

Minutes of the Spring 2019 Meeting of the
Advisory Committee on the Appellate Rules

April 5, 2019

San Antonio, Texas

Judge Michael A. Chagares, Chair, Advisory Committee on the Appellate Rules, called the meeting of the Advisory Committee on the Appellate Rules to order on Friday, April 5, 2019, at 8:30 a.m., at the Hyatt Regency Riverwalk Hotel in San Antonio, Texas.

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, Christopher Landau, Judge Stephen Joseph Murphy III, Professor Stephen E. Sachs, Danielle Spinelli, and Judge Paul J. Watford. Solicitor General Noel Francisco was represented by Mark Freeman, Director of Appellate Staff, Department of Justice.

Also present were: Judge David G. Campbell, Chair, Standing Committee on the Rules of Practice and Procedure; Judge Frank Hull, Member, Standing Committee on the Rules of Practice and Procedure, and Liaison Member, 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; Patricia S. Dodszeit, Clerk of Court Representative, Advisory Committee on the Appellate Rules; Rebecca A. Womeldorf, Secretary, Standing Committee on the Rules of Practice and Procedure and Rules Committee Chief Counsel; Bridget M. Healy, Attorney Advisor, Rules Committee Staff (RCS); Shelly Cox, Administrative Analyst, RCS; Ahmed Al Dajani, Rules Law Clerk, RCS; Marie Leary, Senior Research Associate, Federal Judicial Center; and Professor Edward A. Hartnett, Reporter, Advisory Committee on the Appellate Rules.

Professor Catherine T. Struve, Reporter, Standing Committee on the Rules of Practice and Procedure, and Professor Daniel R. Coquillette, Consultant, Standing Committee on the Rules of Practice and Procedure, participated in the meeting by phone.

I. Introduction

Judge Chagares opened the meeting and greeted everyone, particularly Judge Paul Watford, a new member of the Committee. He thanked Rebecca Womeldorf, Shelly Cox, and the whole Rules team for organizing the meeting and the dinner the night before. He noted that while prior members of the Committee have gone on to become judges, a current member of the Committee, Chris Landau, has been

nominated to be ambassador to Mexico, an apparent first for the Committee. Mr. Landau stated that it has been a privilege to serve on this Committee and that he was happy that he was able to make this meeting. A judge member added that prior members of the Committee have also gone on to become Justices of the Supreme Court.

II. Report on Proposed Amendments Submitted to the Supreme Court

Judge Chagares reported that the proposed amendments to Rules 3, 5, 13, 21, 25, 26, 26.1, 28, 32, and 39 had been sent to the Supreme Court. These proposed amendments mostly reflect the move to electronic filing and the resulting reduced need for proof of service. In addition, the proposed amendment to Rule 26.1 changes the disclosure requirements of that Rule.

These proposed amendments appear to be on track to take effect on December 1, 2019. The agenda book (page 65) includes a list of pending legislation that would effectively amend the Federal Rules; none of the pending legislation targets a Federal Rule of Appellate Procedure.

III. Approval of the Minutes

The draft minutes of the October 26, 2018, Advisory Committee meeting were approved.

IV. Discussion of Matters Published for Public Comment

Proposed amendments to Rules 35 and 40, dealing with the length limits for responses to petitions for rehearing, were published for public comment. There has been only one comment submitted; that comment agreed with the proposed amendment to Rule 40(a)(3). By contrast, the proposed amendment to Civil Rule 30(b)(6) drew over 2000 comments.

Judge Chagares observed that he has also heard informally from judges who approved of these proposed amendments.

The Committee unanimously gave final approval of these proposed amendments for submission to the Standing Committee.

V. Discussion of Matters Before Subcommittees

A. Proposed Amendments to Rule 3 – Merger (06-AP-D)

Professor Sachs presented the subcommittee's report regarding Rule 3. (Agenda Book page 99). The style consultants commented on the proposal since the publication of the Agenda Book, and changes made in light of their suggestions are reflected in documents distributed at the meeting.

