Minutes of the Fall 2016 Meeting of the
Advisory Committee on Appellate Rules

October 18, 2016
Washington, D.C.

Judge Neil M. Gorsuch, Chair, Advisory Committee on Appellate Rules, called the meeting of the Advisory Committee on Appellate Rules to order on Tuesday, October 18, 2016, at 9:00 a.m., at the Thurgood Marshall Federal Judicial Building in Washington, D.C.

In addition to Judge Gorsuch, the following members of the Advisory Committee on Appellate Rules were present: Judge Michael A. Chagares, Justice Judith L. French, Gregory G. Katsas, Esq., Neal K. Katyal, Esq., Judge Brett M. Kavanaugh, Judge Stephen Joseph Murphy III, Kevin C. Newsom, Esq., and Professor Stephen E. Sachs. Acting Solicitor General Ian Heath Gershengorn was represented by Douglas Letter, Esq. and H. Thomas Byron III, Esq.

Also present were: Judge David G. Campbell, Chair, Standing Committee on Rules of Practice and Procedure; Professor Daniel R. Coquillette, Reporter, Standing Committee on 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, Rules Law Clerk, RCSO; Gregory G. Garre, Esq., Member, Standing Committee on the Rules of Practice and Procedure and Liaison Member, Advisory Committee on Appellate Rules; Bridget M. Healy, Esq., Attorney Advisor, RCSO; Marie Leary, Esq., Research Associate, Advisory Committee on Appellate Rules; Professor Gregory E. Maggs, Reporter, Advisory Committee on Appellate Rules; Scott Myers, Esq., Attorney Advisor, RCSO; Elisabeth A. Shumaker, Clerk of Court Representative, Advisory Committee on Appellate Rules; and Rebecca A. Womeldorf, Esq., Secretary, Committee on Rules of Practice & Procedure and Rules Committee Officer. Judge Pamela Pepper, Member, Advisory Committee on Bankruptcy Rules and Liaison Member, Advisory Committee on Appellate Rules, participated by telephone.

I. Introductions

Judge Gorsuch began the meeting by welcoming Judge Campbell, Justice French, Judge Pepper, Professor Sachs, and Ms. Shumaker to their first meeting of the Advisory Committee. He thanked Ms. Cox and Ms. Womeldorf for organizing the meeting and setting up a dinner that took place the evening before.

Judge Campbell greeted the Committee Members and said it was a privilege to be involved in the process. Ms. Womeldorf then introduced the staff of the Administrative Office. Every person present at the meeting then introduced himself or herself. Judge Gorsuch then expressed his gratitude to Judge Colloton, the former chair of the Advisory Committee, for clearing much of the

Committee's agenda before his term expired. Judge Gorsuch further thanked Judge Jeffrey Sutton, the former chair of the Standing Committee, for his assistance with the Advisory Committee's work.

II. Public Comment on Proposed Amendments to Rule 29

In August 2016, the Standing Committee published a proposed amendment to Rule 29(a).[1] The change would authorize a court of appeals to "strike or prohibit the filing of an amicus brief that would result in a judge's disqualification." The Advisory Committee heard comments on this proposed change from Associate Dean Alan Morrison of the George Washington University Law School, who also filed written comments prior to the meeting.[2] Dean Morrison asserted that there was no need for the amendment, that the amendment would not solve the problem that it is intended to solve, that the amendment might deprive the courts of information, and that the amendment will deny amici the opportunity to be heard.

A judge member mentioned that the proposed amendment was largely a codification of existing local rules. Dean Morrison responded that he had never seen a recusal based on an amicus brief. He asserted that most attorneys file amicus briefs well before knowing who the judges are. Accordingly, a client might hire a lawyer to write a brief and then have the brief stricken. Dean Morrison asserted that there would be nothing that the attorney could do about the possibility that the amicus brief might be stricken either before or after filing it. Dean Morrison also pointed out that the Supreme Court receives more amicus briefs than the appellate courts, that all of its Justices are known at the time of filing, and that recusal based on amicus briefs has never been a problem even though the Supreme Court does not have a rule like the one proposed.

