

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

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MEMORANDUM

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

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

RE: Report of the Advisory Committee on the Appellate Rules

DATE: December 5, 2018

I. Introduction

The Advisory Committee on the Appellate Rules met on Thursday, October 26, 2018, in Washington, DC. It discussed several matters, but did not take any formal action on proposed amendments to the Rules. It therefore does not seek any action by the Standing Committee at the January 2019 meeting of the Standing Committee. The draft minutes of the October 26, 2018 meeting are attached as Tab B.

The Committee anticipates that, at the June 2019 meeting of the Standing Committee, it will seek final approval of proposed amendments to Rules 35 and 40, dealing with the length limits for responses to petitions for rehearing (Part II of this report).

It also anticipates that, at the June 2019 meeting, it will seek approval for publication of a proposed amendment to Rule 3, dealing with the content of notices of appeal (Part III of this report).

Other matters under consideration are:

- a proposed amendment to Rule 42(b), dealing with agreed dismissals (Part IV of this report);
- possible amendments to Rules 35 and 40, dealing with en banc proceedings and rehearing petitions (Part V of this report); and
- a proposed addition to Rule 36 to create a Rule-based principle governing how to handle the vote of a judge who leaves the bench (Part VI of this report).

The Committee also considered two other items, removing one from its agenda and tabling another. These items are discussed in Part VII of this report.

II. Proposed Amendments Published for Public Comment

At the spring 2018 meeting, the Standing Committee approved for publication proposed amendments to Rules 35 and 40, dealing with the length limits for responses to petitions for rehearing. They were published in August. There have been no comments submitted, although some judges have informally noted that they are happy with these proposed amendments.

The Committee expects to seek final approval of these proposed amendments in the spring of 2019.

Rule 35. En Banc Determination

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

* * * * *

- (2) Except by the court's permission:
- (A) a petition for an en banc hearing or rehearing produced using a computer must not exceed 3,900 words; and
 - (B) a handwritten or typewritten petition for an en banc hearing or rehearing must not exceed 15 pages.

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- (e) **Response.** No response may be filed to a petition for an en banc consideration unless the court orders a response. The length limits in Rule 35(b)(2) apply to a response.

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Rule 40. Petition for Panel Rehearing

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- (a) **Time to File; Contents; ~~Answer~~ Response; Action by the Court if Granted**

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- (3) **~~Answer~~ Response.** Unless the court requests, no ~~answer response~~ to a petition for panel rehearing is permitted. ~~But~~ Ordinarily, rehearing will not be granted in the absence of such a request. If a response is requested, the requirements of Rule 40(b) apply to the response.

* * * * *

- (b) **Form of Petition; Length.** The petition must comply in form with Rule 32. Copies must be served and filed as Rule 31 prescribes. Except by the court's permission:

- (1) a petition for panel rehearing produced using a computer must not exceed 3,900 words; and
- (2) a handwritten or typewritten petition for panel rehearing must not exceed 15 pages.

* * * * *

Tab C contains the text of the proposed amendments and the proposed Committee Notes to Rules 35 and 40 as published for public comment.

III. Proposed Amendment to Rule 3, Dealing with the Content of Notices of Appeal

The Committee has been considering a possible amendment to Rule 3, dealing with the content of notices of appeal, since the fall of 2017 when a letter from Neal Katyal and Sean Marotta brought to the Committee's attention a troubling line of cases in one circuit. That line of cases, using an *expressio unius rationale*, would treat a notice of appeal from a final judgment that mentioned one interlocutory order but not others as limiting the appeal to that order, rather than reaching all of the interlocutory orders that merged into the judgment.

Research conducted since that time has revealed that the problem is not confined to a single circuit, but instead that there is substantial confusion both across and within circuits. In addition to a number of decisions that used an *expressio unius rationale* like the one pointed to in the Katyal and Marotta letter, there are also numerous decisions that would treat a notice of appeal that designated an order that disposed of all remaining claims in a case as limited to the claims disposed of in that order. Such an order should be followed by a separate document under Civil Rule 58, but that is often not done. If a party waits and no separate document is filed, the judgment is considered entered once 150 days have run, but a party can appeal without waiting for the separate document.

A subcommittee drafted a proposed amendment that would make three changes.

First, the word “appealable” would be inserted before the word “order” in Rule 3(c)(1)(B), thereby indicating that the Rule did not call for a notice of appeal to designate all of the orders that were reviewable on appeal. This change would highlight the key (but sometimes overlooked) distinction between the judgment or order on appeal—the one serving as the basis of the court's appellate jurisdiction and from which time limits are calculated—and the various orders or decisions that may be reviewed on appeal because they merged into the judgment or order on appeal.