Professor Sachs noted that this issue regarding the content of the notice of appeal has been under consideration by the Committee for some time. The current rule calls for the designation of the judgment or order "being appealed," which is ambiguous: does it refer to the judgment or order which can be the basis for moving the case up to the appellate court—the one serving as the basis of the court's appellate jurisdiction and from which time limits are calculated—or to the substantive issues to be reviewed by the appellate court? For example, an evidentiary ruling might be made along the way to a final judgment; the appeal is from the final judgment, but it may be that the evidentiary issue is the one sought to be reviewed.

This ambiguity leads some to list in the notice of appeal the rulings sought to be reviewed. Some courts use an *expressio unius rationale* and treat a notice of appeal from a final judgment that mentions one interlocutory order but not others as limiting the appeal to that order, rather than reaching all the interlocutory orders that merged into the judgment. A memo by the Rules Law Clerk showed splits within and across circuits.

In addition, Civil Rule 58 requires that a judgment be set out in a separate document. If that doesn't happen (and it doesn't always happen), the judgment is considered entered once 150 days have run from an order that resolves all remaining claims. If a notice of appeal designates the final order, some courts construe the notice of appeal as limited to the claims disposed of in that order, rather than reaching earlier orders that merge into the final judgment.

The proposed amendment to Rule 3(c)(1)(B) would replace the phrase "being appealed" with the phrase "from which the appeal is taken." A new (c)(4) would refer to the merger rule and clarify that there is no need to include in the notice of appeal orders that merge into the designated judgment or order. A new (c)(6) would repudiate the *expressio unius rationale*. A new (c)(5)(A) would clarify that a notice of appeal that designates an order that disposes of all remaining claims in a case includes the final judgment.

The subcommittee decided to refer to the merger rule without describing it in the text of the Rule. The fear is getting something wrong in the description of the merger rule.

The subcommittee decided to delete the phrase “or part thereof” from Rule 3, because it is part of the problem. On the other hand, the subcommittee thought that it should be possible for an appellant to deliberately exclude some matters from the appeal.

The subcommittee left to the full Committee the question of whether to add the word “appealable” before the word “order” in proposed Rule 3(c)(1)(B)(ii). Is it confusing? How about the alternative—shown in option B—of adding the phrase “that supports appellate jurisdiction” after the word “order”?

When a party moves for reconsideration or for a new trial, that party can wait until that motion is decided and then appeal. But if the notice of appeal filed after the disposition of the motion designates only the order disposing of that motion, some courts will treat the notice of appeal as not including the underlying judgment. The proposed Rule 3(c)(5)(B) would avoid the accidental loss of appellate rights in these circumstances.

Option C shows a more significant restyling of Rule 3(c), reordering the provisions. There are advantages as well as disadvantages to this restructuring of the Rule.

Form 1 is replaced by Form 1A and Form 1B, in line with the changes to Rule 3(c)(1)(B).

A lawyer member asked if a pro se litigant who used Form 1B (which is designed for appeals from appealable orders) rather than Form 1A (which is designated for appeals from final judgments) when appealing from a final judgment would be okay. Professor Sachs said yes, if the litigant designated the final order.

Judge Chagares noted that the recent Supreme Court decision in *Garza v. Idaho*, 139 S. Ct. 738 (2019), emphasized that filing a notice of appeal is a simple non-substantive act; this proposed amendment is designed to bring that back.

A judge member stated that the committee had done excellent work and that he preferred Option A because it is clearest and most straightforward. Another judge member echoed support for Option A, particularly coupled with the changes to the forms.

Judge Chagares asked about cross appeals. Professor Sachs stated that they would be left as-is. He added that the proposed amendment also did not change the requirement of Rule 4(a)(4)(A) that a party who intends to challenge an order disposing of certain post-judgment motions must file a notice of appeal or an amended notice of appeal.

The Reporter invited discussion of the question whether to delete the phrase “or part thereof.” A judge member inquired about cross appeals and whether there were any rules about them. Professor Sachs responded that the circumstances in which a cross appeal is required are left to caselaw. The Reporter added that Rule 4(a)(3) does not specifically refer to cross appeals, but instead simply empowers any party to file its own notice of appeal within 14 days after another party has filed a notice of appeal.