Dean Morrison acknowledged that a brief causing a recusal could possibly be a problem when a case is reheard en banc and said that his written comments address this issue. He also said that a brief might be filed at the panel stage and then stricken when the case is reheard en banc. An attorney member asked whether, at the time an amicus brief is stricken, it would be too late to file a substitute brief. Dean Morrison said that it would be too late. The attorney member also noted when there is more than one amicus or more than one lawyer on the amicus brief, it might be unclear who caused the recusal. An academic member asked how often judges recuse themselves. Dean

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[1] *See* Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure 41 (August 2016) [hereinafter August 2016 Proposed Amendments] (proposed revision of Appellate Rule 29), http://www.uscourts.gov/file/20163/download.

[2] *See* Comment from Alan Morrison, https://www.regulations.gov/document?D=USC-RULES-AP-2016-0002-0003.

Morrison did not have the statistics. The Advisory Committee took Dean Morrison's comments under advisement and will decide what action to take after the public comment period on Rule 29 ends on February 15, 2017.

III. Approval of Minutes of Spring 2016 Meeting and Report on June 2016 Meeting of the Standing Committee

The Committee approved the Minutes of the April 5, 2016 Meeting of the Advisory Committee, with the correction of one typographical error on page 7.[3] The reporter mentioned that Judge Colloton had communicated with the chief judges of the various circuits about Item No. 15-AP-F (Appellate Rule 39(e) and Recovery of Appellate Fees) as the April 2016 Minutes indicated he would. Judge Gorsuch recounted items of interest from the June 2016 meeting of the Standing Committee.

IV. Action Item—Item 11-AP-C (Amendments to Rules 3(a) and (d))

Judge Gorsuch introduced this matter, which concerns amendments to Rules 3(a) and 3(d) to eliminate references to "mailing."[4] The Advisory Committee first discussed the proposed change to Rule 3(a). The clerk representative suggested eliminating the proposed word "nonelectronic" in line 6 of the discussion draft because it might cause confusion. An attorney member suggested that "hard copy" might be a better word. A judge member then asked whether attorneys reading the rule might think that hard copies would always be needed. Judge Campbell asked whether the confusion might lead to extra paper being filed in the court. The clerk representative said that she did not think so. Judge Campbell also asked whether the second sentence of Rule 3(a) was needed at all, given that clerks can provide the necessary copies. The clerk representative said it probably would not make a difference. A judge member worried about imposing additional burdens on the clerks of court. The Advisory Committee then discussed the proposed changes to Rule 3(d). The reporter explained the purpose of the amendments. The clerk representative expressed agreement with the proposal.

Following the discussion, the Advisory Committee voted to recommend the proposed changes to Rule 3(d) but not to recommend any changes to Rule 3(a). But rather than sending the proposal to the Standing Committee, the Advisory Committee decided to hold the matter until the

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[3] *See* Advisory Committee on Rules of Appellate Procedure, Fall 2016 Meeting at 33 [hereinafter Fall 2016 Agenda Book] (draft minutes of the April 2016 meeting of the Advisory Committee), www.uscourts.gov/file/20243/download.

[4] *See id.* at 51 (memorandum on Item 11-AP-C).

spring. In the meantime, the Advisory Committee asked the reporter to study all references to "mail" in the appellate rules and to prepare a memorandum suggesting revisions. At the Spring 2017 meeting, the Advisory Committee will determine whether to change other rules along with Rule 3(d). It was also the sense of the Advisory Committee that district court judges should be consulted about whether any alternative changes to Rule 3(a) should be considered.

V. Discussion Items

A. Item No. 12-AP-D (Civil Rule 62 / appeal bonds)

The Reporter introduced Item No. 12-AP-D, which concerns the treatment of appeal bonds under Civil Rule 62 and Appellate Rule 8.[5] As explained in the memorandum addressing this issue, there is a discrepancy between the first and second clauses of the first sentence of the version of Rule 8(d) recently published for public comment.[6] The memorandum suggested four possible options for addressing the discrepancy.