Second, a new rule of construction would be added to reject the *expressio unius* approach and provide that designation of additional orders does not limit the scope of the appeal.

Third, another rule of construction would be added to provide that a notice of appeal that designates an order that disposes of all remaining claims would be construed as designating the final judgment, whether or not that judgment is set out in a separate Civil Rule 58 document.

Below is the proposal discussed by the Committee. The Committee is not seeking approval of this draft, but will continue its discussions, focused on the matters discussed further in this Part (after the draft).

Rule 3. Appeal as of Right—How Taken

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(c) Contents of the Notice of Appeal.

- (1) The notice of appeal must:
 - (A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as “all plaintiffs,” “the defendants,” “the plaintiffs A, B, et al.,” or “all defendants except X”;
 - (B) designate the judgment, appealable order, or part thereof being appealed; and
 - (C) name the court to which the appeal is taken.
- (2) A pro se notice of appeal is considered filed on behalf of the signer and the signer’s spouse and minor children (if they are parties), unless the notice clearly indicates otherwise.
- (3) In a class action, whether or not the class has been certified, the notice of appeal is sufficient if it names one person qualified to bring the appeal as representative of the class.
- (4) The designation of any additional judgment, order, or part thereof must not be construed to limit the scope of the notice of appeal.
- (5) In a civil case, the designation of an order that adjudicates all remaining claims and all remaining rights and liabilities of all parties must be construed as a designation of the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58.
- (4)6 An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice.

(§7) Form 1 in the Appendix of Forms is a suggested form of a notice of appeal.

Committee Note

Rule 3(c)(1) currently requires that the notice of appeal “designate the judgment, order, or part thereof being appealed.” Some have interpreted this language as an invitation, if not a requirement, to designate each and every order of the district court that the appellant may wish to challenge on appeal, despite the fundamental principle that designation of the final judgment confers appellate jurisdiction over prior interlocutory orders that merge into the final judgment. The merger principle is a corollary of the final judgment rule: a party cannot appeal from most interlocutory orders, but must await final judgment, and only then obtain review of interlocutory orders on appeal from the final judgment.

In an effort to avoid the misconception that it is necessary or desirable to designate each and every order of the district court that the appellant may wish to challenge on appeal, Rule 3(c)(1) is amended to require the designation of the “judgment, *appealable* order, or part thereof.” In most cases, because of the merger principle, it is appropriate to designate only the judgment. In other cases, particularly where an appeal from an interlocutory order is authorized, the notice of appeal must designate that appealable order. This amendment does not alter the requirement of Rule 4(a)(4)(B)(ii) (requiring a notice of appeal or an amended notice of appeal if a party intends to challenge an order disposing of certain motions).

Whether due to misunderstanding or a misguided attempt at caution, some notices of appeal designate both the judgment and some other order that the appellant wishes to challenge on appeal. A number of courts, using an *expressio unius rationale*, have held that such a designation of a particular order limits the scope of the notice of appeal to the particular order, and prevents the appellant from challenging other orders that would otherwise be reviewable, under the merger principle, on appeal from the final judgment. These decisions create a trap for the unwary. To remove this trap, a rule of construction is added to Rule 3(c): “The designation of any additional judgment, order, or part thereof must not be construed to limit the scope of the notice of appeal.”

A related problem arises when a case is decided by a series of orders, sometimes separated by a year or more. For example, some claims might be dismissed for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), and then, after a considerable period for discovery, summary judgment under Federal Rule of Civil Procedure 56 is granted in favor of the defendant on the remaining claims. That second order, because it resolves all of the remaining claims, is a final judgment, and an appeal from that final judgment confers jurisdiction to review the earlier 12(b)(6) dismissal.

But if a notice of appeal describes the second order, not as a final judgment, but as an order granting summary judgment, some courts would limit appellate review to the summary judgment and refuse to consider a challenge to the earlier 12(b)(6) dismissal. Similarly, if the district court complies with the separate document requirement of Federal Rule of Civil Procedure 58, and enters both an order granting summary judgment as to the remaining claims and a separate document denying all relief, but the notice of appeal designates the order granting summary judgment rather than the separate document, some courts would likewise limit appellate review to the summary judgment and refuse to consider a challenge to the earlier 12(b)(6) dismissal. This creates a trap for all but the most wary, because at the time that the district court issues the order disposing of all remaining claims, a litigant may not know whether the district court will ever enter the separate document required by Federal Rule of Civil Procedure 58. To remove this trap, another rule of construction is added to Rule 3(c)(1): “In a civil case, the designation of an order that adjudicates all remaining claims and all remaining rights and liabilities of all parties must be construed as a designation of the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58.”