Mr. Freeman stated that the subcommittee had done fantastic work, but he was concerned whether the proposed subparagraph 6—which would enable a party to limit the appeal—would constrain a cross appeal. Professor Sachs responded that the current Rule permits a party to designate a “part thereof,” so there would be no change in this regard.

Mr. Freeman voiced concern that the proposed subparagraph 6 would give rise to new fights about whether an issue was beyond the scope of the notice of appeal and give rise to more caselaw on this question. The Reporter echoed Professor Sachs’ point about the existing Rule.

Mr. Freeman responded that he got the point in theory, but he was concerned how it would work in practice. He understood that the current Rule allows such a designation, and therefore parties could fight about the scope of the appeal. He nevertheless thought that the proposed subparagraph 6 would focus litigants’ attention on the issue, and therefore invite these fights.

A judge member suggested that people should have the opportunity to limit their appeals if they want. A lawyer member stated that Mr. Freeman’s point was well taken. While the existing Rule does allow for designation of a “part thereof,” the proposed subparagraph 6 would be more prominent and litigants would use it strategically. Perhaps there shouldn’t be any limiting done in the notice of appeal, leaving that to the briefs. A judge member wondered if the subparagraph was necessary, given the proposed deletion of the phrase “or part thereof.”

Mr. Freeman said that litigants will use subparagraph 6 strategically, trying to limit what can be considered on appeal. He pointed to practice under section 1292(b), where parties have litigated all the way to the Supreme Court whether the appeal reaches the entire order or only the particular question certified.

Professor Sachs argued for retaining proposed subparagraph 6. He imagined a single piece of paper that does six things, some of which are immediately appealable, and some that are not, such as granting a preliminary injunction and disposing of various other matters. An unlimited notice of appeal would invite fights about whether the district court retained jurisdiction regarding those other matters. Both parties might want to limit the appeal; this has to be balanced against the concern

that increased attention that might be brought by proposed subparagraph 6 could increase strategic behavior.

A lawyer member noted the mission creep in this project. We fixed the original *expressio unius* problem, and then fixed the Forms. His initial thought was to simply delete “or part thereof,” but came around to the view that we have a litigant-directed process, and why should we force people to appeal who don’t want to?

Judge Chagares suggested that perhaps the notice of appeal should simply open the door, leaving any limitations to the briefs. A judge member suggested taking out subparagraph 6, but not “or part thereof.” Judge Campbell observed that doing so might not really kill the *expressio unius* approach. A different judge member suggested perhaps moving the last clause of proposed subparagraph (6)—“additional designations do not limit the scope of the appeal”—to proposed subparagraph (4).

Professor Sachs reiterated his concern that without something like subparagraph 6 an appeal from a preliminary injunction that was contained in the same order as a decision on a motion in limine could raise the possibility of divesting the district court of jurisdiction over the issues involved in the motion in limine. Mr. Freeman responded that appeals from such orders happen all the time without a problem.

The Reporter pointed to the example of cases involving multiple claims and multiple parties; the proposed subparagraph (6) leaves parties with the ability to appeal only with regard to some claims or some parties.

A lawyer member suggested that the notice of appeal should not be a means to strategically limit the jurisdiction of the court of appeals. A different lawyer member responded that “strategically limit” is not necessarily a negative, and that an appellant is the master of the appeal. A judge member added that if a party chooses to accept a decision, it is not a bad thing that a court lacks jurisdiction over an issue that the party doesn’t want the court to decide.

Mr. Freeman stated that, as the *Garza* decision explained, the notice of appeal is a simple document. Proposed subparagraph (6) risks giving it greater legal effect and building a body of law about what is within the scope of the appeal. Judge Chagares suggested that the Committee Note say that the briefs are the place to focus the issues and remove both proposed subparagraph (6) and “or part thereof.”

