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

MEMORANDUM

TO: Honorable David G. Campbell, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Michael Chagares, Chair
Advisory Committee on Appellate Rules

DATE: December 27, 2019

RE: Report of the Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on the Appellate Rules met on Wednesday, October 30, 2019, in Washington, DC. 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 Committee anticipates that, at the June 2020 meeting of the Standing Committee, it will seek final approval of proposed amendments to Rules 3, 6, and 42, as well as Forms 1 and 2. Most of these proposed amendments deal with the content of notices of appeal; the proposed amendment to Rule 42 deals with agreed dismissals (Part II of this report).

It also anticipates that, at the June 2020 meeting, it will seek approval for publication of proposed amendments to Rule 35, dealing with rehearing en banc, and to Rule 25, dealing with privacy in Railroad Retirement Act cases (Part III of this report).

The Committee discussed two matters that are under consideration by joint subcommittees:

- earlier deadlines for electronic filing; and
- finality in consolidated cases (Part IV of this report).

The Committee gave initial consideration to two matters that it decided to retain on its agenda:

- a proposal to require that a court of appeals give notice if it is contemplating a decision based on grounds not argued by the parties; and
- a proposal to regularize the handling of applications to proceed in forma pauperis (Part V of this report).

The Committee also considered two other items, removing them from its agenda (Part VI of this report). The draft minutes from the October 30, 2019 meeting are attached to this report.

II. Proposed Amendments Published for Public Comment

At the spring 2019 meeting, the Standing Committee approved for publication proposed amendments to Rules 3, 6, and 42, as well as Forms 1 and 2. They were published in August 2019.

The proposed amendment to Rule 3 is the most significant. It is designed to reduce the inadvertent loss of appellate rights. The proposed amendments to Rule 6 and Forms 1 and 2 are conforming amendments.

The proposed amendment to Rule 42 would restore mandatory dismissal of appeals when the parties agree to such a dismissal.

A. Rules 3 and 6; Forms 1 and 2

The notice of appeal is supposed to be a simple document that provides notice that a party is appealing and invokes the jurisdiction of the court of appeals. But a variety of decisions from around the circuits have made drafting a notice of appeal a treacherous exercise, especially for any litigant taking a final judgment appeal who mentions a particular order that the appellant wishes to challenge on appeal.

In an effort to avoid the misconception that it is necessary or appropriate to designate each and every order of the district court that the appellant may wish to challenge on appeal, the proposed amendment would require the designation of "the judgment—or the appealable order—

from which the appeal is taken," and delete the phrase "or part thereof." In most cases, because of the merger principle, it is appropriate to designate only the judgment.

To alert readers to the merger principle without attempting to codify it, the proposed amendment would add a new provision: "The notice of appeal encompasses all orders that merge for purposes of appeal into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal."

In order to overcome various traps that decisions have created, the proposed amendment would also add these new provisions:

"In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates: (A) an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties; or (B) an order described in Rule 4(a)(4)(A)."

and

"An appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited. Without such an express statement, specific designations do not limit the scope of the notice of appeal."

The Appendix to this report contains all of the proposed Rules and Committee Notes as published for public comment. For convenience, the text of proposed Rule 3 is shown here:

Rule 3. Appeal as of Right—How Taken

* * * * *

(c) Contents of the Notice of Appeal.

(1) The notice of appeal must:

(A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as ''all plaintiffs,'' ''the defendants,'' ''the plaintiffs A, B, et al.,'' or ''all defendants except X'';

(B) designate the judgment~~,~~—or the appealable order—from which the appeal is taken~~, or part thereof being appealed~~; and

(C) name the court to which the appeal is taken.

(2) A pro se notice of appeal is considered filed on behalf of the signer and the signer's spouse and minor children (if they are parties), unless the notice clearly indicates otherwise.

(3) In a class action, whether or not the class has been certified, the notice of appeal is sufficient if it names one person qualified to bring the appeal as representative of the class.