An attorney member said that he preferred the third option because it would correct all problems addressed in the memorandum. In response to a question from a judge member about the term "security" in line 27, the attorney member said that the word "security" in line 27 refers to "security" in line 21. Another attorney member explained the history of the rule. Judge Campbell asked whether Rule 8(d) should match Civil Rule 65.1. An attorney member expressed concern about limiting Rule 8(d) in this way. The Committee then considered additional proposals for redrafting the first sentence of Rule 8(d) so that all forms of security were listed in the first clause and then referred to generically in the second clause as "the security."

Following further discussion, the sense of the Committee was to change the first clause of Rule 8(b) to say "If a party gives security in the form of a bond, a stipulation, an undertaking, or other security~~, a stipulation, or other undertaking~~ with . . ." and to change the second clause to say "affecting its liability on the security ~~bond or undertaking~~ may be served . . . ." The Advisory Committee decided to postpone submitting the proposed changes to the Standing Committee until it receives all public comments on the recently published version of Rule 8.

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[5] *See id.* at 73 (memorandum on Item No. 12-AP-D).

[6] *See* August 2016 Proposed Amendments, *supra* note 1, at 21-23 (proposed revision of Rule 8).

B. Item No. 08-AP-R (disclosure requirements)

This item concerns proposed revisions to Appellate Rules 26.1 and 29(c), which require parties and amici curiae to make certain disclosures.[7] The Advisory Committee first considered the proposed changes to Rule 26.1(a).[8] A judge member expressed the view that the current rule should not be changed. An attorney member said that the coverage of the phrase "related matter" in (a)(2)-(4) "could be immense." Another attorney member said that D.C. Circuit local rules use the term "entity" because that term appears in the financial disclosure form. A judge member said that requiring the disclosure of the names of lawyers, witnesses, and judges could be very burdensome in bankruptcy cases because there could be ten related matters in a major chapter 11 reorganization. Another judge member said that deciding what is a "related matter" would be very difficult without more guidance. He then expressed doubt that the Committee should go forward with the proposal. Another judge member explained that the guiding thought was that judges don't want to dig into a case and then find out that there was a problem; he said the term "related state matter" was drafted with habeas cases in mind. He thought more disclosure could be helpful. Judge Campbell asked why Professor Daniel Capra had written the original memorandum about this item. An attorney member explained that there were complaints by judges that they did not have enough disclosure up front. The clerk representative said that the version of Rule 26.1(a) in the Agenda Book would generate many questions to clerks of court about what is a "related matter." An attorney member said that the costs appeared to be larger than the benefits. The clerk member also said that there is already a "certificate of interested parties" that is filed and that is used for recusal purposes. Another attorney suggested that unless the judges see a strong need for additional disclosure, then the lawyers

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[7] *See* Fall 2016 Agenda Book, *supra* note 3, at 89 (memorandum on Item No. 08-AP-R).

[8] The discussion draft of Rule 26.1(a) under consideration read as follows:

Rule 26.1. ~~Corporate~~ Disclosure Statement

(a) Who Must File; <u>What Must Be Disclosed</u>. Any ~~nongovernmental corporate~~ party to a proceeding in a court of appeals must file a statement that lists:

<u>(1)</u> any parent corporation<u>,</u> and any publicly held ~~corporation~~ <u>entity,</u> ~~that owns 10% or more of its stock~~ <u>that has a 10% or greater ownership interest in the party</u> or states that there is no such corporation or <u>entity</u>;

<u>(2) the names of all judges in the matter and in any related [state] matter;</u>

<u>(3) the names of all lawyers and legal organizations that have appeared or are expected to appear for the party in the matter [and any related matter]; and</u>

<u>(4) the names of all witnesses who have testified on behalf of the party in the matter [and any related matter].</u>

would rather not have it. A judge member said that there could be a benefit to judges and taxpayers, but recognized that it was burdensome. Following discussion, the Advisory Committee approved a motion to table further consideration of amendments to Rule 26.1(a). The Advisory Committee determined that the burdens imposed by the proposed additional disclosure requirements in Rule 26.1(a) would outweigh the likely benefits. The Advisory Committee remains open to a more targeted approach to amending Rule 26.1(a), but does not currently plan to pursue one.