Professor Sachs stated that there are three issues to consider. First, how much of a change in practice would be brought about by bringing attention to an option that litigants have today? Second, should litigants be able to limit the notice of appeal? Third, is estoppel enough to deal with the issue?

A lawyer member found himself on the fence. He doesn't especially like proposed subparagraph (6) and generally thinks simpler is better, but nevertheless thinks that it is important to have some mechanism to provide some assurance that a party can put something on the table without putting everything on the table. A judge member suggested that the briefs could do that, prompting the lawyer member to respond that the notice of appeal is jurisdictional while the brief is not. A different judge member stated that jurisdiction cannot be created or destroyed by rule. Professor Sachs stated that the statute requires a notice of appeal, and the Rules can specify the content of the notice of appeal.

A lawyer member stated that the phrase "may limit the appeal" is the problem. Professor Sachs suggested rephrasing: "An appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited."

A judge member asked about cross appeals, and Professor Sachs responded that this would leave unchanged the principles governing cross appeals.

Discussion then turned to the issue of whether the text of the Rule should state the merger rule, with one judge member noting that the proposed Rule invites the question, "which orders merge?" Judge Campbell suggested a brief explanation of the merger rule in the Committee Note. Judge Chagares observed that one reason to not state the merger rule in the text of the Rule is to avoid stunting its growth. A lawyer member observed that while the basic rule is simple, it's never as simple as that. Professor Sachs pointed to two of the curlicues: 1) can a litigant throw a final judgment to secure an appeal? and 2) what merges into an interlocutory order?

Ms. Womeldorf suggested replacing the word "includes" in the proposed subparagraph 4 with the word "encompasses."

Professor Struve noted that there might be some impact on bankruptcy and tax appeals, and Professor Coquillette added that the proposed changes should not go out for publication prior to a cross-committee check. Judge Campbell instructed the Reporter to check with bankruptcy and tax before going to the Standing Committee and come back to this Committee only if needed.

Judge Chagares added that the Committee Note should state that the brief is the place to limit issues.

Mr. Freeman stated that the changes suggested in the discussion led to material improvement.

Judge Campbell added that the word "additional" in proposed subsection 6 should instead be "specific."

A judge member suggested some changes would be necessary to the Committee Note to reflect these changes to the text. Judge Campbell observed that it is never a good idea to draft Committee Notes by committee. The Reporter will draft a revised Note and circulate it to the Committee by email.

The Committee unanimously approved the proposed Rule (as revised in accordance with the discussion) for submission to the Standing Committee with the recommendation that it be published for public comment.

B. Proposal to Amend Rule 42(b) – Agreed Dismissals (17-AP-G)

Christopher Landau presented the subcommittee's report regarding a proposal to amend Rule 42(b). (Agenda Book page 119). The style consultants commented on the proposal since the publication of the Agenda Book, and changes made in light of their suggestions are reflected in documents distributed at the meeting.

Mr. Landau recounted that this matter came up because sometimes clients want to settle, but cannot be assured that the court of appeals will dismiss the appeal. That's because the current Rule provides that the circuit clerk "may" dismiss an appeal "if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that may be due," and some courts of appeals will refuse to dismiss. Prior to restyling, the "may" was "shall."

There are two options presented. The first works from the existing Federal Rule of Appellate Procedure. The second works from the existing Supreme Court Rule. The differences between the two have narrowed, especially after incorporating suggestions from the style consultants.

A judge member spoke in support of the first option. Judge Chagares agreed, noting that one advantage of the Supreme Court variant was that it might be the path of least resistance, but that advantage was lost with the styling changes. Mr. Landau explained that there was more detail in the Supreme Court variant, but that such detail was not necessary in this Rule, because the Rule dealing with motions covers that detail.

The key change being proposed is changing the word "may" in Rule 42(b) to "must." Second, the sentence dealing with a stipulated dismissal and the sentence dealing with an appellant's motion to dismiss would be broken out into two separate subsections with headings to make the distinction between the two clearer.

The third proposed change is a bit trickier. The current Rule includes the cryptic prohibition that "no mandate" may issue without a court order. The proposed amendment would unpack that prohibition, and add a provision to deal with

situations, such as class actions and the Tunney Act, that require court approval of settlements.

