Minutes of the Fall 2020 Meeting of the

Advisory Committee on the Appellate Rules

October 20, 2020

Via Teams

Judge Jay Bybee, Chair, Advisory Committee on the Appellate Rules, called the meeting of the Advisory Committee on the Appellate Rules to order on Tuesday, October 20, 2020, at 10:00 a.m. EDT. The meeting was conducted remotely, using Microsoft Teams.

In addition to Judge Bybee, the following members of the Advisory Committee on the Appellate Rules were present: Justice Judith L. French, Judge Stephen Joseph Murphy III, Professor Stephen E. Sachs, Danielle Spinelli, Judge Paul J. Watford, and Lisa Wright. Acting Solicitor General Jeffrey B. Wall was represented by H. Thomas Byron III, Senior Appellate Counsel, Department of Justice.

Also present were: Judge John D. Bates, 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; Molly Dwyer, 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; Kevin Crenny, Rules Law Clerk, RCS; Marie Leary, Senior Research Associate, Federal Judicial Center; Brittany Bunting, Administrative Analyst, RCS; Professor Edward A. Hartnett, Reporter, Advisory Committee on the Appellate Rules; Professor Daniel J. Capra, Reporter, Advisory Committee on the Rules of Evidence and Liaison to the CARES Act Subcommittees; 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.

I. Introduction

Judge Bybee opened the meeting and greeted everyone, particularly Molly Dwyer, the new Clerk Representative. He offered his heartfelt appreciation to Judge Michael Chagares, the immediate past chair of the Committee.

II. Report on Meeting of the Standing Committee

The draft minutes of the June Standing Committee meeting are in the agenda book, along with the report of the Standing Committee to the Judicial Conference.

III. Approval of the Minutes

The draft minutes of the April 3, 2020, Advisory Committee meeting were approved.

IV. Discussion of Matters Published for Public Comment

A. Proposed Amendment to Rule 42—Stipulated Dismissal of Appeal (17-AP-G)

The Reporter stated that the Advisory Committee had submitted for final approval a proposed amendment to Rule 42 that would make it mandatory for a Clerk to dismiss an appeal when the parties so stipulate. The Standing Committee, however, was concerned how this proposed amendment could interact with local circuit rules that require evidence of a criminal defendant's consent to dismissal of an appeal. As reflected in the agenda book (page 107), he suggested the addition of a provision to deal with this concern:

> **(d) Criminal Cases.** A court may, by local rule, impose requirements to ensure that a defendant consents to the dismissal of an appeal in a criminal case.

He added that Professor Struve was concerned that this phrasing might be read by naïve readers (particularly defendants themselves) as suggesting that the court of appeals should pressure a defendant to withdraw an appeal. Professor Struve added that no lawyer would read it this way but was concerned about paranoid readings by inmates. She suggested rewriting the provision.

Judge Bybee noted that the proposed addition sends readers to the local rules. Professor Struve responded that her concern was not that any court of appeals would think that it should pressure defendants, but that she is always looking out for ways that members of the public might misread rules.

An academic member suggested using the phrase "confirm whether" instead of "ensure that" and asked whether the addition should be limited to criminal appeals or extend to habeas cases or civil cases generally. Judge Bates suggested that perhaps the addition be broadened to require compliance with all relevant local rules, but also stated that he was not aware of any such local rules other than those dealing with criminal appeals.

Mr. Byron responded that if the Appellate Rules are to encourage or permit local rules, they should do so in a focused way. To date, the relevant local rules are limited; we should not encourage more local rule making, particularly since the point

of the amendment is to require that courts dismiss when the parties stipulate. He said that the addition should not extend to civil cases, including habeas, and noted that securing the parties' consent would be complicated in cases with corporate parties.

The Reporter asked whether the change to "confirm whether" met Professor Struve's concern. She agreed it did.

An attorney member noted that she was not familiar with stipulated dismissals in criminal cases, and that in her experience, such a dismissal was done by motion. The Reporter responded that the concern raised by the Standing Committee was about stipulated dismissals, but that the proposed amendment would reach both.

Judge Bybee moved that the phrase "ensure that" be replaced by the phrase "confirm whether." Mr. Byron found that phrasing awkward: if one imposes a requirement it is usually to do something. Perhaps "confirm that" would be better. Professor Struve suggested "confirm that the defendant is consenting." An attorney member suggested "confirm that the defendant has consented." This last suggestion was met with unanimous approval.

The Committee approved the following addition:

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

B. Proposed Amendment to Rule 25—Railroad Retirement Act (18-AP-E)

The Reporter explained that the proposed amendment to Rule 25 would extend the privacy protection now given to Social Security and immigration cases to Railroad Retirement Act cases. The reason for the amendment is that Railroad Retirement Act benefit cases are very similar to Social Security Act cases. But unlike Social Security Act cases, Railroad Retirement Act cases are brought directly to the courts of appeals.

The proposal has been published for public comment. Only one comment has been received; that comment (reproduced on page 109 of the agenda book) is not specifically directed to the proposed amendment. The Standing Committee, however, expressed some concern about whether other kinds of cases—such as ERISA cases and Hague Convention cases—might warrant similar treatment and asked that outreach be done to relevant stakeholders. The Reporter noted that he had reached out to the ABA Joint Committee on Employee Benefits but had not yet heard back. He invited members of the Committee to suggest any additional outreach, particularly regarding Hague Convention cases.