These rules of construction are added as Rules 3(c)(4) and 3(c)(5), with the existing Rules 3(c)(4) and 3(c)(5) renumbered.

The major issue that the Committee discussed and is continuing to discuss is whether Rule 3 itself should contain some statement of the merger rule, that is, the rule that earlier interlocutory orders merge into the final judgment. On the one hand, there are concerns that any attempt to codify the merger rule would risk missing nuances in that rule, resolving areas that are unclear, and freezing its development. On the other hand, there is a risk of increasing confusion if some mention of the merger rule isn’t made in the text of the Rule in some way. One possibility would be to discuss the merger rule more extensively in the Note. Another possibility would be to refer to the existence of the merger rule in the text of the Rule without attempting to codify its parameters.

Another aspect of the proposal under discussion is whether Rule 3(c)(1)(B) should continue to include the phrase “or part thereof.” This phrase seems to be a source of much of the difficulty, in that it can be read to suggest (particularly to less experienced appellate lawyers) the designation of each order sought to be reviewed. Eliminating this phrase might be of some real benefit. On the other hand, this phrase may serve a useful purpose in at least three circumstances: 1) cases where part of an order is appealable to one court and another part is appealable to another court; 2) cases where part of an order is appealable and part is not; and 3) cases where a party wants to appeal only the parts of an order that were adverse, without calling into question parts of an order that were not adverse. The first category may be sufficiently rare to be of scant concern. Similarly, cases in which a party has standing to appeal from a favorable ruling may be so rare (if not non-existent) that there may be no need to worry about the third category. Perhaps the issue could be

addressed by removing “or part thereof,” while adding a separate provision empowering an appellant who intends to appeal only from a part of a judgment or order to do so expressly.

The Committee discussed the suggestion by the style consultants that it consider placing the proposed new rules of construction immediately after the requirements for the content of a notice of appeal, as Rule 3(c)(2) and (3), rather than as 3(c)(4) and (5). The Committee is inclined not to adopt that suggestion, because the current Rules 3(c)(2) and (3) are rules of construction for Rule 3(c)(1)(A), and the proposed additions are rules of construction for Rule 3(c)(1)(B). For this reason, it seems to make sense to have the rules of construction for Rule 3(c)(1)(B) follow the rules of construction for Rule 3(c)(1)(A). An alternative would be to reorganize the Rule more substantially, so that 3(c)(1)(A) would go with 3(c)(2) and (3) and Rule 3(c)(1)(B) would go with the proposed 3(c)(4) and (5). That approach would produce a cleaner text, but might make legal research more difficult.

The Committee is also considering an amendment to Form 1 (the form notice of appeal) that would conform the Form to the proposed amended Rule.

Finally, the Committee is considering whether to address problems in appeals from orders denying reconsideration. On the one hand, there is a risk in attempting to do too much at once. On the other hand, perhaps a relatively simple rule of construction, similar to the ones already under discussion, might be able to address Rule 4(a)(4)(A) orders.

IV. Proposal to Amend Rule 42(b) – Agreed Dismissals

The Committee is considering a proposal to amend Rule 42(b). 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.” The major question under consideration is whether a dismissal in these circumstances should be mandatory. Prior to restyling, the word “may” was “shall.”

The Rule also provides that “no mandate or other process may issue without a court order.” The Committee believes that the key distinction—not always obvious to readers of the Rule—is between 1) situations in which the parties seek nothing but a dismissal of the appeal and 2) situations in which the parties seek something more than that from the court.

Where the parties seek more than a simple dismissal of the appeal, judicial action would be required, and the parties could not control that judicial action. If a settlement must be judicially approved, a remand for that purpose might be appropriate, but a remand is judicial action that the parties cannot control.

However, where the parties seek nothing but a simple dismissal of the appeal, mandatory dismissal of the appeal might be appropriate, if not constitutionally compelled. And mandatory

dismissal avoids the problems facing counsel who are trying to settle a case but cannot assure clients that the appeal will be dismissed even if they agree to settle.

Mandatory dismissal is the approach of Supreme Court Rule 46, which provides:

Rule 46. Dismissing Cases

1. At any stage of the proceedings, whenever all parties file with the Clerk an agreement in writing that a case be dismissed, specifying the terms for payment of costs, and pay to the Clerk any fees then due, the Clerk, without further reference to the Court, will enter an order of dismissal.

2. (a) A petitioner or appellant may file a motion to dismiss the case, with proof of service as required by Rule 29, tendering to the Clerk any fees due and costs payable. No more than 15 days after service thereof, an adverse party may file an objection, limited to the amount of damages and costs in this Court alleged to be payable or to showing that the moving party does not represent all petitioners or appellants. The Clerk will not file any objection not so limited.

