COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

MEMORANDUM

TO: Honorable John Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Judge Jay Bybee, Chair
Advisory Committee on Appellate Rules

RE: Report of the Advisory Committee on the Appellate Rules

DATE: December 8, 2020

I. Introduction

The Advisory Committee on the Appellate Rules met on Tuesday, October 20, 2020, via Teams. It discussed several matters but did not take any formal action on proposed amendments to the Rules. It therefore does not seek any action by the Standing Committee at the January 2020 meeting of the Standing Committee. The draft minutes of the October 2020 meeting are attached to this Report.

The Committee anticipates that, at the spring 2021 meeting of the Standing Committee, it will seek final approval of a proposed amendment to Rule 42, dealing with stipulated dismissals, and a proposed amendment to Rule 25, dealing with privacy protections in Railroad Retirement Act cases. (Part II of this report.)

It also anticipates that, at the spring 2021 meeting, it will seek approval for publication of a proposed amendment to Rule 2, dealing with the suspension of rules in an emergency, as well as amendments to Rule 4, Rule 33, Rule 34, and Rule 45, all of which involve minor changes based on experience during the pandemic. It also anticipates that it might seek approval for publication of a comprehensive re-write of Rule 35 and Rule 40, dealing with rehearing. (Part III of this report.)

Other matters under consideration (Part IV of this report) are:

- regularizing the criteria for granting in forma pauperis status and revising Form 4;

- a proposed amendment to Rule 4 to deal with premature notices of appeal;

- in conjunction with other Advisory Committees, making the deadline for electronic filing earlier than midnight; and

- in conjunction with the Civil Rules Committee, amendments to Civil Rules 42 and 54 to respond to the Supreme Court's decision in *Hall v. Hall*, 138 S. Ct. 1118 (2018), which held that consolidated actions retain their separate identify for purposes of appeal.

The Committee also considered other items, removing several from its agenda and tabling one. (Part V of this report.)

II. Proposed Amendments Already Published for Public Comment

A. Rule 42—Voluntary Dismissal

This proposed amendment to Rule 42 was published for public comment in August of 2019. At the June 2020 meeting of the Standing Committee, the Advisory Committee presented it for final approval. At the time, the proposed amendment read as follows:

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 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.

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

The Standing Committee was concerned about how the proposed amendment might interact with local circuit rules that require evidence of a criminal defendant's consent to dismissal. It decided to withhold approval until local rules were examined.

The Advisory Committee examined several local rules that are designed to be sure that a defendant has consented to dismissal. These local rules take a variety of approaches, such as requiring a signed statement from the defendant personally or requiring a statement from counsel about the defendant's knowledge and consent.

To guard against the risk that these local rules might be superseded by the proposed amendment, the Advisory Committee approved the following addition:

(d) Criminal Cases. A court may, by local rule, impose requirements to confirm that a defendant has consented to the dismissal of an appeal in a criminal case.

If this addition meets the Standing Committee's concern, the Advisory Committee intends to seek final approval of the following amendment at the spring meeting:

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 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.

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

(d) Criminal Cases. A court may, by local rule, impose requirements to confirm that a defendant has consented to the dismissal of an appeal in a criminal case.

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.

[The amendment permits local rules that impose requirements to confirm that a defendant has consented to the dismissal of an appeal in a criminal case.]

B. Rule 25—Railroad Retirement Act

This proposed amendment to Rule 25 was published for public comment in August 2020. It would extend the privacy protection given to Social Security and immigration cases to Railroad Retirement Act cases. The reason for the amendment is that Railroad Retirement Act benefit cases are very similar to Social Security Act cases. But unlike Social Security Act cases, Railroad Retirement Act cases are brought directly to the courts of appeals.

At the June 2020 meeting of the Standing Committee, a member raised the concern whether other kinds of cases—such as ERISA cases and Hague Convention cases—might warrant similar treatment and asked that outreach be done to relevant stakeholders. The ABA Joint Committee on Employee Benefits has been contacted, but it has not yet commented. (One comment, not specifically addressed to the proposed amendment, has been received from a member of the public).