He added that it was somewhat awkward because any amendment to deal with such cases would have to be to the Civil Rules rather than the Appellate Rules. In most instances, the Appellate Rules can simply piggyback on the privacy protections in the Civil Rules. The only reason this Committee got involved with this proposed amendment is that Railroad Retirement Act cases come directly to the courts of appeals.

Judge Bybee stated that this should be worked out with the Civil Rules Committee; our work is done here. Both Judge Bates and Professor Coquillette stated that the Reporter should talk to the reporters for the Civil Rules Committee.

V. Discussion of Matters Before Subcommittees

A. Proposed Amendment to Rule 2—CARES Act

The Reporter presented the subcommittee's report regarding the CARES Act (Agenda Book page 115). He stated that Congress had directed the Judicial Conference to consider amendments under the Rules Enabling Act to address future emergencies. Each of the Advisory Committees has undertaken this task. The Evidence Committee decided that no changes were needed, thereby freeing its reporter, Professor Daniel Capra, to coordinate the efforts of the other Committees.

Thus far, the various subcommittees have taken a range of approaches, with Criminal being the most restrictive, Appellate the least restrictive, and Civil and Bankruptcy in between. There are three major issues: what triggers the emergency provisions, who decides whether to invoke those provisions, and what can be changed in an emergency.

All four subcommittees are using the same basic triggering language—"If extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a [court of appeals], substantially impair the ability of a [court of appeals] to perform its functions in compliance with these Rules." Criminal, however, adds a requirement that there be no feasible alternative.

The four subcommittees differ regarding who is empowered to invoke the emergency provisions. Criminal and Civil restrict the power to the Judicial Conference, with Criminal adding the requirement of particular findings. Bankruptcy adds both the Chief Circuit Judge and the Chief Judge of the Bankruptcy Court. The Appellate subcommittee proposal empowers the Chief Judge of the Circuit and the Judicial Conference, with power in the latter to review and revise any determination of the former.

Other Committees list particular rules that can be changed. The Appellate subcommittee proposal does not, reflecting that existing Rule 2 permits virtually any rule to be suspended in a particular case.

Professor Capra elaborated on some of the differences between the various subcommittees, noting that many are stylistic, but that Appellate is the outlier in being so open-ended.

Mr. Byron stated that it is appropriate for Appellate to be more open-ended and that we should advocate for that approach. Professor Capra stated that there is much to be said for uniformity, and that the various subcommittees are using the same basic definition of an emergency but have considerable disuniformity.

An academic member raised a question of statutory authority. 28 U.S.C. § 2071 gives each court rule making authority, and 28 U.S.C. § 2072 gives the Supreme Court general rule making authority. 28 U.S.C. § 331 gives the Judicial Conference the authority to modify or abrogate local rules that are inconsistent with federal law. But where does the Judicial Conference or the Chief Judge get the authority to promulgate a rule? In response to a question from Judge Bybee about whether a similar problem affects the existing Rule 2, an academic member stated that a panel hearing a case has authority to act, and existing Rule 2 provides that it is not hemmed in by other existing rules. He suggested that the authority should be channeled through local rules, which in turn could authorize the Chief Judge to act, and the Judicial Conference be empowered to make recommendations.

Judge Bates observed that other committees are proposing language that would substitute for the existing rules that are suspended. The proposed amendment to Rule 2 gives leeway to suspend, but it doesn't say what replaces the suspended rule. This may be a concern when the proposed rules go to the Judicial Conference, the Supreme Court, and Congress.

The Reporter suggested that the CARES Act itself might provide the necessary statutory authorization. A judge member agreed with Judge Bates; there is a difference between suspending the rules and issuing rules. The court should have power, not the chief judge.

Professor Coquillette drew on his institutional memory to recall that when Congress wants the rules committees to do something, it is willing to clarify their authority. It's not a practical problem; Congress wants the committees to act. On the other hand, using local rules is much more problematic. It is far easier for Congress to oversee the Rules Enabling Act rulemaking process than to oversee local rules.

Professor Capra added that the authority issue is not a problem if the Judicial Conference is simply making findings that trigger alternatives that are built into the rules.

An academic member noted that the CARES Act refers only to presidential declarations of national emergencies. He is particularly concerned about the Judicial

Conference, which does not seem to have any rule making authority on its own. A local rule, however, can preauthorize the chief judge to act.

Professor Capra stated that each of the various subcommittees reached beyond presidential declarations of national emergencies, concluding that the proposed amendments need not be tied to such an emergency.

In response to a question, Judge Bates clarified that while nothing has lessened the urgency of moving forward, no action was expected at the January meeting of the Standing Committee. Instead, the expectation is that there will be some disuniformity among the proposals from the various committees. This Committee should send forward for discussion what it thinks best.

