

Minutes of the Spring 2017 Meeting of the
Advisory Committee on the Appellate Rules

May 2, 2017
Washington, D.C.

Judge Michael A. Chagares, Chair, Advisory Committee on Appellate Rules, called the meeting of the Advisory Committee on the Appellate Rules to order on Tuesday, May 2, 2017, at 9:30 a.m., at the Thurgood Marshall Federal Judicial Building in Washington, D.C.

In addition to Judge Chagares, the following members of the Advisory Committee on the Appellate Rules were present: Judge Brett M. Kavanaugh, Judge Stephen Joseph Murphy III, and Professor Stephen E. Sachs. Acting Solicitor General Jeffrey B. Wall was represented by Douglas Letter, Esq., and H. Thomas Byron III, Esq. Justice Judith L. French and Neal Katyal, Esq., participated by telephone. Kevin C. Newsom, Esq., was absent.

Also present were: Ms. Shelly Cox, Administrative Specialist, Rules Committee Support Office of the Administrative Office of the U.S. Courts (RCSO); Ms. Lauren Gailey, Rules Law Clerk, RCSO; Gregory G. Garre, Esq., Member, Standing Committee on the Rules of Practice and Procedure and Liaison Member, Advisory Committee on the Appellate Rules; Bridget M. Healy, Esq., Attorney Advisor, RCSO; Professor Gregory E. Maggs, Reporter, Advisory Committee on the Appellate Rules; and Rebecca A. Womeldorf, Esq., Secretary, Standing Committee on the Rules of Practice and Procedure and Rules Committee Officer.

Judge David G. Campbell, Chair, Standing Committee on the Rules of Practice and Procedure, participated by video conference. The following persons participated by telephone: Judge Pamela Pepper, Member, Advisory Committee on the Bankruptcy Rules and Liaison Member, Advisory Committee on the Appellate Rules; Elisabeth A. Shumaker, former Clerk of Court Representative, Advisory Committee on the Appellate Rules; and Marcia M. Waldron, Clerk of Court Representative, Advisory Committee on the Appellate Rules.

I. Introduction

Judge Chagares opened the meeting and greeted everyone. He expressed congratulations to Justice Neil Gorsuch, the past chair of the Advisory Committee, on his appointment to the Supreme Court, and thanked him for his leadership, his wisdom, and all of his contributions as chair. He thanked Rebecca Womeldorf and her staff for organizing the meeting. He also thanked former attorney member Gregory Katsas and former clerk representative Betsy Shumaker, who have completed their service on the Committee. He also noted that this would be the final meeting for attorney members Neal Katyal and Kevin Newsom and liaison member Gregory Garre, whose terms of service are expiring, and expressed his gratitude for their many contributions to the Committee.

II. Approval of Minutes

A motion to approve the draft minutes of the October 2016 meeting of the Advisory Committee was made, seconded, and approved.

III. Action Items

A. Item 12-AP-D (Rules 8, 11, and 39)

Mr. Byron presented Item 12-AP-D, which concerns the proposed amendments to Appellate Rules 8, 11, and 39 that were published for public comment in August 2016. The amendments eliminate references to "supersedeas bonds" so that the Appellate Rules will conform to a proposed amendment to Civil Rule 62(a). Materials concerning the item begin at page 82 of the Agenda Book.

The reporter reminded the Advisory Committee that Rule 8(b) corresponds to Civil Rule 65.1. He then informed the Advisory Committee that the Civil Rules Advisory Committee has approved a version of Civil Rule 65.1 that uses only the generic terms "security" and "security provider," and does not mention examples of specific types of security (e.g., bonds) or security providers (e.g., sureties). The Advisory Committee then discussed and approved a revised version of Rule 8(b), shown on page 84 of the Agenda Book, that follows the same approach as Civil Rule 65.1.

Mr. Byron suggested amending the Committee Note to make clear that the term "security" in the draft of Rule 8(b) includes but is not limited to the types of security previously listed expressly in Rule 8(b), namely, bonds, stipulations, and undertakings. The Committee approved this suggestion. The Committee also approved changing the word "mail" to "send" in line 11 of the draft on page 84.

The Advisory Committee decided to recommend that the Standing Committee approve (1) the amended version of Rule 8, (2) the amended Committee Note, and (3) the versions of Rules 11 and 39 that were published in August 2016.