The Advisory Committee next considered the proposed changes to Rule 26.1(d). The reporter explained that the language of the current discussion draft is copied from the recently published proposed revision of Criminal Rule 12.4(a)(2).[9] The Committee discussed the matter briefly and then approved the proposed amendment.

The Advisory Committee then considered the discussion draft of Rule 26.1(b). The reporter explained that the proposed changes in this discussion draft would partially conform Rule 26.1(b) to the recently published proposed revision of Criminal Rule 12.4(b).[10] A judge member spoke in favor of the proposed changes to both the title and the text of the rule. Following further discussion, the Advisory Committee voted in favor of the proposed amendment.

The Advisory Committee next considered the discussion draft of Rule 26.1(e), which concerns disclosures in bankruptcy cases. A judge member said that the Advisory Committee on Appellate Rules might not want to take the lead on this matter. An academic member suggested that the bankruptcy courts might not need a rule because they would already know the information. A judge member responded that a bankruptcy court would know the names of debtors at the time the case was filed but would not know additional information until it was developed later in the case. A judge member said that the proposal had been prompted by an ethics opinion. Judge Chagares and Judge Pepper volunteered to discuss the matter further with members of the Advisory Committee on Bankruptcy Rules. The sense of the Committee was to table consideration of Rule 26.1(e) until the Advisory Committee on Bankruptcy Rules provides a recommendation.

The Advisory Committee next considered the discussion draft of Rule 26.1(f), which would impose disclosure requirements on persons who want to intervene. The reporter explained the draft. Following a brief discussion, the Advisory Committee voted in favor of the proposed amendment.

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[9] *See* August 2016 Proposed Amendments, *supra* note 1, at 251-53 (proposed revision of Criminal Rule 12.4).

[10] *See id.*

The Advisory Committee then considered the discussion draft of Rule 26.1(g), which would prevent local rules from increasing or decreasing the disclosure requirements of Rule 26.1(a). Following discussion, the Committee decided to remove section (g) because the section would only make sense if section (a) would be amended.

The Advisory Committee next considered the discussion draft of Rule 29(c)(1).[11] This provision would require persons who file amicus briefs to make the same disclosures required under the discussion draft of Rule 26.1(a). The Committee concluded that the amendment was not needed because the proposal to amend Rule 26.1(a) had been tabled. The Committee therefore also decided to table the proposal to amend Rule 29(c)(1).

Finally, the Advisory Committee considered the discussion draft of Rule 29(c)(5)(D), which would require a statement about whether a lawyer or legal organization authored the brief in whole or in part, and, if so, identifies each such lawyer or legal organization. Following brief discussion, the Advisory Committee rejected the change because there did not seem to be a huge need for it and because party briefs do not require this.

C. Item No. 12-AP-F (class action settlement objectors)

The Advisory Committee next considered Item No.12-AP-F, which concerns a possible problem with some objections to class action settlements.[12] Following a brief discussion, the sense of the Advisory Committee was that this item should be removed from the agenda because the Advisory Committee on the Civil Rules has fully addressed the matter in the recently published amendment to Rule 23.[13] The Advisory Committee concluded that no conforming amendment to the Appellate Rules was necessary.

D. Item Nos. 15-AP-A, 15-AP-E, 15-AP-H (electronic filing by pro se litigants)

The Advisory Committee next considered Item Nos. 15-AP-A, 15-AP-E, and 15-AP-H.[14] These three items concern proposals to modify the Appellate Rules so that they generally would

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[11] *See* Fall 2016 Agenda Book, *supra* note 3, at 93.

[12] *See* Fall 2016 Agenda Book, *supra* note 3, at 133 (memorandum on Item No. 12-AP-F).