The Reporter stated that the standard for an emergency was close to uniform, but that there is a significant difference as to who could invoke the emergency provisions. Judge Bates emphasized that the issue of the authority of the Judicial Conference is more of an issue for the proposal before this committee than for the proposals before other committees. He added that it is problematic to throw the problem to local rulemaking, because that process is not a quick one. Some wonder whether the Judicial Conference can act quickly enough, but local rules are slow. An academic member responded that the local rules could preauthorize the chief judge to act.

Professor Capra stated that local rules would be fighting words for the Criminal Committee. He added that, under the approach taken by other committees, the Judicial Conference would not be engaged in rulemaking, but only declaring that an emergency exists, triggering the replacement rules that then take effect.

Professor Struve urged the Committee to focus on what it thought the best approach would be rather than the question of authorization, noting that Congress might bless the results with legislation if needed.

A judge member expressed concerns about someone acting unilaterally. Judge Bybee stated that he was comfortable with giving authority to the Chief Judge, noting that in the Ninth Circuit, there is an active executive committee. Mr. Byron agreed that he is not concerned about a rogue chief judge, and that a majority of the court could overrule. A different judge member stated that her court also has an executive committee, that any chief judge seeks consensus, and that a majority could override. She added that her court suspended the requirement of paper submissions, and the chief consulted with everyone. Ms. Dwyer agreed that the chief judge is appropriate as an initial decisionmaker, based on working for 32 years under 8 different chief judges.

An academic member suggested empowering the court to act, providing that unless the court orders otherwise, the Chief Circuit Judge may act on a court's behalf,

and empowering the Judicial Conference to recommend suspensions to one or more circuits, as well as reviewing and revising determinations by the court.

Professor Capra observed that this suggestion is even more at odds with other committee because it means that the Judicial Conference would not itself be taking action.

Mr. Byron stated he is happy with giving the power to the chief judge but did not oppose the alternative of empowering the court. He added that uniformity is appropriate; if the Judicial Conference has statutory authority, it should be empowered to make the decision. An academic member clarified that his only objection to the role of the Judicial Conference concerned its statutory authority.

A judge member expressed concern with giving the power to the chief judge, preferring that it be vested in the court. Professor Coquillette stated that the executive committee of the Judicial Conference moves fast when it has to and is under the control of the Chief Justice.

The Reporter suggested addressing separately (1) the power of the chief judge and (2) the power of the Judicial Conference. The Committee reached a tentative consensus to empower the court and the Judicial Conference, while permitting the chief judge to act on the court's behalf unless the court orders otherwise.

An academic member raised two additional issues: Should there be a 90-day sunset provision? Should the proposed amendment be limited, as existing Rule 2 is, by Rule 26(b)?

As to the first issue, the Reporter responded that the proposal required that the suspension be ended when the substantial impairment no longer exists, and Professor Capra stated that other committees are proposing 90-day renewable periods. Mr. Byron observed that our current situation has lasted well more than 90 days.

As to the second issue, the Reporter stated the proposal would allow the suspension of rule-based time limits, but not statutory time limits. Professor Struve suggested that this distinction be written into the text of the rule. Mr. Byron appreciated the value of being clear in the text of the rule but was concerned about trying to identify the limits of what could be suspended. An academic member suggested adding "other than times limits imposed by statute"; the Reporter suggested "other than jurisdictional times limits imposed by statute." Professor Struve suggested that precision is appropriate, and suggested "other than times limits imposed by statute and described in Rule 26(b)(1)–(2)." Mr. Byron was persuaded.

The Committee produced the following working draft:

Rule 2. Suspension of Rules

(a) **Particular Cases.** On its own or a party's motion, a court of appeals may—to expedite its decision or for other good cause—suspend any provision of these Rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b).

(b) Rule Emergencies. If extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court of appeals, substantially impair the ability of a court of appeals to perform its functions in compliance with these Rules, the court may suspend any provision of these Rules in that circuit, other than time limits imposed by statute and described in Rule 26(b)(1)–(2). The court must end the suspension when the substantial impairment no longer exists. The Judicial Conference of the United States may exercise this same power to suspend in one or more circuits, and may review and revise any determination by a court under this rule. Unless the court orders otherwise, the Chief Circuit Judge may act on a court's behalf under this Rule.

Judges Bates urged the Committee to be prepared to defend the decision to empower the chief judge, as opposed to leaving the decision to the Judicial Conference, as Civil and Criminal propose.

Mr. Byron stated that appellate judges act collegially on behalf of the whole court in ordinary appeals. Unlike district judges, they do not act independently. The Reporter added that the issues addressed by district judges include trials, with juries and witnesses, while appellate judges at most hear oral argument, so that greater flexibility in suspending the rules is appropriate—as existing Rule 2 reflects. A judge member added that individual circuit judges exercise little authority, but individual district judges exercise considerable authority. A circuit judge's colleagues can overrule that judge's decision; a district judge's colleagues can't. The public is much more affected in the district court, considering all the ways in which the public comes to proceedings in a district court. The public has little role in the courts of appeals; in her court, only 15% of the appeals are orally argued.

Judge Bates responded that this is all basically accurate and distinguishes the chief judge of a circuit from the chief judge of a district. But the question isn't chief judge of a circuit vs. the chief judge of a district; it is chief judge of a circuit vs. the Judicial Conference.