B. Item 11-AP-D (Rule 25)

The reporter presented Item 11-AP-D, which concerns the proposed amendments to Appellate Rule 25 that were published for public comment in August 2016. The amendments address electronic filing, service, and signatures. Materials concerning the item begin at page 112 of the Agenda Book. The Advisory Committee then discussed issues concerning three subdivisions:

Rule 25(a)(2)(B)(iii). The reporter explained how public comments had criticized the published version of Rule 25(a)(2)(B)(iii) and its counterparts in the Civil, Criminal, and Bankruptcy Rules. The Advisory Committee then approved the revised version of Rule 25(a)(2)(B)(iii) that appears on page 113 of the Agenda Book, which accords with revisions recommended by the other Advisory Committees.

Rule 25(c)(2). The reporter explained that a public comment had revealed that the published version of Rule 25(c)(2) was difficult to understand. The Committee then approved the proposed revision that appears on page 115 of the Agenda Book. The reporter agreed to coordinate this change with the Bankruptcy Rules Advisory Committee, which is considering a very similar rule.

Rule 25(a)(2)(B)(ii). The reporter explained how public comments had criticized the published version of Rule 25(a)(2)(B)(ii), which concerns filing by unrepresented parties. The Advisory Committee previously had considered but rejected these objections at its October 2016 meeting. The Advisory Committee decided not to recommend changes to the published version of this subdivision.

The reporter explained that one public comment recommended adding a provision to Rule 25 that is similar to Criminal Rule 49(d), which concerns filings by non-parties. The Advisory Committee decided that this proposal went beyond the scope of the amendments to Rule 25 that were published for public comment. The reporter and Mr. Letter agreed to study the proposal as a new matter and report back to the Committee at its next meeting.

The Advisory Committee decided to recommend that the Standing Committee approve the proposed amendments to Rule 25, with the revisions discussed above.

C. Item 15-AP-C (Rules 28.1 and 31)

Judge Chagares presented Item 15-AP-C, which concerns the proposed amendments to Appellate Rules 28.1 and 31 that were published for public comment in August 2016. The amendments would extend the time for filing reply briefs to 21 days. Materials concerning the item begin at page 214 of the Agenda Book.

The reporter explained that all public comments had supported the proposal. The Advisory Committee decided to recommend that the Standing Committee approved the proposed amendments as published.

D. Item 14-AP-D (Rule 29)

Judge Chagares presented Item 14-AP-D, which concerns the proposed amendments to Appellate Rule 29 that were published for public comment in August 2016. The amendments would authorize courts by order or rule to strike or prohibit the filing of amicus briefs that would disqualify a judge. Materials concerning the item begin at page 224 of the Agenda Book.

Judge Chagares began by explaining that Rule 29 had been revised and renumbered for other reasons in December 2016. As a result, the changes proposed for public comment will now have to be made to the new subdivision (a)(2), instead of the old subdivision (a). The discussion draft on page 224 shows the change.

Judge Chagares then identified three issues for consideration: (1) whether the Advisory Committee should approved the proposed changes to subdivision (a)(2); (2) whether subdivision (a)(2) should be reworded; and (3) whether subdivision (b)(2) should also be amended.

A judge member said that the proposed change to subdivision (a)(2) is well grounded and well thought out. He asserted that the changes proposed to subdivision (a)(2) should also apply to the new subdivision (b)(2), which concerns amicus briefs on rehearing. He further suggested that the phrase "may strike or prohibit the filing of" should be reworded to say "may prohibit the filing of or strike" because putting the words in that order was more chronological. The Advisory Committee agreed.

A judge member asked whether it was necessary to allow a court to strike a brief filed during the rehearing stage because a brief can be filed only with leave.

Mr. Letter supported the published amendment but noted that it authorized non-uniform rules. An academic member discussed the Federal Bar Council's argument that existing local rules on the subject might not be inconsistent with the current Rule 29(a)(2). A judge member, however, said that the Advisory Committee needed to act because some local rules are now inconsistent.

An attorney member asked whether local rules might allow a court to prohibit a government amicus brief. A judge member said that he did not think that local rules could authorize a court to strike a government brief. No one knew of a situation in which a local rule had been applied to the government.

The Advisory Committee considered Judge Newman's comment arguing that "amicus-curiae brief" should not be changed to "amicus brief" in subdivision (a)(2). While the Committee sees the argument for this position, it observed that the December 2016 amendments had already changed "amicus-curiae brief" to "amicus brief" in other subdivisions of Rule 29. The proposed change was therefore necessary for consistency.