Finally, a new subsection would be added to deal with appeals from agency orders.

Judge Campbell asked about interlocutory appeals: if an interlocutory appeal is dismissed, is some court action required to remand the case to the district court? Ms. Dodszeit stated that no remand is necessary in that situation, and that the proposed language is okay from the perspective of Clerks. In some circumstances, Clerks have found it necessary to issue orders in lieu of mandates to make clear that jurisdiction is being returned to the district court. Mr. Freeman suggested that a mandate in the sense of returning a case to the district court would be necessary if an appeal from a preliminary injunction were dismissed. A lawyer member was not sure of this, because the appeal is simply being dismissed. An academic member pointed out that the proposal eliminates this problem by eliminating the phrase “no mandate.”

Judge Chagares noted the style change in proposed Rule 42(b)(3) from “judicial” to “court.” The Reporter explained that the Court of Appeals for the Ninth Circuit had some concerns about the proposed amendment because in that circuit mediators and the Appellate Commissioner are empowered to remand cases. Judge Campbell suggested that there was no distinction between court action and judicial action. An academic member voiced support for retaining the word “judicial” and leaving the Court of Appeals for the Ninth Circuit to rely on invoking Appellate Rule 2.

Mr. Freeman stated that the word “remand” was ambiguous; we usually think of appellate courts as affirming, reversing, or vacating. A lawyer member stated that we do not need any of the language after the dash, but a judge member spoke in favor of retaining the language after the dash. This judge member also suggested referring to “any relief beyond the mere dismissal of an appeal” rather than “any order”

A judge member asked about sanctions; a lawyer member responded that a court can impose sanctions even when it does not have jurisdiction over a case.

Judge Campbell suggested requiring “action by a judge” rather than “court action,” but a judge member responded that “court action” was needed so that the court can delegate. An academic member stated that he just learned last night about the Appellate Commissioner in the Ninth Circuit and did not want to put it in this Rule.

A lawyer member voiced concern about the sentence dealing with court approval of a settlement, noting that it may not be accurate to say that a court of

appeals may approve the settlement or remand for the district court to consider whether to approve it. For example, a bankruptcy court may need to approve a settlement.

A different lawyer member suggested deleting all of subsection (b)(3) after the dash. The Reporter stated that in light of *United States Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994), it was useful to specifically mention that an order vacating a decision below required court action. The lawyer member suggested making that point in the Committee Note. An academic member thought that this was a helpful illustration and did not pose an expressio unius problem. Mr. Freeman suggested calling out *Bonner Mall* by referring to vacating, but not including any other example. A judge member liked including the reference to remand as an example of what is not a mere dismissal. This judge member also suggested adding “may consider whether to” before “approve the settlement or remand”

Mr. Freeman withdrew his suggestion about not including any other example, and suggested that the subtitle for subsection (b)(3) be changed from “Other Orders” to “Other Relief.” Judge Campbell suggested a corresponding change to the opening language of subsection (3): “A court order is required for any relief beyond”

In response to a concern raised by a judge member about how this would affect practice in the Ninth Circuit, Judge Campbell stated that the Court of Appeals could authorize its delegate to act.

An academic member suggested adding a provision that this Rule does not affect any law that requires court approval of a settlement, noting, in response to a question by Judge Campbell, that without it someone could argue that such laws were superseded by this Rule. Judge Campbell noted that this could be stated in the Committee Note.

Mr. Freeman then raised a concern about redundancy in connection with proposed Rule 42(c), which states that, for purposes of Rule 42(b), the term “appeal” includes a petition for review or an application to enforce an agency order. The Reporter explained that extraordinary writs such as mandamus were not included in proposed Rule 42(c) because there is no equivalent in the section of the Rules dealing with extraordinary writs to Rule 20, which makes many Rules—including Rule 42—applicable to review and enforcement of agency orders. But while Rule 20 states that “appellant” includes a petitioner or applicant, and “appellee” includes a respondent, it does not state that “appeal” includes a petition for review or an application to enforce an agency order. Mr. Freeman did not think it necessary to add that provision and stated that some statutes style review of agency orders as appeals.