(4) The notice of appeal encompasses all orders that merge for purposes of appeal into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal.

(5) In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates:

(A) an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties; or

(B) an order described in Rule 4(a)(4)(A).

(6) An appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited. Without such an express statement, specific designations do not limit the scope of the notice of appeal.

~~(4)~~ (7) An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice.

~~(5)~~ (8) Form~~s~~ 1A and 1B in the Appendix of Forms are ~~is a~~ suggested form~~s~~ of ~~a~~ notice~~s~~ of appeal.

* * * * *

The Committee has received two responsive comments, one favorable and one critical. It also received two completely irrelevant comments discussing bankruptcy.

The favorable comment urges that these amendments be adopted "as written without delay" in order to overcome "traps for the unwary" that "undermine confidence in the fairness and openness of the appellate process."

The critical comment, submitted by Michael Rosman, contends that the proposal is inconsistent with Civil Rule 54(b). If he is right, the proposal needs to be rethought. But no member of the Committee agreed with his analysis.

Mr. Rosman contends that Civil Rule 54(b), properly understood, requires a district court to enter a separate document that lists "all the claims in the action . . . and the counterclaims, cross-claims, and intervenors' claims, if any—and identify what has become of all of them." On this understanding, if a district court dismisses one count of a two count complaint under Civil Rule 12(b)(6) and then grants summary judgment for the defendant on the second count, there is no final judgment until the court files a document that recites both the action on the first count and the action on the second count—and until this is done, an appeal should be dismissed for want of appellate jurisdiction.

He observes that Civil Rule 54(b) provides that an order "that adjudicates fewer than *all* the claims . . . does not end the action as to any of the claims . . . and may be revised at any time before the entry of a judgment adjudicating all the claims." (emphasis added). He emphasizes that Civil Rule 54(b) does not—as the proposed amendment to Appellate Rule 3 does—refer to all *remaining* claims, and contends that it may not reasonably be interpreted as if it did.

Mr. Rosman concedes that "it has not always worked" this way and that "District Court judges have not been trained to file judgments adjudicating all of the claims of all of the parties, they frequently fail to do so, [and] parties tend not to raise this failure, and Courts of Appeals tend not to call them on it." In his view, "[t]his has not been good for the clarity of practice."

What Mr. Rosman views as an unreasonable interpretation of Civil Rule 54(b) is not only consistent with the actual practice he acknowledges, but also is precisely how a leading treatise interprets Civil Rule 54(b). That treatise provides:

> Any order that did not contain both the required determination and direction, even though it adjudicated one or more of the claims, is subject to revision anytime before a judgment is entered adjudicating the *remaining* claims.

10 Wright & Miller, Fed. Prac. & Proc. Civ. § 2653 (4th ed.) (emphasis added); *cf*. Moore's Federal Practice § 54.259[3] ("If an order is not certified under Rule 54(b), but a notice of appeal is nevertheless filed, any subsequent order of the district court that completely adjudicates the remaining claims is sufficient to validate the otherwise premature notice of appeal.").

Because it is generally understood that a decision disposing of all remaining claims of all remaining parties to a case is a final judgment, without the need for the district judge to recite the prior disposition of all previously decided claims, the Committee does not recommend any changes in response to Mr. Rosman's comment.

B. Rule 42

The proposed amendments would restore 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 would also replace old terminology and clarify that any relief beyond mere dismissal—including approving a settlement, vacating, or remanding—requires a court order. It would also

clarify that the Rule does not alter the legal requirements governing court approval of settlements or the like.

Rule 42. Voluntary Dismissal

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(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 beyond the mere 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 Committee has received no comments on the proposed amendments to Rule 42, and does not recommend any changes.

III. Proposed Amendments for Possible Publication in 2020

The Committee anticipates that, at the spring 2020 meeting, it will seek approval for publication of proposed amendments to Rule 35, dealing with rehearing en banc, and to Rule 25, dealing with privacy in Railroad Retirement Act cases.