Following this discussion, the Advisory Committee approved the following four changes to the amendments published in August 2016. First, in light of the December 2016 revision of Rule 29, the amendments originally proposed for former subdivision (a) will be made to subdivision (a)(2). Second, the word order of the amendment in subdivision (a)(2) will be changed to "except that a court of appeals may prohibit the filing of or strike an amicus brief that would result in a judge's disqualification." Third, the same "except" clause will be added to the end of subdivision (b)(2). Fourth, in subdivision (b)(2), the term "amicus-curiae brief" will be changed to "amicus brief."

E. Item 13-AP-H (Rule 41)

Judge Kavanaugh presented Item 13-AP-H, which concerns the proposed amendments to the Appellate Rule 41 that were published for public comment in August 2016. The amendments address stays of the mandate. Materials concerning the item begin at page 268 of the Agenda Book.

Judge Kavanaugh first discussed the comments of Judge Newman and the comments on behalf of the Second Circuit. These comments opposed the proposal to add a sentence to Rule 41(b) saying: "The court may extend the time only in extraordinary circumstances or under Rule 41(d)." The comments asserted that courts might wish to extend the time for good cause even if exceptional circumstances do not exist. For example, a court might wish to poll members about rehearing a case en banc.

Two judge members of the Advisory Committee expressed agreement with Judge Newman's comments. An academic member asked whether the standard in Rule 41(b) should be changed to "good cause." A judge member responded that a court would be unlikely to extend issuance of the mandate absent good cause. A judge member said that the original proposal to require exceptional circumstances arose from a concern that judges were delaying the mandate because they did not like the result of a case. Mr. Letter agreed that this was the original concern. A judge member said that adding the proposed words "by order" in the previous sentence of proposed Rule 41(b) would discourage extending the mandate for improper purposes. Another judge member agreed. Following this discussion, the Advisory Committee decided to recommend that the Standing Committee remove the proposed last sentence of Rule 41(b).

Judge Kavanaugh then discussed the National Association of Criminal Defense Lawyers (NACDL)'s proposal for modifying Rule 41(d). The proposal, as shown on page 271 of the Agenda Book, would allow a stay to exceed 90 days when a Justice of the U.S. Supreme Court extends the time for filing a petition for writ of certiorari.

A judge member commented that the proposal addresses a situation that sometimes arises. Mr. Letter thought it was a good idea and that there would be no downside to adding the language. An attorney member also thought that it would be a good idea.

A judge member asked whether the wording was appropriate. Another judge member said that the language does not fully address the problem. He explained that the stay should be entered automatically if a circuit justice has extended the time for filing a petition. He said that the Advisory Committee ought to make the rule self-executing. The Advisory Committee agreed with this position. It will consider by email an amended proposal to achieve the desired result.

F. Item 15-AP-E (Form 4)

Judge Chagares presented Item 15-AP-E, which concerns a proposed amendment to Form 4 that was published for public comment in August 2016. The amendment would delete a question that asks applicants for leave to proceed in forma pauperis to provide the last four digits of their social security numbers. Materials concerning the item begin at page 330 of the Agenda Book. Judge Chagares explained that all public comments supported the proposal. The Advisory Committee decided to recommend that the Standing Committee approve the proposal as previously published.

G. Items 08-AP-A, 11-AP-C, and 15-AP-D (Rule 3, et al.)

The reporter presented Items 08-AP-A, 11-AP-C, and 15-AP-D, which concern new proposals for amending Rules 3(d), 8(b), and 13(c) to change the words "mail" and "mailing" to "send" and "sending." Materials concerning these items begin at page 352 of the Agenda Book. The reporter reminded the Advisory Committee that it had approved changes to Rule 3(d) at its Fall 2016 meeting, but decided to search the rules for other instances of the word "mail" and "mailing" before making a recommendation to the Standing Committee. Following a brief discussion, the Advisory Committee agreed to recommend that the Standing Committee publish for public comment the proposed changes to Rule 3(d) and Rule 13(c) as shown on pages 353-56 of the Agenda Book. The amendment to Rule 8(b) should be made in connection with Item 12-AP-D (discussed above).

H. Item 08-AP-R (Rule 26.1)

Judge Chagares presented Item 08-AP-R, which concerns the disclosures required by Rule 26.1. Materials concerning the item begin at page 360 of the Agenda Book. The reporter reviewed the previous decisions by the Advisory Committee and then raised the pending issues identified in his memorandum.

The Advisory Committee agreed to change the title of Rule 26.1 from "Corporate Disclosure Statement" to "Disclosure Statement" as shown in the discussion draft on page 362 of the Agenda Book. An attorney member recommended searching the Appellate Rules for cross-references to Rule 26.1 that might need to be changed.