The Appellate Rules Committee believes that if any amendments to extend privacy protections to other kinds of cases are warranted, such amendments would have to be made to the Civil Rules rather than the Appellate Rules. In most instances, the Appellate Rules simply piggyback on the privacy protections in the Civil Rules. The only reason the Appellate Committee got involved with this proposed amendment is that Railroad Retirement Act cases come directly to the courts of appeals.

The Committee expects to seek final approval of the following amendment in the spring of 2021.

Rule 25. Filing and Service

(a) Filing

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(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.

III. Proposed Amendments for Possible 2021 Publication

A. Proposed Amendment to Rule 2, Dealing with Suspension of Rules

See the report from this Advisory Committee on the proposed amendment to Rule 2, which is attached to the umbrella report on the CARES Act prepared by Daniel Capra and Catherine Struve.

B. Various Amendments Occasioned by the CARES Act Review

As noted in the report on the proposed amendment to Rule 2, the CARES Act subcommittee reviewed every Federal Rule of Appellate Procedure to determine whether any amendments were appropriate to deal with future emergencies. That review has led the Committee to consider some minor amendments that may be appropriate in light of the experience of the pandemic without regard to a rules emergency.

1. Rule 4(c)—Prisoner Mailbox Rule

The Committee is considering an amendment to the prison mailbox rule to deal with situations where a prison mail system is unavailable.

Rule 4

* * *

(c) Appeal by an Inmate Confined in an Institution.

(1) If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 4(c)(1). If an inmate files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing and:

(A) it is accompanied by:

(i) a declaration in compliance with 28 U.S.C. § 1746—or a notarized statement—setting out the date of deposit and stating that first-class postage is being prepaid; or

(ii) evidence (such as a postmark or date stamp) showing that the notice was so deposited and that postage was prepaid; or

(B) the court of appeals exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies Rule 4(c)(1)(A)(i).

(2) If an institution's internal mail system is not available on the last day for filing, an inmate who files a notice of appeal on the first day that it becomes available receives the benefit of this rule.

~~(2)~~ (3) If an inmate files the first notice of appeal in a civil case under this Rule 4(c), the 14-day period provided in Rule 4(a)(3) for another party to file a notice of appeal runs from the date when the district court dockets the first notice.

~~(3)~~ (4) When a defendant in a criminal case files a notice of appeal under this Rule 4(c), the 30-day period for the government to file its notice of appeal runs from the entry of the judgment or order appealed from or from the district court's docketing of the defendant's notice of appeal, whichever is later.

* * *

If this change is made to Rule 4(c), a parallel change to Rule 25(a) might also be appropriate.

2. Rule 33—Appeal Conferences

The Committee is considering an amendment to Rule 33 to permit an appeal conference to be conducted "remotely."

Rule 33. Appeal Conferences

The court may direct the attorneys—and, when appropriate, the parties—to participate in one or more conferences to address any matter that may aid in disposing of the proceedings, including simplifying the issues and discussing settlement. A judge or other person designated by the court may preside over the conference, which may be conducted in person or remotely ~~by telephone~~. Before a settlement conference, the attorneys must consult with their clients and obtain as much authority as feasible to settle the case. The court may, as a result of the conference, enter an order controlling the course of the proceedings or implementing any settlement agreement.

3. Rule 34—Oral Argument

The Committee is considering amendments to Rule 34 to broadly permit the court to set the "manner" of oral argument, thereby accommodating oral argument conducted remotely, in whole or in part, and to limit the rule governing physical exhibits in the courtroom to in-person arguments.

Rule 34

* * *

(b) Notice of Argument; Postponement. The clerk must advise all parties whether oral argument will be scheduled, and, if so, the date~~,~~ and time~~, and place~~ for it, and the time allowed for each side. If oral argument will be heard in person, the clerk must advise all parties of the place for it. If oral argument will be heard remotely, in whole or in part, the clerk must advise all parties of the manner in which it will be heard. A motion to postpone the argument or to allow longer argument must be filed reasonably in advance of the hearing date.