[13] *See* August 2016 Proposed Amendments, *supra* note 1, at 211 (proposed revision of Civil Rule 23).

[14] *See* Fall 2016 Agenda Book, *supra* note 3, at 145 (memorandum on Items Nos. 15-AP-A, 15-AP-E, 15-AP-H).

allow pro se litigants to file documents electronically. The Committee considered but did not approve these proposals when addressing the recent changes to Appellate Rule 25. The published proposed revision of Rule 25 retains the current rule that unrepresented parties may file papers electronically only if allowed by court order or local rule.[15] One judge member thought the Committee should resume consideration of this matter, but the sense of the Committee was to remove the item from the agenda. Representatives from the Administrative Office said that they would continue to look at the subject of pro se filing and report back to the Committee.

The Committee then took a break for lunch.

E. Circuit Splits over the Meaning of Appellate Rules 4(c), 7, and 39(a)(4)

When the meeting resumed, the Committee discussed three circuit splits on the interpretation of the Appellate Rules and considered whether to add them to its Agenda.[16] The Committee first considered a circuit split under Rule 4(c). Judge Gorsuch introduced the issue and explained that appellate courts disagree about whether the period for filing a notice of appeal may be extended if prison officials delay in notifying an inmate of the entry of a judgment or appealable decision. Mr. Byron said that the Bureau of Prisons had flagged two issues. First, it would be difficult to track and provide evidence of when an inmate actually receives notice of the district court's entry of judgment. Second, a prisoner's assertion of a delay could be burdensome to prison staff. A judge member said that the Third Circuit's decision was made before *Bowles v. Russell*, 551 U.S. 205 (2007), and the relevant arguments might not have been raised. Judge Campbell said that it would be rare for this issue to arise in a criminal case. No decision was made about including this issue on the agenda. For the spring meeting, the reporter will determine how often this issue arises in civil cases.

The Committee then discussed a circuit split under Rule 7 about whether the costs for which a bond may be required under Rule 7 can include attorney's fees. Some circuits take the position that, where there is a fee shifting statute, the bond on appeal can cover the fees. The D.C. and Third Circuits disagree, reasoning that requiring a bond to cover attorney's fees might deter non-frivolous appeals. A judge member noted that the Third Circuit opinion was not published. Judge Campbell asked how often district courts award fees before the appeal. The clerk representative said that attorney's fees cases usually come to the appellate courts independently. Mr. Byron also wondered how often these cases arise. No decision was made about including this issue on the agenda. For the spring meeting, the reporter will determine how often this issue arises.

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[15] *See* August 2016 Proposed Amendments, *supra* note 1, at 271 (proposed revision of Appellate Rule 25).

[16] *See* Fall 2016 Agenda Book, *supra* note 3, at 163 (memorandum on circuit splits).

The Committee then considered a circuit split about whether an appellate court in awarding costs under Rule 39(a)(4) must specify the specific costs to be taxed. An academic member asked what the objection would be to giving the district court discretion to decide. Judge Campbell asked whether the word "court" refers to the appellate court or to the district court. A member suggested that the historical sections in Moore's Federal Practice and Wright & Miller might have some history on this topic. Following discussion, the Committee decided not to put this issue on the agenda.

F. Initiatives to Improve the Efficiency of Federal Appeals

The Advisory Committee next considered the subject of how amendments to the Appellate Rules might lower costs and make appeals faster and more efficient.[17] Judge Gorsuch introduced the subject and referred to the law review cited in the reporter's memorandum on the subject. Mr. Letter said the Committee already had looked into the interlocutory appeals issue. A judge member said that some of Martin Siegel's suggestions might be ideas to send to the Chief Judge of each circuit. Professor Coquillette said that Rule 84 and the Rule 84 forms were abrogated. But he said that forms making litigation more efficient might be beneficial. Judge Campbell said that he would inquire about whether any of the proposed steps had been taken.