The Advisory Committee next considered the proposed amendments to Rule 26.1(b). The reporter reminded the Advisory Committee that these amendments were designed to conform to proposed amendments to Criminal Rule 12.4(b). The reporter told the Advisory Committee that the reporter for the Criminal Rules Advisory Committee had informed him the Criminal Rules Advisory Committee had trimmed back the published version of Rule 12.4 so that it would simply track the current Civil Rule. Because of this change of direction, the reporter for the Criminal Rules Advisory Committee has recommended that no changes are needed in the Appellate Rules or other rules. The Advisory Committee therefore decided not to amend the title of Rule 26.1(b) or the text of Rule 26.1(b)'s last sentence.

A judge member suggested that Rule 26.1(b) should be moved to the end of Rule 26.1 so that it would clearly apply to all of the disclosure requirements in Rule 26.1, and not just to Rule 26.1(a). This proposal would also require revising the lettering of the subdivision and changing the reference to "Rule 26.1(a)" to "this Rule." The Advisory Committee agreed with this suggestion and the reporter agreed to prepare a draft.

The reporter next asked the Advisory Committee members if they wished to discuss the proposals for creating new subdivisions (d) and (f) to address organizational victims and intervenors. The Advisory Committee approved the drafts of these provisions on page 363 of the Agenda Book at its October 2016 meeting. A judge member said that he saw no reason not to adopt the changes. The Advisory Committee agreed.

The Advisory Committee then discussed the revised proposal to create a new subdivision (e) to address disclosures in bankruptcy cases. The reporter and Judge Chagares described their conversations about the issue with representatives from the Bankruptcy Rules Advisory Committee. Judge Campbell suggested changing line 2 to say ". . . if neither the debtor nor the trustee is a party" The Advisory Committee approved the proposal to create subdivision (d) and asked the reporter to confer with the Style Consultants.

III. Discussion Items

A. Item 16-AP-C (Rules 32.1 and 35)

The reporter presented Item 16-AP-C, a new proposal to require courts to designate orders granting or denying rehearing as "published" decisions so that they would be easier to

locate. Materials concerning the proposal begin at page 398 of the Agenda Book. The Advisory Committee decided to remove the item from its agenda based on considerations identified in the reporter's memorandum.

B. Item 16-AP-D (Rule 28(j))

Judge Chagares presented Item 16-AP-D, a new proposal to amend the Civil Rules to include a provision similar to Appellate Rule 28(j). Materials concerning the proposal begin at page 408 of the Agenda Book. The reporter informed the Advisory Committee that the Civil Rules Advisory Committee had decided to remove the item from its agenda. The Appellate Rules Advisory Committee therefore also agreed to remove this item from its agenda.

C. Item 17-AP-A (Rules 4 and 27)

The reporter presented Item 17-AP-A, a new proposal that concerns subpoenas. Materials concerning the proposal begin at page 414 of the Agenda Book. The Advisory Committee decided to remove the item from its agenda based on considerations identified in the reporter's memorandum.

D. Item 17-AP-B (Rule 28)

Judge Chagares introduced Item 17-AP-B, a new proposal for amending Rule 28 to specify the manner of stating the question presented in appellate briefs. Materials concerning the proposal begin at page 420 of the Agenda Book. The proponent of the proposal, Style Consultant Bryan Garner, spoke to the Advisory Committee by telephone.

Mr. Garner explained that the precise question to be decided on appeal is the most important matter for an appellate court, but the wording of the question presented is often poorly phrased. He said that the manner of stating a question is not just a matter of presentation. On the contrary, it is a subject that directly affects the administration of justice. Mr. Garner asserted that the question presented should be moved to the front of the brief. He said that the fact that judges often don't pay attention is evidence that questions are not presented well. He said it was important to include examples of how to state the question presented in the Appellate Rules. He also said that the Rule could be made precatory rather than mandatory by including the words "preferably" or "preferably should," in proposed subdivisions (a)(1) and (a)(1)(D) on page 425 of the Agenda Book.

A judge member asked Mr. Garner if he thought that questions should never start with "whether." Mr. Garner said yes, explaining that the single sentence fragment necessarily precludes any discussion of the facts.

A judge member expressed concern that lawyers have difficulty complying with technical rules. He also said that a party could use the proposed technique of stating the question presented under the current Rules. He felt that it was a question of advocacy. He did not think it was possible to make lawyers better advocates by changing the Appellate Rules.

