Minutes of the Spring 2020 Meeting of the

Advisory Committee on the Appellate Rules

April 3, 2020

By telephone conference call

Judge Michael A. Chagares, Chair, Advisory Committee on the Appellate Rules, called the meeting of the Advisory Committee on the Appellate Rules to order on Friday, April 3, 2020, at 10:00 a.m.

In addition to Judge Chagares, the following members of the Advisory Committee on the Appellate Rules were present: Judge Jay S. Bybee, Judge Paul Watford, 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, Senior Appellate Counsel.

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); 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 welcomed everyone. He expressed the hope that all are healthy. He noted that it is awkward to meet by phone, but that it was necessary under the circumstances.

II. Report on Status of Proposed Amendments and Legislation

Judge Chagares directed the committee's attention to the rules tracking chart in the agenda book (pages 25-28) and noted that amendments took effect in December of 2019 modernizing the rules to take account of electronic filing and to amend the disclosure requirements of Rule 26.1. In addition, amendments to Rules 35 and 40

are on track to take effect in December of 2020. Additional proposed amendments are out of public comment and will be discussed later in the meeting.

As for pending legislation, Judge Chagares stated that the proposed AMICUS Act does not appear at this time to be moving in Congress. The subcommittee does not believe that any action is necessary now but has asked for research to be done into ascertaining the number of parties that would be covered by the proposed Act. It will continue to monitor the status of the bill.

The Coronavirus Aid, Relief, and Economic Security (CARES) Act has been enacted. As it pertains to the judiciary, the CARES Act authorizes teleconferences in certain criminal matters. While the bill was pending, Judge Chagares and Professor Hartnett were asked to review the Federal Rules of Appellate Procedure to see if any emergency amendments were needed to deal with COVID-19 pandemic. They found nothing that needed immediate attention. The CARES Act directs the judiciary to consider possible amendments through the Rules Enabling Act process in case of future emergencies. Accordingly, Judge Chagares formed a subcommittee to review the Federal Rules of Appellate Procedure for possible amendments. Professor Sachs, Tom Byron, and Judge Watford agreed to serve on this subcommittee. As usual, the Chair and the Reporter will serve as well.

Judge Campbell provided a bit of background on the CARES Act. An earlier version would have directly amended the Federal Rules of Criminal Procedure. The judiciary asked Congress to please not do so, but instead to simply authorize certain procedures during this emergency; and if Congress wanted something more permanent, to direct that the Rules Enabling Act process be used to address the matter. Congress chose to do what the judiciary requested. To implement that directive, subcommittees of each advisory committee should meet before the fall 2020 meeting to consider possible amendments. Any proposed amendments would be refined before the spring 2021 meeting, so that any proposed amendments would be published for public comment in the summer of 2021 and be on track to take effect in December 2023. The criminal rules committee is considering proposing some amendments; other committees may or may not.

Professor Coquillette noted that Judge Campbell had acted very quickly and had done a great job. Judge Chagares stated that we are all grateful for Judge Campbell's leadership.

III. Consent Agenda

Judge Chagares invited a motion to approve the consent agenda, consisting of approval of the minutes of the fall meeting on October 29, 2019, and the removal of

the suggestion regarding Congressional subpoenas (19-AP-H) from the agenda. The motion was made and approved with none opposed.

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

A. Rule 3

The Reporter presented the subcommittee report regarding Rule 3. Proposed amendments have been published for public comment. Two comments, if accepted, would derail the project. One was considered at the last meeting; a second was received since the last meeting.

At the last meeting, the committee considered the comments of Mr. Rosman, whose critique is based on his reading of Civil Rule 54. No committee member was persuaded last time, no member of the standing committee expressed concern, and the subcommittee did not see any need to revisit the issue. The Reporter emphasized that this was the last call for committee members to speak up on the issue. None did.

The Reporter then turned to the second comment that would, if accepted, derail the project. Judge Colloton has urged the committee to abandon the proposal. Judge Colloton points to cases across the circuits, written by illustrious judges, that appropriately read the existing rule to hold appellants to their choices to limit the notices of appeal. He observes that it isn't hard for appellants to designate everything for appeal and does not think we should encourage appellate counsel to expand the scope of the appeal beyond what was in the notice.

The subcommittee concluded that if the rule leads to the decisions reflected in the Rules Clerk memo, we need to change the rule. In contrast to Judge Colloton, the comment submitted by the National Association of Criminal Defense Lawyers (NACDL) emphasizes the importance of appellate counsel being able to review record material that may not be available at the time the notice of appeal is filed—as does the Supreme Court decision in *Garza*.