* * *

(g) Use of Physical Exhibits at Argument; Removal. Counsel intending to use physical exhibits other than documents at ~~the~~ an in-person argument must arrange to place them in the courtroom on the day of the argument before the court convenes. After the argument, counsel must remove the exhibits from the courtroom, unless the court directs otherwise. The clerk may destroy or dispose of the exhibits if counsel does not reclaim them within a reasonable time after the clerk gives notice to remove them.

4. Rule 45—Clerk's Duties

The Committee is considering an amendment to Rule 45 to acknowledge the reality that circumstances may sometimes prevent a clerk or deputy clerk from being "in attendance" at the clerk's office. Prior to restyling, the Rule stated that a clerk or deputy clerk "shall" be in attendance; that was changed to "must." The Committee is considering using the word "will" rather than "must."

It decided against any change to the provision that the court "is always open." The provision echoes a statute with roots going back to 1842, 28 U.S.C. § 452, whose apparent purpose was to empower courts to act between terms (that is, in vacation) and perhaps to enable judges to act in chambers as well as in open court.

Rule 45

* * *

(2) When Court Is Open. The court of appeals is always open for filing any paper, issuing and returning process, making a motion, and entering an order. The clerk's office with the clerk or a deputy in attendance ~~must~~ will be open during business hours on all days except Saturdays, Sundays, and legal holidays. A court may provide by local rule or by order that the clerk's office be open for specified hours on Saturdays or on legal holidays other than New Year's Day, Martin Luther King, Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day.

C. Comprehensive Review of Rules 35 and 40—Rehearing

For several years, the Committee has been considering a comprehensive revision of Rules 35 and 40. Rule 35 addresses hearing and rehearing en banc, and Rule 40 addresses panel rehearing.

Early on, the Committee considered three basic approaches that could be taken in reconciling the two ways of petitioning for rehearing:

1) align the two Rules with each other;

2) revise both Rule 35 and Rule 40, drawing on Rule 21;

3) revise Rule 35 so that it addresses only initial hearing en banc, and revise Rule 40 so that it addresses both panel rehearing and rehearing en banc.

The Committee viewed the third approach as the most radical but potentially the most valuable. Under the current Rules, a lawyer must consider both Rule 35 and Rule 40 when petitioning for rehearing. Litigants frequently request both panel rehearing and rehearing en banc, and while a litigant seeking only panel rehearing need only rely on Rule 40, it would be necessary even in that instance to check both Rules. Reconciling the differences between the two current rules while combining petitions for panel rehearing and rehearing en banc in one rule would provide clear guidance.

But there was considerable resistance to this approach, particularly because devoting Rule 35 to only initial hearing en banc would draw more attention to the possibility of initial hearing en banc—a proceeding that is and should remain rare.

For a time, the Committee decided to forego any comprehensive revision and focus instead on spelling out what happens when a petition for rehearing en banc is filed and the panel believes that it can fix the problem. The goal is to make clear that a panel can act while still preserving a party's ability to access the full court. But working on the specifics led the Committee to revisit the possibility of a comprehensive revision.

The Committee has not yet decided to recommend a comprehensive revision. But it has made substantial progress toward creating an integrated draft that will enable it—and others in the Rules Enabling Act process—to decide whether the benefits of such a revision are worth the costs.

The central feature of the working draft is that it abrogates Rule 35 and revises Rule 40 to govern all petitions for rehearing (and the rare initial hearing en banc).

- Rule 40(a) provides that a party may petition for panel rehearing, rehearing en banc, or both.

- Rule 40(b) sets forth the criteria for each kind of rehearing.

- Rule 40(c) brings together in one place uniform provisions governing matters such as the time to file, form, and length. It also provides that any amendment to a decision restarts the clock for seeking rehearing and that a petition for rehearing en banc does not limit a panel's authority to grant relief. These provisions empower a panel to fix a problem identified by a petition for rehearing, while not blocking access to the full court.

- Rule 40(d) deals with initial hearing en banc.

Here is the current working draft:

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

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

(a) In General. A party may seek rehearing of a decision through a petition for panel rehearing, a petition for rehearing en banc, or a petition for both forms of rehearing. Panel rehearing is the ordinary means of reconsidering a panel decision, and en banc rehearing is not favored. Oral argument on whether to grant the petition is not permitted.