Judge Campbell suggested moving the proposed Rule 42(c) to the Committee Note, and a judge member suggested referring to Rule 20 in the Committee Note.

Mr. Freeman then raised a concern about the reference to “fees” in Rule 42(b)(1), noting that some litigants have taken the position that this includes attorney’s fees under the Equal Access to Justice Act. He suggested that the phrase “to the clerk” be inserted after the word “pay,” but agreed with another member’s suggestion that the word “court” be inserted before the word “fees,” instead.

The Committee unanimously approved the proposed Rule (as revised in accordance with the discussion) for submission to the Standing Committee with the recommendation that it be published for public comment.

Judge Chagares thanked Mr. Landau for raising this issue, noting that it demonstrated the virtue of having lawyers—not just judges—on the Committee.

C. Rules 35 and 40 – Comprehensive Review (18-AP-A)

The Reporter presented the subcommittee’s report regarding its ongoing review of Rules 35 and 40. (Agenda Book page 137). The style consultants commented on the proposal since the publication of the Agenda Book, and changes made in light of their suggestions are reflected in documents distributed at the meeting.

The subcommittee 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.

Instead, the subcommittee recommended more modest changes. It recommended adding three provisions to Rule 35: (1) if a judge on the panel requests, a petition for panel rehearing will be treated as a petition for rehearing en banc; (2) a petition for rehearing en banc may be treated by the panel as a petition for panel rehearing; and (3) if the criteria for en banc review is not met, panel rehearing under Rule 40 may be available.

It also recommended adding to Rule 40 a provision echoing the first addition to Rule 35: if a judge on the panel requests, a petition for panel rehearing will be treated as a petition for rehearing en banc.

The Reporter then noted—speaking only for himself and not the subcommittee—that on further reflection, it might be appropriate to pare down the

proposal still further and *not* provide that if a judge on the panel requests, a petition for panel rehearing will be treated as a petition for rehearing en banc. The concern is with judges on the panel, such as senior judges and visiting judges, who are not eligible to vote for rehearing en banc.

A judge member suggested cutting the provision permitting a panel to treat a petition for rehearing en banc as a petition for panel rehearing, voicing a concern about a panel cutting off the full court. The Reporter responded that the idea was not to let the panel cut off the full court, but rather to allow the panel to fix something on its own; he suggested adding the word “including” before the phrase “a petition for panel rehearing.”

An academic member suggested that the same approach could be taken to proposed Rule 35(a)(2) and the word “including” added there as well, stating that maybe visiting judges should be able to flag an issue for en banc consideration. A judge member noted that this would create an obligation to circulate the petition to the full court, which the academic member thought may be desirable.

A lawyer member stated that he was glad that the Committee was addressing this issue, that panel rehearing is generally thought of as a lesser included petition when one petitions for rehearing en banc, and that it is good to make that explicit in the Rule. The concern is what happens when the panel does make a change in response to a petition. Can the panel side-step the full court? There should be clarity about what happens next. Is rehearing en banc foreclosed? Can a petition for rehearing en banc be filed again? Sometimes a panel will say that there can be no further en banc. Mr. Freeman stated that this has happened to the Department of Justice.

A judge member stated that every judge on the court receives what the panel has done, that what can happen next is put in the orders, and a panel can't hijack a petition. Mr. Freeman responded that not every circuit does that. The Reporter noted that there are varying local rules on handling the relationship between petitions for rehearing en banc and panel rehearing.

A different judge member stated that the Rule should make clear that full en banc review is available after a panel treats a petition for en banc rehearing as a petition for panel rehearing.

Mr. Freeman asked why the Rule shouldn't provide that a petition for rehearing en banc is always treated as including a petition for panel rehearing. A lawyer member stated that panel rehearing is always a lesser included request. The Reporter stated that there are situations in which a petition for rehearing en banc would be appropriate, but not a petition for panel rehearing, such as when existing

circuit precedent is clear and the petition asks the full court to overrule that precedent.