Finally, Judge Colloton urged that if the project goes forward, references to "trap for the unwary" should be deleted from the committee note as pejorative. The subcommittee does not view that phrase as pejorative. As reflected in Black's Law Dictionary, a trap can exist even if no one intended to set it.

In response to a question from Judge Chagares, the Reporter stated that he planned to address another concern raised by Judge Colloton—dealing with whether the proposal itself creates a trap for the unwary—later in the discussion.

No member of the committee suggested abandoning the project or eliminating the phrase "trap for the unwary" from the committee note.

The Reporter then turned to smaller issues, ones that might call for some adjustments but not abandonment of the project.

First, the Reporter stated that the Standing Committee had raised a concern whether the proposal might inadvertently change the rule that there is an appealable final judgment even though a motion for attorney's fees is outstanding. Discussion at the Standing Committee suggested that perhaps the proposal should use the conjunction "or" rather than "and" in connecting "claims" with "rights and liabilities" or perhaps the phrase "rights and liabilities" should be deleted.

The subcommittee recommended that neither change be made. While part of Civil Rule 54(b) uses the conjunction "or," the last sentence of 54(b) uses the conjunction "and." Keeping "rights and liabilities" preserves the intended connection between the proposal and Civil Rule 54(b). Instead, the subcommittee recommended adding to the committee note a statement that the amendment does not change the principle established in the Supreme Court decisions *Budinich* and *Ray Haluch*.

The subcommittee also considered a related question about Civil Rule 58(e), a rule that allows a district court to treat a motion for attorney's fees as if it were a Civil Rule 59 new trial motion for purposes of Appellate Rule 4(a)(4)(A). The subcommittee concluded that this situation is covered by Rule 4(a)(4)(A)(iii) because such a district court order is effectively an extension of time and Civil Rule 58(e) is the intended reference of subsection (iii).

The Reporter also discussed a comment from Professor Lammon proposing a way to simplify the proposal. The subcommittee did not recommend the proposed simplification, viewing it as both too broad and too narrow.

The committee accepted all of these recommendations by the subcommittee without further discussion.

The Reporter then turned to an issue that has been a significant recurring question: whether to allow the designation to limit the scope of the notice of appeal or to leave any such narrowing to the briefs. At the last meeting, members of the committee voiced differences about this issue but decided on allowing such limitation in the proposed amendment that was published for public comment.

The issue was raised at the Standing Committee and was the subject of public comment. The Council of Appellate Lawyers favored the opposite approach: not allowing the designation to limit the scope of the notice of appeal but leaving any such

narrowing to the briefs. The Association of the Bar of the City of New York (ABCNY) did not make such a recommendation, but did suggest adding an "except" clause to proposed subsection (c)(4) to make clear that the ability to limit the scope of the notice of appeal in subsection (6) operates as an exception to the general principle of subsection (4).

The subcommittee presented the committee with two alternatives. One alternative was the proposed amendment as published, with (c)(6) allowing limitation of the scope of the notice of appeal if done expressly. The other alternative would delete (c)(6) as published and add a sentence to (c)(4): "Specific designations do not limit the scope of the notice of appeal." Corresponding changes to the committee note would also be made.

Mr. Byron made a pitch for the "cleaner" alternative of deleting (c)(6) and adding the sentence to (c)(4). This approach would create less uncertainty and avoid inadvertent loss of appellate rights. He saw good arguments on both sides of this issue, yet thought that the concerns supporting the retention of proposed (c)(6) could be managed in other ways. For example, in multi-party cases where some parties settle, assurance that the appealing party is not breaching the settlement agreement could be provided in other ways, separate from the text of the notice of appeal. Similarly, issues regarding the ability of a district court to modify existing rulings could be handled on a case-by-case basis. A motion in the district court, or a statement in a brief, could signal to the courts and parties the limits of what was sought to be raised on appeal. In response to the argument that if proposed (c)(6) would lead to abuses, then we should see abuses now, Mr. Byron observed that the reason for this project as a whole is to respond to cases that have resulted in the inadvertent loss of appellate rights.

Judge Chagares noted that the existing rule permits parties to designate "a part thereof."

An academic member urged the committee to retain proposed (c)(6). He observed that current law allows limited notices of appeal, and that the point of the current project is to avoid miscommunication, not to change what a party can and can't do. Retaining the ability to expressly limit the scope of the notice of appeal is valuable, and there is utility in binding oneself in the notice of appeal rather than with some assurance on the side. If a matter has been appealed, the district court can only make an indicative ruling. Putting the question on the committee's calendar to review at some point in the future is better than taking away the ability to expressly limit the scope of the notice of appeal.