Professor Coquillette added that this could be a real concern when the proposal is before the Standing Committee. The Judicial Conference is very collegial; the chief judges of each circuit will be involved.

A judge member supported keeping the authority in the chief judge, mainly for efficiency reasons. But if that's going to cause problems with the Standing Committee, it may be better to simply put the authority in the Judicial Conference. The chief judge will deal with the executive committee of the Judicial Conference.

Judge Bybee noted that we already have Rule 2; the proposal we are considering looks an awful lot like just using Rule 2 in every case.

Mr. Byron stated that he preferred staying with what we have, but that if the Standing Committee opposes giving this authority to anyone but the Judicial Conference, he can live with it.

An academic member suggested giving the Judicial Conference the authority to declare an emergency. That declaration, in turn, would trigger the power of the court (or the chief judge, unless the court orders otherwise) to suspend. Judge Bates stated that there might be pushback in the Supreme Court or Congress about different solutions in different parts of the country to a national emergency. He emphasized a particular concern if the emergency rule did not identify the substitute rule that would govern if the ordinary rule were suspended. He is concerned about Congress getting into the act. Professor Coquillette agreed. Professor Capra stated that the latest suggestion (giving the Judicial Conference authority to declare an emergency) would move the Appellate proposal closer to that of other committees. There would still be the need to identify which rules were suspended.

The Reporter cautioned that an emergency rule that specified which rules could be suspended ran the risk of losing the flexibility provided by existing Rule 2, which seems to have been sufficient for this pandemic.

Judge Bates observed that the Advisory Committee on Civil Rules had a similar concern and came close to not recommending an emergency rule. Criminal is in a different situation.

A judge member like the idea of doing nothing. There's no issue of statutory authority. Rule 2 has already been adopted.

Mr. Byron suggested that we propose the broad version of Rule 2 that we have been working with and pull it if we meet with significant push back. A judge member stated that he would be willing to give up on the authority of the chief judge, leaving it in the hands of the Judicial Conference, but that if we had to specify which rules could be suspended, he would withdraw the proposal.

Mr. Byron stated that there are relative risks to consider. If it is necessary to leave the authority in the Judicial Conference alone, that's probably okay. But the biggest risk would be if others insist on identifying particular rules that can be suspended and specifying their replacements. That would limit existing authority.

The Committee agreed without dissent to forward the working draft above to the Standing Committee for discussion.

The Reporter noted that the Civil Rules Committee currently lists Civil Rule 6 as one that could be suspended in an emergency. If that goes forward, it will be necessary to coordinate with this Committee.

The Committee recessed for lunch at approximately 12:45 p.m. and reconvened at approximately 1:15 p.m.

The Reporter presented the rest of the recommendations by the CARES Act subcommittee. Reviewing the Federal Rules of Appellate Procedure in light of the experience of the pandemic led the subcommittee to suggest some changes without regard to a rules emergency (agenda book page 118).

FRAP 4(c). The subcommittee recommended providing for situations where a prison mail system is unavailable by adding a new provision to the prisoner mail box rule: "If an institution's internal mail system is not available on the last day for filing, an inmate who files a notice of appeal on the first day that it becomes available receives the benefit of this rule."

FRAP 26(a)(3). The subcommittee considered defining "inaccessibility" of the clerk's office in a way that takes account of the possibility that electronic filing might be unavailable. But further research led the subcommittee to recommend not making any revision to FRAP 26(a)(3). That's because the 2009 amendment removed the reference to "weather or other conditions" precisely to account for the possibility of inaccessibility of electronic filing.

FRAP 33. The subcommittee recommended permitting an appeal conference to be conducted "remotely" rather than "by telephone."

FRAP 34(b). The subcommittee recommended providing that argument may be held in a courtroom as usual, but with some participants joining in remotely and, more broadly, permitting the court to set the "manner" of oral argument. To do this, the requirement that the clerk advise all parties of the "place" for oral argument would be deleted, and the following provision would be added: "If oral argument will be heard in person, the clerk must advise all parties of the place for it. If oral argument will be heard remotely, in whole or in part, the clerk must advise all parties of the manner in which it will be heard."

FRAP 34(g). The subcommittee recommended that the rules governing use of physical exhibits apply only if argument is held in person, by adding the phrase "an in-person" before the word argument. Judge Bybee noted that physical exhibits might be used in a remote argument. The Reporter responded that Rule 34 requires that

arrangements be made for placing physical exhibits in the courtroom and removing them, requirements that would not apply to a remote argument.

FRAP 45(a). The subcommittee looked into clarifying the interplay between a court being "always open" under Rule 45 and the clerk's office being "inaccessible" under Rule 26. Given the history and apparent purpose of the "court always open" provision, and its connection to longstanding statutory provisions, the subcommittee suggested leaving the "court always open" provision in place rather than making any change to it. On the other hand, it is difficult to see how the requirement that the clerk or a deputy must be in attendance during business hours can be reconciled with the possibility envisioned by Rule 26 that the clerk's office might be inaccessible. Prior to restyling, the word used was "shall," rather than "must," and "shall" often carries some element of discretion. But the stylists banned the word "shall," so the "shall" became a "must." Rather than trying to restore "shall"—as was done for Civil Rule 56 in 2010—the subcommittee recommended leaving the word "must," but imposing the duty only whenever reasonably possible.