(b) When the objection asserts that the moving party does not represent all the petitioners or appellants, the party moving for dismissal may file a reply within 10 days, after which time the matter will be submitted to the Court for its determination.

(c) If no objection is filed—or if upon objection going only to the amount of damages and costs in this Court, the party moving for dismissal tenders the additional damages and costs in full within 10 days of the demand therefor—the Clerk, without further reference to the Court, will enter an order of dismissal. If,

after objection as to the amount of damages and costs in this Court, the moving party does not respond by a tender within 10 days, the Clerk will report the matter to the Court for its determination.

3. No mandate or other process will issue on a dismissal under this Rule without an order of the Court.

The Committee will continue to discuss reasons that it might be appropriate not to mandate dismissal. One reason offered is when a court's decision is ready to be filed. Another is a concern about manipulation if there are multiple cases, perhaps pending concurrently before different panels of the same court, that present the same issue.

If the Committee decides to recommend that dismissal be made mandatory, it would then address whether simply to change the existing word "may" in Rule 42(b) to "must" or "will," or to revise the Rule more thoroughly to mirror the Supreme Court Rule. In either event, it might be appropriate to clarify what is included in the "mandate or other process" that requires judicial action, particularly that any kind of vacatur or remand is included.

V. Comprehensive Review of Rules 35 and 40

As noted in part II of this report, proposed amendments to Rules 35 and 40 have been published for public comment. These amendments would create length limits applicable to responses to petitions for rehearing, and change the term "answer" in Rule 40 to "response" to make it consistent with Rule 35.

Both the Advisory Committee and the Standing Committee were well aware last spring that these modest proposed changes left other disparities between the two Rules, but approved these changes for publication with a plan to look more comprehensively at these Rules this year. There is no demonstrated problem, so it is important to balance the benefits of consistency against the harms of disruption.

The significant discrepancies between the two Rules are traceable to the time when parties could petition for panel rehearing (covered by Rule 40) but could not petition for rehearing en banc (covered by Rule 35), although they could "suggest" rehearing en banc. The Committee considered three basic approaches that could be taken in reconciling the two ways of petitioning for rehearing:

- 1) align the two Rules with each other;

- 2) revise both Rule 35 and Rule 40, drawing on Rule 21, which might provide a good model;
- 3) revise Rule 35 so that it addresses only initial hearing en banc, and revise Rule 40 so that it addresses both panel rehearing and rehearing en banc.

The third approach is the most radical but potentially the most valuable. Under the current Rules, a lawyer must consider both Rule 35 and Rule 40 when petitioning for rehearing. Most litigants requesting rehearing seek both panel rehearing and rehearing en banc, and while a litigant seeking only panel rehearing need only rely on Rule 40, it would be necessary even in that unusual instance to check both Rules. Reconciling the differences between the two current rules while combining petitions for panel rehearing and rehearing en banc in one rule would provide clear guidance.

But there was considerable resistance to this approach, particularly because devoting Rule 35 to only initial hearing en banc would draw more attention to the possibility of initial hearing en banc—a proceeding that is and should remain rare.

The Committee discussed two major aspects of the close relationship between panel rehearing and rehearing en banc.

First, current Rule 35(b)(3) allows circuits, by local rule, to require separate petitions for panel rehearing and rehearing en banc. Because most parties who petition for rehearing seek both panel rehearing and rehearing en banc, perhaps parties should be required, on a uniform basis, to file a single petition covering both requests.

Second, sometimes a panel makes some change in its decision in response to a petition seeking both panel rehearing and rehearing en banc. Depending on the nature of the change that the panel makes, the panel might determine whether or not a further petition for rehearing en banc may be filed.

Handling the relationship between panel rehearing and rehearing en banc is addressed by many local rules. The Committee will look at the relevant local rules to determine if there are local practices worth building into Rules 35 and 40.

VI. Counting of Votes by Departed Judges

The Committee began consideration of a new issue: how to handle the vote of a judge who leaves the bench, whether by death, resignation, conviction at an impeachment trial, or expiration of a recess appointment. The question arises when an opinion was drafted or a judge voted in conference, but no opinion had yet been sent to the clerk for filing before the judge leaves the bench. This is a recurrent issue, and practice in this area should be the same across the circuits.

The Committee discussed whether this is an appropriate matter for rulemaking or should be left to statute. The argument for rulemaking is that determining when a vote vests is a matter of practice or procedure under the Rules Enabling Act, although there may be a legal limit on the possible choices rulemaking could make. The proposal before the Committee would amend Rule 36 to treat the time that an order or opinion is delivered to the clerk as the relevant time.