A. Rules 35 and 40—Rehearing

Amendments to Rule 35 and 40 imposing length limits on responses to petition for rehearing have been approved by the Judicial Conference and submitted to the Supreme Court for its consideration. They are on track to take effect on December 1, 2020.

The Committee has also been looking at more comprehensive changes to these Rules. But it has been dissuaded from doing so, aware that there is no demonstrated problem calling for such a comprehensive solution, and having balanced the benefits of consistency against the harms of disruption. In particular, it has considered, but rejected, a number of options, including:

(1) revising Rule 35 to apply solely to initial hearing en banc and Rule 40 to apply to both kinds of rehearing;

(2) revising Rules 35 and 40 to make them more parallel to each other, or parallel to Rule 21;

(3) requiring a single petition rather than separate petitions for panel rehearing and rehearing en banc; and

(4) adding to Rule 35 the statement in Rule 40 that a grant of rehearing is unlikely without a call for a response.

After conducting a review of the local rules, internal operating procedures, and the like from the various courts of appeals, the Committee has also decided against adding a provision that would empower any judge on a panel to cause a petition for panel rehearing to be treated as a petition for rehearing en banc. It saw insufficient reason to disrupt local practices with regard to the role of visiting and senior judges.

At this point, the Committee is focused on the relationship between petitions for panel rehearing and rehearing en banc. It is inclined to:

(1) codify the widespread practice that allows a petition for rehearing en banc to be treated by the panel as a petition for panel rehearing;

(2) remind litigants that if the criteria for en banc review are not met, panel rehearing may be available; and

(3) assure litigants that a panel will not be able to block access to the full court.

This last point requires some explanation. There are cases in which a panel will state in an order that no subsequent petitions for rehearing en banc may be filed. The Committee suspects that this happens when the members of the panel, based on confidential communication between the panel and the non-panel members of the court, know that other members of the court are satisfied with the changes made by the panel. But the parties do not know what has been said by off-panel members of the court, and the court does not know what the parties might have to say in response to the changes made by the panel. For this reason, the Committee is inclined to recommend making clear that parties have a right to seek review by the full court.

The Committee is continuing to work on this proposal.

One question under discussion is whether the ability to file a new petition should be limited to situations where the panel changes the substance of the decision. At first blush, such a limitation makes good sense, so as not to invite new petitions when the panel makes an insignificant change, such as fixing a typo or a citation. On the other hand, such a limitation might invite battles over what counts as significant.

Another question under discussion is whether the ability to file a new petition should be limited to petitions for rehearing en banc. On the one hand, if the panel has made an error in attempting to fix its prior decision, the aggrieved party should be able to point it out. On the other hand, allowing repeated petitions for panel rehearing endangers finality and risks confusion about issuance of the mandate. Whichever is chosen merely sets the default rule, a default rule that can be overcome pursuant to Rule 2.

Here is a working draft, with options noted in brackets:

Rule 35. En Banc Determination

(a) **When Hearing or 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 heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:

(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or

(2) the proceeding involves a question of exceptional importance.

(b) **Petition for Hearing or Rehearing En Banc**. A party may petition for a hearing or rehearing en banc.

(1) The petition 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.

* * * * *

(4) If neither of the criteria in (b)(1) is met, panel rehearing pursuant to Rule 40 may be available.

(5) A petition for rehearing en banc may be treated by the panel as including a petition for panel rehearing. If the panel changes the [substance of its] decision, a party may—within the time specified by Rule 40(a), counted from the day of filing of the amended decision—file a new petition for rehearing [en banc].

* * * * *

Committee Note

A party dissatisfied with a panel decision may petition for rehearing en banc pursuant to this Rule or petition for panel rehearing pursuant to Rule 40. The amendment calls attention to the different standards for the two kinds of rehearing.

The amendment also explicitly provides for the common practice of treating a petition for rehearing en banc as including a petition for panel rehearing, so that the panel can address issues raised by the petition for rehearing en banc and grant relief that is within its power as a panel. It also provides that if the panel changes the [substance of its] decision, a party is given time to file a new petition for rehearing [en banc].