(b) Criteria.

(1) Petition for Panel Rehearing. A petition for panel rehearing 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.

(2) Petition for Rehearing En Banc. A petition for rehearing en banc 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.

(3) When 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 reheard by the court of appeals en banc. A vote need not be taken to determine whether the case will be reheard en banc unless a judge calls for a vote. 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.

(c) Time to File; Form and Length; Response; Action by the Court if Granted; Panel's Authority.

(1) Time. Unless the time is shortened or extended by order or local rule, a petition for rehearing may be filed within 14 days after entry of judgment, or, if the panel subsequently amends its decision (on rehearing or otherwise), within 14 days after the entry of the amended 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 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) Form of Petition; Length. The petition must comply in form with Rule 32. Copies must be served and filed as Rule 31 prescribes, but the number of copies to be filed of a petition addressed to the court en banc must be prescribed by local rule and may be altered by order in a particular case. Except by the court's permission:

(A) a petition produced using a computer must not exceed 3,900 words; and

(B) a handwritten or typewritten petition must not exceed 15 pages.

(3) Response. Unless the court requests, no response to the petition is permitted. Ordinarily the petition will not be granted in the absence of such a request. If a response is requested, the requirements of Rule 40(c)(2) apply to the response.

(4) Action by the Court. If a petition for 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 [, including an order that no further petitions for panel rehearing will be entertained].

(5) Panel's Authority. A petition for rehearing en banc of a panel decision does not limit the panel's authority to grant relief under Rule 40(c)(4).

> **(d) Initial Hearing En Banc**. An appeal or other proceeding may be heard initially en banc, and a party may petition for such a hearing. The petition must be filed by the date when the appellee's brief is due. The provisions of Rule 40(b)(3) apply to an initial hearing en banc, and those of Rule 40(b)(2) and (c)(2)–(3) apply to a petition therefor.

There are three particular issues still under discussion.

First, current Rule 35(b)(3) allows circuits, by local rule, to require separate petitions for panel rehearing and rehearing en banc. Should this local option continue or should the Rule call for a single petition covering both requests?

Second, when a panel changes its decision in response to a petition for rehearing, should a party be able to stand on its previously filed petition for rehearing en banc rather than file a new petition for rehearing? Requiring a new petition is the clearest way to make a party's position clear. On the other hand, requiring a new petition may be burdensome, particularly for pro se litigants.

Third, should the rule state that a panel that changes its decision in response to a petition for rehearing may order that no further petitions for panel rehearing will be entertained? The advantage of such a provision would be to save resources when the panel is convinced that it has heard enough. The disadvantage would be that the panel can't know what a party would want to say in response to whatever change it made.

The major question whether the benefits of a comprehensive revision are worth the costs will also be discussed further. Notably, two of the strongest proponents of comprehensive revision are practicing lawyers with considerable federal appellate expertise. While they themselves are quite familiar with the interaction of Rules 35 and 40, they are concerned that lawyers without such federal appellate expertise find Rules 35 and 40 quite confusing.

IV. Other Matters Under Consideration

A. IFP Status

The Committee is continuing to consider suggestions to regularize the criteria for granting IFP status and to revise Form 4 of the Federal Rules of Appellate Procedure. This form, unlike the Administrative Office forms used in the district courts, was adopted pursuant to the Rules Enabling Act. Even though the Civil Rules Committee has removed the item from its agenda, the Appellate Rules Committee has not.

In addition to reviewing other extant forms (such as one used in other courts and one published as a suggested federal form), the Committee is seeking information about how the courts of appeals handle IFP applications, including what standards are used and what information from Form 4 is actually useful.

B. Relation Forward of Notices of Appeal

The Committee has begun to consider a new suggestion to deal with a recurring issue: premature notices of appeal. In many situations, existing Rule 4(a)(2)—which provides that a notice of appeal filed after the announcement of a decision but before its entry is treated as if it were filed immediately after its entry—works appropriately to save premature notices of appeal. But there are other premature notices of appeal that are not saved. The Committee considered this problem about a decade ago but did not find an appropriate solution, apparently because of a concern with inviting more premature notices of appeal.