There is a pending petition for certiorari presenting this question in *Yovino v. Rizzo*, 18-272, <http://www.scotusblog.com/case-files/cases/yovino-v-rizo/>. It is now fully briefed at the petition stage and scheduled for the consideration at the Supreme Court's December 7, 2018, conference. A subcommittee has been formed to consider this proposal if the petition is denied.

VII. Items Tabled or Removed

The Committee has been considering whether any amendments are appropriate in light of the Supreme Court's decision in *Hamer v. Neighborhood Housing Services of Chicago*, 138 S. Ct. 13 (2017), which distinguished between the statutory time for appeal (which is jurisdictional) and more stringent time limits in the Federal Rules of Appellate Procedure (which are not jurisdictional).

The Committee is considering three options. First, delete the time limit in the Rule, so that the Rule tracks the statute. Second, do nothing, leaving the existing time limit in the Rule. Third, take an intermediate position, specifying some standard for allowing extensions beyond 30 days in limited circumstances.

There is, however, a case currently before the Supreme Court presenting the question of whether there are any equitable exceptions to the time limit set in Appellate Rule 23(f). *Nutraceutical Corp. v. Lambert*, 17-1094, <http://www.scotusblog.com/case-files/cases/nutraceutical-corp-v-lambert/>. The case was argued on November 27, 2018.

The Committee decided to table this matter for now.

The Committee also discussed a memo from Judge Hodges, the Chair of the Committee on Court Administration and Case Management, regarding privacy concerns in Social Security and immigration opinions. The Committee decided that because the relevant Federal Rule of Appellate Procedure piggybacks on Civil Rule 5.2, there was no need at this point for this Committee to take any action, and therefore removed this item from its agenda.

TAB 2B

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Minutes of the Fall 2018 Meeting of the
Advisory Committee on the Appellate Rules

October 26, 2018

Washington, DC

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 Thursday, October 26, 2018, at approximately 9:00 a.m., at the Thurgood Marshall Federal Judiciary Building in Washington, DC.

In addition to Judge Chagares, the following members of the Advisory Committee on the Appellate Rules were present: Christopher Landau, Judge Stephen Joseph Murphy III, Professor Stephen E. Sachs, and Danielle Spinelli. Solicitor General Noel Francisco was represented by H. Thomas Byron III. Judge Jay S. Bybee and Justice Judith L. French participated in the meeting by phone.

Also present were: Judge David G. Campbell, Chair, Standing Committee on the Rules of Practice and Procedure; Shelly Cox, Administrative Specialist, Rules Committee Support Office of the Administrative Office of the U.S. Courts (RCSO); Ahmed Al Dajani, Rules Law Clerk, RCSO; Patricia S. Dodszeit, Clerk of Court Representative, Advisory Committee on the Appellate Rules; Mark Freeman, Director of Appellate Staff, Department of Justice; Professor Edward A. Hartnett, Reporter, Advisory Committee on the Appellate Rules; Bridget M. Healy, Attorney Advisor, RCSO; Judge Frank Hull, Member, Standing Committee on the Rules of Practice and Procedure, and Liaison Member, Advisory Committee on the Appellate Rules; Marie Leary, Research Associate, Advisory Committee on the Appellate Rules; and Rebecca A. Womeldorf, Secretary, Standing Committee on the Rules of Practice and Procedure and Rules Committee Officer.

Professor Catherine T. Struve, Associate Reporter, 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 Mark Freeman, Director of Appellate Staff, Department of Justice, and Ahmed Al Dajani, the new Rules Law Clerk. He thanked Rebecca Womeldorf, Shelly Cox, and the whole Rules team for organizing the meeting and the excellent dinner the night before. He noted that Justice Brett Kavanaugh, a former member of the Committee, can no longer serve on the Committee in light of his appointment to the Supreme Court. He

recognized Justice Kavanaugh’s contributions to the Committee, noting that he was brilliant and soft-spoken, and he added substance to the work of the Committee with his great judgment. Judge Chagares thanked Justice Kavanaugh for his service to the Committee.

Judge Chagares noted that the Committee is down two members, and thanked everyone for volunteering to work on the subcommittees.

II. Approval of the Minutes

The draft minutes of the April 6, 2018, Advisory Committee meeting were amended to correct the spelling of Judge Kevin Newsom’s name and a typographical error, and approved as amended.

III. Report on Actions Taken on Prior Proposals

Judge Chagares directed the Committee’s attention to the valuable Rules Tracking Chart. (Agenda Book page 21). The only change effective December 1, 2017, was to restore a provision that had previously been inadvertently deleted. Amendments scheduled to go into effect December 1, 2018, unless Congress intervenes, include the elimination of the antiquated term “supersedeas,” and the addition of a provision allowing an amicus brief to be stricken if it would lead to a judge’s disqualification.