Judge Bates stated that the phrase "reasonably possible" was not a common one. He suggested a possible cross-reference to Rule 26. Judge Bybee noted that there is always a force majeure exception. Mr. Byron suggested instead that the word "must" be replaced by the word "will," so that the rule would provide. "The clerk's office with the clerk or a deputy in attendance will be open during business hours on all days except Saturdays, Sundays, and legal holidays."

With this change, the Committee agreed unanimously to forward these proposed amendments to the Standing Committee for discussion.

B. Proposed Amendment to Rules 35 and 40—Rehearing

Professor Sachs presented the subcommittee's report regarding Rule 35 and 40 (agenda book page 125). He explained that this project has been kicking around for some time. There is considerable duplication that results from having two rules that address rehearing. The Committee previously focused on spelling out what happens when a petition for rehearing en banc is filed and the panel believes that it can fix the problem. How do we make clear that this can happen while still preserving a party's right to access the full court? Working on the specifics revealed a spaghetti string of cross-references.

As a result, the Committee asked the subcommittee to attempt to integrate the two rules. The main arguments against doing so is that the changes are mostly stylistic, that renumbering rules can produce some difficulties in legal research, and that local rules will themselves have to be renumbered. On the other hand, having a single rule governing rehearing is much less confusing for those not already familiar with appellate practice.

The subcommittee proposes that Rule 35 be abrogated and that a single rule—Rule 40—govern all petitions for rehearing. Proposed Rule 40(a) provides that a party may petition for panel rehearing, for rehearing en banc, or for either. Proposed Rule 40(b) sets forth the criteria for each kind of rehearing. Proposed Rule 40(c) brings together in one place uniform provisions governing matters such as the time to file, form, and length.

The key moves to deal with the problem that prompted this project are contained in proposed (c)(1) and (c)(5). Proposed (c)(1) provides that any amendment to a decision restarts the clock for seeking rehearing, thereby not blocking access to the full court. Proposed (c)(5) provides that a petition for rehearing en banc does not limit a panel's authority to grant relief.

Before turning to the details of the proposal, the Committee first discussed the big question: whether or not to engage in the comprehensive revision. Mr. Byron thanked Professor Sachs for the huge amount of work and reflection he put into this project. Mr. Byron stated that for the last several years he has been advocating a comprehensive revision. It provides a real benefit of clarifying the interaction of panel rehearing and rehearing en banc, and of creating a single resource rather than leaving readers flipping back and forth between two rules. This is a huge improvement.

A lawyer member stated that overall this is great, but had one concern about the statement that panel rehearing is the "ordinary" means of reconsidering a panel decision. She found that phrasing too encouraging; panel rehearing is not ordinarily done. Judge Bybee added that none of this is favored.

A judge member stated that she has never been in favor of the comprehensive revision, seeing no problem that needs fixing. The substantive standards for each kinds of rehearing are totally different. The proposed additions contained in (c)(1) and (c)(5) to deal with the identified problem can be put in one of the rules; there is no need to redo the whole thing. The comprehensive revision will create tremendous work for the courts and will make people file combined petitions for panel rehearing and rehearing en banc. Now, forty percent seek only panel rehearing; with this amendment, everyone will file for both. The ship has sailed on a comprehensive revision, but it is important to keep people from filing for both all the time. The prohibition on oral argument should be placed in (b)(1) dealing with panel rehearing.

Professor Sachs responded that it is a good idea to extend the existing prohibition on oral argument to en banc petitions. A lawyer member stated that she was not aware that the Committee had yet made a decision to consolidate Rules 35 and 40, and that she had never heard of a court hearing argument on a petition for rehearing. She suggested adding "unless the court orders otherwise." No member of the Committee could identify a situation in which a court would hold oral argument

on the question whether to grant rehearing—as opposed to hearing oral argument on the merits after deciding to grant rehearing. Mr. Byron and Judge Bybee suggested moving the prohibition on oral argument to subsection (a). Professor Sachs voiced support for making clear that the prohibition on oral argument applies to the petition for rehearing itself and feared that adding "unless the court orders otherwise" would invite motions for oral argument on the petition. The Committee agreed to move the provision regarding oral argument to subsection (a) and revise it to read, "Oral argument on whether to grant the petition is not permitted."

Discussion then turned to the first bracketed language in the subcommittee's draft (agenda book page 127). That language in (b)(2) would require that a petition for rehearing en banc also meet the standard in (b)(1) for a petition for panel rehearing.

A lawyer member stated that this bracketed language doesn't make sense. A petition for rehearing en banc might not involve a claim that the panel misapprehended any law or fact; it might simply argue that the prior precedent should be revisited. She urged deleting the bracketed language. Judge Bybee agreed, and no one urged keeping it.

Professor Sachs then explained the reasons for retaining the second bracketed language in the subcommittee's draft. That language in (b)(3) establishes the criteria for rehearing en banc that applies even when the court acts sua sponte. He also worried about the negative inference that some could draw if the provision, which is in current Rule 35, were delated.