Another judge thought that it would make sense to move the statement of the question presented up to the front of the brief. He also thought Mr. Garner was correct in asserting that many issue statements are poor and could be improved.

Mr. Letter said that if judges found the proposal useful, then he would support it. An attorney member agreed that the Rules should impose a word limit on the statement of the question presented.

A judge member identified a different problem in many briefs. He said that it is often difficult to determine which issues have to be decided if others are decided (e.g., "If we agree on issue #1, do we have to reach issue #2?").

An attorney member agreed that the statement of the questions presented are often a problem. But he did not think that the proposed codification would help.

Two judge members thought that moving the statement of the question presented to the front of the brief would not be beneficial.

Following this discussion, the consensus was that the Advisory Committee should not go forward with the proposal. The Committee will remove it from the Table of Agenda Items.

IV. Improving Efficiency in Federal Appellate Litigation

The Committee next considered suggestions for improving efficiency in federal appellate litigation.

A. Collateral Order Doctrine

Professor Stephen E. Sachs presented his extensively researched memorandum on the Collateral Order Doctrine, which starts on page 432 of the Agenda Book. He first discussed the difficulty that appellate courts have in balancing factors to determine whether an order is appealable. He suggested that to improve the situation, it might be possible to come up with a list of orders that are automatically appealable. But before going forward, he said that it might be valuable to obtain empirical evidence about these orders.

A judge member was concerned that the empirical study would be a very large undertaking. Mr. Letter said that he and a former Advisory Committee member, Mr. Katsas, previously investigated a similar proposal. They found that coming up with an improved rule was too difficult because the circumstances varied so much. But he said that their lack of success was not a good reason not to look into the matter.

Two judge members agreed that Rule 23(f) is not popular. Professor Sachs elaborated further on how it might be possible to list some orders that are definitely appealable and some that are not, but otherwise leave the multi-factor test in place. Mr. Byron was worried that this might be difficult.

Two judge members expressed doubt about whether more resources should be devoted to this project. Another judge said that he did not think that changing the rule would make the appellate system more efficient. He further observed that proposed federal legislation may address this topic.

Following this discussion, the Advisory Committee decided not to include the matter on its agenda.

B. Suggestions of the American Academy of Appellate Lawyers

Judge Chagares presented the suggestions of the American Academy of Appellate Lawyers (AAAL), which appear in a memorandum beginning on page 474 of the Agenda Book.

After summarizing the memorandum, Judge Chagares asked the Advisory Committee about the proposal regarding pre-argument focus letters. A judge member said that such letters are often a good idea, but the proposal is not a good topic for a Rule. A judge member said that increased use of focus letters might be suggested to appellate judges as a good practice without changing the Appellate Rules.

An academic member next discussed the proposal concerning judicial notice. He said that there was already a rule on judicial notice, and perhaps judges were just misapplying the rules. An attorney member agreed with the AAAL that some bad practices existed, but did not think that the Appellate Rules needed to address them.

A judge member said that reply briefs are abused. But he did not think a satisfactory rule could be proposed.

Following the discussion, the Advisory Committee decided not to add any of the AALS's suggestions to its agenda at this time.

C. Suggestion Regarding Appellate Rule 47

Professor Sachs finally discussed the possibility of a rule requiring Circuit Courts to post on their website templates of briefs that comply with local rules. He suggested that litigants could download the templates and add the content of the brief. The templates would have all the proper word-processing formatting. The former clerk representative said that the Tenth Circuit does not have templates but they send litigants a checklist. She also said that they make one sample brief available. The current clerk representative said that the Third Circuit's practice is the same. She also worried about the inflexibility of templates. She was also concerned about phone calls from people complaining that the template might not work.

Professor Sachs said that if there was an error in the template, there would be a safe harbor rule. So if there was a problem, the lawyer would be safe. But Professor Sachs said that the proposal only makes sense if clerks often reject briefs. Mr. Letter said that many briefs filed in federal circuits are bounced for not being compliant.

VI. Concluding Remarks

The Administrative Office law clerk reported that she is working on a memorandum regarding Rule 7. Mr. Letter and Mr. Katyal reported that they are working on a memorandum regarding a problem that may arise when a party makes an interlocutory appeal of only one issue in a case that involved multiple appellate issues. Professor Sachs and the reporter said that they would investigate new language from Rule 41(d).

Judge Chagares thanked all of the members of the Advisory Committee and the staff of the Administrative Office. He noted the Committee will miss Mr. Katyal, Mr. Garre, and others who are completing their service.

The meeting of the Advisory Committee adjourned at 12:30 p.m.