The amendments finally approved by this Committee at the last meeting have been approved by the Standing Committee and the Judicial Conference, and received by the Supreme Court. If approved by the Supreme Court and not disapproved by Congress, they would take effect December 1, 2019. These amendments change the disclosure requirements of Rule 26.1 and update several rules to take account of electronic filing and the resulting reduced need for proofs of service.

Finally, the proposed amendments to Rules 35 and 40, dealing with the length limits for responses to petitions for rehearing, were approved for publication by the Standing Committee. There have been no comments submitted, although some judges have informally noted that they are happy with these proposed amendments. These proposed amendments are on track for an effective date no earlier than December 1, 2020.

IV. 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 143). He distinguished between the judgment or order on appeal—the one serving as the basis of the court’s appellate jurisdiction and from

which time limits are calculated—and the various orders or decisions (such as jury instructions) that may be reviewed on appeal because they merged into the judgment or order on appeal. He noted, however, that the distinction is sometimes confusing. This agenda item began with a letter from Neal Katyal and Sean Marotta that pointed to one circuit that, using an *expressio unius rationale*, would treat a notice of appeal from a final judgment that mentioned one interlocutory order but not others as limiting the appeal to that order, rather than reaching all of the interlocutory orders that merged into the judgment. (See Agenda Book page 155).

At the last meeting, the subcommittee offered a brief report suggesting that the concern had merit. After that meeting, the Rules Law Clerk, Patrick Tighe, researched and wrote a long and detailed memo that demonstrated that the problem was not confined to a single circuit, but instead that there was substantial confusion both across and within circuits. In addition to a number of decisions that used an *expressio unius rationale* like the one pointed to in the Katyal letter, this memo showed that there were also numerous decisions that would treat a notice of appeal that designated an order that disposed of all remaining claims in a case as limited to the claims disposed of in that order. Such an order should be followed by a separate document under Civil Rule 58, but that is often not done. If a party waits and no separate document is filed, the judgment is considered entered once 150 days have run, but a party can appeal without waiting for the separate document.

The subcommittee recommended three changes. First, the word “appealable” would be inserted before the word “order” in Rule 3(c)(1)(B), thereby indicating that the Rule did not call for the notice of appeal to designate all of the orders that were reviewable on appeal. (Agenda Book page 148). Second, a new rule of construction would be added to reject the *expressio unius* approach and provide that designation of additional orders does not limit the scope of the appeal. (Agenda Book page 149). Third, another rule of construction would be added to provide that a notice of appeal that designates an order that disposes of all remaining claims would be construed as designating the final judgment, whether or not that judgment is set out in a separate Civil Rule 58 document. (Agenda Book page 151). In addition, the subcommittee noted several other potential issues to consider further. (Agenda Book page 152).

Judge Chagares stated that he had initially been skeptical of the need to do anything, but that the extensive memo by Patrick Tighe convinced him that there is no consistency in the cases and that this is an issue that cries out for correction. The subcommittee proposal hits the three biggest areas. To the extent that one is concerned about providing sufficient notice of the issues on appeal, the issues are stated in the brief. He noted that the style consultants had suggested placing the proposed new rules of construction immediately after the requirements for the content of the notice of appeal, as Rule 3(c)(2) and (3), rather than as 3(c)(4) and (5). (See Agenda Book page 167).

The Reporter explained that the subcommittee had considered that placement, but realized that the current Rules 3(c)(2) and (3) are rules of construction for Rule 3(c)(1)(A), and that the proposed additions are rules of construction for Rule 3(c)(1)(B). For this reason, the subcommittee thought that it made sense to have the rules of construction for Rule 3(c)(1)(B) follow the rules of construction for Rule 3(c)(1)(A).

Professor Struve recommended against renumbering Rules 3(c)(2) and (3) unless and until someone checks to be sure that those subsections are not much cited in the case law. She noted that there was not much case law regarding the current Rules 3(c)(4) and (5), so renumbering them was not of concern.

Judge Campbell observed that he had initially had a similar reaction as the style consultants until he figured out what the Reporter explained about the ordering. If things are to be moved around, 3(c)(1)(A) would go with 3(c)(2) and (3) and Rule 3(c)(1)(B) would go with the proposed 3(c)(4) and (5). That would produce a cleaner text, but might mess up research. For now, the subcommittee's proposal is in a logical order as it stands.