A lawyer member stated that the language is certainly duplicative, and that she is not worried about sua sponte rehearing. A judge member urged changing as little as possible in the existing rule. This accentuates the point. The proposed rule is so much shorter than the existing rules. Judge Bybee added that any redundancy is in the existing Rule 35. A lawyer member noted that the proposed rule now says that rehearing en banc "is not favored" twice; maybe it's worth making that point twice. A judge member noted that 50% of appeals involve pro se litigants.

No member of the Committee objected to retaining this language.

A judge member suggested that proposed (c)(1), which restarts the time to file a petition for rehearing after a decision is amended, should refer to when the "panel" amends its decision, not when the "court" amends its decision. Professor Sachs responded that use of the word "court" was deliberate, to take account of the possibility of seeking rehearing of an en banc court's decision. While rare, an en banc court could make a mistake; even the Supreme Court allows petitions for rehearing of its decisions. A judge member stated that this project started because of an identified problem dealing with panel decisions; we shouldn't make this change.

Judge Bybee pointed out that using the word "panel" would include the en banc panels used in the Ninth Circuit, where it is possible to have a super en banc.

The Committee decided to use the word "panel" rather than "court."

A judge member stated that Professor Sachs had produced a phenomenal draft, and asked what happens if a party files a petition for rehearing en banc and, while it is pending, the panel changes its decision? She urged that a party should be able to stand on the already-filed petition for rehearing en banc, amend it, or file a new one.

Professor Sachs responded that, under the current draft, the earlier petition is wiped out and treated as moot. The clock starts for a new one. The party may have a very different point.

A judge member stated that the change might be minor, so a party might want to simply stand on the existing petition or amend it.

A lawyer member stated that she would file a new petition, alerting the court that she still wanted the rehearing en banc. She suggested that it might be worth clarifying this in (c)(5).

Mr. Byron agreed that a litigant's response should be clear. A new petition makes the litigant's response clear, including to the clerk. A judge member expressed concern that this will lead to pro se litigants having to file new sets of papers, even where the change was minor. Mr. Byron stated that requiring a new filing is the clearest way to know the litigant's position. Judge Bybee stated that this could be very difficult for little folks; Mr. Byron responded that a pro se letter could be treated as a petition.

The Reporter noted that we are not trying to submit a draft for the Standing Committee to approve for publication at its January meeting. The Committee decided to leave this issue to be considered further by the subcommittee.

A lawyer member raised an issue that had not been considered by the subcommittee. Subsection (c)(3) of the subcommittee's draft provides that "ordinarily" a petition will not be granted in the absence of a request for a response. She was recently involved in a case where a panel amended an opinion in response to a petition for rehearing without calling for a response. Perhaps the panel figured that since the same party prevailed, it didn't matter. But if a response had been sought, the prevailing party could have pointed out that the issue had been expressly waived. She is still dealing with the fallout. Perhaps stronger language could be used.

Judge Bybee noted that sometimes scrivener's errors are fixed without calling for a response. Sometimes parties simply want their ages stated correctly, or their names spelled correctly. A judge member suggested maybe something that required that a decision not be "substantively amended" without calling for a response. A

lawyer member stated that in another context, the subcommittee struggled with a similar question, and ultimately decided against using the modifier "substantive."

Professor Sachs then turned to the final bracketed language from the subcommittee draft, subsection (c)(4)(C) (agenda book page 128). The question is whether to include language that would add new language, not in the current rules, empowering a panel to prevent second or successive rehearing petitions; a concern is not preventing access to the full court. In response to a question from a judge member, he explained that rest of proposed section (c)(4) currently applies to panel rehearing, but that it makes sense for it to apply to both a panel and the full court. It doesn't impose a restriction on the full court.

A judge member stated that we should not add the new bracketed language, especially if we require a new petition in response to changes made by a panel. Judge Bybee noted that his court issues these orders, but he now questions whether it should.

A lawyer member stated that even if a panel is empowered to block further petitions for panel rehearing, it should not be empowered to block petitions for rehearing en banc.

A judge member urged keeping out the new language and suggested, more broadly, that subsection (c)(4) doesn't really fit the en banc court, urging that it remain limited to panel rehearing.

A lawyer member responded that no substantive change is intended, that applying subsection (c)(4) to the en banc court is the consequence of combing the two rules, and that it does fit the en banc court. Professor Sachs agreed that while it is a change, it is not a substantive change, and worries about negative inferences if the subsection is limited to panels. A judge member responded that the en banc court has inherent power to do whatever it wants. A lawyer member noted that the rule can make clear to litigants what a court may do.

A judge member drew attention to current Rule 35 (b)(3), which provides that length limitations apply to separately filed petitions for panel rehearing and rehearing en banc as if they were a single document, unless a local rule requires separate petitions. Does the subcommittee proposal change that?

Professor Sachs responded that it was intentional to require a single document subject to the word limits. In response to a question about what would happen if a party filed separate documents, Professor Sachs stated that the subcommittee did not envision that the use of the word "either" in subsection (a) would lead parties to file two separate documents. A lawyer member suggested using the word "both" rather than "either."

The concern remains whether to remove the ability of local rules to require separate documents. The Committee's recollection is that at this point only the Court of Appeals for the Fifth Circuit has such a local rule. We will check with the Fifth Circuit.