B. Rule 25—Privacy in Railroad Retirement Act Cases

The Committee has been considering a suggestion from Ana Kocur, General Counsel of the Railroad Retirement Board, that the privacy protections afforded in Social Security benefit cases be extended to Railroad Retirement Act benefit cases.

Civil Rule 5.2(c) protects the privacy of Social Security claimants by limiting electronic access to case files. Although members of the public can access the full electronic record if they come to the courthouse, they can remotely access only the docket and judicial decisions. Appellate Rule 25(a)(5) piggybacks on Civil Rule 5.2(c): "An appeal in a case whose privacy protection was governed by . . . Federal Rule of Civil Procedure 5.2 . . . is governed by the same rule on appeal."

This piggyback approach works fine for categories of cases that can be heard in both the district courts and the courts of appeals. But unlike Social Security benefit cases, Railroad Retirement benefit cases go directly to the courts of appeals. The Railroad Retirement Board does not generally litigate cases in the federal district courts. For that reason, this Committee took up this matter.

There is little doubt that there are close parallels between the Social Security and Railroad Retirement programs. *See BNSF Ry. Co. v. Loos*, 139 S. Ct. 893, 898 (2019) ("Given the similarities in timing and purpose of the two programs, it is hardly surprising that their statutory foundations mirror each other."). Accordingly, the Committee believes that it makes sense to accord the same kind of privacy protection to both kinds of cases.

The Committee checked with the Committee on Court Administration and Case Management, and found no objection to this Committee proceeding. A limited number of lawyers who practice in the area were also consulted, and none objected.

The Committee also considered the possibility of including other kinds of cases that go directly to the courts of appeals and implicate similar privacy concerns. It found only two statutory schemes that might possibly warrant similar privacy treatment: the Longshore and Harbor Workers' Compensation Act, *see* 33 U.S.C. § 921, and the Black Lung Act, *see* 30 U.S.C. § 932. But the Department of Labor raised some concerns about categorically treating those cases the same as Social Security cases, because the administrative process in those cases differs in important respects from the process in Social Security cases. For this reason, the Committee expects to propose publication of a proposed amendment limited to the Railroad Retirement Act.

Here is a working draft:

Rule 25. Filing and Service

(a) **Filing**

* * * * *

(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.

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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.

IV. Matters Before Joint Subcommittees

A. Earlier Deadlines for Electronic Filing

A cross-committee subcommittee is studying the possibility of rolling back electronic filing deadlines from midnight to some earlier time. The Federal Judicial Center is looking at deadlines across the country, including Delaware, which has adopted an earlier deadline. Information being sought includes when clerks' offices actually close, what opportunities there are for after-hours filings, who actually files at late hours, and the extent to which pro se litigants may file electronically. The ABA and other membership organizations have been asked to comment.

Some members of the Appellate Rules Committee recalled that, before electronic filing, they would use after-hours drop boxes or the latest Federal Express drop off box to file documents after the Clerk's Office closed. They urged caution about how any change might interact with the mailbox rule. Some noted the value of the flexibility provided by a midnight filing deadline.

B. Finality in Consolidated Cases

A joint Civil/Appellate subcommittee is considering the issue of finality in consolidated cases. When cases are consolidated, and all of the issues in one such case are resolved, can (and must) an immediate appeal be taken? This question produced a four-way split among the circuits prior to the Supreme Court's decision in *Hall v. Hall*, 138 S. Ct. 1118 (2018). In *Hall*, the Supreme Court decided that the consolidated actions retain their separate identities so that an immediate appeal is available, and presumably must be taken at that time or lost.

In addition to the problem of possible lost appellate rights if litigants do not realize that they need to appeal, there is also a potential for inefficiency in the courts of appeals dealing with related issues in multiple appeals.