A judge member suggested the rules should require an introduction and summary together in the brief and not separately. Another judge member asked whether there might be ways to address interlocutory appeals. An attorney member said local rules on contents of briefs are a problem. As examples, he mentioned that the circuits have different rules on parallel citations and ways to cite the record or trial. Professor Sachs volunteered to study interlocutory appeals and report back to the Advisory Committee. Judge Kavanaugh volunteered to work with the representatives from the Department of Justice on the issues of sections of briefs and citations.

VI. New Business

Judge Gorsuch invited members of the Advisory Committee to propose possible new business for the Committee to consider.

Mr. Katyal said that the Eighth Circuit has a trap for the unwary. If a party seeks an interlocutory appeal on one issue, the party then cannot later appeal other issues. Other circuits have a different rule. Judge Gorsuch said that the topic will be on the agenda for the spring meeting and that the spring agenda book will include a memorandum on the subject prepared by Mr. Katyal. Prof. Coquillette said that it would be better for a committee to resolve this issue than to wait for the Supreme Court to resolve it through litigation.

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[17] *See* Fall 2016 Agenda Book, *supra* note 3, at 163 (memorandum on circuit splits).

Mr. Katyal separately discussed variations in the circuits on Appellate Rule 30 concerning joint appendices. He cited the example of whether supplemental joint appendices are allowed by motion or by right. Another issue is whether the joint appendix can be deferred until after all the briefs come in. Mr. Letter and Prof. Coquillette both supported the suggestion that the Committee should consider this issue. Ms. Shumaker agreed. Judge Chagares and Judge Kavanaugh, and others thought the Committee should consider the matter. Judge Campbell asked whether electronic filing would affect joint appendices. Ms. Shumaker said that hyperlinking between electronically filed briefs and the record will be possible in the future, and said that the Second and Ninth Circuit are already experimenting with a system. Judge Chagares said that there should not be a rule prohibiting all paper. Judge Murphy said that this is one of the most complicated things appellate lawyers have to deal with. He saw the benefit of a national rule but thought that such a rule might affect lawyers who know only the local practice. Judge Gorsuch asked Mr. Letter and Mr. Katyal to prepare a memorandum for the spring meeting.

Mr. Byron suggested another item of new business. He said that Rule 45 and Rule 40(b) provide lengths for rehearing en banc petitions but not for responses. The clerk representative said that the responding party just follows the petitioner's limit. She said that although it seems like there is a gap, the issue has not been a problem. Given that the rule was just amended and there was no confusion, the sense of the Committee was that this proposed item should not be included on the agenda.

Judge Gorsuch announced that the Committee had received a request to make a rule that courts publish orders granting en banc hearing. The worry is that a lawyer (or another court) will rely on a panel decision without knowing that rehearing en banc had been granted. A judge member believed that this is a sensible request. Mr. Byron said that a rule requiring publication might raise controversy and that "publication" is an unusual term given that most documents are available on Pacer. Judge Gorsuch asked the clerk representative for guidance. She said that Westlaw decides what order to publish, not the court. Mr. Letter said that maybe this is an issue for which a letter should be written. Mr. Byron asked whether there was a problem requiring publication. A judge member said that a 7th Circuit local rule says that it must be published in the Federal Reporter. These orders do appear on Pacer. Mr. Byron and Mr. Letter said they will work with others in investigating this issue.

Finally, the Advisory Committee considered Ms. Shumaker's memorandum in the Agenda Book.[18] The memorandum explains that Rules 10, 11, 27, and 30 do not account (or do not account fully) for electronic records. She said that the current situation is difficult to address. Judge Campbell said that the Civil Rules contained too many references to paper to correct but they did not

[18] *See id.* at 183 (memorandum on Potential Fed. R. App. P. Updates).

cause many problems. The clerk representative said that on appeal the problems are greater. The sense of the Committee was that this is a topic to look into; there should be an inventory of what has to be changed. The clerk representative and reporter will make a list of all places where the rules have to be changed to bring them into conformity with current practice without trying to change the practice.

VII. Adjournment

The meeting adjourned at 2:10 p.m.