The subcommittee will continue its work in light of this discussion. A judge member stated that it was a great improvement.

C. IFP Standards—(19-AP-C)

The Reporter reported on the work of the IFP subcommittee (agenda book page 144). The subcommittee is considering a suggestion by Sai to regularize the criteria for granting IFP status and to revise the IFP form. The Civil Rules Committee has removed the item from its agenda. The forms used in the district courts are Administrative Office forms that can be revised by the Administrative Office. The form used in courts of appeals, however, is Form 4 of the Federal Rules of Appellate Procedure and adopted pursuant to the Rules Enabling Act.

There is reason to think that the there is considerable variation in the way the IFP statute is implemented across the district courts. In addition, the IFP statute, as amended by the Prison Litigation Reform Act, is a mess.

The subcommittee is looking at other forms. It also hopes to learn how the courts of appeals handle IFP applications, including what standards are used and what information from Form 4 is actually useful.

Ms. Dwyer will look into this.

D. Relation Forward of Notices of Appeal—(20-AP-A)

Mr. Byron presented the report of the subcommittee (agenda book page 155). The subcommittee is considering a suggestion to deal with premature notices of appeal. While the existing Rule 4(a)(2) usually works, there are situations in which there is a discernible problem, even if that problem is not large.

The solution offered by Professor Bryan Lammon, who submitted the suggestion, would allow any premature notice of appeal to become effective once a judgment or appealable order is filed. The subcommittee thinks that this proposed solution would cause more problems than it solves.

One category of cases is the most sympathetic one. These cases involve appeals from district court decisions that could have been certified for immediate appeal under Civil Rule 54(b) but were not. A belated certification works, but what if the

case reaches final judgment without a Rule 54(b) certification? Sometimes, but not always, this results in a loss of appellate rights.

Another category of cases involves appeals from decisions regarding liability without a determination of the remedy. A third category involves appeals from reports and recommendation by magistrate judges prior to their adoption by a district judge. This final category often involves pro se litigants.

All the solutions that the subcommittee has considered so far are unsatisfactory. We do not want to create incentives for premature notices of appeal. Perhaps there is a way to increase awareness of the effect of a notice of appeal and whether it divests the district court of jurisdiction. The subcommittee will continue to look.

VI. Discussion of Matters Before Joint Subcommittees

A. Electronic Filing Deadlines (19-AP-E)

Judge Bybee reported that the joint subcommittee considering whether the deadline for electronic filing should be moved to some time prior to midnight continues to gather information, but that data gathering has been delayed due to COVID-19 (agenda book page 168). He added that the Court of Appeals for the Ninth Circuit has had some discussion about whether the existing rule is unfair to young associates.

The Reporter noted that Judge Chagares continues to be involved in this project. Ms. Dwyer stated that lawyers in immigration matters want to keep the midnight deadline. It can be especially important when seeking a stay of removal.

B. Finality in Consolidated Cases after *Hall*

The Reporter reported on the work of the joint subcommittee dealing with finality in consolidated cases. The Supreme Court in *Hall v. Hall* decided that consolidated actions retain their separate identify for purposes of appeal so that if one such action reaches final judgment it is appealable, even though other consolidated cases remain pending. This decision creates the risk that some will lose their appellate rights because they did not realize that their time to appeal had begun to run, and creates the risk of inefficiency in the courts of appeals because multiple appeals are taken at different times from a proceeding that a district judge thought similar enough to warrant consolidation. Because any fix would likely be made to the Civil Rules, particularly Rule 42 and Rule 54(b), enabling district judges to release for appeal individual actions that were consolidated, the Reporter for the Civil Rules Committee is taking the lead. His report is in the agenda book (page 170).

A docket study by Emery Lee has identified thousands of consolidated cases, not including MDL cases. A sample of 400 of these consolidated cases revealed nine that produced a final judgment in one originally separate action while the rest of the consolidated proceeding remained pending. He projected that there may be hundreds of such instances every year.

No particular problem was found in the cases from this sample. Problems may exist but be hidden. Lawyers may miss the issue, and only discover it when it is too late. Lawyers spend time having to figure out whether a decision in consolidated proceedings finally resolves one of the originally separate actions. Courts may overlook the problem. The joint subcommittee intends to learn what, if anything, courts of appeals are doing to screen appeals for *Hall* problems. Perhaps Ms. Dwyer can help with that. The joint subcommittee may also reach out to the bar. For now, the joint subcommittee continues its evaluation.

The one thing that is said in favor of the rule in *Hall* is that it is clear. But while it is clear in simple cases, it is not so clear in cases where there has been a consolidated amended complaint or where additional parties have been added after consolidation. The Reporter asked members of the Committee to keep an eye out for problems.

VII. Discussion of Recent Suggestions

A. Titles in Official Capacity Actions (19-AP-G)

The Reporter stated that Sai has suggested that Civil Rule 17 be amended to require, rather than merely permit, the use of an official title in official capacity actions, and that Appellate Rule 43 be amended accordingly. At the last meeting, this matter was tabled pending the gathering of information about how Circuit Clerks currently handle the naming of official capacity actions. Perhaps all or most courts do what the Court of Appeals for the Third Circuit does—replace an official's name with his title.