The Federal Judicial Center is undertaking a study of how large a problem there might be. But even if the statistics do not reveal a large problem, there may nevertheless be a large problem. Cases in which one consolidated case has reached a final judgment may be overlooked by both litigants and courts. So, it is problematic to have a jurisdictional rule that is difficult to detect, and difficulties are compounded if additional claims or parties are added after consolidation. Moreover, there may well be cases that are consolidated in the district of filing prior to being transferred to an MDL district.

Any changes would likely be made to the Civil Rules. The joint subcommittee may propose a rule that would allow for delayed appealability, with a district judge empowered to dispatch cases for appeal, as with Civil Rule 54(b).

V. Matters Initially Considered and Retained on Agenda

A. Decision on Grounds Not Argued

The American Academy of Appellate Lawyers (AAAL) submitted a suggestion that would require a court of appeals, if it is contemplating a decision based on grounds not argued, to provide notice and an opportunity to brief that ground.

A subcommittee was appointed to consider the suggestion. Questions to be addressed include whether the matter is appropriate for rulemaking.

B. In Forma Pauperis Standards

The Civil, Criminal, and Appellate Committees have received a suggestion regarding how courts decide whether to grant IFP status. IFP status is governed by statute. 28 U.S.C. § 1915 provides, in relevant part, that:

> any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor.

The standard of poverty required for IFP status is not absolute destitution. *Adkins v. E.I. DuPont de Nemours & Co.*, 335 U.S. 331, 338–40 (1948). "The public would not be profited if relieved of paying costs of a particular litigation only to have imposed on it the expense of supporting the person thereby made an object of public support." *Id*. A recent article in the Yale Law Journal, which focuses on IFP practice in the district courts, contends that "there is a dizzying degree of variation across and within the ninety-four U.S. district courts." Andrew Hammond, *Pleading Poverty in Federal Court*, 128 YALE L.J. 1478, 1482 (2019). Hammond proposes eligibility for IFP status based on any one of the following 1) net income at or below 150% of federal poverty level and assets less than $10,000, excluding home and vehicle; 2) eligibility for public assistance; 3) representation by pro bono attorney, including one funded by Legal Services; or 4) judicial discretion to determine that fees and costs cannot be paid without substantial hardship. *Id*. at 1522. He provides a proposed IFP form as well. *Id*. at 1565.

There is some support on the Committee for potential rulemaking to establish a default rule, or a few easy-to-apply rules such as those suggested in the Yale article.

Even if there is consensus among other committees not to undertake rulemaking, there is an aspect unique to the Appellate Rules that may warrant it. The official forms have been largely eliminated in the Civil Rules. The IFP forms available for use in district court proceedings are AO forms. By contrast, the Appellate Rules still have official forms as part of the Appellate Rules. When someone seeks leave to pursue an appeal IFP, Appellate Rule 24 requires the use of Appellate Form 4. Moreover, Supreme Court Rule 39 requires a party seeking IFP status in the

Supreme Court to use Appellate Form 4. If the AO changes the forms used in the district court, the Committee might want to reconsider whether to continue to have its own form as part of the Rules.

VI. Items Removed from Agenda

A. Specifying "Good Cause" for an Extension of Time to File a Brief

A lawyer who was quite sure that the government did not have good cause for an extension it received submitted a suggestion to specify criteria for good cause.

The Committee, without dissent, agreed to remove this item from its agenda.

B. Court Calculated Deadlines

The Appellate, Bankruptcy, Civil, and Criminal Committees received a suggestion that courts calculate deadlines and provide the information to the parties so the parties can rely on them.

Although Committee members believed that calculating deadlines is a real problem for pro se litigants, the proposal would put an enormous burden on the clerks' offices or the judges' staffs—as well as risk being misleading because of jurisdictional deadlines that are fixed even if a court provides a litigant with incorrect information.

There was some discussion of whether deadlines that CM/ECF generates automatically could be made available, but even this is impractical because there are case-to-case variables and these deadlines are sometimes wrong.

The Committee, without dissent, agreed to remove this item from its agenda.