A judge member expressed support for the proposal, but thought that there should be some affirmative statement of the merger rule, the largely uniform rule that earlier interlocutory orders merge into the final judgment. The Reporter explained that the subcommittee sought to avoid codifying the merger rule at the risk of missing nuances in that rule, leaving mention of the merger rule to the comment, but that it might work to simply point to the merger rule in the text of the Rule without trying to codify it. Mr. Byron added that there was not only the danger of not articulating the merger rule accurately, but also of freezing its development. A lawyer member noted that his initial reaction was the same as the judge's but that the merger rule has a number of asterisks and that there was good reason to avoid opening that can of worms. An academic member observed that Wright & Miller notes some areas that are unclear, such as appeals under Rule 54(b), and that the subcommittee did not want to exclude the application of the merger rule to appealable interlocutory orders, nor state a broader principle than accurate.

Judge Chagares noted that there was a breathtaking breadth of decisions in this area, and a lawyer member noted that there were a lot of bugs under this rock. The judge member who raised the issue stated that she was satisfied that there was a reason for the subcommittee's decision, and that as a lawyer, her practice was to designate just the final judgment.

A different judge member raised concerns with the phrase "part thereof." A lawyer member stated that he liked adding the word "appealable" because it makes clear that the notice is not supposed to designate all of the orders sought to be reviewed, but rather the order that triggers the notice of appeal. He also voiced concern about the "part thereof" language, because it suggests getting into the weeds

of each order sought to be reviewed, while a good appellate lawyer simply notes that the appeal is from the final judgment, period. The “part thereof” language is in the current rule, and the subcommittee intends to keep looking at the issue.

The Reporter explained that one reason for the subcommittee’s reluctance to delete “part thereof” was that sometimes a single district court order will be appealable to two different courts, such as one part appealable to the Supreme Court and one part appealable to the regional court of appeals. However, these cases may be sufficiently rare that the cost in confusion in other cases may not be worth it. Mr. Byron thought this concern could be met by the requirement of designating the court to which one is appealing. An academic member raised another concern, worrying about the impact on the district court’s jurisdiction if a notice of appeal is not limited to the appealable part of an interlocutory order that includes both appealable and non-appealable aspects.

A different lawyer member noted that she understood the reluctance to codify the merger rule, but thought that there was a risk of increasing confusion if some mention of the merger point wasn’t made in the text of the Rule in some way. Professor Struve added that if the merger rule is not understood, then there is a risk that litigants will designate the earlier interlocutory order, reasoning that it was not appealable at the time but then became appealable later, and invoke Rule 4(a)(2).

A judge member urged stating the merger rule in the affirmative in the comment and beefing up that part of the comment.

A different judge member sought to simplify the rule of construction designed to overcome the *expressio unius* approach by stating that the additional designation “does not limit” the scope of the appeal. Mr. Byron noted that the phrasing was directed to the court, and the Reporter noted that the focus was on responding to how courts were construing notices of appeal, but conceded, in response to Judge Campbell’s observation that the judge’s suggestion was more straightforward, that it did not defeat the proposal’s purpose.

Judge Campbell, echoed by Judge Chagares, stated that he viewed the “part thereof” language as designed for the situation where a party wins on some aspects of a judgment, but loses on others, and seeks to appeal from the latter without disturbing the former.

Discussion then turned to the other issues flagged for continued investigation by the subcommittee. (See Agenda Book page 152).

As for possible changes to Form 1, a lawyer member suggested perhaps tracking the proposed Rule and adding “appealable” before the word “order.” An academic member stated that the phrase “describing it” can lead litigants to list the underlying decisions. More than one lawyer member voiced opposition to requiring

the date of entry or statutory authority for appeal, as required for notices of appeal to the Supreme Court, contending that simpler was better, and that we shouldn't be making it more complicated. Judge Chagares expressed concern that it may pose a trap for pro se litigants.

A lawyer member voiced opposition to addressing the problems caused in appeals from orders denying reconsideration, fearing an attempt to do too much at once. The Reporter suggested that a relatively simple rule of construction, similar to the ones already under discussion, might be able to address Rule 4(a)(4)(A) orders, and urged keeping open that possibility. An academic member noted that it is impossible to fix everything, and a lawyer member suggested using some broader language in comments.

Judge Chagares stated that one rule can't solve everything, and urged the subcommittee to meet earlier rather than later to continue its discussions.

A judge member closed this discussion by noting the wonderful work done by Patrick Tighe.

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

The Reporter presented the subcommittee's report regarding a proposal to amend Rule 42(b). (Agenda Book page 173). 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." The major question is whether a dismissal in these circumstances should be mandatory. Prior to restyling, the "may" was "shall."

The Rule also provides that "no mandate or other process may issue without a court order." As the subcommittee sees it, the key distinction—not always obvious to readers of the Rule—is between 1) situations in which the parties seek nothing but a dismissal of the appeal and 2) situations in which the parties seek something more than that from the court. If the full Committee agrees that this is the key distinction, it would seem appropriate to mandate dismissal in the first circumstance, but not in the second. Where the parties seek more than a simple dismissal of the appeal, judicial action would be required, and the parties could not control that judicial action. It might be enough to amend the first sentence of the Rule to make dismissal of the appeal mandatory when the parties seek nothing more than dismissal. Alternatively, the Rule could be revamped along the lines of the similar Supreme Court Rule.