The information gathered, however, reveals that most litigants and courts use an individual's name (agenda book page 176). The Reporter noted that if parties are choosing to use individual names, despite the longstanding Rules permitting the use of official titles, maybe they have some reason to do so. Do the advantages of using official titles justify overriding the considered choice of litigants?

He added that the Civil Rules Committee removed the item from its agenda. The Department of Justice opposed the suggestion, not only because there was no problem needing fixing, but because the use of titles can be complicated. Some federal officers are appointed by the President with the advice and consent of the Senate, others are acting officers, still others perform the duty of an office as a matter of

delegation. Judge Dow was concerned that the proposed amendment could mislead litigants, particularly in the *Ex parte Young* context where a name is required.

Mr. Byron suggested removing the item from the agenda, and the Committee agreed.

B. Incorporate Civil Rule 11 (20-AP-B)

The Reporter stated that Sai has submitted a suggestion that Civil Rule 11 be amended to require prefiling review of all complaints, matching the prefiling review of IFP cases under 28 U.S.C. § 1915(e), and that a new Rule 25.1 be added to the Appellate Rules to incorporate Civil Rule 11. The Reporter noted that there was consideration of this idea back in the 1980s, at a time when Civil Rule 11 had mandatory sanctions. He suggested removing this item from the Committee's agenda—unless the members of the Committee believe that Rule 38 sanctions are not being imposed frequently enough, or that Rule 38 is inadequate to serve its purposes.

Mr. Byron recalled that the idea of explicitly adopting the Rule 11 standard in the Appellate Rules was considered in the 90s and the 00s. Rule 38 seems adequate to him, and he suggested removing the item from the agenda. There doesn't seem to be a problem.

The Committee agreed to remove this item from its agenda.

C. Pro Se Electronic Filing (20-AP-C)

The Reporter described a suggestion that electronic filing be made more widely available to pro se litigants, especially because of the pandemic (Agenda Book page 186). There have been a number of similar suggestions made to the Civil Rules Committee. Current Appellate Rule 25(a)(2)(B) establishes a presumption against electronic filing by pro se litigants, but a court order or local rule may permit it.

An academic member thought that it might become appropriate to flip the presumption and suggested revisiting the issue at the next meeting. Mr. Byron stated that this issue has come up several times. In the past, clerks—especially district court clerks—have voiced strong opposition, but maybe that has changed. Ms. Dwyer stated that Mr. Byron is correct, but that the Court of Appeals for the Ninth Circuit has allowed it. The big staffing issue in the pandemic has been sending people into the office to deal with the paper filings. There is a huge problem with incarcerated litigants. Arizona has set up kiosks in prisons; they are working well. The pushback has been from district clerks rather than circuit clerks. In the court of appeals, if someone abuses the system, we just bar them.

Judge Bates added that PDF filings sent by email are being made in the D.C. Circuit and that he is not aware of any problems. A judge member expressed concerns about repeat filers. A different judge member said that her court used to block such filings but now allows them and it hasn't been a problem. The item should not be removed from the agenda; the current presumption increases costs for pro se litigants. Perhaps we can wait to see what Civil does.

The Committee agreed to table the matter, revisiting it once we see what the Civil Rules Committee does.

D. IFP Forms (20-AP-D)

The Reporter stated that Sai has submitted a suggestion calling for quick revision to Form 4, focusing on the Form's demand for financial information about a spouse (Agenda Book page 193). This suggestion is directly related to Sai's broader suggestion regarding IFP standards (19-AP-C).

The Committee agreed to refer this suggestion to the IFP subcommittee.

E. Rule 3 (20-AP-E)

The Reporter stated that Sai has submitted a suggestion calling for a simplification of Rule 3 (Agenda Book page 205). The suggestion is really a comment on the proposed amendment to Rule 3 that has already been approved by the Standing Committee.

For that reason, it could be removed from the agenda and, if the pending amendment to Rule 3 proves problematic, a new suggestion could be entertained at that time. Alternatively, the suggestion could be referred to the Relation Forward subcommittee.

The Committee decided to refer the suggestion to the Relation Forward subcommittee.

VIII. Review of Impact and Effectiveness of Recent Rule Changes

The Reporter stated that Rule 25(d) was amended in 2019 to no longer require proof of service for documents served via the court's electronic docketing system. At the last meeting, it was reported that some courts of appeals were still requiring proof of service despite this rule change.

The Reporter added that research indicates that some courts of appeals continue to have local rules that require proof of service, but that at least one of these courts does not in practice require such proof of service, and is working on revisions to its local rules.

Mr. Byron stated that DOJ continues to have problems and urged that we reach out again. He added that the Fifth Circuit seems to be the prime offender.

IX. New Business

No member of the Committee presented any new business.

X. Adjournment

Judge Bybee thanked the participants, stating that it is wonderful to be part of this group that speaks up frankly and civilly to have an impact on important issues. He knows that it takes a lot of time out of the day, and that it can make for a very expensive day.

He announced that the next meeting would be held on April 7, 2020, in San Diego. That's optimistic, but the situation is fluid.

The Committee adjourned at approximately 4:00 p.m.