The subcommittee will report back again, taking into account this discussion.

VI. Update on Matters Being Held Awaiting Supreme Court Decisions

A. Rule 4(a)(5)(C) and the *Hamer* Decision (no # yet)

This matter was tabled at the last meeting pending the Supreme Court's decision in *Nutraceutical v. Lambert*, 139 S. Ct. 710 (2019).

The Reporter presented a discussion of that decision. (Agenda Book page 151). The Supreme Court held that a mandatory claims-processing rule is not subject to equitable tolling. It left open the possibility that the “unique circumstances” doctrine—which applies when a judge misleads the litigant in a situation where the litigant could have and likely would have complied if not misled by the judge—might be available. It also left open “whether an insurmountable impediment to filing timely might compel a different result.” *Id.* at 717, n.7.

A lawyer member stated that he had initially thought that we needed to fix the Rule, but he was convinced that there is no need to do so, and now thinks we should leave well enough alone. An academic member stated that there was no need to deal with this, and the Committee agreed.

B. Departed Judges (18-AP-D)

Judge Chagares presented an update on a proposal to prescribe how courts of appeals handle the vote of a judge who leaves the bench. (Agenda Book page 165).

At the last meeting, a subcommittee was formed to deal with this matter if the Supreme Court denied certiorari in a pending case that presented the issue.

Since then, the Supreme Court granted certiorari and summarily reversed, holding that a federal court cannot count the vote of a judge who dies before the decision was filed, noting that “federal judges are appointed for life, not for eternity.” *Yovino v. Rizo*, 139 S. Ct. 706 (2019).

The Committee agreed to remove this item from its docket.

VII. Discussion of Recent Suggestion

Privacy in Railroad Retirement Act Benefit Cases (18-AP-E; 18-CV-EE)

Judge Chagares stated that the General Counsel of the Railroad Retirement Board had proposed equivalent privacy protections for Railroad Retirement Act benefit cases as those provided in Social Security cases. (Agenda Book page 167). As the recent Supreme Court decision in *BNSF v. Loos*, 139 S. Ct. 893 (2019), emphasized, there is a real similarity between the two statutes.

Civil Rule 5.2—which Appellate Rule 25(a)(5) piggybacks on for Social Security cases—does not apply to Railroad Retirement Act benefit cases. One possibility would be to amend Civil Rule 5.2, but Railroad Retirement Act benefit cases do not come to the district court. It is appropriate for this Committee to act on this proposal.

But we should do so comprehensively. It might be appropriate to include benefit cases arising under other statutes, such as those dealing with Black Lung and Longshoremens.

A subcommittee consisting of Judge Watford and Tom Byron was created.

A judge member asked about privacy protection in Board of Immigration Appeals cases. Judge Chagares responded that it is handled by incorporation of the Civil Rule.

VIII. New Business and Updates on Other Matters

Judge Campbell noted major projects in other Advisory Committees:

The Civil Rules Committee approved a modest change to Civil Rule 30(b)(6). It is also considering MDL rules: MDL cases comprise some 30 to 40% of the entire civil docket. The question is whether to maximize discretion in handling these cases or create Rules. Special Rules governing appeals in Social Security cases are also under consideration.

The Evidence Rules Committee is working on forensic expert evidence and Evidence Rule 702.

The Criminal Rules Committee is considering requiring greater disclosure of expert reports.

The Bankruptcy Committee is working on restyling.

Judge Chagares invited discussion of possible new matters for the Committee's consideration, and, in particular, matters that would promote the just, speedy, and inexpensive resolution of cases. None was immediately forthcoming.

Judge Chagares announced that his term was supposed to end, but that he had been asked to remain for another year and would do so.

IX. Adjournment

Judge Chagares again thanked Ms. Womeldorf and her team for organizing the dinner and the meeting, and the members of the Committee for their participation. He announced that the next meeting would be held on October 30, 2019, in Washington, DC.

The Committee adjourned at noon.