The Committee is not inclined to support the solution that was offered in the suggestion—which would allow any premature notice of appeal to become effective once a judgment or appealable order is filed—because it fears that this would cause more problems than it solves by inviting premature notices of appeal.

At this point, the kinds of cases that appear most sympathetic involve appeals from district court decisions that could have been certified for immediate appeal under Civil Rule 54(b) but were not. A belated certification works to save a premature notice of appeal. But if the case reaches final judgment without a Rule 54(b) certification ever being entered, a premature notice of appeal can sometimes result in a loss of appellate rights.

The Committee is exploring ways to deal with this issue, perhaps by increasing awareness of the effect of a notice of appeal and whether it divests the district court of jurisdiction. It is not confident that it will succeed this time around, but it will try.

C. Deadline For Electronic Filing (with other Advisory Committees)

The joint subcommittee considering whether the deadline for electronic filing should be moved to some time prior to midnight continues to gather information, but that data gathering has been delayed due to COVID-19.

D. Finality in Consolidated Cases after *Hall* (with Civil Committee)

The joint subcommittee dealing with finality in consolidated cases continues to gather information. Any amendment would likely be made to the Civil Rules, particularly Rule 42 and Rule 54(b), not the Appellate Rules.

The Supreme Court in *Hall v. Hall*, 138 S. Ct. 1118 (2018), decided that consolidated actions retain their separate identify for purposes of appeal. If one such action reaches final judgment it is appealable, even though other consolidated cases remain pending. This decision creates the risk that some will lose their appellate rights because they did not realize that their time to appeal had begun to run, and creates the risk of inefficiency in the courts of appeals because multiple appeals are taken at different times from a proceeding that a district judge thought similar enough to warrant consolidation.

A docket study by Emery Lee of the Federal Judicial Center has identified thousands of consolidated cases, not including MDL cases. A sample of four hundred of these consolidated cases revealed nine that produced a final judgment in one originally separate action while the rest of the consolidated proceeding remained pending. He projected that there may be hundreds of such instances every year.

No particular problems were found in the cases from this sample, leaving the joint committee with little sense of urgency. However, problems may exist but be hidden. Lawyers may miss the issue, and only discover it when it is too late. Lawyers who are aware of the issue spend time determining whether a decision in consolidated proceedings finally resolves one of the originally separate actions. Courts may overlook the problem. The one thing that is said in favor of the rule in *Hall* is that it is clear. But while it is clear in simple cases, it is not so clear in cases where there has been a consolidated amended complaint or where additional parties have been added after consolidation.

For now, the joint subcommittee continues its evaluation.

V. Items Removed or Tabled

The Committee has been considering 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. Previously, this matter was tabled pending the gathering of information about how Circuit Clerks currently handle the naming of official capacity actions.

The information gathered revealed that most litigants and courts use an individual's name. In the Civil Rules Committee, the Department of Justice opposed

the suggestion, not only because there was no problem needing fixing, but because the use of titles can be complicated. The Civil Rules Committee removed the item from its agenda, and the Appellate Rules Committee did the same.

The Committee considered a suggestion that Civil Rule 11 be amended to require prefiling review of all complaints, matching the prefiling review of IFP cases under 28 U.S.C. § 1915(e), and that a new Rule 25.1 be added to the Appellate Rules to incorporate Civil Rule 11. The Committee saw no problem that needs to be addressed and removed this item from its agenda.

The Committee considered a suggestion that electronic filing be made more widely available to pro se litigants, especially because of the pandemic. There have been many similar suggestions made to the Civil Rules Committee. Current Appellate Rule 25(a)(2)(B) establishes a presumption against electronic filing by pro se litigants, but a court order or local rule may permit it.

The Committee discussed that in the past, clerks—especially district court clerks—have voiced strong opposition to more broadly permitting electronic filing by pro se litigants, but that the big staffing issue in the pandemic has been sending people into the office to deal with the paper filings. The Committee decided to table the matter, revisiting it once it sees what the Civil Rules Committee does.