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

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

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

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.

(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)

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.

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

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."

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.

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.

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.