or an administrative agency, or remanding the case to either of them.

(c) Court Approval. This Rule 42 does not alter the legal requirements governing court approval of a settlement, payment, or other consideration.

Committee Note

The amendment restores the requirement, in effect prior to the restyling of the Federal Rules of Appellate Procedure, that the circuit clerk dismiss an appeal if all parties so agree. It also clarifies that the fees that must be paid are court fees, not attorney's fees. The Rule does not alter the legal requirements governing court approval of a settlement, payment, or other consideration. See, e.g., F.R.Civ.P. 23(e) (requiring district court approval).

The amendment replaces old terminology and clarifies that any relief beyond mere dismissal—including vacating or remanding—requires a court order.

Pursuant to Rule 20, Rule 42(b) applies to petitions for review and applications to enforce an agency order. For Rule 42(b) to function in such cases, "appeal" should be understood to include a petition for review or application to enforce an agency order.

* * * * *

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

1 **Rule 3. Appeal as of Right—How Taken**

2 * * * * *

3 **(c) Contents of the Notice of Appeal.**

4 (1) The notice of appeal must:

5 (A) specify the party or parties taking the

6 appeal by naming each one in the caption or

7 body of the notice, but an attorney

8 representing more than one party may

9 describe those parties with such terms as

10 ‘‘all plaintiffs,’’ ‘‘the defendants,’’ ‘‘the

11 plaintiffs A, B, et al.,’’ or ‘‘all defendants

12 except X’’;

---

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

13 (B) designate the judgment, —or the appealable
14 order—from which the appeal is taken, or
15 part thereof being appealed; and
16 (C) name the court to which the appeal is taken.
17 (2) A pro se notice of appeal is considered filed on
18 behalf of the signer and the signer's spouse and
19 minor children (if they are parties), unless the
20 notice clearly indicates otherwise.
21 (3) In a class action, whether or not the class has
22 been certified, the notice of appeal is sufficient
23 if it names one person qualified to bring the
24 appeal as representative of the class.
25 (4) The notice of appeal encompasses all orders that
26 merge for purposes of appeal into the designated
27 judgment or appealable order. It is not
28 necessary to designate those orders in the notice
29 of appeal.

30 (5) In a civil case, a notice of appeal encompasses
31 the final judgment, whether or not that judgment
32 is set out in a separate document under Federal
33 Rule of Civil Procedure 58, if the notice
34 designates:
35 (A) an order that adjudicates all remaining
36 claims and the rights and liabilities of all
37 remaining parties; or
38 (B) an order described in Rule 4(a)(4)(A).
39 (6) An appellant may designate only part of a
40 judgment or appealable order by expressly
41 stating that the notice of appeal is so limited.
42 Without such an express statement, specific
43 designations do not limit the scope of the notice
44 of appeal.
45 ~~(4)~~ (7) An appeal must not be dismissed for
46 informality of form or title of the notice of
47 appeal, or for failure to name a party whose

48 intent to appeal is otherwise clear from the

49 notice.

50 (~~5)~~ (8) Forms 1A and 1B in the Appendix of Forms

51 are ~~is a~~ suggested forms of ~~a~~ notices of appeal.

52 * * * * *

Committee Note

The notice of appeal is supposed to be a simple document that provides notice that a party is appealing and invokes the jurisdiction of the court of appeals. It therefore must state who is appealing, what is being appealed, and to what court the appeal is being taken. It is the role of the briefs, not the notice of appeal, to focus and limit the issues on appeal.

Because the jurisdiction of the court of appeals is established by statute, an appeal can be taken only from those district court decisions from which Congress has authorized an appeal. In most instances, that is the final judgment, see, e.g., 28 U.S.C. § 1291, but some other orders are considered final within the meaning of 28 U.S.C. § 1291, and some interlocutory orders are themselves appealable. See, e.g., 28 U.S.C. § 1292. Accordingly, Rule 3(c)(1) currently requires that the notice of appeal "designate the judgment, order, or part thereof being appealed." The judgment or order to be designated is the one serving as the basis of the court's appellate jurisdiction and from which time limits are calculated.

However, some have interpreted this language as an invitation, if not a requirement, to designate each and every

order of the district court that the appellant may wish to challenge on appeal. Such an interpretation overlooks a key distinction between the judgment or order on appeal—the one serving as the basis of the court's appellate jurisdiction and from which time limits are calculated—and the various orders or decisions that may be reviewed on appeal because they merge into the judgment or order on appeal. Designation of the final judgment confers appellate jurisdiction over prior interlocutory orders that merge into the final judgment. The merger principle is a corollary of the final judgment rule: a party cannot appeal from most interlocutory orders, but must await final judgment, and only then obtain review of interlocutory orders on appeal from the final judgment.

In an effort to avoid the misconception that it is necessary or appropriate to designate each and every order of the district court that the appellant may wish to challenge on appeal, Rule 3(c)(1) is amended to require the designation of "the judgment—or the appealable order—from which the appeal is taken"—and the phrase "or part thereof" is deleted. In most cases, because of the merger principle, it is appropriate to designate only the judgment. In other cases, particularly where an appeal from an interlocutory order is authorized, the notice of appeal must designate that appealable order.

Whether due to misunderstanding or a misguided attempt at caution, some notices of appeal designate both the judgment and some particular order that the appellant wishes to challenge on appeal. A number of courts, using an *expressio unius* rationale, have held that such a designation of a particular order limits the scope of the notice of appeal to the particular order, and prevents the appellant from challenging other orders that would otherwise be reviewable,

under the merger principle, on appeal from the final judgment. These decisions create a trap for the unwary.

However, there are circumstances in which an appellant may deliberately choose to limit the scope of the notice of appeal, and it is desirable to enable the appellant to convey this deliberate choice to the other parties.

To alert readers to the merger principle, a new provision is added to Rule 3(c): "The notice of appeal encompasses all orders that merge for purposes of appeal into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal." The general merger rule can be stated simply: an appeal from a final judgment permits review of all rulings that led up to the judgment. Because this general rule is subject to some exceptions and complications, the amendment does not attempt to codify the merger principle but instead leaves its details to case law.

To remove the trap for the unwary, while enabling deliberate limitations of the notice of appeal, another new provision is added to Rule 3(c): "An appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited. Without such an express statement, specific designations do not limit the scope of the notice of appeal."

A related problem arises when a case is decided by a series of orders, sometimes separated by a year or more. For example, some claims might be dismissed for failure to state a claim under F.R.Civ.P. 12(b)(6), and then, after a considerable period for discovery, summary judgment under F.R.Civ.P. 56 is granted in favor of the defendant on the remaining claims. That second order, because it resolves all of the remaining claims, is a final judgment, and an appeal

from that final judgment confers jurisdiction to review the earlier F.R.Civ.P. 12(b)(6) dismissal. But if a notice of appeal describes the second order, not as a final judgment, but as an order granting summary judgment, some courts would limit appellate review to the summary judgment and refuse to consider a challenge to the earlier F.R.Civ.P. 12(b)(6) dismissal. Similarly, if the district court complies with the separate document requirement of F.R.Civ.P. 58, and enters both an order granting summary judgment as to the remaining claims and a separate document denying all relief, but the notice of appeal designates the order granting summary judgment rather than the separate document, some courts would likewise limit appellate review to the summary judgment and refuse to consider a challenge to the earlier F.R.Civ.P. 12(b)(6) dismissal. This creates a trap for all but the most wary, because at the time that the district court issues the order disposing of all remaining claims, a litigant may not know whether the district court will ever enter the separate document required by F.R.Civ.P. 58.

To remove this trap, a new provision is added to Rule 3(c): "In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates . . . an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties."

Frequently, a party who is aggrieved by a final judgment will make a motion in the district court instead of filing a notice of appeal. Rule 4(a)(4) permits a party who makes certain motions to await disposition of those motions before appealing. But some courts treat a notice of appeal that designates only the order disposing of such a motion as limited to that order, rather than bringing the final judgment

before the court of appeals for review. (Again, such an appeal might be brought before or after the judgment is set out in a separate document under F.R.Civ.P. 58.) To reduce the unintended loss of appellate rights in this situation, a new provision is added to Rule 3(c): "In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates . . . an order described in Rule 4(a)(4)(A)." This amendment does not alter the requirement of Rule 4(a)(4)(B)(ii) (requiring a notice of appeal or an amended notice of appeal if a party intends to challenge an order disposing of certain motions).

These new provisions are added as Rules 3(c)(4), 3(c)(5), and 3(c)(6), with the existing Rules 3(c)(4) and 3(c)(5) renumbered. In addition, to reflect these changes to the Rule, Form 1 is replaced by Forms 1A and 1B, and Form 2 is amended.

Rule 6. Appeal in a Bankruptcy Case

* * * * *

(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;

(C) when the appeal is from a bankruptcy appellate panel, ''district court,'' as used in

19 any applicable rule, means ‘‘appellate
20 panel’’; and
21 (D) in Rule 12.1, ‘‘district court’’ includes a
22 bankruptcy court or bankruptcy appellate
23 panel.
24 * * * * *

Committee Note

The amendment replaces ‘‘Form 1” with ‘‘Forms 1A and 1B” to conform to the amendment to Rule 3(c).

Form 1A

Notice of Appeal to a Court of Appeals From a Judgment ~~or Order~~ of a District Court.

United States District Court for the __________
District of __________
File Number __________

A.B., Plaintiff v. C.D., Defendant	Notice of Appeal

Notice is hereby given that ___(~~here~~ name all parties taking the appeal)__, (plaintiffs) (defendants) in the above named case,* ~~hereby~~ appeal to the United States Court of Appeals for the _______ Circuit ~~(~~from the final judgment ~~)~~ ~~(from an order (describing it))~~ entered in this action on the _______ day of _______, 20___.

(s) ______________________________
Attorney for ______________________
Address:_________________________

[***Note to inmate filers:*** *If you are an inmate confined in an institution and you seek the timing benefit of Fed. R. App. P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing) and file that declaration along with this Notice of Appeal.*]

---

* See Rule 3(c) for permissible ways of identifying appellants.

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Form 1B

Notice of Appeal to a Court of Appeals From ~~a Judgment or~~ an Appealable Order of a District Court.

United States District Court for the __________
District of __________
File Number __________

A.B., Plaintiff v. C.D., Defendant	Notice of Appeal

Notice is hereby given that ___(~~here~~ name all parties taking the appeal)__, (plaintiffs) (defendants) in the above named case,[*] ~~hereby~~ appeal to the United States Court of Appeals for the _______ Circuit ~~(from the final judgment)~~ ~~(~~ from ~~an~~ the order ___ (describe~~ing~~ the order ~~it~~)_________~~)~~ entered in this action on the _______ day of _______, 20___.

(s) ________________________________
Attorney for ______________________
Address:__________________________

[***Note to inmate filers:*** *If you are an inmate confined in an institution and you seek the timing benefit of Fed. R. App. P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing) and file that declaration along with this Notice of Appeal.*]

---

[*] See Rule 3(c) for permissible ways of identifying appellants.

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Form 2

Notice of Appeal to a Court of Appeals From a Decision of the United States Tax Court

UNITED STATES TAX COURT
Washington, D.C.

A.B., Petitioner v. Commissioner of Internal Revenue, Respondent	Docket No. _______

Notice of Appeal

Notice is hereby given that ______ (~~here~~ name all parties taking the appeal[*])_____ ~~hereby~~ appeal to the United States Court of Appeals for the _____ Circuit from ~~(that part of)~~ the decision of this court entered in the above captioned proceeding on the _____ day of ______, 20__ (relating to _________).

(s) ___________________________________
Counsel for _________________________
Address:___________________________

[*] See Rule 3(c) for permissible ways of identifying appellants.

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Rule 42. Voluntary Dismissal

* * * * *

(b) Dismissal in the Court of Appeals.

(1) Stipulated Dismissal. The circuit clerk ~~may~~ must dismiss a docketed appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any court fees that are due. ~~But no mandate or other process may issue without a court order.~~

(2) Appellant's Motion to Dismiss. An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court.

(3) Other Relief. A court order is required for any relief beyond the mere dismissal of an appeal—including approving a settlement, vacating an action of the district court or an administrative agency, or remanding the case to either of them.

18 **(c) Court Approval.** This Rule 42 does not alter the legal
19 requirements governing court approval of a settlement,
20 payment, or other consideration.
21 * * * * *

Committee Note

The amendment restores the requirement, in effect prior to the restyling of the Federal Rules of Appellate Procedure, that the circuit clerk dismiss an appeal if all parties so agree. It also clarifies that the fees that must be paid are court fees, not attorney's fees. The Rule does not alter the legal requirements governing court approval of a settlement, payment, or other consideration. See, e.g., F.R.Civ.P. 23(e) (requiring district court approval).

The amendment replaces old terminology and clarifies that any relief beyond mere dismissal—including approving a settlement, vacating, or remanding—requires a court order.

Pursuant to Rule 20, Rule 42(b) applies to petitions for review and applications to enforce an agency order. For Rule 42(b) to function in such cases, "appeal" should be understood to include a petition for review or application to enforce an agency order.

TAB 4D

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PUBLIC SUBMISSION

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Comments Due: February 19, 2020
Submission Type: Web

Docket: USC-RULES-AP-2019-0001
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2019-0001-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2019-0001-0003
Comment on USC-RULES-AP-2019-0001

Submitter Information

Name: Michael Rosman
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General Comment

See attached file(s)

Attachments

rules comments (frap) 2019

<u>Comments to Proposed Rules</u>

I have the following comments to the proposed changes to Federal Rules of Appellate Procedure 3.

1. <u>Final Judgments And Proposed Rule 3(c)(5)</u>

My first concern is that the proposed modification to Rule 3(c), and specifically proposed new Rule 3(c)(5), is inconsistent with the Federal Rules of Civil Procedure.

I begin with the text that best helps understand what a "final judgment" is under those rules, and the system that they seem to have set up. The second sentence of Fed. R. Civ. P. 54(b) states:

> [A]ny order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

The key feature that I wish to point out from this sentence is that the word "remaining" does not appear. Rule 54(b) does *not* state that an order or other decision "that adjudicates fewer than all the *remaining* claims . . . does not end the action . . ." and it does *not* state that any order that adjudicates fewer than all the claims "may be revised at any time before the entry of a judgment adjudicating all the *remaining* claims . . ." Nor can it be reasonably so interpreted. The fact that an early order adjudicating claims can be revised at any time – that is, any prior adjudication of a claim is tentative – demonstrates that any adjudication of "remaining" claims is not an adjudication of "all" claims.

Thus, the system Rule 54(b) was intended to implement seems fairly straightforward: it

requires a judge who dismissed some claims in Order A and all of the remaining claims one year later in Order B – or, alternatively, who granted relief to plaintiff with a complete set of remedies in Order B on the remaining claims at summary judgment or after a trial – to *also* issue a separate document, preferably called "Judgment," *in addition to* these orders. Under Rule 54(b), this "Judgment" should then list *all* the claims in the action (or at least those on which a judgment has not already been entered pursuant to the first sentence of Rule 54(b)) – and the counterclaims, cross-claims, and intervenors' claims, if any – and identify what has become of all of them. And this requirement is in *addition to* the requirement that a judgment be placed on a "separate document." A "separate document" that only refers to "remaining" claims and not "all" claims may meet the requirements of Rule 58, but it does not meet the requirement of the second sentence of Rule 54(b).

Rule 54(b), then, has consequences for what is a "final decision" for purposes of Section 1291 of the Judiciary Code. If each of separate orders dismissing an individual claim "does not end the action as to any of the claims," and "may be revised at any time," then it would be hard to argue that any of the orders – even the last of them – is a final decision. And, again, this is true regardless of whether the last of these order is on a "separate document" that otherwise would meet the requirements of Fed. R. Civ. P. 58.

To be sure, and despite seemingly obvious language, it has not always worked the way it should. District Court judges have not been trained to file judgments adjudicating all of the claims of all of the parties, they frequently fail to do so (even in documents called "judgments"), parties tend not to raise this failure, and Courts of Appeals tend not to call them on it. This has not been good for the clarity of practice. The Report of the Advisory Committee on Appellate

Rules points out that there are "numerous decisions that would treat a notice of appeal that designated an order that disposed of all remaining claims in a case as limited to the claims disposed of in that order." (p. 8)[1] The Advisory Committee seems to think that the problem there is that these courts do not treat the order as a final judgment in which prior interlocutory orders are merged. But the real problem is that the order, because it does not adjudicate all the claims in the case, is not a final judgment under Rule 54(b) at all, and not a "final decision" for Section 1291 purposes. If a notice of appeal is nonetheless filed under these circumstances, the Committee believes the appellant should be able to raise any issue it chooses. Perhaps under the principle of *Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978), the appeal should nonetheless be heard on the ground that the parties have waived *both* the requirement of a final decision *and* a separate document in a context where the issuance of one or the other seems to be a formality. But if finality is a prerequisite to subject matter jurisdiction, then the appeal should be dismissed for want of jurisdiction. An amendment to FRAP 12.1 might be useful to permit the court of appeals to remand solely for the purpose of entering a final decision that meets the requirements of Rule 54(b).

What does this mean for the proposed modification to Rule 3? First, the foregoing requires a serious reconsideration of the language of proposed Rule 3(c)(5). The proposed rule states that "a notice of appeal encompasses the final judgment" if it designates "an order that adjudicates all the remaining claims and the rights and liabilities of all remaining parties." Initially, I think "encompasses" is probably a poor choice of word. I take it that the Committee

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[1] Page references are to the Preliminary Draft: Proposed Amendments to the Federal Rules of Appellate, Bankrutcy, and Civil Procedure, Request for Comment (Aug. 2019) prepared by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.

means that a notice of appeal that designates such an order should be deemed to include an appeal from the final judgment. In any event, if that is correct, the proposed rule requires a court of appeals to deem a notice of appeal designating an order adjudicating all remaining claims to include an appeal from the final judgment. And judging from the example in the Committee Notes, discussed in the next paragraph, the court should so deem the notice *even if there has not been a final judgment entered at all*. Thus, the notice of appeal so described may be in a case where there has been no appealable judgment entered.

Second, I believe that the example given in the ninth paragraph of the Committee Notes (pp. 15-16, 32) is just wrong and bound to confuse. In the example given, some claims are dismissed for failure to state a claim and summary judgment is granted to the defendant on the remaining ones sometime later. The Notes say "[t]hat second order, because it resolved all of the *remaining* claims, is a final judgment . . ." (Pp. 15, 32) (emphasis added). But, as noted at the outset of this section, the word "remaining" does not appear in the second sentence of Rule 54(b) and, for the reasons I have given, is not a final judgment under *that* rule. The example, then, is inconsistent with the language of Rule 54(b) and should be changed. (The example given later in the paragraph, where the judge correctly issues a separate final judgment that "denies all relief," and thus presumably disposes of all of the claims, is better.)

In addition, even taken on its own terms, the example is either very confusing or inconsistent with the proposed text of Rule 3(c)(5). If the second order (dismissing the remaining claims) *is* a final judgment (as the Notes say), then why is there a need for a rule that says that a notice that designates that order "encompasses *the* final judgment"? Is it not obvious that a notice "encompasses" the very document that it designates? Did the Committee mean that

the notice "encompasses" a *second* "final judgment"? (Can there be more than one "final" judgment?) Or the "separate document" entered pursuant to Fed. R. Civ. P. 58? If so, it should make that clearer.

Alternatively, the Committee on Rules should consider (or have the Advisory Committee on Civil Rules consider) a change in the language of Fed. R. Civ. P. 54(b) (so that it refers to "all the remaining claims" instead of "all the claims"). This would (1) harmonize the language of proposed FRAP Rule 3(c)(5) and FRCP 54(b) and (2) probably conform with the practice of many courts who ignore the language of the rules. (To be clear: in my opinion, this is inferior to the system that Rule 54(b) currently establishes and which is described in the second paragraph of this section. But it is better than leaving the rules in conflict with one another.)

2. "Appealable Orders" And Proposed Rule 3(c)(1)(B)

The proposed amendment to Rule 3(c)(1)(B) would change the language slightly so that (1) the word "appealable" appears before the word "order" and (2) a phrase referring to a part of the judgment or order is eliminated. It deserves mention that Fed. R. Civ. P. 54(a) defines "judgment" to include "any order from which an appeal lies," so the term "appealable order" appears to be redundant of the word "judgment." Arguably, the current version of the rule is also redundant since it also refers to an "order," but that reference might be to orders merged into the final judgment that are not independently appealable. (That is, reviewable, but not appealable, orders.) Given the other provisions being suggested, it is probably sufficient for this rule to refer only to the "judgment" from which the appeal is taken. (So, too, with Proposed Rule 3(c)(4) – the phrase "appealable order" is unnecessary.) Alternatively, the word "appealable" could be placed before "judgment," since the mere labelling of a document as a "judgment" does not make

it so. Fed. R. Civ. P. 54(b) ("any order or other decision, *however designated* . . .") (emphasis added).

3. Does The Amendment Accomplish Its Goal?

The impetus for the rule, according to the Report of the Advisory Committee on Appellate Rules (p. 8) was to deal with lines of cases that limited the issues that could be raised on appeal when the notice of appeal mentioned an order (either an interlocutory order or an order resolving the remaining claims in a case). A worthy goal, this is presumably accomplished, in part, through proposed Rule 3(c)(4), which states that a notice of appeal "encompasses all orders that merge for purposes of appeal into the designated judgment or appealable order" and that "[i]t is not necessary to designate those orders in the notice of appeal." But the second sentence does not really address the problem that the Committee identifies. It is more in the nature of advice ("You don't need to do this.") than a protection ("Nothing bad will happen if you do."). I would suggest that the second sentence of proposed Rule 3(c)(4) be changed to something like: "The designation of any such order does not limit the scope of the previous sentence." Or perhaps the entire subsection should read: "The notice of appeal encompasses all orders that merge for purposes of appeal into the designated judgment [or appealable order], regardless of whether any specific merged order is mentioned in the notice." (As noted in the last section, the words in brackets are probably unnecessary.) This would better clarify that the designation of interlocutory orders is not only not necessary, but also has no effect.

This still leaves the problem of the "remaining claims" order – the one that resolves only claims that were not previously resolved and resolves all of those remaining claims. Proposed Rule 3(c)(4) will not help achieve the Committee's goal if courts do not perceive such orders as

final judgments into which prior interlocutory orders are merged. The ideal solution, of course, would be to have district court judges issue final judgments resolving all claims but, as noted, this seems to be wishful thinking. As a second best solution, the amendment of Rule 54(b) discussed previously could transform such an order into a final decision in which interlocutory orders are merged, or perhaps a separate rule can be promulgated that interlocutory orders should be deemed merged into any such “remaining claims” orders.

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Document: USC-RULES-AP-2019-0001-0004
Comment from Thomas Mayes

Submitter Information

General Comment

Attachments

Comment from Thomas Mayes

September 15, 2019

Thomas A. Mayes
1510 32nd Street
Des Moines, IA 50311

Rules Committee Staff
Via e-mail at RulesCommittee_Secretary@ao.uscourts.gov

RE: Bankruptcy, Appellate, and Civil Rules – Amendments

Dear colleagues:

I am an attorney licensed to practice in Iowa and admitted to practice in the Northern District of Iowa and the Eighth Circuit. I have some background in federal court (*Jones v. Barnhart*, 335 F.3d 697 (8th Cir.2003)) and a scholarly interest in appellate practice (Thomas A. Mayes & Anuradha Vaitheswaran, *Error Preservation in Civil Appeals in Iowa: Perspectives on Present Practice*, 55 Drake L. Rev. 39 (2006)).

I write to offer my full support to the rules proposals. Filing a notice of appeal ought to be straightforward and ministerial, unless clearly required otherwise. The cases which would impose a different or higher requirement are judge-made rules and are, simply put, a solution in search of a non-existent problem. These judge-made rules are traps for the unwary and undermine confidence in the fairness and openness of the appellate process.

Please adopt these rules as written without delay. Thank you for your attention to these brief comments.

Sincerely,

/s/Thomas A. Mayes

Thomas A. Mayes, CWLS
Attorney
thomas.a.mayes@gmail.com

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Submitter Information

Name: Mapin Desai
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General Comment

October 6, 2019

Mapin Desai
9 Lynch Road
Voorhees, NJ 08043

Rules Committee Staff
Via e-mail at RulesCornmittee_Secretary@ao.uscourts.gov

RE: Bankruptcy, Appellate, and Civil Rules - Amendments

I am a Ph.D. from Northwestern University.

I have been following Adelphia Communications Corporation Chapter 11 Bankruptcy Case No. 02-41729 for over 17 years from 2002, and is still going on.

From my 17+ years experience with Adelphia bankruptcy proceedings, I have the following suggestions for Transparency, Predictability, Accountability and Enforceability in Bankruptcy Proceedings.

TRANSPARENCY

Any time a Distribution is requested, the justification for the request of that Distribution should be clearly stated. Example: Is the Distribution towards Principal or is it for Post-Petition Interest, etc.

Any time a Motion is proposed, it should clearly state if the approval of the Motion in its entirety will result in violation of any Bankruptcy Code (e.g. New York Out of Pocket Rule) or Circumvention of Higher Court Rulings like District Court Ruling, Second Circuit Court Ruling or Supreme Court Ruling.

When the assets of a Bankrupt Estate are stated on the Quarterly Statement, it should clearly list additional assets (e.g. Tax Refund, Disallowed but reinstated Claims subject to disallowance, Settlement Funds, Cash Funds borrowed from the Estate, or any other asset) not listed in the Quarterly Statement Balance Sheet.

PREDICTABILITY

If a Distribution is requested towards payment of Post-Petition Interest, which would violate Bankruptcy Codes (New York Out of Pocket Rule & Pennsylvania Out of Pocket Rule), it should be predictable that such Distribution would be denied.

If the approval in entirety of an innocuously titled Motion (e.g. a Motion seeking for clarification in the approved Plan) results in violation of Bankruptcy Codes, Circumvention of Higher Court Rulings, or Appellate Court Rulings, it should be predictable that such a Motion would be denied.

ACCOUNTABILITY

All persons responsible for proposing and approving a Distribution, Motion or the Bankrupt Company Estate Assets Statement should sign off under Oath with penalties of perjury to their truthfulness.

ENFORCEABILITY

There needs to be a mechanism for enforcement of Bankruptcy Codes, Appellate Court Rulings, District Court Rulings, Second Circuit Court Rulings and Supreme Court Rulings.

In absence of Enforcement, Bankruptcy Codes could be violated, Appellate and Higher Court Rulings circumvented by stretching out Bankruptcy proceedings for years if not decades till nobody is watching, by approval in entirety of a cleverly worded innocuously titled Motion through backdoor in Bankruptcy Court.

The onus for litigating Bankruptcy Codes Violation, Circumvention of Appellate and Higher Court Rulings, and smuggling of invalid claims through backdoor in Bankruptcy Court should not be on the Public.

Respectfully,

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Comment on USC-RULES-AP-2019-0001

Submitter Information

Name: Amicus Curiae

General Comment

Nov. 29, 2019

What is in the Contract must trump in bankruptcy.

The terms of a contract cannot be voided or retroactively changed by a Stay Order in Bankruptcy Court.

1) Subordinate Convertible Debt (Convertible into Common Stock) and Convertible Preferred Stock (Convertible into Common Stock) must get converted as per the terms of the contract, at the conversion ratio stated in the contract. A stay order in Bankruptcy Court should not be able to override the terms of a contract.

2) Canceled Subordinate Convertible Debt (Convertible into Common Stock) and Canceled Convertible Preferred Stock (Convertible into Common Stock) if reinstated must get converted as per the terms of the contract, at the conversion ratio stated in the contract.

Please refer to Case number: 1:02-bk-41729 in Southern District of New York, Bankruptcy Court.

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Comment on USC-RULES-AP-2019-0001

Submitter Information

Name: Bryan Lammon

General Comment

Please see the attached file.

Attachments

comments-re-3c-amendments

Bryan Lammon
Professor of Law
University of Toledo College of Law

February 3, 2020

The Honorable Michael A. Chagares
United States Court of Appeals
U.S. Post Office and Courthouse
Two Federal Square, Room 357
Newark, NJ 07102-3513

Professor Edward Hartnett
Richard J. Hughes Professor of Law
Seton Hall University School of Law
One Newark Center
Newark, NJ 07102

Subject: Proposed amendment to Federal Rule of Appellate Procedure 3(c).

Dear Judge Chagares & Professor Hartnett:

I write in support of the proposed amendments to Federal Rule of Appellate Procedure 3(c). The amendments are an important and necessary fix to that rule. But I ask that the Committee consider two questions. First, can the proposed rule be simplified? And second, should Rule 4(a)(4)(B)(ii) also be amended?

1. *Simplifying the amendment*

As the Committee noted in its memorandum, several courts of appeals have used Rule 3(c)(1)(B)'s order-designation requirement to limit the scope of appeals. Amendments to abrogate those decisions cannot come soon enough. The order-designation requirement exists to help identify the decision that creates appellate jurisdiction and from which the time for appealing is calculated. It is not supposed to set the scope of an appeal. I doubt appellees are often surprised—much less harmed—when the appellants' brief challenges an order that was not mentioned in the notice of appeal. And if an appellee is ever surprised, any harm can probably be mitigated by extending the briefing deadlines. There is simply no good reason for using the order-designation requirement to deprive litigants of a full opportunity to appeal.

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But the proposed rule strikes me as a bit complicated, and the amendment adds a lot to what could be a simple rule. I am particularly concerned about the new subsections (c)(4) and (5), which directly address scenarios that the Committee uncovered in its research. These new provisions might be confusing to those who are unaware of the practices they are supposed to abrogate. More to the point, the rule does not tackle the underlying problem—using the order-designation requirement to limit the scope of review. Without addressing that underlying problem, it is possible that courts will create other improper limits via interpretations of Rule 3(c).

I think the amended rule could be simplified by changing Rule 3(c)(1)(B) as the current proposal does and then add to 3(c)(1) that the designation does not affect the scope of appellate review. The scope of appellate review normally encompasses all preserved issues that subsequent events have not rendered moot. The three groups of cases that the amendment addresses all seem to limit that scope due to something said in the notice of appeal. But (as discussed in the proposal's memo and above) notices are not supposed to set the scope of appellate review. So perhaps the problem can be fixed by just saying as much.

A revised rule might read:

(c) Contents of the Notice of Appeal.
  (1) The notice of appeal must:
    (A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X";
    (B) designate the judgment or appealable order from which the appeal is taken; and
    (C) name the court to which the appeal is taken.
    Unless the notice states otherwise, the designation of a judgment or order does not affect the scope of appellate review.

I think this new language would have the same effect as the proposed (c)(4) and (5) without all of the detail. It would foreclose courts from using Rule 3(c) to create additional limits on the scope of appellate review. And it would retain the option of expressly limiting the scope of appellate review via a notice of appeal.

2. *Amending Rule 4(a)(4)(B)(ii), too*

The Committee might also consider amending Rule 4(a)(4)(B)(ii). That rule requires filing a second or amended notice to challenge a decision on a motion listed in Rule 4(a)(4)(A) (motions for judgment as a matter of law under Rule 50(b), to amend or make factual findings under Rule 52(b), etc.) or the change in a judgment due to one of those motions:

> A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal—in compliance with Rule 3(c)—within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

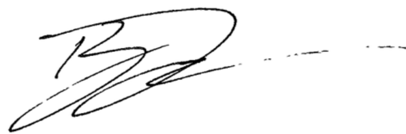
This provision seems to use a notice of appeal to set the scope of appellate review; the order disposing of the motion is within the scope of review only if the order is designated in a notice. But that is precisely what the amended Rule 3(c) rejects. And I cannot see a good reason why the rule should limit the scope of appellate review in these circumstances. Again, I doubt appellees are often surprised or harmed when a party who appealed the underlying judgment also wants to challenge the decision on one of the Rule 4(a)(4)(A) motions.

I saw in the minutes of the Committee's April 5, 2019, meeting that Rule 4(a)(4)(B)(ii) was discussed, and it was said that the rule was not affected by these amendments. I cannot tell from the minutes how much this issue was discussed. But I think it is worth considering again. The matter might be as simple as deleting subparagraph (ii) and renumbering the other provisions in Rule 4(a)(4)(B).

* * *

Again, I fully support the Committee's efforts to amend Rule 3(c). I offer these thoughts only in case they might improve those amendments. Thank you for your consideration, and please let me know if there is anything I can do to assist the Committee in its work.

Sincerely,



Bryan Lammon

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Comment on USC-RULES-AP-2019-0001

Submitter Information

Name: New York City Bar Association

General Comment

On behalf of the New York City Bar Association's Federal Courts Committee, attached please find a comment letter on proposed amendments to the Federal Rules of Appellate Procedure.

Attachments

2020632-FederalRulesofAppellateProcedure_FINAL_2.10.20

NEW YORK CITY BAR

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COMMENT ON THE PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

The New York City Bar Association greatly appreciates the opportunity for public comment provided by the Judicial Conference's Committee on Rules of Practice and Procedure on the proposed amendments to the Federal Rules of Appellate Procedure. The Association, founded in 1870, has over 24,000 members practicing throughout the nation and in more than fifty foreign jurisdictions. The Association includes among its membership many lawyers in virtually every area of law practice, including lawyers generally representing plaintiffs and those generally representing defendants; lawyers in large firms, in small firms, and in solo practice; and lawyers in private practice, government service, public defender organizations, and in-house counsel at corporations. The Association's Committee on Federal Courts (the "Federal Courts Committee" or "Committee") is charged with responsibility for studying and making recommendations regarding proposed amendments to the Federal Rules. The Federal Courts Committee respectfully submits the following comments on the proposed amendments.

I. COMMENT ON PROPOSED REVISION TO FEDERAL RULE OF APPELLATE PROCEDURE 3(C)

The Advisory Committee on Appellate Rules ("Advisory Committee") has proposed revisions to Rule 3 of the Federal Rules of Appellate Procedure ("Rule 3") to reduce the inadvertent loss of appellate rights caused by the phrasing of a notice of appeal. The Advisory Committee proposed re-styling Rule 3 to clarify that a notice of appeal must designate the judgment or appealable order that serves as the basis for the court's appellate jurisdiction and from which time limits are calculated, but that designation does not displace the general merger principle which confers appellate jurisdiction over interlocutory orders that merge into the designated judgment or order. The proposed revisions call attention to the merger principle in the text of Rule 3(c)(4), but still permit an appellant to designate only part of a judgment or appealable order for appeal by expressly stating that the appeal is so limited in the notice of appeal pursuant to Rule 3(c)(6).

We support these changes, but recommend a minor edit to the proposed text of Rule 3(c)(4) to clarify that the application of the merger principle set forth in that subpart is subject to the exception set forth in Rule 3(c)(6), as follows.

* * *

a. Proposed Further Edit To The Proposed Revisions To Rule 3(C).

Federal Rule of Appellate Procedure 3
(c) Contents of the Notice of Appeal.
(1) The notice of appeal must:

(A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as ''all plaintiffs,'' ''the defendants,'' ''the plaintiffs A, B, et al.,'' or ''all defendants except X'';

(B) designate the judgment,—or the appealable order—from which the appeal is taken; and

(C) name the court to which the appeal is taken.

(2) A pro se notice of appeal is considered filed on behalf of the signer and the signer's spouse and minor children (if they are parties), unless the notice clearly indicates otherwise.

(3) In a class action, whether or not the class has been certified, the notice of appeal is sufficient if it names one person qualified to bring the appeal as representative of the class.

(4) **Except as otherwise provided pursuant to Rule (3)(c)(6), t**he notice of appeal encompasses all orders that merge for purposes of appeal into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal.

(5) In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates:

(A) an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties; or

(B) an order described in Rule 4(a)(4)(A).

(6) An appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited. Without such an express statement, specific designations do not limit the scope of the notice of appeal.

(7) An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice.

(8) Forms 1A and 1B in the Appendix of Forms are suggested forms of notices of appeal.

II. COMMENT ON PROPOSED REVISION TO FEDERAL RULE OF APPELLATE PROCEDURE 42

The Advisory Committee has proposed to amend Rule 42 to include the following added provision:

(3) Other Relief. A court order is required for any relief beyond the mere dismissal of an appeal—including approving a settlement, vacating an

action of the district court or an administrative agency, or remanding the case to either of them.

We propose that the language be modified to conform with the authorizing statute and to avoid suggesting a substantive entitlement to remand that may or not be authorized by law, as follows:

(3) Other Relief. A court order is required for any relief beyond the mere dismissal of an appeal—including approving a settlement, vacating an action of the district court, **setting aside or enforcing an administrative agency order**, or remanding the case to either of them**, if provided by applicable statute**.

The reason for this proposed modification is that there is a substantive legal question regarding whether a Circuit Court is authorized to "remand" a matter to an administrative agency. For example, in *Lucia v. SEC*, 138 S. Ct. 2044 (2018), the Supreme Court found an SEC administrative proceeding to be invalid because the SEC ALJ who presided over the hearing was not properly appointed as required by the Appointments Clause of Article II of the Constitution, and remanded the matter to the United States Court of Appeals for the D.C. Circuit. *Id.* at 2050-51, 2055-56. Mr. Lucia requested that his petition be granted and that the Commission's order be "set aside"; the SEC agreed but also requested that the matter be "remanded" to the Commission. *Lucia v. SEC*, Docket No. 15-1345, document 1741942 (D.C. Cir. July 23, 2018) (Lucia's motion); *id.* document 1742549 (D.C. Cir. July 25, 2018) (SEC's request for remand). Other litigants have similarly disputed the proper remedy—remand or setting aside—for unconstitutional agency orders. *See Harding Advisory v. SEC*, Docket No. 17-1070, document 1741454 (D.C. Cir. July 19, 2019) (SEC's motion to remand); *Harding Advisory v. SEC*, Docket No. 17-1070, document 1741988 (D.C. Cir. July 23, 2019) (Harding's opposition; arguing that the Securities Laws do not include "remand" to the Commission as an available remedy except when additional development of the record is required to facilitate review). The D.C. Circuit rejected these arguments and ordered a "remand" to the Commission. *Harding Advisory v. SEC*, Docket No. 17-1070, document 1751503 (D.C. Circuit Sept. 19, 2019).

Although the arguments referenced above were unsuccessful, these cases illustrate that the issues concerning remands are not just procedural matters, but could involve disputes in substantive law, and should not be prejudged in a Rules amendment. The Rules should not take a position, one way or the other, on the substantive question. Under the Rules Enabling Act, 28 U.S.C. § 2072:

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

(emphasis added). The proposed modification ensures that the amendment does not run afoul of subsection b of the Act by "abridg[ing], enlarg[ing] or modify[ing] any substantive right."

The proposed modification is similar to the language of Rule 15 ("Review or Enforcement of an Agency Order—How Obtained; Intervention"), which is drafted in recognition that review or enforcement of an administrative agency order may be governed by a variety of statutes, depending on the agency involved. Thus, the definitional provisions of Rule 15 provide that "(4) In this rule "agency" includes an agency, board, commission, or officer; "petition for review" includes a petition to enjoin, suspend, modify, or otherwise review, or a notice of appeal, whichever form is indicated by the applicable statute." Fed. R. App. P. 15 (emphasis added). Likewise, the provision requiring that the petition name the agency involved recognizes that certain applicable statutes may have an additional requirement not reflected in the Rule: "The petition must … name the agency as a respondent (even though not named in the petition, the United States is a respondent if required by statute)." Fed. R. App. P. Rule 15(a)(2)(B). (emphasis added).

Respectfully submitted,

Federal Courts Committee
Harry Sandick, Chair

<u>Drafting Subcommittee</u>
Brian Fraser
Richard Hong
Mara Leventhal
Kiran Rosenkilde
Justin Weddle

February 2020

* The Committee's members are serving in their individual, personal capacities. They are not representing any organization or employer and nothing in this report should be attributed to an organization or employer with which a committee member was or is affiliated.

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Comment On: USC-RULES-AP-2019-0001-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2019-0001-0011
Comment on USC-RULES-AP-2019-0001

Submitter Information

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Organization: National Ass'n of Criminal Defense Lawyers

General Comment

The attached comments are submitted on behalf of the National Association of Criminal Defense Lawyers.

Attachments

NACDL comments FRAP 021820

National Association of Criminal Defense Lawyers
12th Floor, 1660 L Street, NW
Washington, DC 20036

February 19, 2020
Submitted online

Rebecca A. Womeldorf, Esq.
Secretary, Committee on Practice & Procedure
Judicial Conference of the United States

AMENDMENTS TO APPELLATE RULES PROPOSED FOR COMMENT, Aug. 2019

Dear Ms. Womeldorf:

The National Association of Criminal Defense Lawyers is pleased to submit our comments on the proposed changes to Rules 3(c) and 42(b) of the Federal Rules of Appellate Procedure.

Founded in 1958, NACDL is the preeminent organization in the United States representing the views, rights and interests of the criminal defense bar and its clients. Our association has more than 8000 direct members. Including NACDL's 94 state and local affiliates, in all 50 states, we are able to speak for a combined membership of some 40,000 private and public defenders, along with many academics.

APPELLATE RULE 3(c) and FORMS – THE NOTICE OF APPEAL

The proposed amendments to Appellate Rule 3(c) would clarify that an appeal taken from the final judgment permits appellate review of all prior orders in the case, and that no order other than the judgment need be mentioned in the notice of appeal. The amendment further clarifies that the appellant's gratuitous mention in the notice of one or more of the earlier orders in the case (such as, in a criminal case, the denial of a suppression motion, the conviction or verdict, or an order denying post-trial motions) must not be interpreted as precluding appellate review of other orders. Finally, the amendment would clarify that in a civil case a notice of appeal taken from the denial of a motion covered by Appellate Rule 4(a)(4)(A) – most importantly, a motion under Civil Rule 59(e) – should ordinarily be understood to encompass also the final order that was sought to be reconsidered or amended. NACDL supports these amendments, which are of particular importance in criminal cases. However, we do have two suggestions for improvement and expansion of those reforms.

1. A defendant's notice of appeal in a criminal case is due within 14 days from the entry of the judgment of conviction and sentence. Fed.R.App.P. 4(b). This is less than half the time allowed under Rule 4(a) for filing the notice of appeal in most civil cases. For that reason, it is particularly unlikely that the appellant in a criminal case would intend, by the wording of the notice, to limit the scope of issues that might be raised in their one direct appeal of right. Indeed, as of the time of filing, it is unlikely that the appellant will have a clear idea of what issues ought to be raised. Moreover, as a matter both of professional

ethics and of constitutional right, a notice of appeal must be filed by the defendant's last attorney of record (typically, the lawyer who handled the sentencing) unless the defendant has clearly and expressly asked counsel not to do so with full knowledge and understanding, after proper counseling, of the consequences of that waiver. See *Garza v. Idaho*, 586 U.S. —, 139 S.Ct. 738 (2019); *Roe v. Flores-Ortega*, 528 U.S. 470 (2000); *Peguero v. United States*, 526 U.S. 23 (1999). The attorney who has this responsibility may not be the attorney who will be handling the appeal, may likewise not be the same attorney who handled the plea or trial, and in many cases will not be in a position at that time to know what issue or issues would be available or fruitful to advance on appeal. To interpret the notice, by virtue of its wording, as precluding any potentially appealable issue is therefore particularly inappropriate in criminal cases.

2. The new provision designated as Rule 3(c)(5) – limited by its terms to appeals "[i]n a civil case" – is directly pertinent to our members and clients when the appeal arises out of a habeas corpus or § 2255 case, which are deemed to be civil in nature for appellate purposes. *See* Fed.R. §2255 P. 11(b). Habeas petitioners and 2255 movants who avail themselves of Fed.R.Civ.P. 59(e), for example, may then appeal from the denial (or less-than-full granting) of that motion and neglect to mention in their notice of appeal the antecedent "final order." Or, an appellant might mention the underlying order and not the denial of reconsideration. In such cases, it is highly unlikely that anyone would intend to appeal from the denial of reconsideration only, and not from the underlying order, or to exclude from the scope of the appeal any matter raised on reconsideration. The amendment thus comports with fairness, common sense and good practice.

We do question, however, the Committee's choice to make the amended Rule 3(c)(5) apply only in appeals arising out of civil cases. Perhaps, when excluding criminal cases, the committee was thinking of defendants' direct appeals under 28 U.S.C. § 1291 and government sentencing appeals under 18 U.S.C. § 3742(b). In those cases, which constitute the greatest number of criminal appeals, the proposed limitation is understandable, since there are no proper, nonfrivolous motions akin to those listed in Rule 4(a)(4)(A) that can be filed after entry of the judgment in a criminal case. *Cf*. Fed.R.Crim.P. 35(a); Fed.R.App.P. 4(b)(5). On the other hand, there are certain appeals in criminal cases where applying the clarifying principle to be codified in Rule 3(c)(5) would be apt: for example, a defendant's collateral-order appeal of a detention or bail order under 18 U.S.C. § 3145(c) or a defendant's double jeopardy appeal as authorized by *Abney v. United States*, 431 U.S. 651 (1977). Such appeals are often preceded in the district court by a motion for reconsideration. Yet under the terms of the new Rule, the Courts of Appeals may conclude, by application of *expressio unius* – even in Circuits whose previous precedent was consistent with the amended rule but not limited to civil cases – that the notice of appeal now *must* identify both the underlying appealable order and the denial of reconsideration in order to authorize appellate review of the principal order. The same would be true of a government notice of appeal, when the prosecution appeals an order as authorized under 18 U.S.C. § 3731 and Fed.R.App.P. 4(b)(1)(B). To avoid this undesirable result, proposed Rule 3(c)(5) will have to be reworked, perhaps by adding a subparagraph along these lines:

> In a criminal case, a notice of appeal from an appealable order other than the final judgment encompasses both that order and any order denying a timely motion for reconsideration of that order, whether the notice of appeal is filed after entry of the appealable order or after denial of reconsideration.

3. As for the proposed amendments to the suggested forms for a Notice of Appeal, we are pleased to see the striking of the superfluous second "hereby," which should have been deleted at the time of restyling many years ago. Indeed, along the same lines, we would suggest deletion of the first five, entirely uninformative words ("Notice is hereby given that") as well as the self-evident and useless phrases "in the above named case" and "in this action" from both Form 1A and Form 1B. The forms would be more consistent with the style of the rules in general – without any loss of clarity or legal effect – if the notice of appeal simply said: "The defendant, Joan Doe [or other appellant], appeals to the United States Court of Appeals for the [appropriate] Circuit from the final judgment [or "judgment of sentence"] [or other appealable order] entered on [date entered]."

APPELLATE RULE 42(b) – VOLUNTARY DISMISSAL

The proposed amendments to Rule 42(b) are well taken for the reasons discussed in the Committee's report and Note. However, as applied to direct appeals of right taken by criminal defendants, we believe that the new Rule 42(b)(2) (currently, the last sentence of Rule 42(b)) should be strengthened to protect defendants from inappropriate "voluntary" dismissal of their appeals by counsel. A second sentence should be added to this new subsection stating, in words or substance, that:

> In a criminal case, the court must not dismiss a defendant's appeal unless satisfied that the appellant personally has approved the motion to dismiss with full knowledge of the right being waived and the consequences of the dismissal. A written consent to the dismissal signed and affirmed by the appellant personally, articulating the nature of the right being waived and the consequences of that waiver, must be included with any motion of the appellant to dismiss a defendant's direct criminal appeal.

This requirement would be consistent with current practice in many but not all of the Circuits, under the Rule's "terms ... fixed by the court" clause. A signed waiver of this sort is essential to protect the defendant-appellant's Sixth Amendment rights and to prevent motions under Rule 42(b) from being used to evade the constitutional requirements of *Smith v. Robbins*, 528 U.S. 259, 269–84 (2000) (explaining *Anders v. California*, 386 U.S. 738 (1967)), particularly where counsel has not been court-appointed. An amendment of this sort would also serve to minimize the later filing of unnecessary post-conviction challenges to the efficacy of such dismissals of direct appeals.

We thank the Committee for its excellent and valuable work and for this opportunity to contribute our thoughts. NACDL looks forward to continuing our longstanding relationship with the advisory committees as a regular submitter of written comments.

Respectfully submitted,
THE NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS

By: Peter Goldberger
Ardmore, PA

Chair, Committee on Rules of Procedure

Cheryl D. Stein
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In Memoriam:

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Submitter Information

Name: Jill Wheaton
Submitter's Representative: Jill M. Wheaton
Organization: Council of Appellate Lawyers, American Bar Association

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General Comment

See attached file(s)

Attachments

CAL rule comments

COUNCIL OF APPELLATE LAWYERS
AMERICAN BAR ASSOCIATION
JUDICIAL DIVISION
APPELLATE JUDGES CONFERENCE

Comments on Proposed Amendments to the Federal Rules of Appellate Procedure Before the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States
February 19, 2020

Statement of Interest

The Council of Appellate Lawyers (the "Council") is part of the Appellate Judges Conference of the American Bar Association's Judicial Division. It is the only nationwide bench-bar organization devoted to appellate practice. We submit these comments with respect to the proposed new Federal Rule of Appellate Procedure 3(c)(6). The views expressed herein are solely those of the Council, considered and approved by the Council's Executive Board, and have not been endorsed by the Appellate Judges Conference, the Judicial Division, or the American Bar Association. We have no objection to the amendments proposed for other parts of Rule 3 or to other rules.

Comment on Proposed Federal Rule of Appellate Procedure 3(c)(6)

The Council respectfully recommends against the proposed inclusion of a provision permitting an appellant to "designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited" and stating that "[w]ithout such an express statement, specific designations do not limit the scope of the notice of appeal."

It is the view of the Council that this provision will create confusion and may facilitate efforts to limit appellate jurisdiction that the Committee did not intend. These concerns outweigh any benefits of the proposed rule, which is not necessary because an appellant may reach the same result of limiting the scope of its appeal through briefing.

As the Committee noted in its May 31, 2019 Report, the decision whether to include this particular rule was a subject of debate. Report at 10. The Committee acknowledged that there are times an appellant may deliberately want to limit the scope of the appeal, and "in an adversary system, litigants shouldn't be required to appeal more than they choose, particularly in cases involving multiple claims and multiple parties." Report at 10. But the Committee also recognized that "any limiting work could be left to the briefs" and that "explicit attention in the Rules to the possibility of a limited notice of appeal might lead to strategic attempts to limit the jurisdiction of the court of appeals." Report at 10. Rather than explicitly permitting limits on the appeal or the scope of appeal, the Committee "settled" on proposed new Rule 3(c)(6).

The Council is concerned that the language of this proposed rule may give rise to the very issue that the Committee identified – "strategic attempts to limit the jurisdiction of the court of appeals" (Report at 10) – particularly when cross-appeals are involved. This is a legitimate concern. A cross-appellant should be entitled as a matter of right to raise any issues it desires once a case is on appeal following a final judgment. However, if the appellant has expressly limited the issues on appeal through use of the language in proposed Rule 3(b)(6), there is a risk that the appellant might claim that any cross-appeal is similarly limited. Similarly, a cross-appellant might attempt to limit the scope of the case before the court by stating the issues or briefing them in a narrower way than the appellant, with limiting language that it claims governs the entire appeal. Even if the attempt is ultimately unsuccessful, the rule may create confusion, and thus complicate the litigation, until the issue is resolved.

The better approach is the other one suggested in the Report: moving the phrase "specific designations do not limit the scope of the notice of appeal" to a separate sentence at the end of proposed new Federal Rule of Appellate Procedure 3(c)(4). Report at 10. That rule would then read: "The notice of appeal encompasses all orders that merge for purposes of appeal into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal. Specific designations do not limit the scope of the notice of appeal." This would address the concern behind the overall proposed changes to Rule 3, which is to "reduce the inadvertent loss of appellate rights caused by the phrasing of a notice of appeal." Report at 8. Should the appellant wish to limit the issues on its appeal, it may do so in its briefing. But if a cross-appellant wants to raise other, appealable issues, it should be able to do so without fear of that right being taken away by limiting language in the claim of appeal that would be allowed under proposed Rule 3(c)(6).

Council of Appellate Lawyers

Deena Jo Schneider
Chair

Jill M. Wheaton
Chair, Rules Committee

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Submitter Information

Name: Steven Colloton

General Comment

Please see attached documents.

Attachments

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FRAP-3-comment-021920

United States Court of Appeals
for the Eighth Circuit

CHAMBERS OF
STEVEN M. COLLOTON
UNITED STATES CIRCUIT JUDGE

February 19, 2020

Honorable Michael A. Chagares
Chair, Advisory Committee on Appellate Rules
c/o Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle NE
Washington, DC 20544

Dear Judge Chagares:

With appreciation for your service as chair of the advisory committee, I respectfully submit the attached comment regarding the proposed amendment to Federal Rule of Appellate Procedure 3.

Sincerely,

Attachment

I respectfully suggest that the Advisory Committee take another look at the proposed amendment to Rule 3(c) and consider adhering to the current rule.

The Advisory Committee may have commenced this project based on a misunderstanding. The Committee's May 2019 report refers to a so-called "troubling line of cases in one circuit" that apparently prompted the undertaking. In fact, the line of cases cited in the report follows a longstanding mode of analysis, adopted in *every* circuit, that goes back at least 43 years to *Elfman Motors, Inc. v. Chrysler Corp.*, 567 F.2d 1252, 1254 (3d Cir. 1977) (per curiam).

As the D.C. Circuit explained in *Brookens v. White*, 795 F.2d 178 (D.C. Cir. 1986) (per curiam), "[s]everal circuits have held that if an appeal is noticed only from part of a judgment, then no jurisdiction exists to review other portions of the judgment." *Id*. at 180. Judges Edwards, Starr, and Silberman "agree[d] with that proposition, inasmuch as *it is faithful to the text of Fed. R. App. P. 3(c)*; in addition, *its application promotes the orderly administration of justice*." *Id*. (emphases added). The court concluded that "the repose that is due" to parties who obtain a favorable judgment in the district court, and then observe that the notice of appeal manifests an intent to forego an appeal against them, "is *a legitimate interest which merits safeguarding*." *Id*. (emphasis added).

Decisions enforcing the limits of a notice of appeal under Rule 3(c) do not "create a trap for the unwary." They properly apply the text of the rule and give effect to the intent manifested by the appellant when a notice of appeal was filed. *See Elfman*, 567 F.2d at 1254 ("We are led inescapably to the conclusion that the appellant at the time it filed its notice of appeal did not intend to seek review of the summary judgment which it now, out of time, seeks to have us review."); *Brookens*, 795 F.2d at 181 ("Taken together, the specification of these orders and hearing dates and the failure to mention the July 12, 1984 order in either the notice of appeal or the docketing statement indicate an intent *not* to appeal the earlier grant of summary

judgment."); *see also Kotler v. Am. Tobacco Co.*, 981 F.2d 7, 11 (1st Cir. 1992) (Selya, J.) ("Omitting the preemption order while, at the same time, designating a completely separate and independent order loudly proclaims plaintiff's intention not to appeal from the former order."); *Johnson v. Perry*, 859 F.3d 156, 168 (2d Cir. 2017) (Kearse, J.) (because notice of appeal "neither stated that [appellant] wished to challenge all parts of the district court's order nor mentioned the court's revival and continuation of [plaintiff's] due process claim sua sponte, but instead expressly referred to the denial of [defendant's] motion for summary judgment, we cannot infer that the notice encompassed any ruling by the district court other than that denying his summary judgment motion"); *Jackson v. Lightsey*, 775 F.3d 170, 176 (4th Cir. 2014) (Harris, J.) ("Given Jackson's express designation of one particular order, the fairest inference is that Jackson did not intend to appeal the other."); *C. A. May Marine Supply v. Brunswick Corp.*, 649 F.2d 1049, 1056 (5th Cir. 1981) (per curiam) ("The express mention in the notice of appeal of one part of the order negated any inference of intent to appeal from the order as a whole."); *Burley v. Gagacki*, 834 F.3d 606, 620 (6th Cir. 2016) (Griffin, J.) ("[I]f an appellant chooses to designate specific determinations in his notice of appeal—rather than simply appealing from the entire judgment—only the specified issues may be raised on appeal") (internal quotation omitted); *Chaka v. Lane*, 894 F.2d 923, 925 (7th Cir. 1990) (Easterbrook, J.) ("When a notice of appeal specifies an interlocutory order that merged into the final decision, we shall treat it as limiting the appeal to questions raised by that order, to the exclusion of other possible decisions taken in the case. This not only gives force to the language of Rule 3(c) but also eliminates the possibility of prejudice tot he appellees."); *C&S Acquisitions Corp. v. Northwest Aircraft, Inc.*, 153 F.3d 622, 625 (8th Cir. 1998) (F. Gibson, J.) ("We conclude that C&S's intent to appeal the district court's order compelling arbitration was not apparent from its Notice of Appeal, Appeal Information Form, nor the procedural history of the case. C&S's Notice of Appeal specifically provides that C&S appeals 'from the *summary judgment* entered on October 24, 1996.' The summary judgment concerned only Count IV. The Notice of Appeal failed to mention the district court's prior decision

to refer Counts I, II, and III to binding arbitration.") (citation omitted); *Havensight Capital v. Nike*, 891 F.3d 1167, 1171 (9th Cir. 2018) (Rawlinson, J.) ("Havensight's notice of appeal named 'the order, and sanctions imposed against the Plaintiff by the Court,' referenced 'document[s] 123 [order granting Rule 11 sanctions] and 124 [order granting defendant's motion to dismiss the Amended Complaint],' and attached the orders as exhibits. No intent to appeal any other rulings can reasonably be inferred from Havensight's notice of appeal."); *Navani v. Shahani*, 496 F.3d 1121, 1133 (10th Cir. 2007) (Briscoe, J.) ("[W]e have jurisdiction to review only the two orders that Shahani designated."); *Pitney Bowes, Inc. v. Mestre*, 701 F.2d 1365, 1374 (11th Cir. 1983) (Johnson, J.) ("[B]y specifically listing only the non-injunction issues, Mestre indicated his intent *not* to appeal the injunction."); *Pazandeh v. Yamaha Corp. of Am.*, 718 F. App'x 975, 980 (Fed. Cir. 2018) (per curiam) ("[Pazandeh] failed to properly appeal the district court's exceptionality determination, as his notice of appeal does not identify the order containing this determination as one he is appealing.").

Lawyers who are appellate specialists, retained after a notice of appeal is filed, understandably may prefer a different rule that permits an appellant *to change its intent* after the time for filing a notice of appeal has expired. Such a rule would allow latecoming appellate lawyers to search the record for potential claims of error that the appellant did not intend to raise when it filed the notice of appeal. But facilitating an appellant's ability to change its intent, outside the time for noticing an appeal, is not a sound reason to amend Rule 3(c). Nor is it necessarily in the best interests of the system to skew the rule so that virtually every notice of appeal must be construed to allow the broadest possible scope of appellate litigation. The current rule properly remains neutral; it refrains from placing a thumb on the scale with an express-statement requirement, and it allows an appellant to manifest its intent through the ordinary use of language. There is enough litigation without drafting the rules to maximize it.

To be sure, a notice of appeal is supposed to be a simple document. But under the current rule, if an appellant wishes to designate every order in the case, or merely to preserve its options, then it is usually simple to do so. The appellant ordinarily may designate only the final judgment and rely on the merger rule to encompass all earlier interlocutory orders. *See Denault v. Ahern*, 857 F.3d 76, 81-82 (1st Cir. 2017). Or it may designate the last order and all previous orders in the case. Or an appellant may list individually all orders that it might want to challenge on appeal and then narrow the field in an opening brief. Rule 3(c) need not presume that lawyers are incapable of carrying out this task if it is consistent with their true intent.

If the Committee nonetheless elects to forge ahead with an amendment, please consider striking references to "traps for the unwary" in the proposed Committee Note. This is a pejorative phrase, suggesting that the original rulemakers, and courts applying the current rule, have endeavored to take lawyers by surprise to gain an advantage. This is not a fair characterization. It is not difficult under the current rule to file a notice of appeal that designates every order that an appellant might wish to challenge. Decisions limiting the scope of a notice of appeal based on the appellant's manifested intent are faithful to the text of the current rule.

One more point: Under the current rule, once there is a final decision, a party may designate an interlocutory order by itself in the notice of appeal, and the notice will be effective as to that order. *See Chaka*, 894 F.2d at 925 (concluding that assumption of jurisdiction in that situation "gives force to the language of Rule 3(c)"). Would the conclusion be different under the proposed rule, which deletes the word "order" from Rule 3(c)(1)(B)? Proposed Rule 3(c)(1)(B) would require the notice to designate "the judgment—or the appealable order—from which the appeal is taken," with "appealable order" defined in the Committee Note as an interlocutory order from which an appeal is authorized before entry of a final judgment. But suppose the appellant designates only an interlocutory order from which an appeal is *not* authorized before final judgment, but which is appealable at the time the notice

is filed because there is a final decision in the case. Would the proposed rule create a trap for the unwary, and require dismissal, because the appellant did not designate either "the judgment" or "an appealable order"?

Respectfully, this looks like a situation in which it could be wise to leave well enough alone. Thank you for your consideration.

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To: Advisory Committee on the Federal Rules of Appellate Procedure

From: FRAP 35 Subcommittee

Date: March 6, 2020

Re: Possible Amendments to FRAP 35

At the last meeting of the Advisory Committee, the focus was on making sure that, if a panel changed its decision in response to a petition for rehearing en banc, access to the full court would not be blocked.

Two major issues were left open. First, should the ability to file a new petition be limited to situations where the panel changed the substance of its decision? Second, should a new petition for panel rehearing be available, or only a new petition for rehearing en banc?

Here is the working draft of FRAP 35 that emerged from that meeting, with options noted in brackets:

Rule 35. En Banc Determination

(a) **When Hearing or Rehearing En Banc May Be Ordered.**

A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:

(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or

(2) the proceeding involves a question of exceptional importance.

(b) **Petition for Hearing or Rehearing En Banc**. A party may petition for a hearing or rehearing en banc.

(1) The petition must begin with a statement that either:

(A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or

(B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition

may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.

* * * *

(4) If neither of the criteria in (b)(1) is met, panel rehearing pursuant to Rule 40 may be available.

(5) A petition for rehearing en banc may be treated by the panel as including a petition for panel rehearing. If the panel changes the [substance of its] decision, a party may—within the time specified by Rule 40(a), counted from the day of filing of the amended decision—file a new petition for rehearing [en banc].

* * * * *

Committee Note

A party dissatisfied with a panel decision may petition for rehearing en banc pursuant to this Rule or petition for panel rehearing pursuant to Rule 40. The amendment calls attention to the different standards for the two kinds of rehearing.

The amendment also explicitly provides for the common practice of treating a petition for rehearing en banc as including a petition for panel rehearing, so that the panel can address issues raised by the petition for rehearing en banc and grant relief that is within its power as a panel. It also provides that if the panel changes the [substance of its] decision, a party is given time to file a new petition for rehearing [en banc].

The subcommittee has discussed these open issues. It has taken into account the view of one member of the Standing Committee who believes that the proposed Rule should not refer to the "substance" of the decision because things should be clear where the time for issuance of the mandate and time limits to seek review are at issue. It has also considered stylistic input.

The subcommittee recommends that the proposed Rule not refer to the "substance" of the decision. First, use of the term "substance" would invite disputes over what changes are sufficiently substantive. Second, a party who petitioned for rehearing en banc seeking a substantive change should not be blocked from the full court by an inconsequential change to the panel decision.

The subcommittee recommends that the proposed Rule permit both petitions for panel rehearing and petitions for rehearing en banc. A panel might change a prior decision in a way that would be appropriately fixed by the panel rather than the full court.

The subcommittee also recommends some stylistic changes from the prior working draft. In particular, it recommends referring to a panel that "issues a new or amended decision," rather than "changes the decision," and recommends referring to "the entry of such decision," rather than "the day of filing of the amended decision." It also recommends flipping subparagraphs 4 and 5, so that the cross-reference to Rule 40 comes at the end.

Here is the proposed amendment as recommended by the subcommittee:

Rule 35. En Banc Determination

(a) When Hearing or Rehearing En Banc May Be Ordered.

A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:

(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or

(2) the proceeding involves a question of exceptional importance.

(b) Petition for Hearing or Rehearing En Banc. A party may petition for a hearing or rehearing en banc.

(1) The petition must begin with a statement that either:

(A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or

(B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.

* * * *

(4) A petition for rehearing en banc may be treated by the panel as including a petition for panel rehearing. If the panel issues a new or amended decision, a party may—within the time specified by Rule 40(a), counted from the entry of such decision—file a new petition for panel rehearing or rehearing en banc.

(5) If neither of the criteria in (b)(1) is met, panel rehearing under Rule 40 may be available.

* * * * *

Committee Note

A party dissatisfied with a panel decision may petition for rehearing en banc pursuant to this Rule or petition for panel rehearing pursuant to Rule 40. The amendment explicitly provides for the common practice of treating a petition for rehearing en banc as including a petition for panel rehearing, so that the panel can address issues raised by the petition and grant relief that is within its power as a panel. It also provides that if the panel amends its decision or issues a new decision, a party is given time to file a new petition for panel rehearing or rehearing en banc.

The amendment also calls attention to the different standards for the two kinds of rehearing, emphasizing that rehearing en banc is not favored, and that panel rehearing may be more appropriate in many cases.

The subcommittee is aware that the full committee has previously rejected a thorough revision of Rules 35 and 40. But there continues to be some support in the subcommittee for such a revision, and a member of the subcommittee has prepared what a thorough revision might look like, if full committee chooses to reconsider its prior decision:

[**Rule 35. En Banc Determination**] (Abrogated.)[1]

~~**(a) When Hearing or Rehearing En Banc May Be Ordered**~~. ~~A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:~~

~~(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or~~

~~(2) the proceeding involves a question of exceptional importance.~~

~~**(b) Petition for Hearing or Rehearing En Banc.** A party may petition for a hearing or rehearing en banc~~.

[1] Red text is added, blue text is deleted, green text is moved; gray edits are those already approved by the Judicial Conference for the December 2020 cycle. Notice how much blue text there is—that is, how much is deleted as duplicative.

~~(1) The petition must begin with a statement that either~~:

~~(A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or~~

~~(B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.~~

~~(2) Except by the court's permission:~~

~~(A) a petition for an en banc hearing or rehearing produced using a computer must not exceed 3,900 words; and~~

~~(B) a handwritten or typewritten petition for an en banc hearing or rehearing must not exceed 15 pages.~~

~~(3) For purposes of the limits in Rule 35(b)(2), if a party files both a petition for panel rehearing and a petition for rehearing en banc, they are considered a single document even if they are filed separately, unless separate filing is required by local rule.~~

~~**(c) Time for Petition for Hearing or Rehearing En Banc.** A petition that an appeal be heard initially en banc must be filed by the date when the appellee's brief is due. A petition for a rehearing en banc must be filed within the time prescribed by Rule 40 for filing a petition for rehearing.~~

~~**(d) Number of Copies.** The number of copies to be filed must be prescribed by local rule and may be altered by order in a particular case.~~

~~**(e) Response.** No response may be filed to a petition for an en banc consideration unless the court orders a response. The length limits in Rule 35(b)(2) apply to a response.~~

~~**(f) Call for a Vote.** A vote need not be taken to determine whether the case will be heard or reheard en banc unless a judge calls for a vote.~~

Rule 40. Petition for ~~Panel~~ Rehearing; En Banc Determination.

(a) Time to File; Contents; ~~Answer~~ Response; Action by the Court if Granted.

(1) Time. Unless the time is shortened or extended by order or local rule, a petition for ~~panel~~ rehearing may be filed within 14 days after entry of judgment, or, if the court subsequently issues a new or amended decision (on rehearing or otherwise), within 14 days after the entry of such decision. But in a civil case, unless an order shortens or extends the time, the petition may be filed by any party within 45 days after ~~entry of judgment~~ such entry if one of the parties is:

(A) the United States;

(B) a United States agency;

(C) a United States officer or employee sued in an official capacity; or

(D) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf—including all instances in which the United States represents that person when the court of appeals' judgment is entered or files the petition for that person.

(2) Contents. The petition must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition. Oral argument is not permitted.

(3) Answer Response; Oral Argument. Unless the court requests, no answer response to a petition for panel rehearing is permitted. But o Ordinarily rehearing will not be granted in the absence of such a request. If a response is requested, the requirements of Rule 40(b) apply to the response. Oral argument is not permitted.

(4) Action by the Court. If a petition for panel rehearing is granted, the court may do any of the following:

(A) make a final disposition of the case without reargument;

(B) restore the case to the calendar for reargument or resubmission; or

(C) issue any other appropriate order.

(b) Form of Petition; Length. The petition must comply in form with Rule 32. Copies must be served and filed as Rule 31 prescribes. Except by the court's permission:

(1) a petition for panel rehearing produced using a computer must not exceed 3,900 words; and

(2) a handwritten or typewritten petition for panel rehearing must not exceed 15 pages.

(c) En Banc Rehearing.

(1) When Ordered. A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be reheard by the court of appeals en banc. An en banc rehearing is not favored and ordinarily will not be ordered unless:

(A) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or

(B) the proceeding involves a question of exceptional importance.

(2) Call for a Vote. A vote need not be taken to determine whether the case will be reheard en banc unless a judge calls for a vote.

(3) Request for Rehearing En Banc. A party's petition for rehearing may request en banc determination. The number of copies of the petition to be filed must be prescribed by local rule and may be altered by

order in a particular case. The petition must begin with a statement that either:

(A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or

(B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.

(4) Panel's Authority. A party's request for en banc rehearing of a panel decision does not limit the panel's authority to act under Rule 40(a)(4).

(d) Initial Hearing En Banc. A case may be heard initially en banc, and a party may petition therefor. The petition must be filed by the date when the appellee's brief is due. The provisions of Rule 40(c)(1)–(2) apply to an initial hearing en banc, and those of Rule 40(a)(3), (b), and (c)(3) apply to a petition for such a hearing.

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TAB 5B

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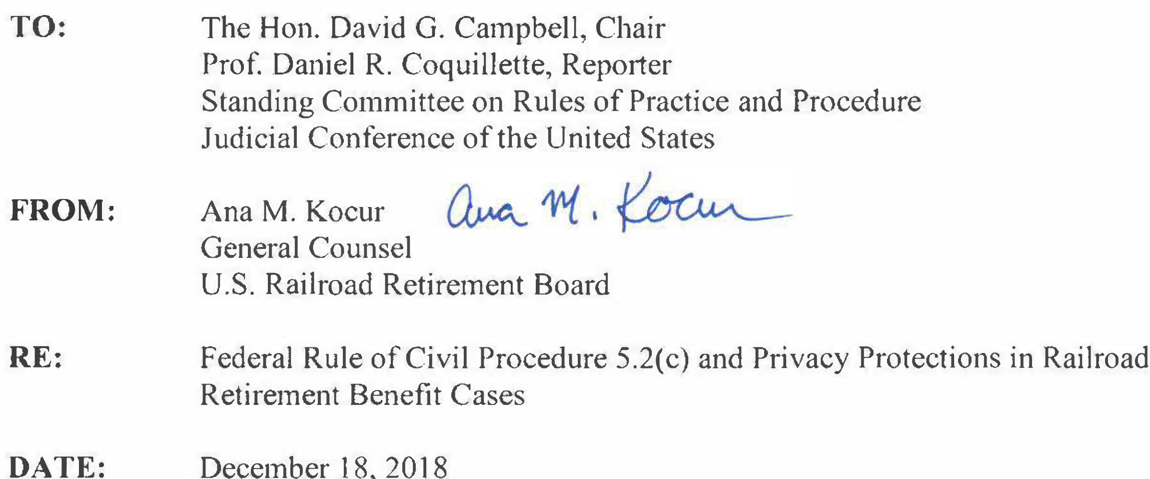
UNITED STATES OF AMERICA
RAILROAD RETIREMENT BOARD
844 NORTH RUSH STREET
CHICAGO, ILLINOIS 60611-1275

GENERAL COUNSEL

MEMORANDUM



TO: The Hon. David G. Campbell, Chair
Prof. Daniel R. Coquillette, Reporter
Standing Committee on Rules of Practice and Procedure
Judicial Conference of the United States

FROM: Ana M. Kocur
General Counsel
U.S. Railroad Retirement Board

RE: Federal Rule of Civil Procedure 5.2(c) and Privacy Protections in Railroad Retirement Benefit Cases

DATE: December 18, 2018

I understand from the May 1, 2018 memorandum of the Committee on Court Administration and Case Management of the Judicial Conference of the United States that the Standing Committee has been asked to consider whether any changes to Fed. R. Civ. P. 5.2(c) or related rules are needed to protect personal and sensitive information of individuals in social security and immigration cases. I am writing to propose that Fed. R. Civ. P. 5.2(c) be revised to include actions for benefits under the Railroad Retirement Act in the types of cases limiting remote access to electronic files.

The Railroad Retirement Act (RRA), 45 U.S.C. § 231 *et seq.*, replaces the Social Security Act with respect to employment in the railroad industry and provides monthly annuities for employees who meet certain age and service requirements, including annuities based on disability. Many family relationships in the RRA are defined by reference to the Social Security Act.[1] Courts have also consistently recognized the similarities between benefits

[1] Section 2(c)(4) of the RRA, 45 U.S.C. § 231a(c)(4) (defining "divorced wife" by reference to section 216(d) of the Social Security Act); section 2(d)(1) of the RRA, 45 U.S.C. § 231a(d)(1)) (defining "widow", "widower", "child", "parent", "surviving divorced wife", and "surviving divorced mother" by reference to sections 216(c), 216(g),

under the Social Security Act and the RRA, and have referred to social security case law in evaluating railroad retirement cases.[2] Much like claim files in Social Security benefit cases, claim files in Board cases contain substantial personal and medical information which is difficult to fully redact in a public court filing. Since the Advisory Committee on Civil Rules noted in 2007 that actions for benefits under the Social Security Act are entitled to special treatment due to the prevalence of sensitive information and the volume of filings, I believe it is appropriate to extend this recognition and privacy protection to actions for benefits under the RRA.

Section 8 of the RRA provides that decisions of the Board determining the rights or liabilities of any person under the Act shall be subject to judicial review in the same manner and subject to the same limitations as a decision under the Railroad Unemployment Insurance Act, except that the statute of limitations for requesting review of a decision with respect to an annuity, supplemental annuity, or lump-sum benefit must be commenced within one year of the Board's decision. 45 U.S.C. § 231g. In turn, section 5(f) of the Railroad Unemployment Insurance Act provides for review of a final decision of the Board by filing a petition for review in one of three United States courts of appeals:

1) The United States court of appeals for the circuit in which the claimant or other party resides or has its principal place of business or principal executive office;
2) The United States Court of Appeals for the Seventh Circuit; or
3) The United States Court of Appeals for the District of Columbia Circuit.

45 U.S.C. § 355(f). Under an agreement with the Department of Justice in place since September 1937, the legal staff of the Board handles litigation of benefits cases in the circuit courts of appeals. Although the Board does not generally litigate cases in the federal district courts, Fed. R. App. P. 25(a)(5) provides that privacy protection in proceedings such as appeals of final Board decisions is governed by Fed. R. Civ. P. 5.2. Because the Board may be called to litigate these types of cases across the country in any

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216(e), 202(h)(3), 216(d), and 216(d) of the Social Security Act respectively); section 2(d)(4) of the RRA, 45 U.S.C. § 231a(d)(4) (applying rules in section 216(h) of the Social Security Act when determining whether an applicant under the Railroad Retirement Act is a wife, husband, widow, widower, child, or parent of a deceased railroad employee).

[2] *See Bowers v. Railroad Retirement Board*, 977 F.2d 1485, 1488 (D.C. Cir. 1992) ("The standard for granting annuities under [section 2(a)(1)(v) of the Railroad Retirement Act] closely resembles that for making disability determinations under the Social Security Act."); *Burleson v. Railroad Retirement Board*, 711 F.2d 861, 862 (8th Cir. 1983) ("The standards and rules for determining disability under the Railroad Retirement Act are identical to those under the more frequently litigated Social Security Act, and it is the accepted practice to use social security cases as precedent for railroad retirement cases."); *Soger v. Railroad Retirement Board*, 974 F.2d 90, 92 (8th Cir. 1992) ("The regulations governing social security disability cases, 20 C.F.R. §§ 404.1501 *et seq.*, may be used by the Board in evaluating disability under the Railroad Retirement Act.").

geographic circuit, a uniform rule applicable to all actions for benefits under the RRA would be beneficial to both the Board and individual claimants who are seeking review of the Board's decisions and place railroad retirement beneficiaries in the same position as beneficiaries under the Social Security Act for privacy protection purposes.

Regarding the text of Fed. R. Civ. P. 5.2(c), this proposed change may be effectuated simply by inserting the phrase "or Railroad Retirement Act" in the first sentence of the rule, after "in an action for benefits under the Social Security Act". Thank you for your consideration. Please let me know if I can provide any additional information to help you evaluate this proposed change.

cc: Committee on Court Administration and Case Management

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TAB 5C

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To: Advisory Committee on the Federal Rules of Appellate Procedure

From: FRAP 25 (Railroad Retirement) Subcommittee

Date: March 5, 2020

Re: Proposed Amendments to FRAP 25

Here is the working draft of FRAP 25 that emerged from the last meeting of the Advisory Committee:

Rule 25. Filing and Service

(a) **Filing**

* * * *

(5) **Privacy Protection**. An appeal in a case whose privacy protection was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same rule on appeal. In all other proceedings, privacy protection is governed by Federal Rule of Civil Procedure 5.2, except that Federal Rule of Criminal Procedure 49.1 governs when an extraordinary writ is sought in a criminal case. The provisions on remote access in Federal Rule of Civil Procedure 5.2(c)(1) and (2) apply in a petition for review of a benefits decision of the Railroad Retirement Board under the Railroad Retirement Act.

* * * *

Committee Note

There are close parallels between the Social Security Act and the Railroad Retirement Act. One difference, however, is that judicial review in Social Security cases is initiated in the district courts, while judicial review in Railroad Retirement cases is initiated directly in the courts of appeals. Federal Rule of Civil Procedure 5.2 protects privacy in Social Security cases by limiting electronic access. The amendment extends those protections to Railroad Retirement cases.

The subcommittee discussed two matters that had been raised at the meeting of the Standing Committee in January.

First, although the style consultants suggested (albeit with a question mark) adding the word "privacy" before the phrase "provisions on remote access," concern was raised that this was both unclear and could create substantive issues. The subcommittee recommends not adding the word.

Second, questions were raised about the scope of the proposal compared to the scope of the work of the Railroad Retirement Board (RRB). The current draft refers to "review of a benefits decision of the Railroad Retirement Board under the Railroad Retirement Act."

Does the RRB render decisions that are not under the Railroad Retirement Act? (If not, the phrase "under the Railroad Retirement Act" may be superfluous.)

The proposal, in accordance with the request of the RRB, covers both disability cases and retirement cases. The disability cases involve lots of medical records. But even the retirement cases have sensitive information. The file identifier is the Social Security number, and it is difficult to redact the claimant's Social Security number from the administrative record and still have the records be meaningful.

The RRB also administers the Railroad Unemployment Insurance Act, which deals with unemployment insurance. The RRB does not seek to have these cases covered. They are very, very rarely appealed to the courts of appeals.

Thus the RRB does render decisions that are not under the Railroad Retirement Act. For that reason, the phrase "under the Railroad Retirement Act" is not superfluous.

One might also ask if the RRB renders decisions that are not "benefits" decisions; if not, the word "benefits" may be superfluous. But it is difficult to see how the word "benefits" does any harm, and it helps explain why there is special protection.

One might also ask if there are petitions for review under the Railroad Retirement Act that are not directed at the RRB; if not, the phrase "Railroad Retirement Board" might be superfluous. But clarity is enhanced by naming the RRB.

For these reasons, the subcommittee does not recommend any changes to the working draft.

TAB 5D

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American Academy of Appellate Lawyers

19-AP-B

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Arthur J. England Jr.

TO: THE HONORABLE MICHAEL CHAGARES, CHAIR FEDERAL ADVISORY COMMITTEE ON APPELLATE RULES

FROM: AMERICAN ACADEMY OF APPELLATE LAWYERS

DATE: APRIL 26, 2019

RE: PROPOSED RULE REGARDING DECISIONS BASED ON UNBRIEFED GROUNDS

The American Academy of Appellate Lawyers proposes that the Federal Rules of Appellate Procedure be amended to address appeals that are decided on legal issues or theories not raised by the parties.[1] The proposed rule provides that, before a court decides an appeal on a ground not raised by parties, the court shall give notice that it is considering a previously unaddressed ground and provide an opportunity to brief it.

The proposed amendment addresses a practice that harms the integrity of the appellate process. To avoid limiting what appellate courts may consider in deciding cases, the proposed amendment merely requires that, before an appeal is decided on a ground the parties framing the appeal have not raised or addressed, the court must give parties notice and an opportunity to be heard on the unbriefed issue or theory.

Proposed Rule 32.2

Rule 32.2
Decisions on Unbriefed Grounds

Before a decision is issued based on a ground not briefed or argued by any party, the court shall provide a notice to the parties that describes the ground, and the court shall give the parties the opportunity to submit supplemental briefing on that ground.

[1] Positions taken in this recommendation state views determined by the Academy's internal process and should not be attributed to individual Fellows, their places of work, or their clients.

1300 Piccard Drive, Suite LL 14 • Rockville, MD 20850 • (240) 404-6498 • Fax: (301) 990-9771 • Email: aaal@appellateacademy.org • Web: www.appellateacademy.org

The problem addressed by the proposed rule

An appellate decision based on a ground not raised by the parties may not be a common occurrence, but it happens.[2] The vast majority of members attending the Academy's Fall 2017 meeting indicated they have received decisions based on issues not presented in the briefs.

Many appellate courts invite supplemental briefs when a court's own research indicates potential grounds for decision other than those raised by the parties.3 But the consequences are severe when courts decide appeals based upon grounds the parties did not have an opportunity to brief. Issues and theories considered without notice and briefing may deprive the appellate court of the reasons those matters were not developed at trial or on appeal.

In addition to being necessary for integrity and quality in appellate decision-making, the opportunity to be heard before decisions are made is fundamental to the American adversary system of justice and due process of law. Notice and opportunity to be heard are also critical to the public perception of justice under law.

Established procedure is necessary

Rule-making provides the procedural mechanism to ensure that litigants can be heard before the court renders decisions in their cases based upon grounds the parties did not have an opportunity to develop or contest. Court rules set forth explicit procedures for providing notice to parties before courts determine facts relevant to the legal issues that determine the outcome of their cases. For example, the Federal Rules of Civil Procedure explicitly require notice and a reasonable time to respond before the court may grant summary judgment either *sua sponte* or on grounds not raised by a party.[4] A court is required to give notice to the parties before appointment of a special master,[5] and also must give notice and an opportunity to respond before

---

[2] *See* E. King Poor & James E. Goldschmidt, Sua Sponte *Decisions on Appeal*, FOR THE DEFENSE, Oct. 2015, at 62.

[3] *See, e.g. In re Woolsey*, 696 F.3d 1266, 1279 (10th Cir. 2012) (Gorsuch, J.) (discussing supplemental briefing by the parties in response to the court's request in light of authority discussing a different statutory basis for the relief sought by the appellant).

[4] Fed. R. Civ. P. 56(f): *Judgment Independent of the Motion.* After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;
(2) grant the motion on grounds not raised by a party; or

[5] Fed. R. Civ. P. 53(b)(1): *Notice.* Before appointing a master, the court must give the parties notice and an opportunity to be heard. Any party may suggest candidates for appointment.

imposing sanctions for a violation of Federal Rule of Civil Procedure 11.[6]

The Academy's proposed Rule of Appellate Procedure is thus consistent with other rules designed to ensure due process.

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[6] Fed. R. Civ. P. 11(c)(1): *In General.* If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on recommendation.

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TAB 5E

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To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Unbriefed Grounds Subcommittee

Date: March 6, 2020

Re: Suggested Rule 32.2 (19-AP-B)

At the last meeting of the Advisory Committee, a subcommittee was appointed to consider the suggestion, submitted by the American Academy of Appellate Lawyers (AAAL), to address appeals decided on grounds not raised by the parties. In particular, the AAAL suggests that, before a decision is issued on grounds not briefed or argued by the parties, the court provide notice of the ground and an opportunity to submit supplemental briefing. It analogizes to Federal Rule of Civil Procedure 56(f) that requires notice and opportunity to be heard before summary judgment is granted on grounds not raised by a party.

While the subcommittee agreed that the AAAL has raised a legitimate concern, the subcommittee does not recommend rulemaking in this area.

First, the opportunities for briefing and submission are different in an appeal than before a trial court, making Civil Rule 56 not a good analogue for this suggestion. In addition, requiring a panel to invite supplemental briefing will drag out the appeal process, often unnecessarily. It could also lead to disputes about when an issue has been sufficiently raised or briefed by the parties. A court can always request supplemental briefing when the panel deems it appropriate. If it doesn't, a petition for rehearing is always an available option for the parties.

The subcommittee recommends that, instead of rulemaking, a letter to the Chief Circuit Judges forwarding the AAAL's concern (and letter) is the preferred approach.

The chair forwarded the AAAL's concern to the Court Administration and Case Management (CACM) Committee for its review. Before the approach recommended by the subcommittee is implemented, the committee needs to receive word from CACM as to whether it desires to take action.

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TAB 6A

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To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett, Reporter

Date: March 5, 2020

Re: Matters Before Joint Subcommittees

Appeal Finality

The joint Civil-Appellate subcommittee is exploring finality in consolidated cases, and whether a rule amendment in response to *Hall v. Hall*, 138 S. Ct. 1118 (2018), is appropriate. The subcommittee continues to review data being gathered by the FJC. *Hall* held that consolidated cases retain their separate identities for purposes of appeal, so that when one of the consolidated cases reaches judgment, that judgment is appealable without waiting for the disposition of other cases with which it was consolidated.

Emery Lee of the FJC has now searched dockets in all 94 districts for filings in 2015 through 2017. Not including MDL cases, there are 20,730 cases with Civil Rule 42 consolidations in this data set—or 2.5% of federal civil filings. These consolidations resulted in 5,953 lead cases filed in 2015-17.

The next step will be to sample these cases in order to try to identify cases in which a *Hall* issue may have arisen.

E-Filing Deadline (19-AP-E; 19-AP-F; 19-BK-H; 19-CR-C; 19-CV-U)

The joint subcommittee exploring the possibility of an earlier-than-midnight deadline for electronic filing continues to gather information, including information from the FJC about actual filing patterns.

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TAB 6B

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APPEAL FINALITY AFTER CONSOLIDATION
JOINT CIVIL-APPELLATE SUBCOMMITTEE

The joint subcommittee of the Appellate and Civil Rules Committees was appointed to examine the question whether rules amendments might be proposed to address the effects of Civil Rule 42 consolidation orders on the final-judgment approach to appeal jurisdiction. In *Hall v. Hall*, 138 S. Ct. 1818 (2018), the Court ruled that disposition of all claims among all parties to a case that began as an independent action is a final judgment, notwithstanding the consolidation of that action with one or more other actions. This rule confirmed one of four approaches that had been taken in the courts of appeals —— although most circuits had taken one of three other approaches. At the end of its opinion, the Court suggested that if its ruling created problems, the solution should be studied in the Rules Committees.

The FJC has undertaken a research project to help the subcommittee determine whether empirical data can help in studying possible rules amendments. Dr. Emery Lee has taken the lead in this project. The subcommittee is deferring further consideration of early drafts of possible rules amendments while the FJC research advances.

The research project has begun by gathering data about Rule 42 consolidations in all civil actions filed in all districts in 2015, 2016, and 2017. This period includes actions that were terminated before the decision in *Hall v. Hall*, as well as others that continued after the decision. That will provide an opportunity to learn whether useful comparisons can be made between experience under *Hall v. Hall* and under each of the four approaches that had been taken before *Hall v. Hall*. Not all of these actions have concluded; it remains possible that additional consolidation orders will be entered. The early thought that it might prove useful to expand the study to include actions filed in 2018, 2019, and 2020 has been abandoned. The number of consolidations found during the initial study period should suffice to provide as much data as needed, and there is little reason to pursue an inquiry that would take the work into 2022 or 2023.

Data collection was completed for all 94 districts by the end of February 2020. A few major results are summarized below. The next steps will be to undertake analysis of the data to uncover the number of events that may fall under the decision in *Hall v. Hall*. Those events then will be examined to determine experience with appeals actually taken or attempted, and, to the extent possible, experience with appeals that might have been taken but were not.

Total civil action filings during the study period were 843,996, including multidistrict proceedings. Consolidations in MDL proceedings, however, were excluded in counting Rule 42 consolidations. The data found a total of 20,730 cases included in Rule 42 consolidations. 5,953 were "lead" cases; the remainder were "member" cases. Together, these cases accounted for 2.5% of all

3181 civil actions, and an indeterminate higher fraction of all civil
3182 actions that were not included in MDL proceedings. This number of
3183 actions is large enough to justify, indeed to require, that the
3184 next steps be carried out by sampling.

3185 The data show that ten nature-of-suit codes account for 58% of
3186 all Rule 42 consolidations. Patent actions alone account for 13%,
3187 followed by "civil rights other" (7%); other contract actions (6%);
3188 prisoner civil rights (6%); securities (6%); bankruptcy appeals
3189 (6%); motor vehicle personal injury (4%); habeas corpus (4%);
3190 insurance (4%); and consumer credit (3%). One question that should
3191 be addressed in determining how heavily to sample the data is
3192 whether some of these types of actions are sufficiently distinct
3193 from general civil filings to be undersampled. Bankruptcy appeals,
3194 for example, seem distinct from other civil actions, and the
3195 concept of finality in bankruptcy is more flexible than § 1291
3196 finality.

3197 A comparison of consolidation rates among the districts
3198 suggests that the rates are affected by the types of filings that
3199 characterize the districts. Districts with a high share of patent
3200 actions, for example, tend to be among those with the most
3201 consolidations.

3202 The ways in which courts dispose of consolidated actions are
3203 important in tracing the effects of *Hall v. Hall*. Eighty-four
3204 percent of the lead cases in the study have terminated in the
3205 district court. Thirty-two percent were coded as "settled." Another
3206 22% were "other dismissal," and 10% were voluntary dismissals ––
3207 often these dispositions reflect settlements. Thirteen percent were
3208 dismissed on motion. Only 2% were disposed of at trial.

3209 For lead cases that were disposed of, the average time from
3210 filing to disposition in the district court was 517 days. Since one
3211 in six cases had not yet reached disposition, the overall average
3212 likely will prove somewhat longer. For all consolidated cases,
3213 however, the average time was 379 days.

3214 Deciding how to select the sample for further study is the
3215 next step. The focus should be on dispositions that are likely to
3216 generate issues under *Hall v. Hall*. Settlements seem less likely
3217 candidates –– even when fewer than all cases in the consolidation
3218 are settled, settlement of one is not likely to generate an
3219 occasion for appeal. But even settlements may need to be examined
3220 carefully –– one action in the consolidation may be terminated by
3221 the court, to be followed later by a settlement that disposes of
3222 all remaining actions, and that then gives rise to an attempt to
3223 appeal termination of the first action. Dispositions on motion are
3224 more likely candidates, whether by a Rule 12(b) motion, summary
3225 judgment, or some other motion.

3226 Once the sample of cases is established, the next step will be
3227 to identify dispositions that fit within the ruling in *Hall v.*
3228 *Hall*. For those cases, an attempt will be made to find out whether

3229 and when appeals were taken or attempted, whether the parties paid
3230 heed to *Hall v. Hall*, whether appeals were taken too late and
3231 thwarted by not paying attention, whether appeals were taken too
3232 late but survived because neither the parties nor the court invoked
3233 *Hall v. Hall*, and any added questions that may be suggested by
3234 working through the case files.

3235 Much work lies ahead for the FJC study, even if it remains
3236 focused just on actions filed in 2015, 2016, and 2017. The
3237 subcommittee will pay close attention to the study as it
3238 progresses, seeking to identify any ways in which it can help guide
3239 the continuing work.

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TAB 7A

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19-AP-C
19-CR-A
19-CV-Q

Dear AOUSC Committees on Civil, Criminal, and Appellate Rules —

There are four major problems with the current civil, criminal, and appellate IFP[1] rules and forms:

1. There is no publicly known definition of what financial standards qualify a person for IFP status.
2. There is no clear rule as to when an IFP litigant needs to update the court about a change in their financial conditions.
3. The IFP forms use ambiguous terms, for which the courts have not given clear definitions.
4. The IFP forms ask for information outside the legitimate scope of 28 U.S.C. § 1915.

All poor litigants deserve to know the rules for IFP qualification, definitions of terms used in forms, and when they must update a court about a change in their financial circumstances; to have uniformity in IFP determinations, know, and to be free of invasive questions that are unnecessary to making IFP determinations. Third parties also have rights to not have their information disclosed without consent; making an IFP application does not convey any right to violate others' privacy.

Pursuant to the Rules Enabling Act and APA, I hereby petition the Committees for rulemaking to cure each of the above, as detailed below. I request to participate remotely at any hearing on the matter, and to receive emailed copies of all relevant agendas, minutes, reports, or other documents.

Respectfully submitted,
Sai[2]
legal@s.ai
+1 510 394 4724

[1] For the purposes of the criminal rules, I use "IFP" synonymously with "CJA".
[2] Sai is my full legal name; I am mononymous. I am agender; please use gender-neutral pronouns. I am partially blind. Please send all communications, in § 508 accessible format, by email.

1. Financial qualification rules for IFP status

Not one court in the country has given a clear statement of the rules for IFP qualification, such as an objective standard of counted assets or income, qualifying thresholds, or discretionary elements.

This is despite the fact that two appellate courts — the Third Circuit[3] and Fifth Circuit[4] — permit *clerks* to grant IFP applications (and in the Fifth, to *deny* them as well). Since clerks have no Article III authority, and it would be improper for them to be vested to exercise discretion, we can infer that both courts have a policy dictating the qualifying standards. Neither court has published it.[5]

Certainly, courts have a duty to guard the public purse from improper claims of poverty. That duty extends to IFP applicants as well, to not *make* an IFP claim unless it is justified — but with no clear standard, it is impossible for potential IFP applicants to make an informed decision.

Contrast the Legal Services Corporation regulations, 45 C.F.R. Part 1611, which implement an identical duty and for an identical purpose. The LSC is a Federal 501(c)(3) corporation, which grants Federal funds to pay for legal aid for millions of poor people throughout the United States. It has promulgated regulations to determine financial eligibility including multiple discretionary factors, excluded assets, etc. It delegates to local LSC organizations determinations such as asset thresholds, costs of living, and assistance programs (e.g. SSI, SNAP, TANF, or Medicaid) whose recipients automatically qualify. *See* e.g. Utah Legal Services' Financial Eligibility Guidelines.[6]

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[3] 3rd Cir. standing order of January 22, 1987

[4] 5th Cir. R. 27.1.17

[5] Courts must publish all "rules for the conduct of the business", "order[s] relating to practice and procedure", and "operating procedures". 28 U.S. Code §§ 332(d)(1), 2071(b), & 2077(a). *See In re Sai*, No. 19-5039 (1st Cir. *filed* May 15, 2019).

[6] https://www.utahlegalservices.org/sites/utahlegalservices.org/files/Financial%20Eligibility%20Guidelines%202.19.pdf

The LSC's regulations for financial qualification for government-funded free legal services are reasonable, well-tested, regularly updated[7], and Congressionally approved. They set out clear asset and income thresholds, asset carve-outs for e.g. work supplies and homes, etc. They were thoroughly debated with low-income legal aid advocates, and were promulgated through notice and comment rulemaking.[8] They therefore make for a very easy and clear reference by which the judiciary can craft a fair and uncontroversial rule, already well familiar to the judiciary, which needs little to no further elaboration: "if you qualify for LSC, you qualify for IFP".

Adopting these standards would protect IFP litigants' privacy, while simultaneously making decisions more transparent than they are now. Court orders granting IFP status could simply say "[litigant] has demonstrated IFP qualification under the standards set forth in 45 C.F.R. § 1611.3(c)(1) + (d)(1)". No further detail of the applicant's finances is needed, and this names a clear standard.

I therefore petition that the Rules Committees promulgate rules stating that a § 1915 IFP applicant shows sufficient[9] basis for qualification if they meet any of the Legal Services Corporation's standards[10] of financial qualification, 45 C.F.R. Part 1611, as elaborated by the applicant's local[11] LSC recipient(s) per § 1611.3(a).

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[7] https://www.federalregister.gov/documents/2019/02/04/2019-00889/income-level-for-individuals-eligible-for-assistance (84 FR 1408 (2019), adjusting for 2019 federal poverty guidelines)

[8] https://www.federalregister.gov/documents/2005/08/08/05-15553/financial-eligibility (70 FR 45545 (2005), revising 45 C.F.R. Part 1611 in entirety)

[9] This is deliberately phrased as "sufficient" — not "necessary". Courts would retain discretion to grant IFP status under circumstances not covered by LSC's standards — so long as they state the standard that they have applied with enough clarity to enable IFP litigants to comply with their obligation to update the court (*see* below).

[10] Part 1611 has *multiple* distinct standards: (1611.3(c)(1) or 1611.5(a)(1–4)) plus (1611.3(d)(1) or (d)(2)); or 1611.4(c).

[11] For applicants living outside the United States, the court should substitute the LSC recipient in the court's jurisdiction with a population most socioeconomically analogous to the applicant's.

2. Requirements to update the courts on change in circumstances

It is neither feasible, nor desirable to anyone, that IFP litigants update courts of *every* change in financial status. Nobody cares if an IFP litigant receives a Christmas gift of $100, or if their expenses in a given month vary a bit from what they set out in their IFP application. Filing updates about minor changes would risk sanctions for "multipl[ying] the proceedings in any case", 28 U.S.C. § 1927, burden courts with immaterial filings, and expose litigants to unnecessary invasion of privacy..

Yet if an IFP applicant were to unexpectedly win a million dollars one month after they receive IFP status, they surely must update the court, withdraw from IFP status, and pay the fee. Failure to do so would subject the previously-IFP litigant to the severe sanction of dismissal "at any time" if "the allegation of poverty is untrue", 28 U.S.C. § 1915(e)(2).

Somewhere between these two extremes lies a threshold triggering obligation. The obvious place for this trigger is at the qualifying threshold. This is the rule used by the LSC, 45 C.F.R. § 1611.8.

I therefore petition that the Rules Committees promulgate rules stating that a person with IFP status

A. need not update the court so long as they remain within the standard under which they qualified, but
B. must update the court when they become aware that they no longer meet that standard.[12]

[12] This does not mean automatic disqualification — the litigant may still qualify under a different standard, e.g. one which requires a discretionary exemption, under 45 C.F.R. § 1611.5(a)(4) — but it does create a clear point at which the court should reëxamine financial qualification.

This necessarily also implies that a court granting IFP status must *clearly state* the standard under which it granted IFP status. It is impossible for a litigant to comply with their obligation to update about a change that might alter their qualification unless they know the standard that was applied.

3. Ambiguous terminology in IFP forms

The courts have given no precise definition of the specific terms in the standard IFP affidavits..

Certainly the terms in the IFP affidavits, such as “income”, *can* have clear, specific meanings.

The problem is that they don’t have any specified meanings in *this* context — and they are amenable to multiple reasonable interpretations.[13] In fact, many of them *do* have specific meanings in other contexts, such as under IRS or Social Security regulations — and those meanings differ between agencies, proving that they are facially vague.

IFP applicants have a due process right to know the precise meaning of terms to which they are expected to swear under penalty of perjury. They risk an unjust accusation of perjury — and dismissal — if their interpretation differs from a court’s (thus far secret) interpretation. Without clarification, the IFP forms are unconstitutionally vague.

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[13] For example: Is an unmarried, unregistered partner a “spouse” or “family”? What about common-law spouses (and by which jurisdiction’s definition)? Do Patreon donations constitute “self-employment income”? Does Bitcoin constitute “cash” or “other financial instrument”, and how does one treat its appreciation or depreciation? Is a Bitcoin exchange, or PayPal, a “financial institution”? Are outgoing donations “support paid to others”? Are domain names, software, inventions, etc. “assets”? Is “value” the original price, currently obtainable resale price, cost to re-acquire, depreciated value by some formula, hypothetical market value, velc.? Is PACER research “expenses … in conjunction with this lawsuit”? Are art, disability-related modifications, musical instruments, appliances, printers, etc. “ordinary household furnishings”? Is an expense occurring once every few years, such as purchase or repair of a computer, a “regular” expense? Does a UOCAVA “voting residence” count as a “legal residence”? Are sales taxes, VAT, or the NHS healthcare surcharge “taxes”? Are visa costs “expenses”? What of joint property? Are litigation settlements or fee/cost awards “income”? What is a large enough change to be “major”?

All of the above are actual questions that I personally must know the answer to in order to correctly fill out FRAP Form 4, but for which there is no available answer in the context of an IFP application.

This clarification can be very readily provided, by simply adopting the definitions of dedicated regulatory bodies as defining the terms used in IFP forms.

The LSC defines "assets" and "income", 45 C.F.R. 1611.2. Crucially, both are limited to what is "currently and actually available to the applicant". This rule was adopted in preference to making a distinction between "liquid" and "non-liquid" assets, and focus on the practical requirements that apply to poor people seeking legal aid. 70 FR 45545, 45547 (2005).

The IRS defines virtually all other financial terms that could be relevant to an IFP application, including e.g. "household" (26 C.F.R. § 1.2-2), "self-employment" (26 C.F.R. § 1.1402(a)-1), "spouse" (26 C.F.R. § 301.7701-18), "gifts" (26 C.F.R. § 25.2503-1), etc. It has also issued guidance for evolving issues such as Bitcoin (IRS Notice 2014-21).[14]

I therefore petition that the Rules Committees:

A. promulgate rules stating that every term used in FRAP Form 4, AO 239, AO 240, and CJA 23 is defined to be identical to those terms' definitions in regulations that the Committees identify;
B. give preference to LSC and then IRS regulations; and
C. amend FRAP Form 4, AO 239, AO 240, and CJA 23 to add an appendix listing the regulatory definition for each term used, by citation.

[14] https://www.irs.gov/pub/irs-drop/n-14-21.pdf

4. Courts' IFP forms request information not authorized by 28 U.S.C. § 1915.

The IFP statute contemplates that courts will assess a prisoner's assets and income, and all IFP affiants' general poverty. However, the IFP forms go much further than the statute permits. *See*[15] e.g.:

A. spouse's income, assets, or debts (unless the affiant has a legal right to expend them for litigation, e.g. if jointly owned), or employment history
B. identities of third parties (spouse, debtor, creditor, financial institution, credit card company, department store, supporter or supportee, etc.)
C. employment & employment history (rather than just current income)
D. sources that can't be used to pay litigation costs (e.g. non-fungible/unavailable[16] or exempt[17])
E. expense breakdowns more detailed than broad categories (e.g. "mandatory costs", "costs of living / working", "exempt", or "discretionary / luxury")
F. make, model, year, and registration # of vehicles
G. legal residence (except as relevant to cost of living & poverty guidelines[18])
H. phone number
I. age
J. years of schooling

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[15] *See also* FRAP Form 4 question re SSN last 4 digits, removed pursuant to my [proposal to AOUSC](), suggestion 15-AP-E, and promulgated by Supreme Court order of April 26, 2018.

[16] 45 C.F.R. § 1611.2(d): ""Assets" means cash or other resources of the applicant or members of the applicant's household that are *readily convertible to cash*, which are *currently and actually available to the applicant*." (emphasis added)

[17] § 1611.2(i): "… [Income] do[es] not include the value of food or rent received by the applicant in lieu of wages; money withdrawn from a bank; tax refunds; gifts; compensation and/or one-time insurance payments for injuries sustained; non-cash benefits; and up to $2,000 per year of funds received by individual Native Americans that is derived from Indian trust income or other distributions exempt by statute."

[18] Only Alaska & Hawaii are distinguished. https://aspe.hhs.gov/poverty-guidelines

These questions are not limited to assessing the affiant's actual, current poverty. Many serve only to pass judgment on the affiant's lifestyle, assess the affiant's ability to earn money (which is not the standard), or otherwise exercise a paternalistic inquiry into the affiant's finances. These are not authorized objectives under 28 U.S.C. § 1915.

By requiring such questions of IFP applicants, courts violate applicants' privacy and dissuade qualified litigants from filing for IFP status.

Furthermore, it is often illegal to answer questions identifying third parties, let alone stating anything about their finances.[19] As a US citizen residing in the UK, obligated to obey UK and EU law, I am subject to very strict legal restrictions under the EU GDPR and UK Data Protection Act 2018. Courts must not demand information that is illegal to give. Here, there is no valid statutory basis for requesting third-party information at all. § 1915 only talks about the *applicant's* poverty; it says nothing about their spouse, creditors, debtors, supporters, etc.

I therefore petition that the Rules Committees amend FRAP Form 4, AO 239, AO 240, and CJA 23 to remove or amend all questions requesting information listed above.

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[19] Under 12 U.S.C. § 3403 (Right to Financial Privacy Act), 5 U.S.C. § 552a(g) (Privacy Act), 18 U.S.C. § 1030(g) (Computer Fraud and Abuse Act), 15 U.S.C. § 1681b *et seq* (Fair Credit Reporting Act), 15 U.S.C. § 1692c *et seq* (Fair Debt Collection Practices Act), and 47 U.S.C. § 227(b)(3) (Telephone Consumer Protection Act), disclosure of such information without consent is unlawful.

Third parties' information disclosed on an IFP affidavit, as with affiant's spouse, creditors, and debtors, also implicate independent privacy rights. *See Gardner v. Newsday, Inc.*, 895 F.2d 74, 79-80 (2d Cir. 1990). An IFP affiant publicly disclosing creditor or debtor information may violate the FDCPA, §§ 1692b, 1692c, & 1692k. This information is also a "consumer credit report", for which public disclosure would likely be actionable under the FCRA. *See* 15 U.S.C. §§ 1681b, 1681n, & 1681o.

TAB 7B

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To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett, Reporter

Date: March 6, 2020

Re: IFP Status (19-AP-C; 19-CR-A; 19-CR-Q)

Sai has submitted a suggestion to the Civil, Criminal, and Appellate Committees regarding how courts decide whether to grant IFP status. My memo discussing this suggestion (from October 3, 2019) follows this memo.

The Civil Rules Committee chose not to pursue this suggestion, concluding that case-by-case determinations, taking into account local circumstances, were appropriate under the IFP statute, and that changes to the forms used in the district courts could be changed, if appropriate, by the Administrative Office. The Criminal Rules Committee did not want to take the lead on this suggestion, but expressed some interest if another committee took the lead. Because the Appellate Rules Committee had the most interest in this suggestion, this Committee will consider it.

I suggest that a subcommittee be appointed to consider the suggestion.

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TAB 7C

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To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett, Reporter

Date: October 3, 2019

Re: IFP Status (19-AP-C; 19-CR-A; 19-CR-Q)

Sai has submitted a suggestion to the Civil, Criminal, and Appellate Committees regarding how courts decide whether to grant IFP status. Some preliminary discussion of this matter at each Advisory Committee seems appropriate before deciding how to proceed.

IFP status is governed by statute. 28 U.S.C. § 1915 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.

Prior to the Prison Litigation Reform Act of 1996, this provision required that a person "make affidavit that he is unable to pay costs or give security therefor." The PLRA added the requirement that the affidavit include "a statement of all assets such prisoner possesses." Omnibus Consolidated Rescissions and Appropriations Act of 1996, PL 104–134, April 26, 1996, 110 Stat 1321.

In 1948, the Supreme Court explained that the statute "provides language appropriate for incorporation in an affidavit," and that "where the affidavits are written in the language of the statute it would seem that they should ordinarily be accepted, for trial purposes, particularly where unquestioned and where the judge does not perceive a flagrant misrepresentation." Adkins v. E.I. DuPont de Nemours & Co., 335 U.S. 331, 338–40 (1948). This would appear to make a barebones affidavit

that merely recited that the person is unable to pay fees or give security generally acceptable.

Nevertheless, when the Federal Rules of Appellate Procedure were promulgated in 1967, Rule 24 required a party seeking to proceed IFP on appeal to file a motion in the district court "together with an affidavit showing, in the detail prescribed in Form 4 . . . his inability to pay . . . . " 389 U.S. 1065, 1093 (1967). *See*, *e.g.*, *United States v. Scharf*, 354 F. Supp. 450, 451 (E.D. Pa.), *aff'd*, 480 F.2d 919 (3d Cir. 1973). Form 4, in turn, called for information about income (including employment, salary, self-employment, rent, interest, and dividend), assets (including cash and bank accounts, real estate, stocks, bonds, and car, but excluding ordinary household furnishings and clothing) and dependents. See attached Form 4 as originally promulgated. The Supreme Court itself had largely accepted barebones affidavits as sufficient until 1980, when it amended its Rules itself—perhaps after seeing a case where a doctor sought IFP status, and a case where hunters seeking big game licenses sought IFP status—to require the submission of the information called for by Form 4 of the Federal Rules of Appellate Procedure. Armed with that additional information, the Supreme Court began to regularly deny IFP status. And the cross-reference to Form 4 in the Supreme Court Rules continues to this day. Supreme Court Rule 39.1. That means that any change to Form 4 will also affect the Supreme Court.

As amended by the PLRA, the statute now requires "a statement of all assets such prisoner possesses," which has been understood to require all persons seeking IFP status—not just prisoners— to provide a statement of all assets. Current Form 4 is considerably more extensive than the original Form 4.

Thus while the statute now requires a statement of all assets, there is a history of using the rulemaking process to require more information than the statute itself was understood to require, and thereby influence the application of the statutory standard.

The *Adkins* decision also established that the standard of poverty required for IFP status is not absolute destitution. It held:

> We cannot agree with the court below that one must be absolutely destitute to enjoy the benefit of the statute. We think an affidavit is sufficient which states that one cannot because of his poverty 'pay or give security for the costs * * * and still be able to provide' himself and dependents 'with the necessities of life.' To say that no persons are entitled to the statute's benefits until they have sworn to contribute to payment of costs, the last dollar they have or can get, and thus make themselves and their dependents wholly destitute, would be to construe the statute in a way that would throw its beneficiaries into the category of public charges. The public would not be profited if relieved of paying costs of a particular litigation only to have imposed on it the expense of supporting the person thereby made an object of public support. Nor does the result seem more desirable if the effect of this statutory interpretation is to force a litigant to abandon what may be a meritorious claim in order to spare himself complete destitution. We think a construction of the statute achieving such consequences is an inadmissible one. See cases collected in 6 A.L.R. 1281—1287 for a discussion as to whether a showing of complete destitution should be made under this and similar statutes.

Adkins, 335 U.S. at 338–40. *Adkins* "has not been overruled or in any way disapproved or restricted in a subsequent decision." Shapiro, et al., SUPREME COURT PRACTICE 8-18 (11th ed. 2019). There are some decisions that reflect a "stringent application of the Adkins standard." *Id*. at 8-20. *See Wrenn v. Benson*, 490 U.S. 89, 91 n.4 (1989) ($1,390.20 per month in salary, $72 in cash, $72,000 home, $250 savings bond, four dependents); *In re McDonald*, 489 U.S. 180, 182 n.6 (1989) (self-employment income of about $300 per month, no dependents, less than $25 in checking or savings account).

A recent article in the Yale Law Journal, which focuses on IFP practice in the district courts, contends that "there is a dizzying degree of variation across and within the ninety-four U.S. district courts." Andrew Hammond, *Pleading Poverty in Federal Court*, 128 YALE L. J. 1478, 1482 (2019). Hammond proposes eligibility for IFP status

based on any one of the following 1) net income at or below 150% of federal poverty level and assets less than $10,000, excluding home and vehicle; 2) eligibility for public assistance; 3) representation by pro bono attorney including one funded by Legal Services; 4) judicial discretion to determine that fees and costs cannot be paid without substantial hardship. *Id*. at 1522. He provides a proposed IFP form as well. Id. at 1565.

The second category may be the most promising, at least from the rulemaking perspective: One reason *Adkins* gave for not insisting on complete destitution as a standard was that the "public would not be profited if relieved of paying costs of a particular litigation only to have imposed on it the expense of supporting the person thereby made an object of public support." 335 U.S. at 339. If someone who is not eligible for public support can be eligible for IFP status lest paying fees and costs make them eligible for public support, someone who is already on public support would seem to qualify for IFP status. As for the third category, there is a big jump from what it takes to pay a filing fee to what it takes to pay a lawyer, making pro bono counsel a more difficult proxy to justify.

TAB 7D

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Dear Committees on Federal Rules of Civil and Appellate Procedure, and of the Supreme Court[1] —

Currently, most cases with an official capacity party — notably, virtually all civil rights litigation — are named using the name of the current holder of that office.[2] This results in multiple clear harms:

1. The case name, usually including the short form (first named patties) version, changes every time the office holder changes, as long as the case is ongoing. This has corollary harms:
    a. Notice to the court needs to be filed, causing unnecessary extra work.[3]
    b. Case cites become needlessly confusing, requiring footnotes, *sub nom* tags, etc., especially if a case name keeps shifting because it involves a high-turnover position.[4]
2. Searches of cases involving people who hold office are unable to distinguish between cases:
    a. unrelated to the office, i.e. actually about that individual *personally*;
    b. arising from the office, but in individual capacity (eg § 1983 / *Bivens*); and
    c. related only to the office, not the individual.
3. Using official capacity parties' personal names confuses tracking service of process[5], which capacity has been dismissed, etc, Multiple capacities should be separately listed parties.
4. There is the possibility of entirely collateral dispute of who actually holds the title, as with "acting" officers of uncertain authority.[6] Using an official capacity party's title sidesteps a trap that could drag the court by technicality into an otherwise irrelevant dispute.

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[1] CC to Committee on Federal Rules of Bankruptcy Procedure re FRBP 7017 & 2010, *see* footnote on page 3.
[2] All current rules *allow* designation by title. FRCP 17(d), FRBP 7025, FRAP 43(c)(1), Sup. Ct. R. 35(4). However, this is almost never actually used.
[3] Substitution is automatic. FRCP 25(d), FRBP 7025 (general) & 2012 (trustees), FRAP 43(c)(2), Sup. Ct. R. 35(3).
[4] E.g., there have been at least *five* (arguably six) DHS Secretaries just since Jan. 1, 2017: Jeh Johnson, John F. Kelly, Elaine Duke, Kirstjen Nielsen, Claire M. Grady (disputed), and Kevin McAleenan. Of those, three were Senate-confirmed.
[5] *See* FRCP 4(i)(2) vs 4(i)(3)
[6] *See e.g. Centro Presente v. McAleenan*, No. 1:19-cv-2840 (D. D.C. filed Sept. 20, 2019), 8th claim for relief (disputing DHS Secretary), *La Clínica de la Raza v. Trump*, No. 4:19-cv-4980, ECF No. 85-1 (N.D. Cal. filed Sept. 11, 2019) (*amicus* disputing USCIS director), Politico, *Legality of Trump move to replace Nielsen questioned* (April 9, 2019). *See also Lucia v. SEC*, 138 S. Ct. 2044 (2018) (vacating and remanding because ALJ not properly appointed).

On the other side, there is simply no clear benefit to the current norm.[7] There's no issue of reliance, *stare decisis*, or the like. There's no reasonable likelihood of confusion when a party is named by title. No law (that I know of) requires an official capacity party to be designated by their personal name; using an unambiguous job title is sufficient to "name" them. The current rules explicitly allow it.

I propose a simple fix, with provisions for the transition to the updated naming scheme. If:

- a party is named in official capacity; and
- the relevant[8] title for that capacity is unique and capable of succession[9];

then

- such parties *shall* (not *may*) be referenced by title ("title form"), rather than by name ("name form"), in the docket and case name;
- the clerk shall automatically update the docket and case name for official capacity parties[10], to designate by title rather than name, in all ongoing and future cases;
- in citations to cases preceding this change, reference by title, with a parallel reference to the name(s) used to date, is preferred; and
- official case reporters and PACER shall add a title-form alias, and a searchable flag distinguishing personal, individual capacity, & official capacity, to all cases and to any index of case or party names, including all prior cases.

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[7] *See e.g. Flores v. […]*, No. 2:85-cv-4544 (C.D. Cal.) (re detention of immigrant children), which has over the years been titled as *v. Meese*, *Thornburgh*, *Barr*, *Gerson*, *Reno*, *Holder*, *Ashcroft*, *Gonzales*, *Clement*, *Keisler*, *Mukasey*, *Filip*, *Holder* (same person, 2nd term), *Lynch*, *Yates*, *Boente*, *Sessions*, *Whitaker*, and now again *Barr* (also same person, 2nd term). Filed in 1985, and settled in 1997, it is still active, with a Ninth Circuit decision and subsequent motions filed within the last few months. Any case name other than *Flores v. Attorney General* is nigh useless, yet that is the one name it has *not* had.

[8] E.g. David Pekoske is currently both acting DHS Deputy Secretary and acting TSA Administrator. The two are distinct. Either or both might be relevant to a given case. All, and only, *relevant* title(s) should be named.

[9] E.g. ordinary police officers have no title distinguishing them from other officers, unlike the chief of police, which is unique. If they are fired, there is no "successor" to whom their party status could transfer, also unlike the chief. This rule would only apply to parties with a unique title that can have a successor.

[10] In case of uncertainty as to the applicable title(s), the clerk shall request parties to identify the correct title(s).

I therefore petition for rulemaking to amend FRCP 17, FRAP 43, and Sup. Ct. R. 35, as follows:[11]

FRCP 17: Plaintiff and Defendant; Capacity; Public Officers

(d) *Public Officer's Title and Name.*[12]

A public officer who sues or is sued in an official capacity ~~may~~ **shall** be designated by **relevant** official title**(s)** rather than by name **if the title is unique and capable of succession.**~~, but t~~ **A party in multiple capacities shall be designated by title for official capacity, and by name for individual capacity, listed as separate parties. The clerk or court may *sua sponte* substitute party designations, and correct the docket, to conform with this rule.**[13] **T**he court may order that the officer's name be added.

In citations to proceedings where an official capacity party was designated by name, it is preferred to cite as if designated by title under this rule, with a reference to the actual designation(s) used in the proceeding.[14]

FRAP 43: Substitution of Parties

(c) *Public Officer: Identification; Substitution.*

(1) *Identification of Party.* ~~A public officer who is a party to an appeal or other proceeding in an official capacity may be described as a party by the public officer's official title rather than by name. But the court may require the public officer's name to be added.~~ **F. R. Civ. P. 17(d) applies to any proceeding involving a public officer in their official capacity.**[15]

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[11] Strikethrough = deletion, bold = addition, plain = original. Italics are headings in original.

[12] [Add line break after paragraph title.]

[13] Rules note: Official case reporters and PACER shall add a title-format alias, and a searchable flag distinguishing personal, individual capacity, & official capacity, to all cases involving an official capacity defendant, and to any index of case or party names. Online editions shall be updated as soon as feasible, and print editions updated on the next printing. Updates shall not alter any page numbering.

[14] Rules note: As an example, the preferred citation form is:

> ***See Flores v. [Attorney General]*, No. 2:85-cv-4544 (Settlement agreement) (C.D. Cal. Jan. 28, 1997); order (C.D. Cal. Jan. 20, 2017) (ECF No. 318), *aff'd*, 862 F.3d 863 (9th Cir. 2017); and order (C.D. Cal. Nov. 5, 2018) (ECF No. 518), *app. dismissed for lack of juris.*, No. 17-56297, __ F.3d __ (9th Cir. Aug. 15, 2019).[1]**

with footnote:

> **[1] Titled as *Flores v. Meese* at initiation; *v. Reno* in 1997 settlement agreement, *v. Lynch* in 2017 district court order; *v. Sessions* in 2017 appeal and 2018 district court order; and *v. Barr* in 2019 appeal and currently. Settlement agreement predates CM/ECF.**

As opposed to:

> ***See Flores v. Reno*, No. 2:85-cv-4544 (Settlement agreement) (C.D. Cal. Jan. 28, 1997); *Flores v. Lynch*, No. 2:85-cv-4544 (Order) (C.D. Cal. Jan. 20, 2017) (ECF No. 318), *aff'd sub nom. Flores v. Sessions*, 862 F.3d 863 (9th Cir. 2017); and *Flores v. Sessions*, No. 2:85-cv-4544 (Order) (C.D. Cal. Nov. 5, 2018) (ECF No. 518), *app. dismissed for lack of juris. sub nom. Flores v. Barr*, No. 17-56297 (9th Cir. Aug. 15, 2019).**

[15] This is copied substantively from FRBP 7017: *Parties Plaintiff and Defendant; Capacity*, which says simply "Rule 17 F.R.Civ.P. applies in adversary proceedings, except as provided in Rule 2010(b)." Due to this cross-reference, FRBP needs no separate amendment. Rather than having parallel rules, I believe that all Federal rules should act by reference to a

Sup. Ct. R. 35: Death, Substitution, and Revivor; Public Officers

(4) ~~A public officer who is a party to a proceeding in this Court in an official capacity may be described as a party by the officer's official title rather than by name, but the Court may require the name to be added.~~ **F. R. Civ. P. 17(d) applies to any proceeding involving a public officer in their official capacity.**

common set except where there is reason to deviate (and then only to state the minimal difference), as FRBP 7017 does.

The change in practice this proposal seeks was specifically encouraged by the Advisory Committee in its *1961* rules amendments. *See id.* notes on FRCP[16] 25(d)(2) (moved to 17(d) in 2007):

> *Subdivision (d)(2).* This provision, applicable in "official capacity" cases as described above, will encourage the use of the official title without any mention of the officer individually, thereby recognizing the intrinsic character of the action and helping to eliminate concern with the problem of substitution. If for any reason it seems necessary or desirable to add the individual's name, this may be done upon motion or on the court's initiative without dismissal of the action; thereafter the procedure of amended Rule 25(d)(1) will apply if the individual named ceases to hold office.
>
> For examples of naming the office or title rather than the officeholder, see Annot., 102 A.L.R. 943, 948–52; Comment, 50 Mich.L.Rev. 443, 450 (1952)[17]; cf. 26 U.S.C. §7484[18]. Where an action is brought by or against a board or agency with continuity of existence, it has been often decided that there is no need to name the individual members and substitution is unnecessary when the personnel changes. 4 [Moore's Federal Practice (2d ed. 1950)], 25.09, p. 536[19]. The practice encouraged by amended Rule 25(d)(2) is similar.

Substitution is now automatic under 25(d)(1) (now 25(d)), and thus the pre-1961 concerns about abatement and the personal vs office-holder character of *mandamus* no longer apply.

However, 25(d)(2) (now 17(d)) had a distinct purpose: to name officers by title, so that there would be *no* need to name the individual, and *no* substitution at all (not even an automatic one). These purposes are still useful. Failing to heed them causes other harms, as I explained on the first page.

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[16] This change was incorporated into FRAP 43(c) in 1967 without further elaboration.

[17] "In view of the fact that the suit against the governmental representative is so much a part of our system of jurisprudence, probably the most practical solution is a compromise under which suit could be brought against the office instead of the official.[40] If, therefore, the official leaves office while the action is pending, the suit merely continues against the successor. No substitution of names would be necessary if the original official was not sued by name. The courts have long held that an action brought against a board or agency with continuity of existence does not abate upon a change in personnel, and no substitution is needed.[41] There is no reason why this practice can not be extended to allow suit against an office with continuity of existence, though held by successive individuals. Many state courts very early recognized this general approach in holding that a mandamus proceeding goes to the office, not to the official, so that a mandamus action against an official will not abate upon his leaving office.[42]
[40] 4 Moore, Federal Practice 536 (1950)
[41] 102 A.L.R. 943 at 956 (1936); *Murphy v. Utter*, 186 U.S. 95, 22 S.Ct. 776 (1902); *Leavenworth County v. Sellew*, 9 Otto (99 U.S.) 624 (1878); *Marshall v. Dye*, 231 U.S. 250, 34 S.Ct. 92 (1913); *Irwin v. Wright*, 258 U.S. 219, 42 S.Ct. 293 (1922).
[42] 102 A.L.R. 943 at 948-952 (1936)."

[18] 26 U.S. Code § 7484: Change of incumbent in office: "When the incumbent of the office of Secretary changes, no substitution of the name of his successor shall be required in proceedings pending before any appellate court reviewing the action of the Tax Court."

[19] This corresponds to § 25.41–45 in Moore's 3d. ed. (2016).

It is the exception, not the rule, that officers are sued in *both* their individual and official capacities, or that the individual who happens to hold the office is even materially relevant to the case.

When they are, the individual and the office litigate as distinct persons. The individual brings separate motions to dismiss, under different legal standards (e.g. qualified immunity). The official capacity, i.e. the office as opposed to the person holding it at the moment, is really a distinct party. It should be named accordingly, i.e. by the title of the office, and listed as a separate party.

Sometimes an office exists but is unfilled.[20] It of course can be sued anyway — and how, but by title?

Unfortunately, in more than half a century of practice since the Committee endorsed use of titles rather than names by default, the current rule has proven insufficient to make it happen. Almost no litigation actually uses title-based designation; we are still mired in pointless naming of individuals when the suit is against the office. It is well past time to change this rule from "may" to "shall".[21]

I have attached as exhibits relevant portions of the 1961 record on FRCP 25(d)(2), including the law review cited in the Notes and the sections of *Moore's* (3d) corresponding to those cited.

I request to participate remotely at any hearing on the matter, and to receive emailed copies of all relevant agendas, minutes, reports, or other documents.

Respectfully submitted,
Sai[22]
legal@s.ai / +1 510 394 4724

[20] Such gaps will inevitably happen during the period just after events triggering FRCP 25(d) substitution, and before the successor is clear. E.g. right now, there is no DHS Secretary: Sec. McAleenan resigned, the succession rule doesn't permit "acting" officials such as Dep. Sec. Pekoske to become Secretary, and the President has not yet appointed a successor.

[21] If the Committee does not pass "shall", then I ask it to indicate a very strong preference—e.g. "should, by default", "are encouraged to", *vel sim.*—that using titles should be the default (and keep the proposed clerk's designation authority).

[22] Sai is my full legal name; I am mononymous. I am agender; please use gender-neutral pronouns. I am partially blind. Please send all communications, in § 508 accessible format, by email.

PRELIMINARY DRAFT OF PROPOSED AMENDMENTS

TO CERTAIN

Rules of Civil Procedure for the United States District Courts

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

of the

JUDICIAL CONFERENCE OF THE UNITED STATES

JANUARY 1961

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1961

PROPOSED AMENDMENTS TO CERTAIN RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS*

Rule 25. Substitution of Parties

(d) PUBLIC OFFICERS; DEATH OR SEPARATION FROM OFFICE. ~~When an officer of the United States, or of the District of Columbia, the Canal Zone, a territory, an insular possession, a state, county, city, or other governmental agency, is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if within 6 months after the successor takes office it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the Constitution of the United States. Before a substitution is made, the party or officer to be affected, unless expressly assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object.~~

(1) When a public officer is a party to an action in his official capacity and during its pendency dies, resigns, or otherwise ceases to

*New matter is shown in italics; matter to be omitted is lined through.

27 *hold office, the action does not abate and his*
28 *successor is automatically substituted as a*
29 *party. Proceedings following the substitution*
30 *shall be in the name of the substituted party,*
31 *but any misnomer not affecting the substantial*
32 *rights of the parties shall be disregarded. An*
33 *order of substitution may be entered at any*
34 *time, but the omission to enter such an order*
35 *shall not affect the substitution.*
36 *(2) When a public officer sues or is sued in*
37 *his official capacity, he may be described as a*
38 *party by his official title rather than by name;*
39 *but the court may require his name to be added.*

ADVISORY COMMITTEE'S NOTE

Subdivision (d)(1). Present Rule 25(d) is generally considered to be unsatisfactory. 4 *Moore's Federal Practice* ¶ 25.01[7] (2d ed. 1950); Wright, *Amendments to the Federal Rules: The Function of a Continuing Rules Committee,* 7 Vand. L. Rev. 521, 529 (1954); *Developments in the Law—Remedies Against the United States and Its Officials,* 70 Harv. L. Rev. 827, 931–34 (1957). To require, as a condition of substituting a successor public officer as a party to a pending action, that an application be made with a showing that there is substantial need for continuing the litigation, can rarely serve any useful purpose and fosters a burdensome formality. And to prescribe a short, fixed time period for substitution which cannot be extended even by agreement, see *Snyder* v. *Buck,* 340 U.S. 15, 19 (1950), with the penalty of dismissal of the action, "makes a trap for unsuspecting litigants which seems unworthy of a great government." *Vibra Brush Corp.* v. *Schaffer,* 256 F. 2d 681, 684 (2d Cir. 1958). Although courts have on occasion found means of undercutting the rule, *e.g, Acheson* v. *Furusho,* 212 F. 2d 284 (9th Cir. 1954) (substitution of defendant officer unnecessary on theory that only a declaration of status was sought), it has

operated harshly in many instances, *e.g. Snyder* v. *Buck, supra; Poindexter* v. *Folsom*, 242 F. 2d 516 (3d Cir. 1957).

Under the amendment, the successor is automatically substituted as a party without an application or showing of need to continue the action. An order of substitution is not required, but may be entered at any time if a party desires or the court thinks fit.

The general term "public officer" is used in preference to the enumeration which appears in the present rule. It comprises Federal, State, and local officers.

The expression "in his official capacity" is to be interpreted in its context as part of a simple procedural rule for substitution; care should be taken not to distort its meaning by mistaken analogies to the doctrine of sovereign immunity from suit or the Eleventh Amendment. The amended rule will apply to all actions brought by public officers for the government, and to any action brought in form against a named officer, but intrinsically against the government or the office or the incumbent thereof whoever he may be from time to time during the action. Thus the amended rule will apply to actions against officers to compel performance of official duties or to obtain judicial review of their orders. It will also apply to actions to prevent officers from acting in excess of their authority or under authority not validly conferred, *cf. Philadelphia Co.* v. *Stimson*, 223 U.S. 605 (1912), or from enforcing unconstitutional enactments, *cf. Ex parte Young*, 209 U.S. 123 (1908); *Ex parte La Prade*, 289 U.S. 444 (1933). In general it will apply whenever effective relief would call for corrective behavior by the one then having official status and power, rather than one who has lost that status and power through ceasing to hold office. *Cf. Land* v. *Dollar*, 330 U.S. 731 (1947); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). Excluded from the operation of the amended rule will be the relatively infrequent actions which are directed to securing money judgments against the named officers enforce-

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able against their personal assets; in these cases Rule 25(a)(1), not Rule 25(d), applies to the question of substitution. Examples are actions against officers seeking to make them pay damages out of their own pockets for defamatory utterances or other misconduct in some way related to the office, see *Barr* v. *Matteo*, 360 U.S. 564 (1959); *Howard* v. *Lyons*, 360 U.S. 593 (1959); *Gregoire* v. *Biddle*, 177 F. 2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950). Another example is the anomalous action for a tax refund against a collector of internal revenue, see *Ignelzi* v. *Granger*, 16 F.R.D. 517 (W.D. Pa. 1955), 28 U.S.C. §2006, 4 Moore, *supra*, ¶ 25.05, p. 531; but see 28 U.S.C. §1346(a)(1), making it likely that such suits will usually be brought against the United States rather than the officer.

Automatic substitution under the amended rule, being merely a procedural device for substituting a successor for a past officeholder as a party, is distinct from and does not affect any substantive issues which may be involved in the action. Thus a defense of immunity from suit may remain in the case despite a substitution.

Where the successor does not intend to pursue the policy of his predecessor which gave rise to the lawsuit, it will be open to him, after substitution, as plaintiff to seek voluntary dismissal of the action, or as defendant to seek to have the action dismissed as moot or to take other appropriate steps to avert a judgment or decree. Contrast *Ex parte La Prade*, *supra; Allen* v. *Regents of the University System*, 304 U.S. 439 (1938); *McGrath* v. *National Assn. of Mfgrs.*, 344 U.S. 804 (1952); *Danenberg* v. *Cohen*, 213 F. 2d 944 (7th Cir. 1954).

As the present amendment of Rule 25(d)(1) eliminates a specified time period to secure substitution of public officers, the reference in Rule 6(b) (regarding enlargement of time) to Rule 25 will no longer apply to these public-officer substitutions.

As to substitution on appeal, the rules of the appellate courts should be consulted.

Subdivision (d)(2). This provision, applicable in "official capacity" cases as described above, will

encourage the use of the official title without any mention of the officer individually, thereby recognizing the intrinsic character of the action and helping to eliminate concern with the problem of substitution. If for any reason it seems desirable to add the individual's name, this may be done upon motion or on the court's initiative; thereafter the procedure of amended Rule 25(d)(1) will apply if the individual named ceases to hold office.

For examples of naming the office or title rather than the officeholder, see Annot., 102 A.L.R. 943, 948–52; Comment, 50 Mich. L. Rev. 443, 450 (1952); *cf.* 26 U.S.C. § 7484. Where an action is brought by or against a board or agency with continuity of existence, it has been often decided that there is no need to name the individual members and substitution is unnecessary when the personnel changes. 4 Moore, *supra*, ¶ 25.09, p. 536. The practice encouraged by amended Rule 25(d)(2) is similar.

Rule 54. Judgments; Costs

1 (b) JUDGMENT UPON MULTIPLE CLAIMS *OR*
2 *INVOLVING MULTIPLE PARTIES*. When more than
3 one claim for relief is presented in an action,
4 whether as a claim, counterclaim, cross-claim,
5 or third-party claim, *or when multiple parties are*
6 *involved*, the court may direct the entry of a
7 final judgment ~~upon~~ *as to* one or more but ~~less~~
8 *fewer* than all of the claims *or parties* only upon
9 an express determination that there is no just
10 reason for delay and upon an express direction
11 for the entry of judgment. In the absence of
12 such determination and direction, any order or
13 other form of decision, however designated,
14 which adjudicates less than all the claims *or the*
15 *rights and liabilities of less than all the parties*
16 shall not terminate the action as to any of the

confer federal subject matter jurisdiction over cases by and against them.[1] These grants of subject matter jurisdiction provide federal officers with requisite capacity.[2]

§ 17.28 Loss of Capacity During Pendency of Action Results in Dismissal

A party may acquire or lose capacity while litigation is pending. An obvious example is when an infant reaches the age of majority while the case proceeds. When a party loses capacity during pending litigation, the suit is dismissed. Capacity is "not only the power to bring an action, but it is also the power to maintain it."[1] For example, a representative's appointment automatically terminates when the person represented sheds the disability that led to its need for a representative.[2] Assuming that the claim survives the disability as a matter of substantive law, however, the action readily can be revived.

§ 17.29 Public Officer Sued in Official Capacity May Be Designated by Title Rather Than by Name

A public officer who sues or who is sued in an official capacity may be described in a pleading by the officer's title rather than by his or her name.[1] In cases in which

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[1] **Jurisdiction over cases involving United States.** *See* 28 U.S.C. § 1345; 28 U.S.C. § 1346 ("Except as otherwise provided by Act of Congress, the district courts shall have original jurisdictional of all actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress."); *see also* U.S. v. American Druggists' Ins. Co., 627 F. Supp. 315, 319 (D. Md. 1985) (28 U.S.C. § 1345 is "a safety net" that gives district courts general subject matter jurisdiction over actions brought by United States; other special jurisdictional provisions of other federal statutes may also give district courts jurisdiction over some cases brought by United States).

[2] **Federal officers.**

2d Circuit	*See* Beeler v. U.S., 894 F. Supp. 761, 771–772 (S.D.N.Y. 1995) (court had subject matter jurisdiction over action pursuant to 28 U.S.C. § 1345 and 28 U.S.C. § 1346 in action involving claim against government and counterclaim by government).
4th Circuit	*See* U.S. v. American Druggists' Ins. Co., 627 F. Supp. 315, 319 (D. Md. 1985) (court had subject matter jurisdiction over action under 28 U.S.C. § 1345, which confers on district courts general subject matter jurisdiction over suits commenced by United States or by federal agencies or officers authorized to sue by federal statute).

[1] **Capacity at time of award controls.** CBF Indústria de Gusa S/A v. AMCI Holdings, Inc., 846 F.3d 35, 46 (2d Cir. 2017) (holder entitled to enforcement against alter egos although Swiss entity was deleted from Swiss Commercial Register after arbitration award, which had become final under Federal Arbitration Act); Mather Constr. Co. v. United States, 475 F.2d 1152, 1155 (Ct. Cl. 1973) (corporation declared incompetent and case dismissed when corporation was suspended under state law for failure to pay taxes).

[2] **Representative appointment terminated.** JuShu Cheung v. Dulles, 16 F.R.D. 550, 553 (D. Mass. 1954) (when child reached age of majority, child no longer incapacitated individual and motion should be brought requesting court to remove representative).

[1] **Officer described by title rather than name.** Fed. R. Civ. P. 17(d); *see also* Fed. R. Civ. P. 17, advisory committee note of 2007 (reproduced verbatim at § 17.06[2]) (before December 2007, this provision was found in Fed. R. Civ. P. 25(d), and was redesignated as part of Fed. R. Civ. P. 17 as part of the overall 2007 restyling of the Civil Rules).

an officer is described by title rather than name, the court, on motion or on its own initiative, may require the officer's name to be added should that be appropriate for some reason.[2]

Permitting pleadings to describe the party by title, rather than by name, was intended by the drafters of the Rules to "encourage the use of the official title without any mention of the officer individually, thus recognizing the intrinsic character of the action" as an action against the government entity rather than the individual, "and helping to eliminate concern with the problem of substitution."[3] Keeping the rule's purpose in mind, the courts have interpreted it broadly. In one case, for example, the plaintiff served the current officer, but the complaint incorrectly named the prior officer by name and title. The present officer argued that service was insufficient; but the court rejected that argument. The court noted that the suit would have been proper if it had been brought against the officer by title alone and, therefore, the result should not be different when the plaintiff had mistakenly included the name of the former officer.[4]

Despite the rule permitting suit by or against public officers by title rather than by name, the practice continues, in most cases, of describing public officers by name. When an officer has been described by name in the pleadings and substitution becomes necessary, the court may either state the name of the new officer or describe the officer by title as allowed by Rule 17(d).[5]

5th Circuit	*See* Ramirez v. Burr, 607 F. Supp. 170, 173 (S.D. Tex. 1984) (original complaint against "unnamed board members" could be amended to include them by name, because plaintiff was entitled to sue them in their official capacities by title rather than name).
8th Circuit	Lathan v. Block, 627 F. Supp. 397, 405 (D.N.D. 1986) (caption of complaint that named defendants as "All State Directors," "All District Directors," and "All County Supervisors" was sufficient to identify defendants in official capacity action).
D.C. Circuit	Rochon v. FBI, 691 F. Supp. 1548, 1553 n.6 (D.D.C. 1988) (Attorney General was sued under title rather than name).

[2] Fed. R. Civ. P. 17(d).

[3] *See* Fed. R. Civ. P. 25, advisory committee note of 1961 (reproduced verbatim at § 25.06[2]); *see also* Fed. R. Civ. P. 17, advisory committee note of 2007 (reproduced verbatim at § 17.06[2]) (prior to December 2007 restyling of the Civil Rules, the provisions of Fed. R. Civ. P. 17(d) were set out as a part of Fed. R. Civ. P. 25(d)).

[4] **Mistake in including wrong name of officer did not invalidate service of summons and complaint.** Echevarria-Gonzalez v. Gonzalez-Chapel, 849 F.2d 24, 31 (1st Cir. 1988) ("The insignificance of Echevarria's omission in not specifically naming Bauza Salas in the caption of the complaint is underscored by the fact that this action could have been brought directly against the Secretary of Agriculture, without the need of including his name. . . . Service here would have been proper if plaintiff had sued the Secretary by title, without naming anybody in particular. . . . The result should not be different where plaintiff mistakenly has included the name of the former officer." [citations omitted]).

[5] **Court may use title rather than name after substitution.**

2d Circuit	Ammcon, Inc. v. Kemp, 826 F. Supp. 639, 640 n.1 (E.D.N.Y. 1993) (court approved substitution of " 'Secretary of HUD" in place of name of former secretary).

Using the title rather than the name of the officer may be particularly appropriate when the successor has not been named.[6] In fact, in an action dealing with the official solely in his or her capacity, the court's actions regarding substitution are somewhat irrelevant. According to Rule 25, when a public officer who is a party dies, resigns, or otherwise ceases to hold office, the officer's successor is substituted as a party "automatically." Any misnomer that does not affect the parties' substantial rights must be disregarded (*see* Ch. 25, *Substitution of Parties*).[7]

§ 17.30 Honest and Understandable Mistakes

The commentary to Rule 17 refers to "honest" and "understandable" mistakes in naming the appropriate party.[1]

7th Circuit	Payne v. County of Cook, 2016 U.S. Dist. LEXIS 35865, at *21–*22 (N.D. Ill. Mar. 21, 2016) (not possible to sue former public official in official capacity; official capacity claims dismissed).
D.C. Circuit	York Assocs., Inc. v. Secretary of Housing & Urban Dev., 815 F. Supp. 16, 18 n.1 (D.D.C. 1993) (court substituted "Secretary of Housing and Urban Development" in place of name of former Secretary).

[6] **Court may use title when successor has not been named.** *See* Farmland Dairies v. Comm'r of N.Y. State Dep't of Agric., 847 F.2d 1038, 1041–1042 n.3 (2d Cir. 1988) (when successor to state commissioner had not yet been named, successor was automatically substituted, and "[a]ny relief awarded by the Court against the Commissioner in his official capacity shall be enforceable against the individual chosen to take on the Commissioner's responsibilities, either on an acting or permanent basis").

[7] Fed. R. Civ. P. 25(d).

[1] **Application of honest and understandable mistake doctrine.**

1st Circuit	Micro Focus (U.S.), Inc. v. Express Scripts, Inc., 2019 U.S. Dist. LEXIS 22345, at *22 (D.C. Md. Feb. 12, 2019) (summary judgment granted when failure to name real party in interest was not understandable mistake; plaintiff never responded to discovery requests that were timely and plain and never sought to join real party in interest).
2d Circuit	Klein v. Qlik Techs., Inc., 906 F.3d 215, 226 (2d Cir. 2018) (honest mistake not required; substitution of plaintiffs liberally allowed when change is merely formal and does not alter factual allegations as to events or participants, is not proposed in bad faith or effort to deceive or prejudice defendants, and would otherwise result in unfairness); Davison v. First Pennco Co., 1996 U.S. Dist. LEXIS 22030, at *19–*20 (S.D.N.Y. March 22, 1996) (citing **Moore's**, plaintiffs should have reasonable time after objection for joinder or substitution).
9th Circuit	Jones v. Las Vegas Metro. Police Dep't, 873 F.3d 1123, 1128 (9th Cir. 2017) (district court should have given plaintiffs reasonable opportunity to substitute right party when counsel made understandable mistake in interpreting district court's approval of stipulation).
10th Circuit	Esposito v. United States, 368 F.3d 1271, 1277 (10th Cir. 2004) (district court abused discretion in denying substitution based on party's failure to demonstrate both that mistake was honest and understandable); CPI Card Grp., Inc. v. Multi Packaging Sols., Inc., 2018 U.S. Dist. LEXIS 117993, at *20–*29 (D.C. Colo. Jul. 16, 2018) (applying *Esposito* and finding that

§ 17.31 Appellate Review

Circuits that have addressed the standard of review on appeal have held that a district court's decision whether to join or substitute a party as a "real party in interest" under Fed. R. Civ. P. 17(a) is reviewed for an abuse of discretion.[1]

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	failure to commence litigation was honest mistake and defendant would suffer no prejudice).
Fed. Circuit	Textainer Equip. Mgmt. v. United States, 2013 U.S. Claims LEXIS 436, at *16 (citing **Moore's,** primary purpose of Rule 17 is to protect defendants from multiple liability and to ensure that judgment will have res judicata effect).

[1] **Review of decision whether to join or substitute party as real party in interest under Fed. R. Civ. P. 17(a) is for abuse of discretion.**

2d Circuit	Stichting Ter Behartiging Van De Belangen Van Oudaandeelhouders in Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber, 407 F.3d 34, 43–44 (2d Cir. 2005) (dismissal under Rule 17(a) is reviewed for abuse of discretion).
3d Circuit	ICON Group, Inc. v. Mahogany Run Development Corp., 829 F.2d 473, 476, n.3 (3d Cir. 1987) (adopting Rule 19 standard for Rule 17 issues as primary purposes are identical).
5th Circuit	Wieburg v. GTE Southwest Inc., 272 F.3d 302, 308–309 (5th Cir. 2001) (refusal to order ratification, joinder, or substitution of trustee reviewed for abuse of discretion).
9th Circuit	Clift v. BNSF Ry. Co., 726 Fed. Appx. 643, 643 (9th Cir. 2018) (unpublished) (Rule 17 determinations are reviewed for abuse of discretion); Jones v. Las Vegas Metro. Police Dep't, 873 F.3d 1123, 1129 (9th Cir. 2017) (district court abused its discretion by failing to give plaintiffs reasonable opportunity to substitute proper party and thus cure defective complaint).
10th Circuit	Esposito v. United States, 368 F.3d 1271, 1277 (10th Cir. 2004) (district court abused discretion in denying substitution based on party's failure to demonstrate understandable mistake).

[4] If Officer Is Party in Both Capacities, Substitution Under Rule 25(d) Applies Only to Official Capacity Claims

If an official is sued in both an individual and official capacity and leaves office, the successor is automatically substituted with respect to the official capacity claims, but the predecessor remains in the suit with respect to the individual capacity claims.[8] If the official dies while in office, automatic substitution takes place with respect to the

the decedent's estate."); *see* Young v. Patrice, 832 F. Supp. 721, 723 (S.D.N.Y. 1993) (court determined that claims were against officer in personal capacity and, therefore, Fed. R. Civ. P. 25(a) applied).

[8] **Official sued in both capacities.**

1st Circuit Saldana-Sanchez v. Lopez-Gerena, 256 F.3d 1, 10 (1st Cir. 2001) (when mayor was succeeded by new mayor, new mayor became titular defendant in official capacity claims, but former mayor remained in case in personal capacity); Batistini v. Aquino, 890 F.2d 535, 536 n.1 (1st Cir. 1989) (after official resigned, successor was substituted with respect to official capacity claim, but action continued in individual capacity against officer who resigned); Brown v. Town of Allenstown, 648 F. Supp. 831, 841 n.15 (D.N.H. 1986) (officer ceased to be party in official capacity but remained liable for claims against him in personal capacity).

2d Circuit Farmland Dairies v. Comm'r of N.Y. State Dep't of Agric., 847 F.2d 1038, 1041–1042 n.3 (2d Cir. 1988) (court continued action against Commissioner of Agriculture in his individual capacity, but substituted his yet unnamed successor with respect to official capacity claims).

4th Circuit Levinson-Roth v. Parries, 872 F. Supp. 1439, 1444 n.3 (D. Md. 1995) (official capacity liability passed to successor, but official remained liable in personal capacity).

5th Circuit American Civ. Liberties Union, Inc. v. Finch, 638 F.2d 1336, 1340 (5th Cir. Unit A Mar. 1981) (new governor and other state officials succeeded to office and were automatically substituted for former officials with respect to official capacity claims, and injunctive and declaratory relief ran against them, while former officials remained as defendants with respect to individual capacity claims).

6th Circuit Kaminski v. Coulter, 865 F.3d 339, 343 (6th Cir. 2017) ("After the complaint was filed, [Michigan] Treasurer Clinton was succeeded in office by Treasurer Nick Khouri. Pursuant to the Federal Rules of Civil Procedure, Khouri was automatically substituted in Clinton's place insofar as the complaint named Treasurer Clinton in his official capacity. . . . Although this extinguished the claims against Clinton in his official capacity, he still remained a party to the suit in his individual capacity.").

7th Circuit Roe v. Elyea, 631 F.3d 843, 847 n.1 (7th Cir. 2011) (successor to medical director of Illinois Department of Corrections was substituted for purposes of official capacity claims but not for those in individual capacity).

8th Circuit Association of Residential Resources v. Gomez, 843 F. Supp. 1314, 1316 n.5 (D. Minn. 1994), *aff'd*, 51 F.3d 137 (8th Cir. 1995) (officer named in both individual and official capacities remained defendant in individual capacity, but was succeeded in official capacity).

10th Circuit Valanzuela v. Snider, 889 F. Supp. 1409, 1412 n.1 (D. Colo. 1995) (successor was added as party with respect to official capacity claims, but predecessor remained in suit with respect to individual capacity claims).

official capacity claims, but any substitution with respect to the individual capacity claims is governed by Rule 25(a) (*see* § 25.10).[9]

§ 25.42 Substitution Is Automatic

[1] Substitution Takes Place Without Need for Motion or Order

When a public officer leaves office, the officer's successor is "automatically substituted as a party."[1] The rule does not require a motion or application or any

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11th Circuit	Ellison v. Chilton Cty. Bd. of Educ., 894 F. Supp. 415, 417 n.3 (M.D. Ala. 1995) (court noted substitution of new school board members for former members with respect to official capacity claims, but former board members remained in their individual capacities).

[9] **Death of official.** *See* Fed. R. Civ. P. 25(a); *see, e.g.*, Felton v. Board of Comm'rs, 796 F. Supp. 371, 380 (S.D. Ind. 1991), *aff'd*, 5 F.3d 198 (7th Cir. 1993) (court dismissed individual capacity claim because plaintiff failed to substitute within 90 days of suggestion of death).

[1] **Substitution is automatic.** Fed. R. Civ. P. 25(d).

1st Circuit	*See, e.g.*, Vaqueria Tres Monjitas, Inc. v. Irizarry, 587 F.3d 464, 468 n.2 (1st Cir. 2009) (when officials sued in official capacity die or leave office, their successors automatically assume their roles in litigation).
2d Circuit	*See, e.g.*, McBurney v. Cuccinelli, 616 F.3d 393, 397 n.1 (4th Cir. 2010) (successor to attorney general was automatically substituted); Kalkouli v. Ashcroft, 282 F.3d 202, 202 n.1 (2d Cir. 2002) (Attorney General was automatically substituted as defendant in place of former Attorney General).
3d Circuit	*See, e.g.*, Coppolino v. Comm'r Pa. State Police, 693 Fed. Appx. 128, 130 (3d Cir. 2017) (unpublished) ("It is the office that is being sued, not the individual officer, and such substitutions are pro forma under our federal rules.").
4th Circuit	*See, e.g.*, Humphries v. Ozmint, 397 F.3d 206, 209 n.1 (4th Cir. 2005) (court of appeals noted that substitution had occurred).
5th Circuit	*See, e.g.*, Stroman Realty, Inc. v. Wercinski, 513 F.3d 476, 480 n.1 (5th Cir. 2008) (successor to Commissioner of Arizona Department of Real Estate was automatically substituted for predecessor).
6th Circuit	*See, e.g.*, Top Flight Entm't, Ltd. v. Schuette, 729 F.3d 623, 630 n.1 (6th Cir. 2013) (action did not abate when Governor of Michigan transferred relevant duties from Michigan Lottery Commissioner to Executive Director of Michigan Gaming Board; instead, Executive Director was automatically substituted for Commissioner).
7th Circuit	*See, e.g.*, Shakman v. Democratic Org., 919 F.2d 455, 456–457 (7th Cir. 1990) (sheriff who succeeded former sheriff automatically became party and was bound by consent decree); Suess v. Colvin, 2103 U.S. Dist. LEXIS 133987, at *1 n.1 (N.D. Ill. Sept. 18, 2013) ("On February 14, 2013, Carolyn W. Colvin became Acting Commissioner of Social Security and is substituted for her predecessor, Michael J. Astrue, as the proper defendant in this action. Fed. R. Civ. P. 25(d)(1) [sic].").
8th Circuit	*See, e.g.*, Wishnatsky v. Rovner, 433 F.3d 608, 610 n.1 (8th Cir. 2006) (action that sought relief against clinic director at University of North Dakota School of Law in her official capacity continued automatically against her successor).

showing of a need to continue the action.[2] A motion may be desirable in some circumstances to clarify the situation or to request permission of the court to amend the caption, but is not necessary to effect the substitution.

An order of substitution may be rendered by the court at any time, but this is not necessary, and omitting an order does not affect the substitution or the conduct of the litigation.[3]

9th Circuit	*See, e.g.,* McCormack v. Herzog, 788 F.3d 1017, 1022 (9th Cir. 2015) (successor to county prosecuting attorney was automatically substituted as defendant); Developmental Servs. Network v. Douglas, 666 F.3d 540, 540 (9th Cir. 2011) ("Toby Douglas is the current Director of the California Department of Health Care Services and has, therefore, been automatically substituted for his predecessor, David Maxwell-Jolly." See Fed. R. Civ. P. 25(d).").
10th Circuit	*See, e.g.,* Society of Separationists v. Pleasant Grove City, 416 F.3d 1239, 1242 n.2 (10th Cir. 2005) (city counsel members elected after case was filed were substituted for original defendants).
11th Circuit	*See, e.g.,* Scott v. Taylor, 405 F.3d 1251, 1253 n.1 (11th Cir. 2005) (Fed. R. Civ. P. 25(d) provides for automatic substitution when public officer who is party in official capacity is succeeded in office during pendency of action).
D.C. Circuit	*See, e.g.,* Griffith v. Lanier, 521 F.3d 398, 399 (D.C. Cir. 2008) (when complaint named chief of police in his official capacity as defendant, his successor's taking office triggered application of Fed. R. Civ. P. 25(d), which automatically substitutes successor of public officer named in official capacity).

[2] **Motion not required.** Fed. R. Civ. P. 25, advisory committee note of 1961.

6th Circuit	*See, e.g.,* Top Flight Entm't, Ltd. v. Schuette, 729 F.3d 623, 630 n.1 (6th Cir. 2013) ("the Executive Director is substituted automatically for the Lottery Commissioner by operation of Federal Rule of Civil Procedure 25(d)").
8th Circuit	*See, e.g.,* Kuelbs v. Hill, 615 F.3d 1037, 1042 (8th Cir. 2010) ("a substitution motion is not required for the action to continue.").
9th Circuit	*See, e.g.,* Developmental Servs. Network v. Douglas, 666 F.3d 540, 540 (9th Cir. 2011) ("Toby Douglas is the current Director of the California Department of Health Care Services and has, therefore, been automatically substituted for his predecessor, David Maxwell-Jolly." See Fed. R. Civ. P. 25(d).").

[3] **Order of substitution is not necessary.** Fed. R. Civ. P. 25(d) ("The court may order substitution at any time, but the absence of such an order does not affect the substitution."); *see also* Fed. R. Civ. P. 25, advisory committee note of 1961 (order of substitution is not required, but may be entered at any time if party desires or court thinks fit).

3d Circuit	*See, e.g.,* Presbytery of the Orthodox Presbyterian Church v. Florio, 40 F.3d 1454, 1457 n.1 (3d Cir. 1994) (no formal order was rendered when new governor was elected to office, but this failure did not affect appeal and was noted by court of appeals for purposes of clarification only).
6th Circuit	*See, e.g.,* Brotherton v. Cleveland, 173 F.3d 552, 558 (6th Cir. 1999) (although court had never altered caption to reflect new official's name, court of appeals disregarded misnomer).
7th Circuit	*See, e.g.,* Baugh v. City of Milwaukee, 829 F. Supp. 274, 276 (E.D. Wis.

In some cases a change of officers may take place more than once during the suit. If so, each new officeholder is automatically substituted for the previous one.[4]

The automatic substitution procedure contrasts with the procedure under the rule before the 1961 amendment. The former rule required that an application be made showing there was a substantial need for continuing the litigation. Moreover, the application was required to be made within six months after the official assumed office or the action would be dismissed. This harsh rule was seen as unduly burdensome and a trap for the unwary.[5]

[2] Showing of Need to Continue Litigation Is Not Required for Substitution, Although Action May Be Dismissed if Moot

Because the substitution is automatic, the plaintiff in an action against a public official is not required to show a need to continue the litigation. Thus, the substitution takes place without any showing that the new administration plans to continue the predecessor's policies. Instead, if the successor does not intend to pursue the policies that gave rise to the suit, the successor may seek voluntary dismissal of the action, or seek to have the action dismissed as moot, or may take other appropriate steps to avert

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1993) (official was automatically substituted at time he left office, regardless of lack of order of substitution).

8th Circuit — *See, e.g.*, Kuelbs v. Hill, 615 F.3d 1037, 1042 (8th Cir. 2010) ("the absence of [a substitution order] does not affect the substitution.").

D.C. Circuit — Air Line Pilots Ass'n, Int'l v. Civil Aeronautics Bd., 750 F.2d 81, 88 (D.C. Cir. 1984) (when successor officials were not yet designated, plaintiff could move for an order of substitution when they were known, but substitution would take place automatically, irrespective of any formal order).

[4] **Series of substitutions may take place.**

1st Circuit — Keyes v. Secretary of the Navy, 853 F.2d 1016, 1018 (1st Cir. 1988) (Navy was sued in person of its secretary, and his successors became parties, seriatim, through operation of law under Fed. R. Civ. P. 25).

2d Circuit — Conyers v. Rossides, 558 F.3d 137, 142 (2d Cir. 2009) ("Conyers's complaint initially named David M. Stone, the then-Acting Administrator of the TSA. In the proceedings below, Kip Hawley was substituted as defendant under Fed. R. Civ. P. 25(d). Current Acting Administrator Gale D. Rossides has now been automatically substituted as defendant pursuant to Federal Rule of Appellate Procedure 43(c)(2)."); Women in City Gov't United v. City of New York, 112 F.R.D. 29, 31 (S.D.N.Y. 1986) (officer became party when she replaced former officeholder and ceased to be party when she left office).

4th Circuit — McBurney v. Cuccinelli, 616 F.3d 393, 397 (4th Cir. 2010) ("The complaint named Robert Francis McDonnell, Attorney General [of Virginia] at the time of filing. Pursuant to Federal Rule of Civil Procedure 25(d), McDonnell's successor William Cleveland Mims was automatically substituted before the district court. After oral arguments in this case, the Appellees substituted the present named Appellee. For clarity, this opinion will refer to individual Appellees by their office titles.")

[5] **Former rule.** *See* Fed. R. Civ. P. 25, advisory committee note of 1961; *see generally* § 25App.103.

a judgment or decree.[6] Substitution is merely a procedural device that does not govern mootness.[7]

After substitution, the claims against the official may be dismissed as moot if there is no longer a live controversy.[8] If a plaintiff claims prior patterns of discrimination by a government official, but there has been a change in the occupant of that office, the plaintiff must establish some basis to believe that the successor will continue the practices of the predecessor before injunctive relief against the successor is warranted. Thus, a motion to dismiss may be granted if the plaintiff fails to allege that the misconduct was the policy of the office or that the successor intended to continue the unlawful practices.[9]

[3] Automatic Substitution May Be Difficult If Successor Is Undetermined

Although substitution of the successor is automatic, in a few situations it may be difficult to determine who the appropriate successor is. For example, when an official leaves office because the position has been eliminated, there may be no obvious successor. In one case, the Civil Aeronautics Board ceased to exist and its authority was transferred to the Department of Transportation. The District of Columbia Circuit ruled that the designated officials at the Department of Transportation, although they

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[6] **No showing required to continue litigation against substituted official.** Fed. R. Civ. P. 25, advisory committee note of 1961; *see, e.g.,* Air Line Pilots Ass'n, Int'l v. Civil Aeronautics Bd., 750 F.2d 81, 88 (D.C. Cir. 1984) (because rule makes substitution automatic, it does away with former requirement of showing of substantial need for continuing and maintaining action).

[7] **Substitution does not govern mootness.**

7th Circuit	Kincaid v. Rusk, 670 F.2d 737, 741 (7th Cir. 1982) ("substitution is merely a procedural device that does not govern the question of mootness").
D.C. Circuit	Network Project v. Corporation for Pub. Broadcasting, 561 F.2d 963, 966 (D.C. Cir. 1977) (substitution will not keep alive otherwise moot controversy).

[8] **Action may be dismissed as moot.** *See* Spomer v. Littleton, 414 U.S. 514, 520–523, 94 S. Ct. 685, 38 L. Ed. 2d 694 (1974) (Court remanded for determination whether any live controversy existed in civil rights case after original defendant left office as state attorney); *see also* Hagan v. Quinn, 867 F.3d 816, 819 n.2 (7th Cir. 2017) ("Because plaintiffs' claim for injunctive relief is moot, they have no claim against defendants in their official capacities, and we need not substitute the current office holders for the named defendants under Federal Rule of Civil Procedure 25(d). This action is now only against the defendants in their individual capacities for damages.").

[9] **To obtain relief against successor, basis of claim must continue.**

5th Circuit	Ciudadanos Unidos de San Juan v. Hidalgo County Grand Jury Comm'rs, 622 F.2d 807, 822 (5th Cir. 1980) (plaintiffs met burden of showing that controversy continued to exist).
D.C. Circuit	Network Project v. Corporation for Pub. Broad., 561 F.2d 963, 968 (D.C. Cir. 1977) (district court properly dismissed when complaint did not show that live controversy existed between plaintiffs and successor official); *see also* National Treasury Employees' Union v. Campbell, 654 F.2d 784, 788 (D.C. Cir. 1981) ("where the conduct challenged is personal to the original named defendant, even though he was sued in his official capacity, a request for prospective injunctive relief is mooted when the defendant resigns").

had not yet been named, would be automatically substituted.[10] In a similar case, the court noted that the Secretary of Transportation was substituted for the Secretary of Commerce after the relevant agency was transferred from the Department of Commerce to the Department of Transportation.[11] In some cases the automatic substitution may be defeated because an office or agency is terminated and there is no successor. In this situation the case is moot because there is no person or agency against which relief may be ordered.[12]

If a permanent successor has not been appointed, then an acting officer is substituted. The significant factor is whether the person has the official power to carry out the corrective acts that may be required by the relief ordered.[13]

§ 25.43 After Substitution, Action Continues Without Substantive Effect

[1] Substitution Does Not Affect Suit Substantively

Automatic substitution under Rule 25(d) does not affect any substantive issues in the action. The automatic substitution is merely a procedural device that substitutes a successor for a past official.[1] The sole purpose of the substitution is to allow the suit

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[10] **Transfer of authority to new entity.** *See* Air Line Pilots Ass'n, Int'l v. Civil Aeronautics Bd., 750 F.2d 81, 88 (D.C. Cir. 1984) (although successor officials were not yet designated, substitution would take place automatically, by force of law, at time of designation with no lapse in jurisdiction).

1st Circuit — *See also* Cornelius v. Hogan, 663 F.2d 330, 334 (1st Cir. 1981) (court noted without deciding that when entity took over functions of previous entity it might be bound by decree in suit).

6th Circuit — Top Flight Entm't, Ltd. v. Schuette, 729 F.3d 623, 630 n.1 (6th Cir. 2013) ("Defendants' argument that the Lottery Commissioner is not a proper party to this lawsuit because he no longer has authority over millionaire-party licensing and regulation is without merit. Although the Michigan Governor transferred these responsibilities to the Executive Director of the Michigan Gaming Control Board, *see* Mich. Comp. Laws § 432.91, the Executive Director is substituted automatically for the Lottery Commissioner by operation of Federal Rule of Civil Procedure 25(d).").

D.C. Circuit — Air Line Pilots Ass'n, Int'l v. Civil Aeronautics Bd., 750 F.2d 81, 88 (D.C. Cir. 1984) (although successor officials were not yet designated, substitution would take place automatically, by force of law, at time of designation with no lapse in jurisdiction).

[11] **Transfer of duties to new agency.** *See* Independent U.S. Tanker Owners Comm. v. Lewis, 690 F.2d 908, 910–911 (D.C. Cir. 1982).

[12] **No successor.** *See* Skolnick v. Parsons, 397 F.2d 523, 525 (7th Cir. 1968) (no substitution was possible in suit against federal commission and its commissioner when commission was terminated and no successor to commissioner was appointed).

[13] **Acting officer may be substituted.** *See* Fed. R. Civ. P. 25, advisory committee note of 1963 (substitution applies "whenever effective relief would call for corrective behavior by the one then having official status and power"); *see, e.g.*, Dole v. Compton, 753 F. Supp. 563, 564 n.1 (E.D. Pa. 1990) (because Secretary of Labor announced her resignation but no successor had been announced, Acting Secretary was automatically substituted).

[1] **Substitution does not affect substantive issues.** Fed. R. Civ. P. 25, advisory committee note of 1961; *see* Saldana-Sanchez v. Lopez-Gerena, 256 F.3d 1, 10 (1st Cir. 2001) ("As Fed. R. Civ. P. 25(d)

to continue without abatement.[2] A defense of sovereign immunity or Eleventh Amendment immunity is not affected by the substitution.[3] However, if a state official has waived the state's sovereign immunity from suit in federal court by removing an action from state court, that immunity cannot be asserted by officials who are substituted or joined as defendants after removal.[3.1]

[2] Successor Steps Into Place of Predecessor

When the change in officers takes place, the successor is automatically substituted (*see* § 25.42[1]), and becomes a party for all purposes. The successor stands in the same position as the predecessor with respect to the suit and has the same procedural position in the suit as did the predecessor.[4] Any order or judgment binds the successor official.[5]

. . . makes clear, the substitution of a public official by his or her successor in an official capacity suit does not affect the underlying action.").

[2] **Suit continues without abatement.** Fed. R. Civ. P. 25(d).

[3] **Substitution does not affect sovereign immunity or Eleventh Amendment immunity.** *See* Fed. R. Civ. P. 25, advisory committee note of 1961; *see also* American Civil Liberties Union, Inc. v. Finch, 638 F.2d 1336, 1342 n.10 (5th Cir. Unit A. Mar. 1981) (citing advisory committee note of 1961 re Eleventh Amendment).

[3.1] **Removal waives sovereign immunity from suit for officials substituted after removal.** Green v. Graham, 906 F.3d 955, 961–962 (11th Cir. 2018) (sovereign immunity belongs to state, and only derivatively to state officials and entities, so removal of suit by original defendants waives immunity not only for them but for officials substituted or joined after removal).

[4] **Successor stands in place of predecessor.**

1st Circuit	Gaztambide v. Torres, 145 F.3d 410, 415 (1st Cir. 1998) (successor officers had standing to challenge settlement agreement; "As the current officeholders, their lack of participation in events prior to their ascendency to office does not alter their substantive rights.").
11th Circuit	Newman v. Graddick, 740 F.2d 1513, 1517–1518 (11th Cir. 1984) (governor and commissioner who were current officials when consent decree was signed had authority to bind successors, who become parties through automatic substitution and stand in the shoes of their predecessors).

[5] **Orders binding on successor.**

1st Circuit	Rosario-Torres v. Hernandez-Colon, 889 F.2d 314, 316 n.2 (1st Cir. 1989) (orders in case would be binding on successor in official capacity).
5th Circuit	Alberti v. Klevenhagen, 610 F. Supp. 138, 142 n.6 (S.D. Tex. 1985) (court held successor officer in contempt for failing to comply with court-ordered staffing plan at jail, noting that "the inevitable succession of officials in public office does not excuse noncompliance").
7th Circuit	Shakman v. Democratic Org., 919 F.2d 455, 456–457 (7th Cir. 1990) (sheriff who succeeded former sheriff was bound by consent decree that had been reached).
11th Circuit	Newman v. Graddick, 740 F.2d 1513, 1517–1518 (11th Cir. 1984) (successor state officials, on taking office, were bound by consent decree).
D.C. Circuit	Air Line Pilots Ass'n, Int'l v. Civil Aeronautics Bd., 750 F.2d 81, 88 (D.C. Cir. 1984) ("The Department of Transportation will receive these cases

The substitution applies only with respect to official capacity claims and does not subject the successor officer to individual liability with respect to the predecessor's acts. Persons may be individually liable only if they are named and properly served.[6]

[3] Former Official Ceases to Be Party in Official Capacity

Once substitution is automatically effected under Rule 25(d), the predecessor public officer ceases to be a party.[7] The predecessor lacks standing to challenge any decisions in the action (unless the officer is also a party in an individual capacity). In one case, legislative officers intervened in an action to defend a statute providing for a minute of silence in schools. They lost in the district court and the court of appeals. After an election, they were replaced as legislative officers, although they remained as members of the legislature. When they sought review in the Supreme Court, the Court ruled that they lacked standing to prosecute the appeal. The authority to do so belonged exclusively to the new legislative officers.[8]

[4] Caption May Be Amended to Reflect Change

After the automatic substitution, or when the substitution is called to the court's attention, the court should amend the caption to reflect the name of the substituted party, and further proceedings should be in that name.[9] Failure to do so does not affect

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under a holding that CAB, the predecessor-defendant, has unreasonably delayed agency action").

[6] **Successor not personally liable.**

1st Circuit — Cabrera v. Municipality of Bayamon, 622 F.2d 4, 6 (1st Cir. 1980) (when mayor replaced predecessor, mayor was not personally liable, because neither original nor amended complaint contained allegations of wrongdoing against mayor in individual capacity).

2d Circuit — Women in City Gov't United v. City of New York, 112 F.R.D. 29, 31 (S.D.N.Y. 1986) (officer became party in official capacity but could not be party in individual capacity because person may not become personally liable without service).

7th Circuit — Kincaid v. Rusk, 670 F.2d 737, 741 (7th Cir. 1982) (sheriff was properly substituted as defendant in official-capacity suit, although he could incur no personal liability).

[7] **Predecessor ceases to be party.** *See, e.g.*, Baugh v. City of Milwaukee, 829 F. Supp. 274, 276 (E.D. Wis. 1993) (official was automatically substituted in his official capacity at time he left office, regardless of lack of order of substitution).

[8] **Predecessor has no standing to appeal after substitution.** Karcher v. May, 484 U.S. 72, 78, 83, 108 S. Ct. 388, 98 L. Ed. 2d 327 (1987) (legislative officers who intervened in suit in their official capacities were not entitled to appeal after they were succeeded in office).

[9] **Case should proceed in name of substituted party.** Fed. R. Civ. P. 25(d).

3d Circuit — *See* Williams v. Red Bank Bd. of Educ., 662 F.2d 1008, 1024 n.18 (3d Cir. 1981) (court of appeals noted that automatic substitution had taken place and that on remand "some restructuring of the complaint may be desired," although this was a matter for the district court to deal with in first instance).

11th Circuit — *See, e.g.*, Klassy v. Weaver, 575 F. Supp. 801, 804–805 (N.D. Ga. 1982)

the progress of the suit, and any misnomer not affecting substantive rights is disregarded.[10]

§ 25.44 Title of Officer May Be Used Rather Than Name

A public officer suing or being sued in an official capacity may be designated by official title rather than by name, although the court may order that the officer's name be added.[1] For a complete discussion of suits by or against public officers designated only by their official titles, *see* Ch. 17, *Plaintiff and Defendant; Capacity; Public Officers*.

§ 25.45 Substitution on Appeal

Rule 25(d) applies when a public officer is separated from office during the pendency of trial court proceedings.[1] If the separation happens on appeal, substitution is governed by Appellate Rule 43(c) or Supreme Court Rule 35.[2] Those rules are

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(court directed clerk of court to change caption to reflect automatic change in public officers).

[10] **Failure to amend caption does not affect case.** *See* Fed. R. Civ. P. 25(d)(1).

3d Circuit — Presbytery of the Orthodox Presbyterian Church v. Florio, 40 F.3d 1454, 1457 n.1 (3d Cir. 1994) (caption in suit against governor was not changed when new governor was elected to office, but this failure did not affect appeal and was noted by court for purposes of clarification only); Finberg v. Sullivan, 634 F.2d 50, 53 n.2 (3d Cir. 1980) (former officer continued to be named in caption after automatic substitution, but court disregarded misnomer because it did not affect substantive rights and noted this only to avoid possible confusion).

5th Circuit — Arizpe v. Peters, 260 Fed. Appx. 663, 663 (5th Cir. 2007) (unpublished) ("We also conclude that Arizpe's argument that the district court's ruling is legally invalid because it listed Maria Cino as Acting Secretary of Transportation, rather than Mary Peters as Secretary of Transportation, is frivolous. See Fed. R. Civ. P. 25(d) ("[A]ny misnomer not affecting the parties' substantial rights must be disregarded.").

6th Circuit — Brotherton v. Cleveland, 173 F.3d 552, 558 (6th Cir. 1999) (although case retained former official's name, "we disregard the misnomer, and we look to the merits").

9th Circuit — Thomas v. County of Los Angeles, 703 Fed. Appx. 508, 512 (9th Cir. 2017) (unpublished) ("[A]lthough the district court erred by substituting the County as the defendant when Sheriff Baca left office—it should have substituted Sheriff Baca's successor, Sheriff John Scott—this error did not 'affect[] the parties' substantial rights' and hence 'must be disregarded.' ").

[1] Fed. R. Civ. P. 17(d); *see* Fed. R. Civ. P. 25, advisory committee note of 2007 (provision dealing with suits by or against public officers brought by or against parties designated only by their official title was formerly contained in Fed. R. Civ. P. 25(d); but as part of the 2007 restyling of the Federal Rules of Civil Procedure, this provision was moved and became Fed. R. Civ. P. 17(d) because "it deals with designation of a public officer, not substitution.").

[1] Fed. R. Civ. P. 25(d).

[2] *See* Fed. R. App. P. 43; Sup. Ct. R. 35.3; *see generally* Ch. 343, *Substitution of Parties*; Ch. 535, *Death, Substitution, and Revivor: Public Officers*.

essentially the same as Rule 25(d), however, and as a practical matter it is unnecessary to be concerned about when the change in officers occurred. The courts of appeals typically cite to both the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure when noting that an automatic substitution has taken place at some time before the appellate opinion is issued.[3]

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[3] **Substitution on appeal.**

1st Circuit	Diffenderfer v. Gomez-Colon, 587 F.3d 445, 456 (1st Cir. 2009) ("Substitution is automatic where, as here, the district court imposed fees against Gomez-Colon only in his official capacity. *See* Fed. R. App. P. 43(c)(2); Fed. R. Civ. P. 25(d)."); Kaweesa v. Gonzales, 450 F.3d 62, 62 (1st Cir. 2006) (U.S. Attorney General Alberto R. Gonzales substituted for John Ashcroft as respondent, citing Fed. R. Civ. P. 25(d)(1) and Fed. R. App. P. 43(c)(2).
2d Circuit	Conyers v. Rossides, 558 F.3d 137, 142 (2d Cir. 2009) ("Conyers's complaint initially named David M. Stone, the then-Acting Administrator of the TSA. In the proceedings below, Kip Hawley was substituted as defendant under Fed. R. Civ. P. 25(d). Current Acting Administrator Gale D. Rossides has now been automatically substituted as defendant pursuant to Federal Rule of Appellate Procedure 43(c)(2)."); Henry v. Scully, 78 F.3d 51, 52 (2d Cir. 1996) (court noted that superintendent of correctional facility had been automatically substituted as party under Fed. R. Civ. P. 25(d) and Fed. R. App. P. 43(c).
4th Circuit	City of Virginia Beach v. Roanoke River Basin, 776 F.2d 484, 486 n.1 (4th Cir. 1985) (court noted that governor had been substituted).
5th Circuit	American Civil Liberties Union, Inc. v. Finch, 638 F.2d 1336, 1340 (5th Cir. Unit A. Mar. 1981) (new governor and other state officials succeeded to office and were automatically substituted by operation of former Fed. R. Civ. P. 25(d)(1) (*now see* Fed. R. Civ. P. 25(d)) and Fed. R. App. P. 43(c)(1)).
6th Circuit	Jones v. Johanns, 264 Fed. Appx. 463, 464 (6th Cir. 2007) (unpublished) ("The district court automatically substituted Mike Johanns for Ann Veneman as the properly named officeholder [i.e., Secretary of the Department of Agriculture] pursuant to Fed. R. Civ. P. 25(d). To the extent that the parties erroneously named Veneman as a party to this appeal, we also recognize the automatic substitution of a successor officeholder pursuant to Fed. R. App. P. 43(c)(2).").
7th Circuit	Kincaid v. Rusk, 670 F.2d 737, 741 (7th Cir. 1982) (noting that Fed. R. App. P. 43(c) was derived from Fed. R. Civ. P. 25(d)).
8th Circuit	McIntyre v. Caspari, 35 F.3d 338, 338 (8th Cir. 1994) (superintendent of correctional facility left office during pendency of appeal, and court substituted new superintendent).
9th Circuit	Dawson v. Myers, 622 F.2d 1304, 1304 (9th Cir. 1980) (state official was substituted for prior official under former Fed. R. Civ. P. 25(d)(1) (now see Fed. R. Civ. P. 25(d)) rather than Fed. R. Civ. P. 43(c)(1) because change took place before appeal was taken).

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COMMENTS

ADMIRALTY—MAINTENANCE AND CURE—The recent decision of *Warren v. United States*[1] marks another instance of the growing inter-

[1] 340 U.S. 523, 71 S.Ct. 432 (1951), discussed infra.

maximum cure was achieved. The minority, consisting of Justices Douglas, Black, Murphy, and Rutledge, dissented on the ground that cure should also include expenses for maintaining a condition of maximum cure if that was necessary.[38]

The duration of the duty of maintenance and cure has been definitively settled by the Supreme Court and today the only question remaining is as to when the maximum cure has been achieved in the particular case.

IV. *Summary*

The shape of the remedy of maintenance and cure has been clearly defined. There are, of course, a number of peripheral questions remaining but the broad outline is clear.

The seaman is entitled to his wages until the end of the voyage or for the period for which he signed on, if longer. He is entitled to maintenance and cure for injuries or illnesses which occur while he is in the service of the ship, but the right may be defeated if the injury or illness arose out of the seaman's gross negligence or willful misconduct. The seaman on shore leave or off duty is considered to be in the service of the ship. The fault of the vessel or its owners is not a requirement of liability. The measure of the maintenance and cure to which the seaman is entitled is the ordinary maintenance and cure given seamen generally. The duty of the vessel and its owners continues only until such time as the maximum cure has been effected.

In line with present day philosophies the trend has been to expand the remedy in favor of the seamen. Justice Douglas is an able spokesman for the majority with its liberalizing tendencies. However, Justices Jackson and Clark appear to have some doubts as to the desirability of further expansion of the remedy.

Donald S. Leeper, S.Ed.

CIVIL PROCEDURE—ABATEMENT—STATUS OF SUIT NOMINALLY AGAINST GOVERNMENT OFFICIAL WHEN OFFICIAL LEAVES OFFICE— Often an action brought against an official of the sovereign is actually against the sovereign itself, nominally represented by the official. The status of such a suit when the official leaves office is even today not

[38] Also denied in Muruaga v. United States, (2d Cir. 1949) 172 F. (2d) 318.

satisfactorily settled. The so-called representative suit,[1] while at one time serving a purpose, has always been somewhat anomalous and today is antiquated and useless.

I. *Common Law Background*

Every civilized political state has, as a part of its judicial system, a principle that the sovereign cannot be sued without its consent.[2] Whether or not this stemmed from the divine right of kings, it is based, at least in part, upon the theory that the ability of governmental authority to operate efficiently depends upon there being no recourse against it. Consequently, both federal and state courts uniformly have held that the United States cannot be sued without its consent.[3] The representative suit was developed as a fiction to circumvent the operation of the principle of sovereign immunity.[4] Instead of making the sovereign a party defendant, suit is brought against an official of the sovereign, not with the intent of making him personally liable,[5] but to force him to perform an official duty, which anyone holding the office could perform, to satisfy a claim in substance against the sovereign.

The representative suit was further identified with the official, the nominal defendant, by the form of action in which the suit was usually brought, namely, a mandamus proceeding.[6] The federal courts have held that mandamus goes to the official, not to the office,[7] so that if the official leaves office while the suit is pending, the action abates[8] as completely as did a tort claim at common law when either party died.[9] The suit could not continue against the official because he could no longer perform the duty requested by the claimant. The official's suc-

[1] In this context, a representative suit, as defined by Justice Frankfurter, is an action against a governmental officer, but in effect against the United States—not a class action in the usual sense of that term. See Snyder v. Buck, 340 U.S. 15 at 28, 71 S.Ct. 93 (1950).

[2] 54 AM. JUR., United States §127 (1945).

[3] The same is true as to the several states. See 49 AM. JUR., States, Territories, and Dependencies §91 (1943).

[4] Snyder v. Buck, 340 U.S. 15 at 28 and 29, 71 S.Ct. 93 (1950).

[5] An exception is the so-called Collector-suit, in which the Collector of Internal Revenue is held to have committed a personal wrong in collecting the tax. For the additional problems raised see 4 MOORE, FEDERAL PRACTICE 531 to 534 (1950).

[6] 102 A.L.R. 943 (1936).

[7] 102 A.L.R. 943 at 945 (1936); 43 AM. JUR., Public Officers §508 (1942); 1 AM. JUR., Abatement and Revival §48 (1936); Secretary of Interior v. McGarrahan, 9 Wall. (76 U.S.) 298 (1869); United States v. Boutwell, 17 Wall. (84 U.S.) 604 (1873).

[8] When an action abated at common law, it was utterly dead and could not be revived except by commencing a new action. First Nat. Bank of Woodbine v. Board of Supervisors of Harrison County, 221 Iowa 348, 264 N.W. 281 (1935). See also 1 WORDS AND PHRASES 65 (1940).

[9] PROSSER, TORTS 950 (1941).

cessor could not be substituted as defendant, because mandamus went to the official, not to the office. If this result was once thought indispensable in order to avoid identification of the official with the sovereign, it became totally unnecessary in many instances after 1855, when the federal government came to realize that it could allow recourse for claims against it and still function as a government, and so created the Court of Claims.[10]

II. *Statutory Development*

The United States Supreme Court became aware of the gross inconvenience caused by the abatement of a representative suit when the official left office. Not only was abatement wasteful both of time and expense, but there was also a likelihood that the plaintiff would be barred forever by the running of a statute of limitations. In an 1895 decision, the Court appealed to Congress to take action.[11] The result was the Act of February 8, 1899,[12] which provided, seemingly unqualifiedly, that an action against a federal government officer should not abate if he left office while the suit was pending. Upon a showing that survival of the action was necessary, the successor could be substituted within twelve months after the original defendant left office. The act, however, was ambiguous as to the result if substitution was not made within the time provided. The Supreme Court in the case of *LeCrone v. McAdoo*[13] held that the action did not abate at all; but, if seasonal substitution was not made, it came to an end. Prior to a judgment the result in the two instances would surely be the same. If, however, the official left office after a judgment in the district court had been obtained, that judgment stood. Actually only the appellate part of the action abated. The effect of a judgment *against* the official after he has

[10] In 1855 the Court of Claims was established with jurisdiction over "All claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States. . . ." 10 Stat. L. 612 (1855). 24 Stat. 505 (1887) increased the jurisdiction of the Court of Claims to include claims founded upon the Constitution of the United States and gave the district courts concurrent jurisdiction.

[11] Bernardin v. Butterworth, 169 U.S. 600 at 605, 18 S.Ct. 441 (1898).

[12] 30 Stat. L. 822 (1899). ". . . no suit, action, or other proceeding lawfully commenced by or against the head of any Department or Bureau or other officer of the United States in his official capacity, or in relation to the discharge of his official duties, shall abate by reason of his death, or the expiration of his term or office, or his retirement, or resignation, or removal from office, but, in such event, the Court, on motion or supplemental petition filed, at any time within twelve months thereafter, showing a necessity for the survival thereof to obtain a settlement of the questions involved, may allow the same to be maintained by or against his successor in office, and the Court may make such order as shall be equitable for the payment of costs."

[13] LeCrone v. McAdoo, 253 U.S. 217, 40 S.Ct. 510 (1920).

left office was not made clear. At least one later United States Supreme Court decision[14] and several court of appeals decisions have misinterpreted the *LeCrone* case to mean that the action would abate completely if after twelve months no substitution had been made.[15] The Supreme Court, however, recently has reaffirmed by dictum the statutory interpretation in the *LeCrone* case.[16]

In a 1922 decision, the United States Supreme Court suggested that the Act of 1899 be amended to include substitution of successors to state officers who leave office while suits to which they are parties are pending.[17] The resulting 1925 amendment embodied this proposal, and also shortened the period of substitution to six months after the officer's tenure terminates.[18]

In 1938, the 1925 amendment was incorporated by reference into Federal Rule 25(d), the only difference being in the prescribed period of substitution: six months after the successor takes office rather than six months after the original official leaves office. In 1948, Rule 25(d) was amended to embody completely the 1925 provision, but without reference to it.[19]

While the statutory development has somewhat eased the harshness of the common law rule of abatement, it has not been completely

[14] Fix v. Philadelphia Barge Co., 290 U.S. 530 at 533, 54 S.Ct. 270 (1934).

[15] Black Clawson Co. v. Robertson, (D.C. Cir. 1934) 71 F. (2d) 536; Oklahoma ex rel. McVey v. Magnolia Petroleum Co., (10th Cir. 1940) 114 F. (2d) 111 at 114; Becker Steel Co. of America v. Hicks, (2d Cir. 1933) 66 F. (2d) 497 at 499.

[16] Defense Supplies Corp. v. Lawrence Warehouse Co., 336 U.S. 631 at 637 to 638, 69 S.Ct. 762 (1949).

[17] Irwin v. Wright, 258 U.S. 219 at 223 to 224, 42 S.Ct. 293 (1922).

[18] 43 Stat. L. 936 at 941, §11(a) (1925). ". . . where, during the pendency of an action . . . brought by or against an officer of the United States . . . and relating to the present or future discharge of his official duties, such officer dies, resigns, or otherwise ceases to hold such office, it shall be competent for the court wherein the action, suit, or proceeding is pending, whether the court be one of first instance or an appellate tribunal, to permit the cause to be continued and maintained by or against the successor in office of such officer, if within six months after his death or separation from the office it be satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved."

[19] Rule 25(d), Rules of Civil Procedure, 28 U.S.C. (1948) §2072. "When an officer of the United States, or of the District of Columbia, the Canal Zone, a territory, an insular possession, a state, county, city, or other governmental agency, is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if within 6 months after the successor takes office it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the Constitution of the United States. Before a substitution is made, the party or officer to be affected, unless expressly assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object."

sound in its approach to the problem, as it has not recognized that in many suits against federal officers the United States is the real party in interest, and that, therefore, substitution of one nominal party to replace another is at best a mere formality.[20]

III. *Snyder v. Buck*

The United States Supreme Court in a five to four decision[21] recently affirmed the dictum of the *Defense Supplies Corporation Case*,[22] namely, that the effect of section 11 of the Act of 1925, which governed,[23] was to abate a suit brought against a government official who leaves office while the action is pending, if substitution is not made within the statutory period.

The plaintiff, a naval officer's widow, sued the Paymaster General of the Navy to recover a statutory death gratuity allowance. The suit could have been brought directly in the district court or the Court of Claims. The original action was for mandamus; but, since the duty the performance of which the plaintiff sought to compel was not strictly ministerial,[24] the district court granted a mandatory injunction instead. The Government appealed in the name of the original Paymaster, Buck, who, before appeal but after the judgment of the district court, had been retired. After the statutory substitution period had elapsed, the Government called to the attention of the court of appeals the fact of Buck's retirement. The court of appeals vacated the judgment of the district court and remanded with directions to dismiss the action as abated.

The plaintiff then appealed to the Supreme Court, which affirmed the action of the court of appeals. Justice Douglas, the author of the majority opinion, tracing the history of the problem of abatement in the representative suit, interpreted the Act of 1899 to mean that the action did not abate, but was at an end, if substitution was not made during the twelve-month period, thus reaffirming *LeCrone v. McAdoo*. According to Justice Douglas, section 11 of the Act of 1925, by leaving out the phrase, "no . . . action . . . shall abate,"[25] changed the effect

[20] 4 MOORE, FEDERAL PRACTICE 511 (1950).

[21] Snyder v. Buck, 340 U.S. 15, 71 S.Ct. 93 (1950).

[22] Defense Supplies Corp. v. Lawrence Warehouse Co., 336 U.S. 631 at 637 to 638, 69 S.Ct. 762 (1949).

[23] "For the Court of Appeals during the period material to our problem had in force its Rule 28(b) which provided that abatement and substitution were governed by §11 of the 1925 Act." Snyder v. Buck, 340 U.S. 15 at 17, note 2, 71 S.Ct. 93 (1950).

[24] 34 AM. JUR., Mandamus §66 (1941); Secretary of Interior v. McGarrahan, 9 Wall. (76 U.S.) 298 (1869).

[25] Act of February 8, 1899, 30 Stat. L. 822. See note 12 supra.

of the earlier statute, so that under the new statute the action abated if seasonal substitution was not made. Plaintiff argued that section 11 was intended to apply only to "actions brought against officials for remedies which could not be got in a direct suit against the United States."[26] Justice Douglas held, however, that the act, by its very wording, covered any action brought by or against any officer of the United States relating to present or future discharge of his official duties, and that this necessarily covers many actions which are in substance suits against the United States. The suit, therefore, abated, and the plaintiff had to start anew. If a statute of limitations had run in the meantime, the remedy would have been lost completely.

The fact that there are two dissenting opinions[27] in the *Snyder* case illustrates how unsettled the problem is. Justice Frankfurter, joined by Justice Jackson, made a thorough analysis of the question and presented a common sense solution, though one probably unwarranted by the language of section 11.[28] He reasoned that since this was in substance a suit against the United States and could have been brought directly against it, the appeal should be allowed, and the court should merely "note as a matter of record that the name of the Paymaster General of the Navy is now Fox [Buck's successor]. . . ."[29] If it could be said that the statute does not apply to such a suit, the United States should be substituted rather than the official's successor. It must be admitted, however, that this would present difficulties where the action is mandamus. Surely it would be desirable if Justice Frankfurter's suggestion could be effectuated. The statute, however, purports to cover any suit to which a government officer in his official capacity is a party, though only nominally, and sets a definite time in which substitution must be made in the event the official leaves office. In the face of these express provisions, it is difficult to find that the suit merely continues as though proper substitution under the statute was made.

Justice Frankfurter believed that the Act of 1899 and section 11 (the 1925 amendment) were intended by Congress to have the same effect, and that the purpose of the later statute was merely to enlarge the scope of the earlier one so as to include state, local, and territorial officers. Under his interpretation, an action under either statute would

[26] Snyder v. Buck, 340 U.S. 15 at 20, 71 S.Ct. 93 (1950).
[27] Id. at 22 and 32.
[28] See note 18 supra.
[29] Snyder v. Buck, 340 U.S. 15 at 31, 71 S.Ct. 93 (1950).

abate unless proper substitution is made. This seems to controvert the holding of *LeCrone v. McAdoo.*[30]

Justice Clark dissented[31] on the ground that the court of appeals should have dismissed the appeal, since Buck, the party appealing, no longer had standing before the court. This probably meant that the judgment of the district court would be left standing. Query as to the effect of a judgment against an official having left office. Although Justice Clark reached this result apparently without relying upon section 11, that statute surely applies. His conclusion logically would necessitate a finding that section 11 had the same effect which Justice Douglas attributed to the Act of 1899, namely, that according to the statute the action was at an end. Under present legislation, this may well be the best result of the three opinions, since it is likely that the two statutes were meant to have the same effect, as Justice Frankfurter claimed,[32] but at the same time the wording of the Act of 1899 seems to indicate categorically that the action would not abate.

IV. *Possible Solutions*

Seeking a solution to the question, one discovers four possibilities.[33] The two which will be considered first could be accomplished under Federal Rule 25(d) as it now stands. The remaining two go more to the philosophy of the representative suit and would require legislative changes.

One possible way to resolve the problem under present legislation would be to by-pass Federal Rule 25(d) by saying, as Justice Frankfurter said of section 11 in the *Snyder* case, that it does not pertain to actions in substance against the United States. A number of O.P.A. cases have so held,[34] on the ground that to hold otherwise "would, in our opinion, be to glorify form over substance and reality."[35] Justice Douglas' broad language in the majority opinion of the *Snyder* case seems, correctly, to foreclose this as a possibility without legislative changes. Surely section 11 and Federal Rule 25(d) were intended to cover any action to which an official is either an actual or a nominal

[30] LeCrone v. McAdoo, 253 U.S. 217, 40 S.Ct. 510 (1920).

[31] Justice Black concurred.

[32] Snyder v. Buck, 340 U.S. 15 at 23, 71 S.Ct. 93 (1950).

[33] 4 MOORE, FEDERAL PRACTICE 534 to 538 (1950).

[34] Northwestern Lumber & Shingle Co. v. United States, (10th Cir. 1948) 170 F. (2d) 692; Ralph D'Oench Co. v. Woods, (8th Cir. 1948) 171 F. (2d) 112; Fleming v. Goodwin, (8th Cir. 1948) 165 F. (2d) 334.

[35] Fleming v. Goodwin, (8th Cir. 1948) 165 F. (2d) 334 at 338.

party. It is unlikely that the majority of the Supreme Court will change its position as to the meaning of the present legislation.

A second suggested solution would be to satisfy the technical requirements of the present legislative scheme by allowing an ex parte blanket substitution of the successor in office. Some of the district courts have done so in O.P.A. cases.[36] The workability of this solution to the problem depends, however, upon the voluntary cooperation of the successor and is, therefore, not likely to prove effective where the official is generally defending actions rather than bringing suit.

Third, Congress could recognize, as it has with respect to suits before the Tax Court,[37] that the United States is the actual party in interest and dispense altogether with the necessity of substitution, which is in truth but a formality in "a suit to secure a money claim due from the United States, enforced against the officer who was the effective conduit for its payment."[38] This could easily be accomplished by means of a proviso limiting Federal Rule 25(d) to actions on claims which cannot be brought directly by or against the United States. To paraphrase Justice Frankfurter, since the representative suit arose as a subterfuge to circumvent sovereign immunity, there is no merit in continuing the fiction in cases as to which the sovereign has consented to direct suit.[39]

In view of the fact that the suit against the governmental representative is so much a part of our system of jurisprudence, probably the most practical solution is a compromise under which suit could be brought against the office instead of the official.[40] If, therefore, the official leaves office while the action is pending, the suit merely continues against the successor. No substitution of names would be necessary if the original official was not sued by name. The courts have long held that an action brought against a board or agency with continuity of existence does not abate upon a change in personnel, and no substitution is needed.[41] There is no reason why this practice can not be extended to allow suit against an office with continuity of existence, though held by successive individuals. Many state courts very early recognized this general approach in holding that a mandamus proceeding goes to the office, not to

[36] 4 MOORE, FEDERAL PRACTICE 536 (1950); Bowles v. Goldman, (D.C. Pa. 1947) 7 F.R.D. 12; Bowles v. Weiner, (D.C. Mich. 1947) 6 F.R.D. 540.

[37] 53 Stat. L. 165 (1939), 26 U.S.C. (1946) §1143; 4 MOORE, FEDERAL PRACTICE 534 and 536 (1950).

[38] Snyder v. Buck, 340 U.S. 15 at 28, 71 S.Ct. 93 (1950).

[39] Id. at 28 and 29.

[40] 4 MOORE, FEDERAL PRACTICE 536 (1950).

[41] 102 A.L.R. 943 at 956 (1936); Murphy v. Utter, 186 U.S. 95, 22 S.Ct. 776 (1902); Leavenworth County v. Sellew, 9 Otto (99 U.S.) 624 (1878); Marshall v. Dye, 231 U.S. 250, 34 S.Ct. 92 (1913); Irwin v. Wright, 258 U.S. 219, 42 S.Ct. 293 (1922).

the official, so that a mandamus action against an official will not abate upon his leaving office.[42]

That the problem of the representative suit should today be so unsettled an issue seems strange, especially in view of the fact that adequate legislation has succeeded in laying to rest many another common law ghost. The representative suit is so solidly implanted in our judicial system, however, that it may be with us indefinitely. One can hope, nevertheless, that eventually our legislators will adopt a more realistic philosophy. Perhaps the Supreme Court through the decision of the *Snyder* case will, as it has done in the past,[43] provide the needed impetus.

Alan C. Boyd, S. Ed.

CONSTITUTIONAL LAW — CIVIL RIGHTS — FIRST AMENDMENT FREEDOMS—REFORMULATION OF THE CLEAR AND PRESENT DANGER DOCTRINE—In July 1948 the apostles[1] of Communism in America were indicted under the conspiracy provisions of the Smith Act of 1940. The tension marking both the trial and the present era has obscured the constitutional problems and policy considerations involved. It is the purpose of this comment to trace the history of this cause celebre, *Dennis et al. v. United States,*[2] and to examine its effect upon our constitutional notions of the permissible bounds of utterance, primarily by an analysis of the appellate opinions.

I. *The Nature of the Indictment and the Trial*

The Smith Act of 1940 contained "the most drastic restriction on freedom of speech ever enacted in the United States during peace,"[3] but the far-reaching sections had been little used.[4] The defendants were

[42] 102 A.L.R. 943 at 948-952 (1936).

[43] The case of Bernardin v. Butterworth, 169 U.S. 600, 18 S.Ct. 441 (1898) was largely responsible for the Act of 1899, and the Supreme Court in the case of Irwin v. Wright, 258 U.S. 219, 42 S.Ct. 293 (1922) urged such changes as were later adopted in §11 of the 1925 Judicial Code.

[1] Originally defendants were twelve leaders of the Communist Party of the United States. Eugene Dennis, general secretary, headed the list after the case of William Foster, chairman, was severed because of his illness. See NEW YORK TIMES, Jan. 19, 1949, p. 1:1.

[2] 341 U.S. 494, 71 S.Ct. 857 (1951), Petition for rehearing denied, 72 S.Ct. 20 (1951).

[3] CHAFEE, FREE SPEECH IN THE UNITED STATES 441 (1941). Chafee indicates that the formal title, the Alien Registration Act of 1940, 54 Stat. L. 670 (1940), was misleading.

[4] Title 1 of the original act. The solitary use of the prohibition against conspiracy to advocate overthrow, section 3, was in Dunne et al. v. United States, (8th Cir. 1943) 138 F. (2d) 137, cert. den. 320 U.S. 790, 64 S.Ct. 205 (1943), where leaders of the Socialist

Admiralty and Shipping Section
Washington 25, D.C.

WS

January 30, 1961

Committee on Rules of Practice
and Procedure
Supreme Court Building
Washington 25, D. C.

Dear Sirs:

Consideration of the proposed January 1961 amendments to the Civil Rules with their notes is convincing that they are sound and desirable in principle. Examination of their proposed language further shows that it is well chosen with a view to their probable future incorporation into the Federal Admiralty Rules.

Proposed Civil Rule 25(d)(2) in particular represents a notable advance of substance over form and is a long overdue adoption of the more convenient English practice. However, the application of the same provision of (d)(2) to lines 31-32 of Civil Rule 25(d)(1) appears equally desirable.

I should like personally to suggest that in lines 31-32 the presently proposed words--

> but any misnomer not affecting the substantial rights of the parties shall be disregarded.

Should be replaced by the words--

> described as a party by his official title rather than by name, but the court may require his name to be added.

At this time, such a provision might well bring about a large practical advance in the style and form of much pending litigation.

Sincerely,

Leavenworth Colby
Chief, Admiralty & Shipping Section

cc: All members of Advisory Committees
on Admiralty and Civil Rules

Exhibit "A"

February 13, 1961

MEMORANDUM ON LETTERS RECEIVED
FROM THE BENCH AND BAR IN RESPONSE
TO JANUARY 1961 DRAFT AMENDMENTS

Rule 25(d) (substitution)

1. Of the total of ten letters received from the Bench and Bar on our draft amendments, seven refer either generally or specifically to the Rule 25(d) amendment, all approvingly.

2. One comment (Mr. Colby) would extend the principle of 25(d)(2) (suit by official title) and bring it into play in 25 (d)(1) as well. Thus where a suit was started against an official by name, and the official left office, the "automatic" substitution would bring in the successor by official title rather than by name (unless the court required his name to be added).

As to cases instituted after the amended Rule takes effect, the party will have available to him under 25(d)(2) the option to use the official title to begin with, and it can be hoped that this will become the prevailing practice. If, instead, he chooses to designate the official by name, then it seems right that the automatic substitution under 25(d)(1) should be in the same style. The proposal is perhaps more attractive as applied to cases now pending (more particularly those pending cases in which there is a prospect of the officeholder changing two or more times during the litigation), but we should hesitate to introduce language specially covering those cases. In all events a litigant who wanted to change the style of referring to an official from name to title could apply to do so at any time.

3. Another letter (Mr. Dreifus) would like to see us take care expressly of transfers of function from one government agency to another, but concedes that the problem of suits pending against the predecessor agencies is customarily dealt with in the statutes effecting the transfers. Our amendment may help in any cases where the statutes are silent; I doubt that we can safely embark on an amendment to deal with such cases in general terms.

4. A third, very interesting letter (Professor Foster) calls attention to the difficulties that can arise where, in order to avoid a desegregation decree, a School Board may resign en masse, taking care that no successor members of the Board are appointed. This is essentially a problem of enforcement. It should be possible, in some cases at least, to find an official somewhere up or down the line of local or State government who can exercise the power, abdicated by the Board, which is needed to enforce the decree. Beyond this point, the problem of meeting

such evasive tactics must be left to the ingenuity of the court and counsel. The letter does not propose any solution by rule. In the great bulk of cases in less delicate areas, some "acting" successor official can be readily found where the defendant official leaves office and a successor to the particular position is not promptly appointed.

Rule 54(b) (appeals in multiple-parties cases)

1. Seven of the letters refer either generally or specifically to this amendment. Six are approving; one disapproves.

2. One approving letter (Judge Brown) raises a question on the application of the amended rule to a case where the court dismisses the main claim and main defendant, but does not dismiss a related third-party claim and third-party defendant: is the dismissal a final decision for purposes of appeal where the District Court does not make a determination under the amended Rule? My own answer is no. The amended Rule, retaining the words "claim" and "cross-claim" (line 4) and adding the references to "parties," seems to require this conclusion. The letter refers critically to a recent Fifth Circuit case going the other way under the present Rule. Howze v. Arrow Transp. Co., 280 F. 2d 403 (5th Cir. 1960); contra: Tomlinson v. Trustees of the University of Pennsylvania, 226 F.2d 569 (3d Cir. 1959); cf. Capital Transit Co. v. District of Columbia, 225 F.2d 38 (D.C. Cir. 1955). The Howze decision seems hard to support; and would be harder still to defend under the amended Rule. In any event I would not recommend an attempt to deal with this problem by more specific language in the Rule. Of course in most imaginable cases the District Court should dismiss the third-party claim when he dismisses the main claim to which it is related.

3. Another approving comment (Judge Burdick) refers to the North Dakota version of the Rule as being a possible improvement from the standpoint of "grammar." The material difference is that the North Dakota text (corresponding to the 1955 proposal) uses the omnibus expression "multiple claims for relief" in substitution for the present wording "more than one claim for relief . . . whether as a claim, counterclaim, cross-claim, or third-party claim." There is some advantage in retaining the more detailed present phrasing because of the reliance of the courts on the exact language, as in Cold Metal Process Co. v. United Engineering & Foundry Co., 351 U.S. 445 (1956).

4. The forceful disapproving letter from Judge Friendly (copy attached) deserves careful reading. For the present, Judge Friendly would apparently let the Rule stand in its present text, covering multiple-claims cases. He would not extend

March 4, 1961

MEMORANDUM ON FURTHER COMMENTS RECEIVED
IN RESPONSE TO JANUARY 1961 DRAFT AMENDMENTS

Rule 25(d)(substitution)

1. Of the total of nine additional comments received on our draft amendments, seven refer to Rule 25(d), five approving this amendment as proposed. Among the approving comments is one from Mr. Walter J. Cummings, Jr. on behalf of the Federal Rules Committee of the American Bar Association.

2. Mr. James R. Browning, Clerk of the Supreme Court, questions why our amendment should not go further and cover the now rare actions against collectors for refunds of taxes (our Note indicates that these are excluded from Rule 25(d)). This point was the subject of correspondence between Mr. Browning and Mr. Cummings. I fear that we cannot go further under existing law. These actions against collectors have been traditionally regarded as running against them individually and not in their official capacity; judgments are enforceable out of their personal assets (the Treasury, however, will pay such a judgment if the court makes a certificate under 28 U.S.C. §2006).

Mr. Browning also points to an apparent discrepancy between this reading of Rule 25(d) in respect to collectors and the text of Rule 81(f). This matter is explained in 4 Moore ¶25.05, p. 531, cited in our Note. When we propose amendments of Rule 81 -- as we shall probably have to do in our next batch -- it may be found advisable to deal explicitly with this point.

3. The executive committee of the Federal Bar Association is opposed to and would eliminate new Rule 25(d)(2) regarding use of the official title rather than the name in suits by or against a public officer in his official capacity. (The Association opposed the similar 1955 proposal; see our memorandum book, p. VI-19.) The objection made is that there may be cases where, despite the amendment, suit will, as a matter of law, be maintainable against the officer only by name. Compare _Blackmar_ v. _Guerre_, 342 U.S. 512 (1952). But our provision is optional, not mandatory; it will still be possible to use the name, if the party wants to do so. Moreover, our amendment states expressly that where the official title is used initially, "the court may require his [officer's] name to be added." So if it appears at any time that there is any reason to use the name, this can be done.

Despite its optional character, the Rule 25(d)(2) amendment is not "superfluous," as the executive committee thinks, but highly beneficial; it can be hoped that under the amendment it will become the general practice to use the official title rather

than the name in "official capacity" cases. Concern with substitution will thereby be eliminated. Thus amended Rule 25(d)(1), providing for automatic substitution, would operate largely for transitional purposes. The executive committee objects to the latter amendment also, and offers a redraft. (The Association opposed the 1955 proposal to extend the time for substitution to a "reasonable" time; although it was sympathetic to the idea, it felt that further study was needed; see p. VI-19.)

While agreeing that Rule 25(d) needs revision, and also apparently favoring a device of automatic substitution, the executive committee is worried that our draft is designed "to simplify the problems of consent to sue and sovereign immunity" in a way that can only be done legislatively. This is fully dealt with in our Note.

The executive committee also points out that actions against officers are now commonly styled against them both individually and officially. The committee seems to feel that in these cases automatic substitution under the wording of our amendment may be awkward, presumably because the possible claim against the predecessor as an individual may disappear from view when the substitution takes effect. This picture is largely unreal.

With "official capacity" broadly construed (see our Note), it will be clear at the time of substitution in the large majority of the cases that relief will be needed and appropriate only against the successor officer, and the Rule 25(d)(1) substitution will do the whole job. In a small fraction of the cases it will be clear that only damages against the officer originally made a party defendant, to be paid out of his own pocket, are sought; here Rule 25(d)(1) will be altogether inapplicable and only Rule 25(a)(1) will apply (substitution on death). If a case arises where it is genuinely doubtful whether the ultimate relief should take one form or the other (or where relief conceivably could be allowed in both forms), the automatic substitution can well apply to bring in the successor, while still leaving the predecessor in the case an an individual. (The executive committee seems to acknowledge this solution.) When a case with such possible complexities is well advanced at the time of the change of officeholder, the doubts will probably have resolved themselves; in any event, clarification, if needed, can be obtained by making a motion. We are dealing at most with fringe situations where the officer is a defendant; the problem does not appear to arise at all where the officer is a plaintiff.

To consider the attempted redraft: Words are added to our draft of Rule 25(d)(1) after "in his official capacity" which attempt both to spell out and limit this concept in terms of relief sought. But the words "derives from" are ambiguously

expansive. I consider the effort at thumbnail definition damaging; compare the explanation in our Note. Automatic substitution in these official capacity cases is retained in the redraft. The possibility of entering an order of substitution is also retained, but the words "on notice" are added. This looks to a motion where questions can be ironed out; but that is available under our draft, which also would allow an order on the court's own initiative. The redraft retains, but seems to put in an inappropriate place, the statements that proceedings following the substitution shall be in the name of the substituted party and that misnomers not affecting substantial rights shall be disregarded.

I do not think we should follow the Federal Bar Association redraft.

Rule 54(b) (appeals in multiple-parties cases)

The six comments on Rule 54(b) are all approving. One of them (Referee Friebolin) raises the linguistic point about "fewer than" in lieu of "less than" mentioned in my covering letter. Another (District of Maryland Committee) inquires whether entry of judgment against one of several defendants may not sometimes prejudice the other defendants. Under the Rule the District Court exercises discretion; see also Rule 62(h) as amended.

Forms 2 and 19

Of the seven comments on the Forms, six are approving. One comment (Mr. Baker) questions why the style of alleging the defendant's principal place of business in Form 2 differs from the style of alleging the plaintiff's. The difference of course reflects the fact that plaintiff will know the facts as to himself but may not be as well informed about his opponent. The same comment cites Cameron v. Hodges, 127 U.S. 322 (1888), as "seriously question[ing] the effectiveness of any non-affirmative allegation in a statement of jurisdictional facts," but the case is distinguishable, and promulgation of the Form as part of the Rules should eliminate any doubt as a practical matter. See Rule 84.

TAB 7E

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To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett, Reporter

Date: March 6, 2020

Re: Suggestion Regarding FRAP 43; Official Capacity Actions (19-AP-G; 19-CV-FF)

Sai has submitted a suggestion that Civil Rule 17 be amended to require, rather than merely permit, the use of an official title in official capacity actions, and that Appellate Rule 43 be amended accordingly. Sai notes that Civil Rule 17 has permitted the naming of the official title, rather than the name of the officer, in official capacity suits since 1961, and that the Committee at the time expected that this would become the norm, but that this expectation has not been fulfilled. Sai contends that the continuing practice of naming the office holder by name, rather than by title, creates paperwork and confusion as new individuals take over the office and get substituted into the case.

On Sai's approach, if an action is brought against an officer in the officer's official capacity, the title should be used; if an action is brought against an officer in the officer's personal capacity, the name should be used; and if an action is brought against an officer in both the officer's official and personal capacity, both should be named and listed as separate parties. That way, clarity is served when a person leaves office: an official capacity claim continues against the office, with the new office holder substituted as the party, and a personal capacity claim continues against the individual, with no substitution.

There is certainly something to be said for this proposal. It might help sort out the confusion between official and personal capacity claims. *Cf. Kentucky v. Graham*, 473 U.S. 159, 165 (1985) (noting that the "distinction between personal- and official-capacity action suits . . . apparently continues to confuse lawyers and confound lower courts"); Fallon et al., Hart & Wechsler's The Federal Courts and the Federal System 998 (7th edition 2015) ("Wouldn't it make sense, instead of using the somewhat elusive labels of official and personal capacity, simply to require the plaintiff to set forth in the complaint, or soon thereafter, the particular person or entity from which monetary relief is sought?").

But I see at least two problems. First, given the theory of *Ex parte Young*—that a state official who violates federal law is "stripped of his official or representative capacity and is subjected in his person to the consequences of his individual conduct," 209 U.S. 123, 160 (1908)—it is not clear that a suit against a state official for an injunction cannot be described as one brought against that official in his personal capacity. *See* Hart & Wechsler at 998 n.9 ("Under the theory of *Young*, it is not clear that a suit seeking prospective relief against an officer in that officer's 'personal capacity' is defective.") After all, if the injunction is disobeyed, that officer himself can be held in custody for contempt, as indeed was Attorney General Edward Young himself. The office of Attorney General is not so readily put in custody.

Second, in *Governor of Georgia v. Madrazo*, 26 U.S. 110, 123–24 (1828), Chief Justice Marshall held that an action against the Governor by title was barred by the Eleventh Amendment. He wrote for the Court:

> The claim upon the governor, is as a governor; he is sued, not by his name, but by his title. The demand made upon him, is not made personally, but officially.
>
> The decree is pronounced not against the person, but the officer, and appeared to have been pronounced against the successor of the original defendant; as the appeal bond was executed by a different governor from him who filed the information. In such a case, where the chief magistrate of a state is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, we think the state itself may be considered as a party on the record. If the state is not a party, there is no party against whom a decree can be made. No person in his natural capacity is brought before the Court as defendant. This not being a proceeding against the thing, but against the person, a person capable of appearing as defendant, against whom a decree can be pronounced, must be a party to the cause before a decree can be regularly pronounced.

Id.

It is true that the Advisory Committee Note to the 1961 amendment confidently asserted, "The expression 'in his official capacity' is to be interpreted in this context as part of a simple procedural rule for substitution; care should be taken not to distort its meaning by mistaken analogies to the doctrine of sovereign immunity from suit or the Eleventh Amendment." I confess that, at least absent more research, I do not share that confidence or see what is "mistaken" in being

concerned that sovereign immunity (unless waived) might be understood to require the naming of the individual officeholder rather than the office. Much has happened in the law of sovereign immunity since 1961, but I know of nothing that I would describe as overruling *Madrazo*. *See also Alabama v. Pugh*, 438 U.S. 781, 782 (1978) (summarily reversing where injunction ran against numerous individual defendants as well as Alabama and noting that "Alabama has an interest in being dismissed from this action in order to eliminate the danger of being held in contempt if it should fail to comply with the mandatory injunction").

Perhaps the hopes of the 1961 drafters have not materialized because of the inertia of lawyerly habit. Or perhaps it is because lawyers share these concerns about sovereign immunity.

In any event, should the Committee wish to pursue this suggestion, I would urge care to avoid creating problems with sovereign immunity.

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TAB 7F

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From: FRED WILCON <fbjon@aol.com>
Sent: Tuesday, December 24, 2019 10:57 AM
To: RulesCommittee Secretary
Subject: Update the procedure to deal with Subpoenas from Congress and Senate

Dear Sir/Madam
If anything has emerged from the latest episode regarding presidential obstruction, it is that the Courts need to have updated and expedited procedures for dealing with the consideration of and enforcement of subpoenas. The executive department has successfully stonewalled Congressional discovery by using specious arguments and the lack of an enforceable, efficient time standard by the courts to provide any sort of efficient subpoena enforcement. This is a disservice to the country and a perversion of justice.

I suggest that there be a very tight procedure for enforcing/ challenging subpoenas and appealing from rulings so that such matters receive immediate priority,above all other pending cases and docket matters so that from district court through circuit courts and even through the Supreme Court, the whole process can be done in three weeks or less. There is no need for more time The issues are usually very clear, and more often than not, the challenges involve specious arguments that are interposed for no other purpose than delay!! (When will the Courts apply Rule 11 to sanction such conduct?) The procedure should apply to subpoenas for witnesses (whether government employees or not) and for documents.
Once a petition to enforce a subpoena is filed, a reply should be required within 2 days. Argument should take place not more than 2 days from then and judges should be required to rule within not more than 3 days from conclusion of argument! (no time out for weekends or holidays) The whole proceeding should be open to the public except if national security issues are (REALLY involved) and there should be a penalty for a false assertion of such an exemption.)
An appeal must be docketed not more than 48 hours from a ruling, with reply and argument and decision to follow on the 2 and 3 day schedule as in the District Court. (En banc hearing in the Circuit court should occur only in extraordinary circumstances and again, on the expedited schedule suggested above.
Appeal to the US Supreme Court should likewise be mandated to take place on such an expedited schedule for filing appeal or request for certiorari, with immediate reply and hearing and decision required as above. (I do not know what to do about when the Supreme Court is not in session, but it seems to me that this could be dealt with so that the process does not just stop over the vacation term from June to October...which is ridiculous!

Presently, there is absolutely no incentive for the Executive branch or witnesses to cooperate with the subpoena process and as demonstrated by the behavior of the current administration, there is every incentive to stonewall, resist, appeal and argue, even the most ridiculous and far fetched arguments, because their sole objective is to waste time.

This is a very serious matter that requires immediate attention or the judicial branch will find itself reduced to an almost irrelevant branch of government because it cannot and does not act in a manner that is timely to the needs of the system.

Thank you for your consideration. I hope some important changes will be made, and made soon.

Fred B. Wilcon
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617-721-5469

TAB 7G

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To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett, Reporter

Date: March 6, 2020

Re: Suggestion Regarding Congressional Subpoenas (19-AP-H; 19-CV-II; 19-CR-E)

Fred Wilcon has submitted a suggestion for "a very tight procedure" for enforcing or challenging Congressional subpoenas. (At least in context, it appears that the suggestion is limited to Congressional subpoenas.) He calls for replies in the district court within two days, argument within two days after that, and decision within three days after argument—and similar timelines in the courts of appeals. He is concerned that absent such expedited proceedings, the executive can simply stonewall and waste time.

Under current procedures, courts can move very quickly when necessary. *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 584 (1952) (noting that the "District Court on April 30 issued a preliminary injunction . . . [o]n the same day the Court of Appeals stayed the District Court's injunction [and] we granted certiorari on May 3 and set the cause for argument on May 12"); *Delo v. Stokes*, 495 U.S. 320 (1990) (stay of execution granted by district court on afternoon of May 9, motion to vacate stay denied by panel of court of appeals on morning of May 11, application to vacate stay granted by Supreme Court on May 11). If lower courts do not respond to emergencies in a timely manner, appellate courts have sufficient power under current law to deal with the issue. *See Delo*, 495 U.S. at 323 (Kennedy, J., concurring) ("If the court of appeals fails to act in a manner sufficiently prompt to preserve the jurisdiction of the court and to protect the parties from the consequences of a stay entered without an adequate basis, an injured party may seek relief in this Court pursuant to our jurisdiction under the All Writs Act.").

I suggest that no rulemaking action is required.

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TAB 7H

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Bryan Lammon
Professor of Law
University of Toledo College of Law

February 9, 2020

The Honorable Michael A. Chagares
United States Court of Appeals
U.S. Post Office and Courthouse
Two Federal Square, Room 357
Newark, NJ 07102-3513

Professor Edward Hartnett
Richard J. Hughes Professor of Law
Seton Hall University School of Law
One Newark Center
Newark, NJ 07102

Subject: Proposed amendment to Federal Rule of Appellate Procedure 4(a)(2).

Dear Judge Chagares & Professor Hartnett:

I write to ask that the Advisory Committee on Appellate Rules consider amending Federal Rule of Appellate Procedure 4(a)(2).

Rule 4(a)(2) is supposed to give effect to notices of appeal filed before the district court enters a judgment or otherwise appealable order. But the courts of appeals are divided over when exactly Rule 4(a)(2) does so. They have also split on whether Rule 4(a)(2) supersedes the common law cumulative-finality doctrine that the rule (at least partially) codified. And courts do not just disagree with each other; several circuits have issued conflicting decisions on these matters. The Committee looked into these issues in 2010 and 2011 but ultimately decided to take no action. The intervening years have not made things any better.

I accordingly ask the Committee to look into this issue again. I recently published an article addressing these issues in depth: *Cumulative Finality*, 52 GA. L. REV. 767 (2018), a copy of which is attached. I use this letter to summarize my analysis in that article and propose a possible rule change. I first briefly discuss the history of cumulative finality up through the Supreme Court's decision in *FirsTier Mortgage Co. v. Investors Mortgage Insurance Co.*, 498 U.S. 269 (1991). Second, I describe the split among and within the circuits on the meaning of Rule 4(a)(2). Finally, I offer potential language for a rule amendment that would

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resolve the current cumulative-finality mess.

1. How We Got Here

Litigants normally must wait until the end of district court proceedings before filing a notice of appeal. But sometimes they file too early, before the district court has entered a judgment or other appealable decision. Problems can then arise if these litigants do not then file a second notice (or amend their first). No proper notice has been filed. And litigants that do not file a proper notice forfeit their right to appellate review.

To address this problem, courts and rulemakers developed the cumulative-finality doctrine, which allows subsequent events to save a premature notice of appeal.

Cumulative finality first emerged as a coherent doctrine in the 1960s and 70s. The courts of appeals developed the doctrine to save a variety of prematurely filed notices of appeal. *See* Lammon, *Cumulative Finality*, *supra*, at 781–87. Courts held, for example, that notices filed after a district court announced its decision were saved by the district court's subsequent entry of a judgment. *See, e.g.*, *Hodge v. Hodge*, 507 F.2d 87 (3d Cir. 1975). They held that notices filed after dismissal of a complaint (but not dismissal of the entire action) were saved by the later dismissal of the action. *See, e.g.*, *Firchau v. Diamond National Corp.*, 345 F.2d 269 (9th Cir. 1965). Courts also held that notices filed after the district court resolved some (but not all) of the claims in a multi-claim action were saved by a subsequent judgment that resolved the remaining claims. *See, e.g.*, *Richerson v. Jones*, 551 F.2d 918 (3d Cir. 1977); *Jetco Electronics Industries, Inc. v. Gardiner*, 473 F.2d 1228 (5th Cir. 1973). And a few decisions from this time allowed subsequent events to save a notice of appeal filed after an order that did not even resolve a claim. *See, e.g.*, *Curtis Gallery & Library, Inc. v. United States*, 388 F.2d 358 (9th Cir. 1967) (holding that a notice of appeal filed after summary judgment on only liability was saved by a subsequent judgment that determined the amount of damages).

Rule 4(a)(2) was added to the Federal Rules of Appellate Procedure in 1979. As amended, the rule now provides that "[a] notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry." The Notes state that the rule was meant "to avoid the loss of the right to appeal by filing the notice of appeal prematurely." The Notes also indicate that the Committee intended to codify an existing practice in the courts of appeals and cited to some the caselaw in this area.

But neither the Notes nor the rule itself specified what precisely was being codified or how the rule affected the then-existing common law cumulative-finality doctrine. And the post-Rule 4(a)(2) caselaw does not offer many hints. Despite the new rule, the courts of appeals continued to develop cumulative finality as a largely judge-made doctrine. *See* Lammon, *Cumulative Finality*, *supra*,

at 788–93.

Then came the Supreme Court's decision in *FirsTier Mortgage Co. v. Investors Mortgage Insurance Co.*, 498 U.S. 269 (1991). *FirsTier* held that Rule 4(a)(2) saved a notice of appeal filed after a district court had announced from the bench its decision to dismiss the case but before it formally entered the final judgment of dismissal on the docket. The Court echoed the Committee Notes on the rule's purpose and origins: Rule 4(a)(2) exists to prevent the loss of appellate rights when a late notice does not prejudice the appellee, and the rule codified an existing practice in the courts of appeals. But the Court added that Rule 4(a)(2) would not save every premature notice of appeal. The rule instead "permits a notice of appeal from a nonfinal decision to operate as a notice of appeal from the final judgment only when a district court announces a decision that *would* be appealable if immediately followed by the entry of judgment."

2. *The Current Split*

FirsTier sowed the seeds for confusion in the courts of appeals; writing for the Tenth Circuit in *In re Woolsey*, 696 F.3d 1266, 1271 (10th Cir. 2012), then-Judge Gorsuch characterized *FirsTier*'s discussion of Rule 4(a)(2)'s limits as "cryptic and arguably tangential," and he noted that the opinion is "open to many different understandings." After *FirsTier*, the courts of appeals developed three approaches to cumulative finality. *See* Lammon, *Cumulative Finality*, *supra*, at 795–802. Some cases held that appeals only from decisions that resolve all outstanding issues in the district court can be saved by the entry of a final judgment. *See, e.g.*, *Miller v. Special Weapons, L.L.C.*, 369 F.3d 1033, 1035 (8th Cir. 2004). Other cases held that Rule 4(a)(2) will also save notices filed after decisions that could have been certified for an intermediate appeal under Rule 54(b). *See, e.g.*, *Outlaw v. Airtech Air Conditioning & Heating, Inc.*, 412 F.3d 156, 161–62 (D.C. Cir. 2005) (Roberts, J.). Still other cases held that nearly any district court decision, no matter how interlocutory, can be saved by a subsequent judgment. *See, e.g.*, *Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581, 587 (3d Cir. 1999).

The courts have also disagreed about the interaction between Rule 4(a)(2) and the common law doctrine that preceded it. Some courts hold that Rule 4(a)(2) is now the only source of law on cumulative finality. *See, e.g.*, *Outlaw*, 412 F.3d at 160. Others have concluded that the common law doctrine survived Rule 4(a)(2) and continues to exist alongside it. *See, e.g.*, *Lazy Oil*, 166 F.3d at 587.

The split is not just between the circuits; several circuits have issued internally inconsistent decisions on these matters. *See* Lammon, *Cumulative Finality*, *supra*, at 802–14. The Eighth Circuit, for example, has one decision holding that Rule 4(a)(2) saved a notice of appeal filed after the district court had ordered sanctions but before it determined the amount of those sanctions. *Hill v. St. Louis Uniersity*, 123 F.3d 1114, 1120–21 (8th Cir. 1997). But seven years later, the Eighth Circuit claimed to be unaware of any Eighth Circuit decision adopting the cumulative finality doctrine and held that neither the common law

cumulative finality doctrine nor Rule 4(a)(2) saved a notice of appeal filed when a counterclaim remained outstanding. *Miller*, 369 F.3d at 1035.

Until recently, the Federal Circuit has generally taken the narrowest approach to cumulative finality, holding in two unpublished cases that notices filed only after decisions resolving all outstanding issues can be saved by the entry of a final judgment. *See Stoney Point Prods., Inc. v. Underwood*, 15 F. App'x 828, 830–31 (Fed. Cir. 2001) (holding that an appeal from "a judgment disposing of only some asserted claims" was not saved by a subsequent final judgment); Meade Instruments Corp. v. Reddwarf Starware, LLC, No. 99-1517, 2000 WL 987268, at *3 (Fed. Cir. June 23, 2000) (same). That court has, however, taken a broader approach in an appeal from the Board of Contract Appeals. *See Fireman's Fund Ins. Co. v. England*, 313 F.3d 1344, 1348–49 (Fed. Cir. 2002). And just recently, the Federal Circuit allowed counsel to cure a premature notice by abandoning an unresolved counterclaim during oral argument. *See Amgen Inc. v. Amneal Pharmaceuticals LLC*, 945 F.3d 1368 (Fed. Cir. 2020). But the recent decision did not reference any of the Federal Circuit's decisions in this context (or any other court's decisions), nor did it mention Rule 4(a)(2). *See* Bryan Lammon, "The Federal Circuit & Cumulative Finality," Final Decisions (Jan. 31, 2020), https://finaldecisions.org/the-federal-circuit-cumulative-finality.

The Fifth Circuit's caselaw is in what's probably the worst state. Even before *FirsTier*, the Fifth Circuit had issued a series of inconsistent decisions on how cumulative finality operates. *Compare Alcorn County v. U.S. Interstate Supplies, Inc.*, 731 F.2d 1160, 1165–66 (5th Cir. 1984) (holding that a subsequent decision on the amount of attorneys' fees saved a notice of appeal filed after the district court had determined liability, damages, and entitlement to attorney's fees), *and Tower v. Moss*, 625 F.2d 1161, 1164–65 (5th Cir. 1980) (holding that the subsequent dismissal of the sole outstanding claim saved a notice of appeal filed from an earlier order dismissing only some of the claims), *with United States v. Taylor*, 632 F.2d 530, 531 (5th Cir. 1980) (holding that the subsequent dismissal of a plaintiff's claims did not save the defendant's notice of appeal filed after the dismissal of its counterclaims). The Fifth Circuit's post-*FirsTier* decisions are a mess. That court first appeared to hold that Rule 4(a)(2) would save notices filed after decisions that could be certified for an intermediate appeal under Rule 54(b). *See Barrett v. Atl. Richfield Co.*, 95 F.3d 375, 378–79 (5th Cir. 1996); *Riley v. Wooten*, 999 F.2d 802, 804–05 (5th Cir. 1993). But in *United States v. Cooper*, 135 F.3d 960, 963 (5th Cir. 1998), the Fifth Circuit held that *FirsTier* required the narrowest interpretation of Rule 4(a)(2)—only notices filed from decisions that resolve all outstanding issues in the district court can be saved by the entry of a final judgment. (*Cooper* addressed the scope of then-Rule 4(b), now Rule 4(b)(2), which is the criminal analogue of Rule 4(a)(2). *Id.* at 962. The *Cooper* court noted, however, that Rule 4(b) should be interpreted like the nearly identical Rule 4(a)(2). *Id.* at 962 n.1.) But *Cooper*'s limiting of Rule 4(a)(2) has not stuck, as some subsequent Fifth Circuit decisions reject it. *See Miller v. Gorski Wladyslaw Estate*, 547 F.3d 273, 277 n.1 (5th Cir. 2008) (holding that a premature notice of appeal filed after a partial

grant of summary judgment was saved by the later disposition of all outstanding issues); *Boudreaux v. Swift Transportation Co.*, 402 F.3d 536, 539 n.1 (5th Cir. 2005) (holding that a premature notice of appeal filed after the district court had granted summary judgment in favor of one defendant but before dismissing the claims against a second defendant was saved by the subsequent final judgment). *See also Swope v. Columbian Chemicals Co.*, 281 F.3d 185, 191–92 (5th Cir. 2002).

The Fifth, Eighth, and Federal Circuits are not alone. The First, Third, Ninth, and Tenth Circuits all have issued cumulative-finality decisions that are at least in tension (if not direct conflict) with prior panel decisions. *See* Lammon *Cumulative Finality*, *supra*, notes 226–231 & 239–51 and accompanying text.

3. A Better Cumulative-Finality Rule

Given the various approaches to cumulative finality, some litigants are losing their opportunities for appellate review by filing a notice of appeal too early. I find that troubling. The error here is a technical one. It is not as though a notice of appeal was not filed; it was just filed too early. And the proper time for filing a notice of appeal is not always clear, particularly to those who are not well versed in the intricacies of federal appellate procedure. Parties accordingly sometimes file too early.

Technicalities can be important, especially when dealing with procedure. But the punishment for a procedural misstep should fit the crime. The misstep here—filing a premature notice of appeal—generally does little (if any) harm. Similarly harmless is allowing subsequent events to save these notices. Early notices—unlike late ones—do not implicate any reasonable reliance interests on the finality of a judgment. Early notices create no risk of piecemeal appeals, as the district court must enter a judgment or appealable order before anyone can perfect the appeal. And no one should be surprised when a litigant who filed a premature notice of appeal wants to later obtain appellate review of the district court's decisions.

Granted, a more generous approach to saving premature notices of appeal could encourage litigants to file more premature notices. And when parties file a premature notice of appeal, there is some risk of bogging down litigation while the courts and parties determine the effect of the notice.

But a clearer rule could mitigate these problems. Premature notices that disrupt litigation already occur, due largely to uncertainty about what to do with them. A clearer cumulative finality rule—no matter its content—might largely solve this problem. And of the possible rules, the broadest approach is the most pragmatic. Indeed, courts rarely (if ever) conclude that giving effect to a premature notice causes any prejudice. What little harm a broader approach to cumulative finality might cause can be mitigated through a clear rule. And courts could develop internal procedures for handling the premature notices—placing the appellate docket in suspension, for example, and allowing the parties to reopen it once the district court has entered a judgment or appealable order.

As for language, I have a proposed starting point.. (The language I propose here is different from that proposed in the article, which is due to the proposed amendments to Rule 3(c).) Again, Rule 4(a)(2) currently reads:

> *Filing Before Entry of Judgment.* A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

One possible change would be the following:

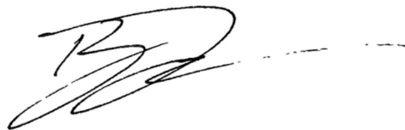
> *Filing Before Entry of Judgment.* A notice of appeal filed before the court enters a judgment or appealable order is treated as filed on the date of and after the entry of that judgment or order.

The proposed language treats all premature notices the same; it no longer asks what kind of decision or order a notice was filed after. The language makes that notice effective at the entry of the judgment or order that would normally have been appealable. And given that notices of appeal are not supposed to define the scope of appellate review (as the proposed amendments to Rule 3(c) make clear), there is no need to address which judgment or order is entered. Upon the entry of a judgment or appealable order, a prior notice of appeal would spring into effect and allow the party to appeal any matters that would be within the scope of appellate review in an appeal from that judgment or order.

This is not the only way in which to amend Rule 4(a)(2) to cure its ills. But I hope it will provide a helpful jumping-off point for the Committee's work.

I appreciate your time and consideration of this issue. Please let me know if there is anything I can do to assist the Committee in its work.

Sincerely,



Bryan Lammon

TAB 7I

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To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett, Reporter

Date: March 6, 2020

Re: Suggestion Regarding FRAP 4(a)(2) and Cumulative Finality (20-AP-A)

Professor Bryan Lammon has submitted a suggestion that FRAP 4(a)(2) be amended to deal more thoroughly with premature notices of appeal. He notes that current FRAP 4(a)(2) by its terms governs a particular instance of premature notices of appeal—where a notice of appeal is filed after the court announces a decision or order, but before entry of the judgment or order—but that courts of appeals are divided regarding both the interpretation of FRAP 4(a)(2) and whether it supersedes the common law cumulative-finality doctrine.

The Committee examined this issue about a decade ago, but decided to take no action. Professor Lammon contends that the "intervening years have not made things any better," and asks the Committee to look into it again.

Based on his letter and his underlying article, *Cumulative Finality*, 52 Ga. L. Rev. 767 (2018), it does appear that the issue is worth looking into again, even though I am by no means sure that the Committee will reach a different conclusion than it did a decade ago.

Professor Lammon suggests that FRAP 4(a)(2) could be amended to read as follows:

> *Filing Before Entry of Judgment*. A notice of appeal filed before the court enters a judgment or appealable order is treated as filed on the date of and after the entry of that judgment or order.

Such an amendment runs the risk of encouraging litigants to file notices of appeal immediately upon filing a complaint or answer. Even if parties do not go to that extreme, encouraging premature notices of appeal could disrupt district court proceedings. Ordinarily, a notice of appeal divests the district court of jurisdiction, but "some courts have developed a procedure whereby the district court can certify its conclusion that the appeal is frivolous and that

it accordingly intends to assert the right to proceed pending the appeal." Wright & Miller, 16A Federal Practice & Procedure § 3949.1 (5th ed.). *See Behrens v. Pelletier*, 516 U.S. 299, 310–11 (1996) (stating that the "District Court appropriately certified petitioner's immunity appeal as 'frivolous' . . . and noting that this "practice, which has been embraced by several Circuits, enables the district court to retain jurisdiction pending summary disposition of the appeal, and thereby minimizes disruption of the ongoing proceedings"). If the notice of appeal is not frivolous, then the district court is disrupted; if the notice is sufficiently frivolous that the district court can proceed, then (under this practice) the district court should have made such a determination—in which case the appellant is on notice that a later notice of appeal is required.

Perhaps there is a way to generalize and build upon this process so that—unless the time lag is so short that the district judge reaches final judgment without being aware of the notice of appeal—the appellant is on notice of the need to file a later notice of appeal. An additional rule permitting notices of appeal to relate forward might be limited to situations (1) where the district judge reaches final judgment without being aware of the notice of appeal, or (2) where the question of whether the notice of appeal is in fact premature is sufficiently unclear that a reasonable person might have thought it was not premature. *Cf. FirsTier Mortg. Co. v. Inv'rs Mortg. Ins. Co*., 498 U.S. 269, 276 (1991) ("This is not to say that Rule 4(a)(2) permits a notice of appeal from a clearly interlocutory decision—such as a discovery ruling or a sanction order under Rule 11 of the Federal Rules of Civil Procedure—to serve as a notice of appeal from the final judgment. A belief that such a decision is a final judgment would not be reasonable. [But where] a litigant's confusion is understandable . . . permitting the notice of appeal to become effective when judgment is entered does not catch the appellee by surprise.").

In any event, I recommend appointment of a subcommittee to examine Professor Lammon's suggestion.

AMENDMENT NO.________ Calendar No.______

Purpose: Providing emergency assistance and health care response for individuals, families and businesses affected by the 2020 coronavirus pandemic.

IN THE SENATE OF THE UNITED STATES—116th Cong., 2d Sess.

H. R. 748

To amend the Internal Revenue Code of 1986 to repeal the excise tax on high cost employer-sponsored health coverage.

Referred to the Committee on ____________________ and ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT IN THE NATURE OF A SUBSTITUTE intended to be proposed by ______________

Viz:

1 Strike all after the enacting clause and insert the fol-
2 lowing:

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Coronavirus Aid, Re-
5 lief, and Economic Security Act" or the "CARES Act".

6 **SEC. 2. TABLE OF CONTENTS.**

7 The table of contents for this Act is as follows:

Sec. 1. Short title.
Sec. 2. Table of contents.
Sec. 3. References.

DIVISION A—KEEPING WORKERS PAID AND EMPLOYED, HEALTH CARE SYSTEM ENHANCEMENTS, AND ECONOMIC STABILIZATION

1 Commissioner shall submit to the Committees on Appro-
2 priations of the House of Representatives and the Senate
3 a spending plan for such funds: *Provided further*, That
4 such amount is designated by the Congress as being for
5 an emergency requirement pursuant to section
6 251(b)(2)(A)(i) of the Balanced Budget and Emergency
7 Deficit Control Act of 1985.

8 THE JUDICIARY

9 SUPREME COURT OF THE UNITED STATES

10 SALARIES AND EXPENSES

11 For an additional amount for ''Salaries and Ex-
12 penses'', $500,000, to prevent, prepare for, and respond
13 to coronavirus, domestically or internationally: *Provided*,
14 That such amount is designated by the Congress as being
15 for an emergency requirement pursuant to section
16 251(b)(2)(A)(i) of the Balanced Budget and Emergency
17 Deficit Control Act of 1985.

18 COURTS OF APPEALS, DISTRICT COURTS, AND OTHER
19 JUDICIAL SERVICES

20 SALARIES AND EXPENSES

21 For an additional amount for ''Salaries and Ex-
22 penses'', $6,000,000, to prevent, prepare for, and respond
23 to coronavirus, domestically or internationally: *Provided*,
24 That such amount is designated by the Congress as being
25 for an emergency requirement pursuant to section

1 251(b)(2)(A)(i) of the Balanced Budget and Emergency
2 Deficit Control Act of 1985.

3 DEFENDER SERVICES

4 For an additional amount for ''Defender Services'',
5 $1,000,000, to remain available until expended, to pre-
6 vent, prepare for, and respond to coronavirus, domestically
7 or internationally: *Provided*, That such amount is des-
8 ignated by the Congress as being for an emergency re-
9 quirement pursuant to section 251(b)(2)(A)(i) of the Bal-
10 anced Budget and Emergency Deficit Control Act of 1985.

11 ADMINISTRATIVE PROVISION—THE JUDICIARY

12 VIDEO TELECONFERENCING FOR CRIMINAL PROCEEDINGS

13 SEC. 15002. (a) DEFINITION.—In this section, the
14 term ''covered emergency period'' means the period begin-
15 ning on the date on which the President declared a na-
16 tional emergency under the National Emergencies Act (50
17 U.S.C. 1601 et seq.) with respect to the Coronavirus Dis-
18 ease 2019 (COVID–19) and ending on the date that is
19 30 days after the date on which the national emergency
20 declaration terminates.

21 (b) VIDEO TELECONFERENCING FOR CRIMINAL PRO-
22 CEEDINGS.—

23 (1) IN GENERAL.—Subject to paragraphs (3),
24 (4), and (5), if the Judicial Conference of the United
25 States finds that emergency conditions due to the

1 national emergency declared by the President under
2 the National Emergencies Act (50 U.S.C. 1601 et
3 seq.) with respect to the Coronavirus Disease 2019
4 (COVID–19) will materially affect the functioning of
5 either the Federal courts generally or a particular
6 district court of the United States, the chief judge
7 of a district court covered by the finding (or, if the
8 chief judge is unavailable, the most senior available
9 active judge of the court or the chief judge or circuit
10 justice of the circuit that includes the district court),
11 upon application of the Attorney General or the des-
12 ignee of the Attorney General, or on motion of the
13 judge or justice, may authorize the use of video tele-
14 conferencing, or telephone conferencing if video tele-
15 conferencing is not reasonably available, for the fol-
16 lowing events:
17 (A) Detention hearings under section 3142
18 of title 18, United States Code.
19 (B) Initial appearances under Rule 5 of
20 the Federal Rules of Criminal Procedure.
21 (C) Preliminary hearings under Rule 5.1 of
22 the Federal Rules of Criminal Procedure.
23 (D) Waivers of indictment under Rule 7(b)
24 of the Federal Rules of Criminal Procedure.

1 (E) Arraignments under Rule 10 of the
2 Federal Rules of Criminal Procedure.
3 (F) Probation and supervised release rev-
4 ocation proceedings under Rule 32.1 of the
5 Federal Rules of Criminal Procedure.
6 (G) Pretrial release revocation proceedings
7 under section 3148 of title 18, United States
8 Code.
9 (H) Appearances under Rule 40 of the
10 Federal Rules of Criminal Procedure.
11 (I) Misdemeanor pleas and sentencings as
12 described in Rule 43(b)(2) of the Federal Rules
13 of Criminal Procedure.
14 (J) Proceedings under chapter 403 of title
15 18, United States Code (commonly known as
16 the ''Federal Juvenile Delinquency Act''), ex-
17 cept for contested transfer hearings and juve-
18 nile delinquency adjudication or trial pro-
19 ceedings.
20 (2) FELONY PLEAS AND SENTENCING.—
21 (A) IN GENERAL.—Subject to paragraphs
22 (3), (4), and (5), if the Judicial Conference of
23 the United States finds that emergency condi-
24 tions due to the national emergency declared by
25 the President under the National Emergencies

1 Act (50 U.S.C. 1601 et seq.) with respect to
2 the Coronavirus Disease 2019 (COVID-19) will
3 materially affect the functioning of either the
4 Federal courts generally or a particular district
5 court of the United States, the chief judge of a
6 district court covered by the finding (or, if the
7 chief judge is unavailable, the most senior avail-
8 able active judge of the court or the chief judge
9 or circuit justice of the circuit that includes the
10 district court) specifically finds, upon applica-
11 tion of the Attorney General or the designee of
12 the Attorney General, or on motion of the judge
13 or justice, that felony pleas under Rule 11 of
14 the Federal Rules of Criminal Procedure and
15 felony sentencings under Rule 32 of the Federal
16 Rules of Criminal Procedure cannot be con-
17 ducted in person without seriously jeopardizing
18 public health and safety, and the district judge
19 in a particular case finds for specific reasons
20 that the plea or sentencing in that case cannot
21 be further delayed without serious harm to the
22 interests of justice, the plea or sentencing in
23 that case may be conducted by video teleconfer-
24 ence, or by telephone conference if video tele-
25 conferencing is not reasonably available.

1 (B) APPLICABILITY TO JUVENILES.—The
2 video teleconferencing and telephone confer-
3 encing authority described in subparagraph (A)
4 shall apply with respect to equivalent plea and
5 sentencing, or disposition, proceedings under
6 chapter 403 of title 18, United States Code
7 (commonly known as the "Federal Juvenile De-
8 linquency Act").
9 (3) REVIEW.—
10 (A) IN GENERAL.—On the date that is 90
11 days after the date on which an authorization
12 for the use of video teleconferencing or tele-
13 phone conferencing under paragraph (1) or (2)
14 is issued, if the emergency authority has not
15 been terminated under paragraph (5), the chief
16 judge of the district court (or, if the chief judge
17 is unavailable, the most senior available active
18 judge of the court or the chief judge or circuit
19 justice of the circuit that includes the district
20 court) to which the authorization applies shall
21 review the authorization and determine whether
22 to extend the authorization.
23 (B) ADDITIONAL REVIEW.—If an author-
24 ization is extended under subparagraph (A), the
25 chief judge of the district court (or, if the chief

1 judge is unavailable, the most senior available
2 active judge of the court or the chief judge or
3 circuit justice of the circuit that includes the
4 district court) to which the authorization ap-
5 plies shall review the extension of authority not
6 less frequently than once every 90 days until
7 the earlier of—
8 (i) the date on which the chief judge
9 (or other judge or justice) determines the
10 authorization is no longer warranted; or
11 (ii) the date on which the emergency
12 authority is terminated under paragraph
13 (5).
14 (4) CONSENT.—Video teleconferencing or tele-
15 phone conferencing authorized under paragraph (1)
16 or (2) may only take place with the consent of the
17 defendant, or the juvenile, after consultation with
18 counsel.
19 (5) TERMINATION OF EMERGENCY AUTHOR-
20 ITY.—The authority provided under paragraphs (1),
21 (2), and (3), and any specific authorizations issued
22 under those paragraphs, shall terminate on the ear-
23 lier of—
24 (A) the last day of the covered emergency
25 period; or

1 (B) the date on which the Judicial Con-
2 ference of the United States finds that emer-
3 gency conditions due to the national emergency
4 declared by the President under the National
5 Emergencies Act (50 U.S.C. 1601 et seq.) with
6 respect to the Coronavirus Disease 2019
7 (COVID-19) no longer materially affect the
8 functioning of either the Federal courts gen-
9 erally or the district court in question.
10 (6) NATIONAL EMERGENCIES GENERALLY.—
11 The Judicial Conference of the United States and
12 the Supreme Court of the United States shall con-
13 sider rule amendments under chapter 131 of title
14 28, United States Code (commonly known as the
15 "Rules Enabling Act"), that address emergency
16 measures that may be taken by the Federal courts
17 when the President declares a national emergency
18 under the National Emergencies Act (50 U.S.C.
19 1601 et seq.).
20 (7) RULE OF CONSTRUCTION.—Nothing in this
21 subsection shall obviate a defendant's right to coun-
22 sel under the Sixth Amendment to the Constitution
23 of the United States, any Federal statute, or the
24 Federal Rules of Criminal Procedure.

1 (c) The amount provided by this section is designated
2 by the Congress as being for an emergency requirement
3 pursuant to section 251(b)(2)(A)(i) of the Balanced Budg-
4 et and Emergency Deficit Control Act of 1985.

5 DISTRICT OF COLUMBIA

6 FEDERAL FUNDS

7 FEDERAL PAYMENT FOR EMERGENCY PLANNING AND
8 SECURITY COSTS IN THE DISTRICT OF COLUMBIA

9 For an additional amount for ''Federal Payment for
10 Emergency Planning and Security Costs in the District
11 of Columbia'', $5,000,000, to remain available until ex-
12 pended, to prevent, prepare for, and respond to
13 coronavirus, domestically or internationally: *Provided*,
14 That such amount is designated by the Congress as being
15 for an emergency requirement pursuant to section
16 251(b)(2)(A)(i) of the Balanced Budget and Emergency
17 Deficit Control Act of 1985.

18 INDEPENDENT AGENCIES

19 ELECTION ASSISTANCE COMMISSION

20 ELECTION SECURITY GRANTS

21 For an additional amount for ''Election Security
22 Grants'', $400,000,000, to prevent, prepare for, and re-
23 spond to coronavirus, domestically or internationally, for
24 the 2020 Federal election cycle: *Provided*, That a State
25 receiving a payment with funds provided under this head-

Dear Committees on Federal Rules of Civil and Appellate Procedure, and Profs. Cooper and Hartnett —

1. Request to participate in April FRAP & FRCP meetings

I request that I be given an opportunity to speak in support of my proposals, and to respond to any questions or issues raised by the Committees, at the April 1 & 3 meetings, which I will attend by phone.

This is standard practice for rulemaking proceedings, cf. 5 USC 553(c) & 556(c & d). The reasons supporting this practice are no different when rulemaking is conducted by the judiciary: the proponent has more interest in presenting a compelling argument than a rapporteur, agency counsel, or the like, and worse decisions are reached when concerns or complications are allowed to be raised but go unrebutted for lack of interested representation on the committee.

I will later be submitting a proposal to address this systemically, by changing the rules and composition of the Committees themselves.

In the meantime, I request to be heard, simply as a matter of courtesy.

2. Re 19-AP-C/19-CV-Q (IFP standards)

Although I would like to have filed comments on this, my health has not permitted me to do so at this time. I will endeavor to do so later, should the matter be extended.

From my perspective, there are numerous problems with the reports and comments on this proposal, as well as several good ideas and legitimate issues that need to be addressed.

IFP litigants are a class of people whose interests are not represented by current committee members. To the contrary, they are frequently viewed in an adversarial light, e.g. as a problem to be managed. Unless I am sorely mistaken, not one committee member has personal experience *as* an IFP litigant — unlike most other topics, where there will be committee members whose collective experience represents all sides.

The record shows several notes of interest in forming a subcommittee to address this issue, possibly in collaboration with the court executive offices. I strongly endorse this.

I therefore request that:

a) the FRCP committee revive the proposal and place it on the next meeting's agenda,
b) both committees carry the proposal over to the next meeting, after discussion,
c) the committees create a joint subcommittee to discuss the matter, with interested representatives from the FRCP, FRAP, FRCrP, & standing committees, court executive, and LSC, and
d) I be designated as a member of the subcommittee, as a representative of IFP litigants.

3. Re 19-AP-G/19-CV-FF (naming in official capacity)

A. Responding to Prof. Cooper's undated report at § 12 of the FRCP agenda for April 1, 2020

Prof. Cooper is correct that, under our current legal fictions, suits are properly instituted against state officials rather than states. Furthermore, some officials have immunity from suit under some circumstances.[1]

However, FRCP 17(d) / 25(d) does not address who may be sued or when, but only how they are "designated". My proposal would not change this fact.

Prof. Cooper suggests that my proposal should be limited to cases "in which suit can be brought against the office". This is wrong in two ways:

a) Suit is brought against the officer, not the office. An office *per se* is not an entity capable of suing or being sued.[2]
b) The rule's trigger should be about succession, not capacity to be sued.

My proposal, like the current (permissive) rule, does not alter the actual parties involved — just the naming convention. There is no alteration to who can or can't be sued, nor what theory of jurisdiction may apply (e.g. 11th Amendment, APA, waiver of immunity, etc).

The question is not whether a suit can or can't be brought against the officer. It is completely irrelevant to the 11th Amendment whether I describe the defendant as "William Barr, in his official capacity", "Bill Barr, AG", "the head of the Department of Justice", "the Attorney General", or indeed "John Doe, an unknown Federal official" (if, by some circumstance, I don't know who did an action and it turns out to have been the AG).

Either I can sue him or I can't. How I describe him — remember, "designated by" / "described as" are the key words in both FRCP 17(d) and FRAP 43(c)(1) — makes no difference whatsoever.

Rather, what makes a difference is *substitutability*.

If the title would continue to describe the correct party if the person referenced by that title changes — e.g. because of death, resignation, firing, or the like — then they should be referenced by title. Their successor *by title* will continue to be the party automatically, by operation of FRCP 25(d) / FRAP 43(c)(2).

If such an event would change the case, then they should be named as an individual. Their successor *by estate* would continue in the event of death, or they would remain personally liable despite losing the title.

Though rare, it is possible for the official capacity to "die" while the human yet lives: namely, if the office is abolished or terminates. This has happened with e.g. the Independent Counsel. In such circumstances, if the action is in official capacity, it is in a sense the "estate" of the office that might

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[1] Nobody is *entirely* above the law: neither as an individual, nor as an officer. Immunity — whether sovereign, judicial, qualified, or otherwise — is a question of the circumstances, not the person.

[2] See below, in response to Prof. Hartnett's report, part (a).

be substituted, e.g. if there is some other officer who "inherits" its legal responsibilities — which is nicely analogous to what happens if the action is in individual capacity and the human dies.

This is what my draft was intended to explicitly address. Neither alternative proposed by Prof. Cooper does so, though his proposed Note does (including, correctly, noting the potential for transformation or abolishment of the office).

I therefore oppose Alternative 2 proposed by Prof. Cooper, and the corresponding portions of the proposed Note.

However, as an improvement along the lines of Prof. Cooper's proposal, I suggest the following substitution in the first sentence of my original proposal:

> … rather than by name**, if Rule 25(d) substitution would apply**.

In addition to my original proposed Note sections (p. 3, n. 13 & 14), I also endorse the following portions of Prof. Cooper's proposed Note, slightly amended per (a) above (deletions marked by **•••**):

> Rule 17(d) is amended to require, not simply permit, designation by official title of a public officer who sues or is sued in an official capacity. **•••** The court's power to require that the officer's name be added is retained. Designating **••• by title** means that there is no need to substitute parties under Rule 25(d) when a particular public official leaves the office, with or without immediate appointment of a successor. But if the office is transformed or abolished, substitution of a different office may be required, at least so long as there is an appropriate office to sue or be sued.
>
> The rule **••• is purely stylistic, and has no effect on** whether **•••** any particular public official can sue or be sued. **•••** It does not affect the rules that determine when suit against a public official is permitted by sovereign immunity or the Eleventh Amendment. See the 1961 committee note to Rule 25(d). Neither does the rule address whether a government can be sued directly, or whether a public agency can be made a party as an agency rather than by joining agency members.
>
> When a public officer is sued in both an official capacity and an individual capacity, the **••• officer's** title must be used for the official-capacity claim when that is possible, and the officer's name must be used for the individual claim. **•••** The Rule 4(i)(2) and (3) provisions for making service when a United States officer or employee is sued in an official capacity continue to apply when the office is designated as a party. A wrong designation should be cured by amending the pleadings **or by order of the court**.

B. Responding to Prof. Hartnett's March 6, 2020 report

The report accurately summarizes my proposal, and quite correctly highlights the difference between continuation of official capacity parties (who are substituted) vs personal capacity parties (who are not).

a) Re *Ex parte Young*

Prof. Hartnett confuses reference *by* title with reference *to* title (or to the office).

Linguistically, so long as Edward Young is the Attorney General, there is no semantic difference between the referents of "the Attorney General" and "Edward Young, in his official capacity as Attorney General". They are co-referential.

There *is* a difference between "the Attorney General" and "*the office of* the Attorney General". The former is a human who, as Prof. Hartnett rightly points out, can be put into custody if necessary to compel obedience. The latter is not a person at all, nor even an entity; it's a function.

However, it is the office*r*, not the office, that is sued. This is already perfectly clear in FRAP 43(c)(1), which operates only on a "public officer who is a party to an appeal or other proceeding in an official capacity" — *officer*, not *office*. My proposal does not change this.

b) Re *In re Sundry African Slaves (Governor of Georgia v. Madrazo)*

The proper lead name of this case is *In re Sundry African Slaves*, since it is an action *in rem*.

First, let's not gloss over the fact that Madrazo was a slaver attempting to illegally import Africans as property, whom the Governor of Georgia then seized and (partially) sold. The two sued over who properly owned the proceeds of the sale of these humans, together with the "sundry" others who had not yet been sold into slavery. Prof. Hartnett's titular omission elides this rather odious fact — and thereby demonstrates why it is important to have case titles refer to the parties involved in the most relevant possible way.

Second, this case was an action in libel, which no longer exists. (It was eliminated when the Admiralty Rules were merged into the FRCP in 1986.)

Third, the central holding of the case is that the court lacked jurisdiction because (a) it lacked original jurisdiction over admiralty cases, and (b) the "things" (namely, human beings) whose ownership was at issue were not in the possession of the court.

This case is despicable in content, over actions that now illegal for *both* of the represented parties (n.b. the enslaved Africans were not represented), using forms of action that no longer exist, under formalistic rules of procedure that have long been abolished, and predating major statutory changes.

While I, too, do not know any case squarely overruling *In re Sundry African Slaves*, there is also no case overruling *Korematsu v. United States*. Nevertheless, neither one is good law.

With all due respect to Prof. Hartnett, I believe that the concerns he raises are unfounded, and more to the point, completely unaffected by my proposal. No problem of sovereign immunity is raised by the mere *styling* of a case, let alone by mandating a rule whose current, optional version has been entirely uncontroversial (though rarely used) for decades.

Summary

To my view, the whole point of FRCP 17(d) & 25(d), and its counterpart FRAP 43(c)(1 & 2), is to make substitution so much of a technicality that it need not even be mentioned, except perhaps in a footnote, and make the most relevant, stable way of referring to a party be the one used.

These rules were originally passed, as a pair, in order to address problems with abatement, i.e. where a suit against an official would be dismissed because the official was replaced (even though the wrong was not addressed, and the new official still proper to sue). This had been remediated by statute (former[3] 28 U,S,C, § 780). *See Ex parte La Prade*, 289 US 444, 453 (1933).

The only thing my proposal would make mandatory is *styling*, and only under the circumstances originally envisioned, i.e. where substitution can operate. It makes no change whatsoever to who is named.

Rather, it simply ensures that

a) parties are referred to in the most relevant and substitution-agnostic fashion, and

b) separate capacities are nominally separate parties, since they are in practice treated as separate in so many ways (service, immunity, succession, single-capacity dismissal, etc) that it makes more sense to list them distinctly.

Respectfully submitted,
Sai
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[3] Section 780 no longer exists. I have not found where it was transferred or when. However, it appears to be essentially equivalent to the current FRCP 25(d) / FRAP 43(c)(2).