Mr. Byron moved to delete proposed (c)(6) and add the sentence to (c)(4). The motion failed by a vote of 3 to 5. (Byron, Wright, and Watford in favor; Bybee, Murphy, French, Sachs, and Spinelli opposed).

The Reporter then turned to another concern raised by Judge Colloton: whether the proposed amendment might create a new trap for the unwary if an appellant designates only a prior interlocutory order. To meet this concern, the material in the agenda book suggested an addition to (c)(7), providing that an appeal should not be dismissed for improperly designating the judgment if the intent is otherwise clear. But subsequent discussion with Judge Chagares led the Reporter to a different phrasing: that an appeal should not be dismissed "for failure to properly designate the judgment if the notice of appeal was filed after entry of the judgment and designates an order that merged into that judgment."

A judge member asked whether any change was necessary, given proposed (c)(4). The Reporter replied that he hoped that judges would read proposed (c)(4) the way the judge member did, but was concerned that not all judges would do so. Judge Chagares explained that some might read (c)(4) to require that the judgment be designated, and if this threshold requirement is not met, the appellant is going nowhere.

An academic member suggested that the proposed language would be better placed in (c)(5) as a rule of construction rather than in (c)(7) as a simple prohibition on dismissal of the appeal. Professor Struve agreed, and particularly noted that the phrasing now under discussion was an improvement over the one in the agenda book.

Mr. Byron thought the language would be better in (c)(7), because a court might conclude that appellate jurisdiction is lacking altogether, while (c)(5) addresses what sort of designations count as designating the final judgment. An academic member noted that this was a fair point.

Judge Chagares stated that there appeared to be a consensus to keep the language in (c)(7).

Discussion then turned to whether the new language should be limited to "the judgment" or should extend to "appealable orders." The Reporter stated that he had considered adding that phrase, but doing so would add complexity by inserting "appealable order" in three places—"for failure to properly designate the judgment *or appealable order* if the notice of appeal was filed after entry of the judgment *or appealable order* and designates an order that merged into that judgment *or appealable order*"—that did not appear worth it in light of the likelihood of the problem arising in the context of an appealable order. An academic member agreed

that the problem would not be likely to arise in that context, and that the provision is designed as a failsafe only to prevent complete loss of appellate rights.

Mr. Byron favored leaving out "appealable order." Like the Reporter, he did not envision a case in which the problem would arise in that context. With no problem identified, there is no need to go too far afield.

Judge Campbell suggested that the phrase "entry of" should be deleted. The Reporter stated that retaining the phrase "entry of" would connect the new provision to Rule 4(a) while deleting it could leave the relevant date uncertain. Mr. Byron agreed with Judge Campbell that the phrase "entry of" should not be included. An academic member suggested that the addition of a committee note stating that this provision should be read consistently with Rule 4(a)(2) and 4(b)(2). The committee decided, without dissent, to reject the phrasing in the agenda book and to adopt the phrasing discussed above, including the phrase "entry of."

The Reporter presented two ideas for expanding the project that had been suggested in public comments.

The first, suggested by Professor Lammon, was to provide that there was no need to file a new or amended notice of appeal, after the denial of a Rule 4(a)(4)(A) motion. The subcommittee thought that this suggestion would require further review and republication. It recommended rolling this suggestion into the new agenda item, to be discussed later, 20-AP-A. The committee agreed.

The second, suggested by the NACDL, was to expand proposed Rule 3(c)(5) to cover criminal cases. The subcommittee similarly thought that this proposed expansion would require further review and republication. The NACDL did not point to a particular problem currently occurring in criminal cases, and indicated that there are not many criminal cases where the issue addressed by proposed (c)(5) is presented. Its concern was that a rule limited to civil cases might lead some courts, using an expressio unius rationale, to abandon their current precedent that takes an approach in criminal cases similar to that of the proposed rule. The subcommittee suggested an addition to the committee note stating that similar issues may arise in a small number of criminal cases, but that no inference should be drawn from the new provision about how such issues should be handled in criminal cases.

A lawyer member expressed concern about this note, fearing that it could be read to suggest that the criminal rule should be stricter. Maybe it would be better to not add this to the committee note. Or maybe it could be added to the text in (c)(5).

Mr. Byron noted that, for appellate purposes, the nature of the order rather than the nature of the case determines whether it is treated as civil or criminal.

Professor Struve agreed that it is the nature of the act for which review is sought that determines treatment as civil or criminal.

The Reporter clarified that there are some orders that the NACDL is concerned about, such as a denial of a motion to dismiss on double jeopardy grounds, that are plainly criminal for purposes of appeal. Even though some appeals in criminal cases will be addressed by the existing proposal, not all will.

The Reporter suggested adding the clause, "and similar treatment may be appropriate" to the committee note. An academic member urged retention of the "no inference should be drawn" language, pointing out that it is less clear on the civil side when there is a final judgment, and that Rule 4(b) allows appeals from the denial of certain motions without an amended notice of appeal. Without further study, we shouldn't suggest that courts do anything other than what they are doing on the criminal side.

The lawyer member who raised this concern agreed, emphasizing that the concern was that the proposal in the agenda book suggests that similar treatment might not be appropriate.

Mr. Byron urged both keeping the "no inference" language and adding the "similar treatment may be appropriate" language.

The committee agreed without dissent, charging the subcommittee with finalizing the language.

The committee further agreed, without dissent, to send the proposed amendment, as modified by the discussions at this meeting, to the Standing Committee for final approval.

Judge Chagares thanked the subcommittee, consisting of Mr. Byron, Judge French, and Professor Sachs.

B. Rule 42

Judge Bybee presented the subcommittee report regarding the proposed amendment to Rule 42(b) that was published last summer for public comment. It would make dismissal of appeals mandatory in certain circumstances. Two comments were received, one from the ABCNY, the other from NACDL. Both comments proposed adding language.

ABCNY suggested additional language dealing with agency orders, particularly by the SEC. NACDL suggested additional language dealing with the

obligations of defense counsel. The subcommittee recommended neither addition. There is no need to add qualifications to the rule as published.

The subcommittee did, however, recommend eliminating the word "mere." The Reporter added that the subcommittee also recommended adding references to Rule 42(b)(1) and (b)(2) to clarify the scope of the amendment.

The committee agreed, without dissent, to send the proposed amendment, as presented in the agenda book, to the Standing Committee for final approval.

Judge Chagares thanked the subcommittee, consisting of Judge Bybee and Christopher Landau (now United States Ambassador to Mexico).

V. Discussion of Matters Before Subcommittees

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

Judge Chagares presented the subcommittee's report regarding Rules 35 and 40. He stated that the committee had previously rejected doing a thorough re-write of these rules, and so reported to the Standing Committee. Accordingly, the subcommittee presented more modest changes. But some members of the subcommittee favored a more thorough re-write, and he suggested that the committee address that question as a threshold matter. He noted that the committee could produce better rules, but there has been no real complaint or problem; if it ain't broke don't fix it.

Mr. Byron made a pitch for a more thorough re-write. The current rules have lots of duplication that arose inadvertently, traceable to the days when parties could not petition for rehearing en banc, but only suggest it. Once the two rules were aligned in that regard—so that a party could petition for rehearing en banc as well as petition for panel rehearing, frequently in a single document—it made sense to eliminate duplication. Lots of streamlining can be done.

A lawyer member agreed. The existing rules are confusing to someone who hasn't encountered them before. Two judge members favored taking a look at the rules.

The committee voted 5-2 to send the matter back to the subcommittee to consider the more thorough re-write. (French, Spinelli, Bybee, Wright, and Sachs in favor; Murphy and Watford opposed).

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 concerns in Railroad Retirement Act cases. A working draft was discussed at the last meeting and presented to the Standing Committee. One question that arose was whether it was redundant to refer to both the Railroad Retirement Board and the Railroad Retirement Act. But since the Railroad Retirement Board also issues decisions under the Railroad Unemployment Act, the subcommittee recommended no change to the working draft.

The committee, without dissent, agreed to send the proposed amendment to the Standing Committee for possible publication seeking public comment.

C. Unbriefed Grounds (19-AP-B)

Judge Chagares presented the subcommittee's report regarding decisions on unbriefed grounds. The subcommittee thought that there is a legitimate concern, but it was not a matter for rulemaking. Rulemaking could increase the time to decision and invite disputes about what was briefed. In addition, rehearing is available. Instead, the subcommittee recommended sending a letter to Chief Circuit Judges about the issue and including the letter from the American Academy of Appellate Lawyers, which expressed concern about courts deciding cases on grounds that had not been briefed.

Mr. Byron noted his support for the concern. The Department of Justice has encountered the same problem, and it is very frustrating. Perhaps a precatory rule encouraging supplemental briefing would be helpful while avoiding disputes about whether such briefing is required. A judge member agreed that it is a legitimate issue, but writing a rule would be ineffective and create further problems. A letter from the committee chair would be better.

Judge Chagares stated that the subcommittee's proposal, if adopted, would do that. He'd like to think that the Chief Judges would share the letter with their respective courts. Perhaps the committee could monitor the issue to see if it remains a continuing concern.

An academic member suggested sending a letter and calendaring the matter for the future. Mr. Byron agreed.

The committee, without dissent, adopted the proposal to send a letter and calendar the matter for the future. The matter will remain on the agenda to be revisited in three years.

VI. Discussion of Matters Before Joint Subcommittees

Judge Chagares stated that reports on matters before joint subcommittees are in the agenda book materials.

VII. Discussion of Recent Suggestions

The Reporter presented a discussion of recent suggestions.

A. IFP Standards (19-AP-C)

The Reporter noted that this committee has expressed the most interest in the suggestion regarding IFP standards and suggested that the next step would be the appointment of a subcommittee. Judge Chagares appointed a subcommittee consisting of Justice French, Judge Watford, and Ms. Wright.

B. Use of Titles in Official Capacity Actions (19-AP-G)

The Reporter stated that Sai suggested that the use of titles rather than names in official capacity suits be made mandatory. In particular, Sai suggested that the word "may" in Appellate Rule 43 and Civil Rule 17 be changed to "shall." The Reporter noted that this change could promote clarity, but that there is a possible worry about how it would interact with *Ex parte Young* and the Eleventh Amendment. He also noted that Sai had submitted a response to the memo in the agenda book and that this response had been circulated to the committee in advance of the meeting. The Reporter invited discussion, asking whether there is a real problem that needs to be addressed and whether the concerns about the Eleventh Amendment are overblown.

An academic member stated that he had no strong views. It could promote clarity, but at some downside risk. He shared the concern about sovereign immunity, but thought that it could be avoided. He slightly favored the formation of a subcommittee.

Mr. Byron noted that since the civil rules committee had kept it on its agenda, we should as well, but that he did not feel strongly. A judge member suggested that we wait for the civil rules committee; the Reporter said that it seemed like civil rules committee had a similar reaction, waiting for us.

The Reporter asked for comments on whether there was a problem that needed to be addressed. Ms. Dodszuweit responded that the Clerk's Office in the Court of Appeals for the Third Circuit currently uses titles rather than names. Judge Chagares suggested that the matter be tabled pending inquiry by Ms. Dodszuweit regarding the practice by other circuit clerks. The committee agreed without dissent.

C. Relation Forward of Notices of Appeal (20-AP-A)

Professor Lammon has suggested that premature notices of appeal relate forward. Current Rule 4(a)(2) allows relation forward when the notice of appeal is filed after the announcement of a decision but prior to entry. The committee considered this matter about a decade ago and decided against taking action; Professor Lammon contends that things have not gotten better since then.

The Reporter said that his sense from reading the prior minutes was that the committee was concerned about inviting premature notices of appeal, and added his concern about the disruption of district court proceedings. He suggested that there might be a way to avoid these problems by drafting a narrower provision that draws on the practice that allows a district court to certify that an appeal is frivolous.

Judge Chagares appointed a subcommittee to consider this suggestion, consisting of Judge Bybee, Judge Murphy, Ms. Spinelli, and Mr. Byron.

VII. Recent Rule Changes

Judge Chagares turned to a review of the impact and effectiveness of recent rule changes.

The 2019 amendment to Rule 25(d) eliminated the requirement of proof of service when service is made through a court's electronic-filing system. Some local rules have not yet been amended to conform to this new Rule, and continue to require proof of service, but the expectation is that this will change with a bit more time. Ms. Dodszuweit offered to follow-up with the Clerks of circuits that have not yet changed their rules or practices.

The 2018 amendment to Rule 29(a)(2) permits the rejection or striking of an amicus brief that would result in a judge's disqualification. This has happened in three circuits so far.

VIII. New Business and Updates on Other Matters

Judge Chagares invited any other suggestions that would result in the just, speedy, and inexpensive resolution of cases or any new business. None was immediately forthcoming.

Judge Campbell noted that other committees had covered a lot of ground and added that the Reporters will share information with each other.

IX. Adjournment

Judge Chagares thanked everyone for their contributions to the meeting and wished them good health in these uncertain times. He stated that the next meeting would be on October 20, 2020, and is scheduled to be held in Washington, DC.

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