Judge Campbell asked if there was a problem here that needed to be addressed. A lawyer member explained that there have been cases where courts have refused to dismiss after oral argument, and that settlement can be inhibited when a lawyer cannot assure a client that an appeal will be dismissed. He noted that the change

from “shall” to “may” was stylistic, and that requiring dismissal would bring certainty to the courts and parties.

Judge Chagares asked Ms. Dodszuweit how common the problem was, and she responded that in her experience it was very rare, but did happen. She recalled a case where the court said no to a requested dismissal because the decision was ready to be filed.

Mr. Byron inquired about a possible contrast with the Civil Rules where a plaintiff can voluntarily dismiss a complaint unilaterally, but withdrew the concern after Judge Campbell pointed out that this was possible only before the defendant answers the complaint.

Judge Chagares raised a concern about the need for judicial approval of settlement in some instances, such as those involving a minor. A lawyer member responded that this would have been addressed in the district court, that there would have been no requirement to appeal in the first place, and that the court of appeals is not the right forum to approve a settlement. Ms. Dodszuweit noted that sometimes the court of appeals, when informed of a settlement, will issue a limited remand to the district court to effect the settlement. The Reporter noted that a remand is the sort of mandate or other process that the second sentence of the Rule states may not issue without a court order, and a lawyer member suggested fixing the language of that sentence to make the point clearer.

A different lawyer member voiced agreement with making the first sentence mandatory. Judge Chagares observed that judges generally don't like having their discretion taken away. A judge member responded that if the parties agree to dismissal, but the court persists in putting out an opinion, there is no controversy and the court is wrong in persisting.

Judge Chagares asked if anyone opposed making the first sentence mandatory. A judge member noted that judges invest time and energy in writing opinions. A lawyer member acknowledged that judges may push back, but that lawyers and clients don't know how close the court is to resolving a case. Another judge member noted frustration when an appeal is dismissed as an opinion is ready to go. Another judge member noted the possibility of manipulation of panels, if the same issue is before more than one panel, and other judges noted that panels are aware of the issues before other panels and, to promote collegiality, let the first panel decide overlapping issues first.

A lawyer member asked why manipulation would be a concern in situations where both sides agree. Mr. Byron suggested that perhaps a case would involve a repeat-player on one side and a one-off player on the other. A judge member pointed to immigration cases with the involvement of advocacy groups as an example. An academic member wondered about the government agreeing to dismissal in such

cases, and noted that a settlement could have been reached before an appeal was filed. If panel shopping is a real issue, it has to be balanced against the difficulty the current Rule presents to locking down a deal. A judge member added that the Constitution does not allow courts to exercise jurisdiction in order to prevent panel shopping.

With regard to the issue of whether to revamp the entire Rule along the lines of the Supreme Court Rule, or merely change the word “may,” a lawyer member observed that he usually thinks less is more, but is torn in this context.

A judge member voiced concern that a dismissal of an appeal be with prejudice and not subject to some contingency. Mr. Byron wondered what the distinction between with and without prejudice means in this context. The judge member referred to the possibility of an appeal from a preliminary injunction being dismissed and a later appeal from the final judgment in the same case, suggesting law of the case carryover from the initial appeal. An academic member suggested that a stipulated dismissal of an appeal—as opposed to some judicial decision—would create no law of the case, no prevailing party, etc.

The subcommittee will continue its discussion.

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

Mr. Byron reported on behalf of the subcommittee formed to consider a comprehensive review of Rules 35 and 40. (Agenda Book page 183). At the last meeting, the Committee picked the low-hanging fruit, making modest changes to these Rules. But now attention turns to the bigger picture questions. There are significant discrepancies between the two Rules, traceable to the time when parties could petition for panel rehearing (covered by Rule 40) but could not petition for rehearing en banc (covered by Rule 35), although they could “suggest” rehearing en banc. The subcommittee explored reconciling the two ways of petitioning for rehearing. There is no demonstrated problem, so it is important to balance the benefits of consistency against the harms of disruption.

The subcommittee considered three basic approaches: 1) align the two Rules with each other, thereby obtaining some benefit; 2) a broader approach that would revise both Rule 35 and Rule 40, drawing on Rule 21, which might provide a good model; 3) revise Rule 35 so that it addresses only initial hearing en banc, and revise Rule 40 so that it addresses both panel rehearing and rehearing en banc. The third approach is the most radical but potentially the most valuable. