Minutes of the Fall 2017 Meeting of the
Advisory Committee on the Appellate Rules

November 8, 2017
Washington, D.C.

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 Thursday, November 8, 2017, at 9:00 a.m., at the Thurgood Marshall Federal Judicial Building in Washington, D.C.

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

Also present were: Judge David G. Campbell, Chair, Standing Committee on the Rules of Practice and Procedure; Professor Daniel R. Coquillette, Reporter, Standing Committee on the Rules of Practice and Procedure; Ms. Shelly Cox, Administrative Specialist, Rules Committee Support Office of the Administrative Office of the U.S. Courts (RCSO); Ms. Lauren Gailey, former Rules Law Clerk, RCSO; Judge Frank Mays Hull, Member, Standing Committee on the Rules of Practice and Procedure and Liaison Member, Advisory Committee on the Appellate Rules; Bridget M. Healy, Esq., Attorney Advisor, RCSO; Marie Leary, Esq., Research Associate, Advisory Committee on the Appellate Rules; Professor Gregory E. Maggs, Reporter, Advisory Committee on the Appellate Rules; Judge Pamela Pepper, Member, Advisory Committee on the Bankruptcy Rules and Liaison Member, Advisory Committee on the Appellate Rules; Patrick Tighe, Rules Law Clerk, RCSO; Marcia M. Waldron, Clerk of Court Representative, Advisory Committee on the Appellate Rules; and Rebecca A. Womeldorf, Esq., Secretary, Standing Committee on the Rules of Practice and Procedure and Rules Committee Officer.

Professor Catherine T. Struve, Associate Reporter, Standing Committee on the Rules of Practice and Procedure, participated by telephone.

I. Introduction

Judge Chagares opened the meeting and greeted everyone. Judge Chagares welcomed Judge Jay Bybee, Chris Landau, Esq., and Danielle Spinell, Esq., as new members of the Committee, and Judge Frank Hull, as a new liaison member from the Standing Committee. He noted that Clerk of Court Marcy Waldron will be completing her service for the Advisory Committee, and thanked her for her contributions.

Judge Chagares noted that the President had appointed or nominated several members of the Committee to judicial offices. Former Advisory Committee Chair Neil Gorsuch was elevated to the Supreme Court, former Committee member Kevin Newsom was appointed to the U.S. Court of Appeals for the Eleventh Circuit, former Committee member Amy Coney Barrett is a nominee for a judgeship on the U.S. Court of Appeals for the Seventh Circuit, former Committee member Alison Eid is a nominee for a judgeship on the U.S. Court of Appeals for the Tenth Circuit, former Committee member Gregory Katsas is a nominee for a judgeship on the U.S. Court of Appeals for the D.C. Circuit, and Committee reporter Gregory Maggs is a nominee for a judgeship on the U.S. Court of Appeals for the Armed Forces.

II. Approval of the Minutes

An error in the spelling of Acting Solicitor General Jeffrey B. Wall's name in the draft minutes of the May 2017 meeting of the Advisory Committee was noted and corrected. A motion to approve the draft minutes was then made, seconded, and approved.

III. Report on June 2017 Meeting of the Standing Committee

The reporter presented a report of the action taken by the Standing Committee at its June 2017 meeting. As described in the Advisory Committee Agenda Book at 31, the Advisory Committee recommended that the Standing Committee (1) send proposed amendments to Appellate Rules 8, 11, 25, 26, 28.1, 29, 31, 39, and 41, and Forms 4 and 7 to the Judicial Conference of the United States and (2) publish proposed amendments to Appellate Rules 3, 13, 26.1, 28, and 32 for public comment. The Standing Committee approved these recommendations at its June 2017 meeting with the minor changes noted in the Agenda Book.

IV. Discussion Items

A. Item 09-AP-B: Proposal to Amend Rule 29 to Allow Indian Tribes and Cities to File Amicus Briefs without Leave of Court or Consent of Parties

Judge Chagares presented discussion Item 09-AP-B, which concerns a proposal to allow Indian tribes and cities to file amicus briefs under Rule 29 without leave of the court or the consent of the parties. *See* Agenda Book at 131. Judge Chagares noted that the Committee had last considered the issue in 2012. At that time, the Committee took no action and recommended revisiting the issue in 2017. Judge Chagares suggested that the question for the Committee now was whether the matter should be pursued or removed from the Committee's agenda.

Mr. Letter recounted some of the history of the matter. He said that some judges thought that Indian tribes should be accorded the same dignity as other sovereigns under Rule 29. He

informed the Committee that the Solicitor General saw no need for amending Rule 29 but would not oppose the amendment if the judges supported it.

An attorney member said that she wondered why Indian tribes were not treated the same as states and the United States. If the policy is to allow sovereigns to file, then it would be consistent to add Indian Tribes. Cities, however, would not need to be included because they are subdivisions of states.

Mr. Coquillette recounted that Judge Sutton had spent a lot of time checking with judges and Indian tribes about the matter and had concluded that this was more of an academic issue than a practical one. Mr. Coquillette recalled that research could not locate any instance in which an Indian tribe was denied leave to file an amicus brief. But Mr. Coquillette said that allowing cities to file amicus briefs without leave of the court or party consent might cause problems.

A judge member observed that Indian tribes, unlike most states and the United States, typically hire law firms to represent them. Accordingly, there may be more recusal issues arising out of amicus briefs filed by Indian tribes than amicus briefs filed by states or the United States.

Mr. Letter noted that foreign nations are sovereign and are not permitted to file amicus briefs without leave of the court or consent of the parties. He also noted that the United States generally does not oppose amicus briefs.

An attorney member asked for clarification on the rules on when counsel for an amicus would require recusal. Judge Chagares and Judge Hall said that their Courts of Appeals generally treat amicus briefs the same as other briefs. The attorney member also asked what percentage of motions to file an amicus brief are denied. The clerk representative said that they were seldom denied unless they caused a recusal or were not in conformity with the rules. The attorney member also asked how the word "state" in Rule 29 is defined. Mr. Letter said that Rule 1(b) defines the term "state" to include territories, Puerto Rico, and D.C.

Judge Campbell discussed the recently proposed amendments to Rule 29. The amendments would allow a court to strike or deny leave to file an amicus brief if the brief would cause a recusal. But these amendments do not apply to amicus briefs filed by states or the United States. They therefore would also not apply to Indian tribes if the rule were amended to treat Indian tribes like the states and the United States.

A judge member moved that the Committee not act on the proposal given the general tenor of the comments. The motion was seconded and then passed. Judge Chagares said that the matter could be brought up again in the future if the Committee desired.

B. Potential Amendments to Rules 5(a)(1), 21(a)(1) and (c), 26(c), 32(f), and 39(d)(1) Regarding Proof of Service

The reporter introduced a new matter concerning potential amendments to Rules 5(a)(1), 21(a)(1) and (c), 26(c), 32(f), and 39(d)(1) regarding proof of service. *See* Agenda Book at 131. He explained that proposed changes to Rule 25(d) will eliminate the requirement of a proof of service when a paper is presented for filing through the court's electronic filing system. Accordingly, slight changes to other rules that address proof of service might be necessary.

The Committee first discussed the proposed amendments to Rule 25(d). The clerk representative was concerned that the proposed amendment might not address situations in which some parties were served electronically and some parties were served non-electronically. The Committee noted the potential issue. But the sense of the Committee was to take no action at this time because the proposed amendment to Rule 25(d) matches the proposed amendment to Civil Rule 5(d)(1)(B), and both proposals are currently before the Supreme Court. The Committee may wish to revisit the issue if actual problems arise in the future.

The Committee considered and approved the proposed changes to Rule 5(a)(1). *See* Agenda Book at 180-81.

The Committee considered the proposed changes to Rule 21, *see* Agenda Book at 181-82, and approved the changes as slightly modified by the style consultants. The approved version of the proposal reads as follows:

Rule 21. Writs of Mandamus and Prohibition, and Other Extraordinary Writs

(a) Mandamus or Prohibition to a Court: Petition, Filing, Service, and Docketing.

(1) A party petitioning for a writ of mandamus or prohibition directed to a court must file ~~a~~ the petition with the circuit clerk ~~with proof of service on~~ and serve it on all parties to the proceeding in the trial court.

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(c) Other Extraordinary Writs. An application for an extraordinary writ other than one provided for in Rule 21(a) must be made by filing a petition with the circuit clerk ~~with proof of service on~~ and serving it on the respondents. Proceedings on the application must conform, so far as is practicable, to the procedures prescribed in Rule 21(a) and (b).

Committee Note

The words "with proof of service" in subdivision (a)(1) and (c) are deleted because Rule 25(d) specifies when proof of service is required for filed papers. Under Rule 25(d), proof of service is not required when a party files papers using the court's electronic filing system.

The Committee next addressed the proposed changes to Rule 26(c). *See* Agenda Book at 183-84. The reporter noted that the style consultants had recommended two versions of more extensive revisions for Rule 26(c), which had previously been circulated by email to the Committee members.[1] Discussion of the issue revealed dissatisfaction with both the original proposal and the style consultants' proposed revisions because they were too complicated. An attorney member said that lawyers look at this rule whenever they file a brief, and the rule must be easier to understand.

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[1] The style consultants' first proposed revision of Rule 26(c) would read as follows:

> When a party may or must act within a specific period after being served, 3 days are added after the period would otherwise expire under Rule 26(a). But three days are not added if the paper:
>
> (1) is delivered on the date of service stated in the service;
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> (2) is served electronically without using the court's electronic-filing system—in which event it is treated as delivered on the date of service stated in the service; or
>
> (3) is served electronically by using the court's electronic-filing system—in which event it is treated as delivered on the date of filing.

The style consultants' alternative revision of Rule 26(c) would read as follows:

> This Rule 26(c) applies only when a paper is not served electronically. When a party may or must act within a specified time after being served, 3 days are added after the period would otherwise expire under Rule 26(a), unless the paper is delivered on the date of service stated in the proof of service.

The Committee then took a brief recess. During the recess, an alternative was drafted, printed, and circulated to the Committee. The Committee approved this alternative proposal subject to minor adjustments. As approved, the proposal reads as follows:

Rule 26. Computing and Extending Time

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(c) Additional Time after Certain Kinds of Service. When a party may or must act within a specified time after being served with a paper, and the paper is not served electronically on the party or delivered to the party on the date stated in the proof of service, 3 days are added after the period would otherwise expire under Rule 26(a) ~~unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is treated as delivered on the date of service stated in the proof of service~~.

The Committee did not approve a revised Committee Note during the meeting.

The Committee considered an amendment to Rule 32(f). *See* Agenda Book at 184-85. The Committee first determined that the phrase "the proof of service" should be changed to "a proof of service" because there will not always be a proof of service. Further consideration led the Committee to conclude that two other uses of the word "the" should also be changed to "a" for the same reason. As approved by the Committee, the proposed change to Rule 32 reads as follows:

Rule 32. Form of Briefs, Appendices, and Other Papers

(f) Items Excluded from Length. In computing any length limit, headings, footnotes, and quotations count toward the limit but the following items do not:

- ~~the~~ **a** cover page;
- a corporate disclosure statement;[2]
- a table of contents;
- a table of citations;

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[2] The Standing Committee has published for public comment a proposal that will change "corporate disclosure statement" to "disclosure statement."

- a statement regarding oral argument;
- an addendum containing statutes, rules, or regulations;
- certificates of counsel;
- ~~the~~ **a** signature block;
- ~~the~~ **a** proof of service; and
- any item specifically excluded by these rules or by local rule.

The Committee discussed and approved the proposed change to Rule 39. *See* Agenda Book at 185.

After the Committee considered and proposed all of the changes above, Judge Campbell observed that they might be properly seen as technical correction to the Rules to conform to the amendments to Rule 25(d). As a result, he did not see the need to publish them for additional comments. The sense of the Committee was to recommend this approach to the Standing Committee.

C. Item No. 16-AP-D: Appellate Rule 3(c)(1)(B) and the Merger Rule

Judge Chagares next presented a new proposal, prepared by former Committee member Neal Katyal, regarding Rule 3(c)(1)(B) and the Merger Rule. *See* Agenda Book at 189.

Mr. Byron expressed caution in taking action to address the interpretation of Rule 3(c)(1)(B). He was concerned that the case law in the Eighth Circuit, upon closer examination, might not be so clearly divergent from the decisions of other Courts of Appeals. He explained that there is often some uncertainty as to whether a particular order is a final order. He also said that there were other cases where it would be appropriate to inquire into the party's intent. Judge Chagares agreed, and said that revising the rule would be a really complex matter.

An attorney member said that the issue is often very fact-specific. He explained: "If you say I am appealing order A and order B, then it is clear that you are not appealing order C." An academic member said that it should be clearer what is a final order. Mr. Letter said that lawyers often take a belt-and-suspenders approach, and say that they are appealing the final judgment and specific orders.

Following the discussion, Judge Chagares asked for the views of the Committee. An academic member proposed further study. Mr. Letter suggested that the main point should be to make the rules clearer. The Chair formed a subcommittee to consider the matter further. The members of the subcommittee are Mr. Letter, Mr. Byron, Mr. Landau, and Prof. Sachs.

D. New Discussion Item Regarding Possible Amendments to Rules 10, 11, and 12

Mr. Byron led the discussion of a new suggestion for amending Rules 10, 11, and 12 to address electronic records. *See* Agenda Book at 197. He explained that these Rules were mostly directed to clerks of court. Accordingly, the initial question is whether electronic records currently present a problem for the clerks.

The clerk representative informed the Committee that she had spoken to clerks of court from other Courts of Appeals. The other clerks did not have any objection to changing the word "send" to "make available" in Rules 10, 11, and 12 as proposed. But she further noted that various Courts of Appeals follow different approaches on whether the District Courts or the Courts of Appeals do relevant tasks with respect to records. She suggested that, in the future, records might be kept in a central repository and might not be transmitted from District Courts to Courts of Appeals. Accordingly, by the time the proposed amendment works it way through the system, it might be obsolete. She also noted that there are still many paper records, especially in state habeas corpus cases.

Judge Chagares asked whether there was a risk of upsetting what is now a stable system. A liaison member was concerned that if the District Court did not send the record, but merely made it available, the record might be incomplete. Judge Chagares said that it was not clear that a problem needs to be fixed and that any amendment might soon be obsolete.

The sense of the committee was to take the matter off the agenda.

E. New Discussion Item Regarding a Circuit Split on Whether Attorney's Fees Are "Costs on Appeal" Under Rule 7

Judge Chagares presented a matter concerning a circuit split on whether attorney's fees are "costs on appeal" under Rule 7. *See* Agenda Book at 223. He thanked Ms. Gailey, the former Rules clerk, for her research into the matter. He noted that the Committee previously had considered the issue, and thanked Ms. Struve for finding memoranda on the subject that the Committee previously considered. Summarizing the research, he explained that the U.S. Court of Appeals for the Third Circuit appears to be an outlier, but has taken a position only in a non-precedential opinion.

Ms. Struve said that the question was a perennial issue. An attorney member asked why the question was addressed in the Appellate Rules instead of the Civil Rules. He suggested that Civil Rule 62 should address the question. A judge member agreed with this point. The clerk representative said that few cases involve bonds.

An academic member said that it was unclear to him how the issue comes up. The Rule refers to costs, not fees, and usually the law distinguishes between costs and fees. He said that maybe the solution would be to remove the word "costs" and specify more clearly what should and what should not be covered.

Judge Campbell said that the rule formerly provided for an automatic $250 bond. He said that there now may be strategic use of the rule to require a large bond to prevent the other party from appealing. He also said that many of the cases citing the rules deal with class action objectors. He suggested asking Mr. Edward Cooper, the reporter for the Civil Rules Advisory Committee, for his opinion.

The sense of the Committee was to keep this matter on the Agenda and ask the Civil Rules Committee for its opinion.

V. New Matters

Judge Chagares led a discussion of possible new matters that the Committee might want to take up. He said that he recently had spoken to the American Academy of Appellate Lawyers (AAAL) and that they were concerned with three matters. First, the AAAL wants to clarify when a cross-appeal is necessary. The AAAL believes that cross-appeals often are filed just to avoid the risk that one might be needed. Second, the AAAL was concerned about judges considering facts that are not in the record. The AAAL thought that the court should provide some sort of notice to the parties before doing this. A judge member pointed out that there was the possibility of seeking rehearing. Third, the AAAL was concerned about courts' sua sponte consideration of legal issues. The AAAL thinks parties should receive notice and opportunity to be heard. Judge Chagares said that the AAAL had not yet submitted any proposals to the Committee.

Judge Chagares next suggested that the Committee might review the rules regarding the appendix. In his experience, much of what is in the appendix is unnecessary. He suggested that it might be best to require the appendix to be filed seven days after the last brief. An attorney member said that the rule as written is often not followed. He believed that it is better to have a deferred appendix that only contains what is cited in the brief (including some context). But Mr. Letter said that a potential problem with a deferred appendix is that the parties then have to file a revised brief that cites the appendix. The clerk representative agreed that this is a problem, especially when trying to docket briefs. She said that in the future, briefs will contain hyperlinks to the actual record, and appendices therefore might be unnecessary.

An attorney member said that every Court of Appeals now has its own rules on appendices. Mr. Byron predicted that most Courts of Appeals would be unlikely to want to

change their local rules. The attorney member responded that it might still be better to have an improved default rule. The Chair formed a subcommittee to study the issue. The members of the subcommittee are Mr. Letter, Mr. Byron, Ms. Spinelli, and Judge Bybee.

Judge Chagares asked whether members of the Committee had ideas for improving the efficiency of appellate litigation. An attorney member raised the issue of how much discretion clerks have under Rule 42(b) in not allowing parties to dismiss a case after they have settled. A liaison member said that a request to dismiss is often "subject to settlement agreements being executed." Ms. Struve said that there are very few cases that deny leave to dismiss. Mr. Letter said that sometimes judges say something like "the government should not be settling on these terms." An academic member said that there are some situations in which settlements must be reviewed and others when they should not be reviewed. Mr. Byron asked whether it is necessary to have both parties sign the request for dismissal. A judge member asked whether the matter should be addressed in the Civil Rules. The chair formed a subcommittee to study the issue. The members of the subcommittee are Mr. Landau, Judge Kavanaugh, and Mr. Letter.

VI. Information About the Activities of the Other Committees

Judge Campbell reported that the Civil Rules Advisory Committee is looking at multi-district litigation, interlocutory appeals, third-party funding of litigation, and pilot programs aimed at improving discovery and making litigation quicker.

Judge Campbell reported that the Evidence Rules Advisory Committee is looking at issues under Rules 404(b), 702, and 609. He noted that one recommendation is to refine the analysis with respect to specific kinds of evidence like fingerprints, bite marks, etc.

Judge Campbell reported that the Criminal Rules Advisory Committee is looking for better ways to protect cooperators in criminal cases. He said that there were hundreds of instances in which cooperators were threatened or killed based on information included in court records.

Judge Campbell also observed that the House has passed bills that could affect appeals. HR 985 could make every class certification appealable as of right and would limit the kinds of classes that could be certified. The other legislation would address current rules requiring complete diversity, which are often manipulated. Another bill would alter Rule 11 standards.

VII. Adjournment

Judge Chagares thanked Ms. Womeldorf and her staff for organizing the dinner and meeting. He also thanked Ms. Waldron for all of her contributions to the Committee. He announced that the next meeting will be held on April 6, 2018 in Philadelphia.

The Committee adjourned at 12:15 pm.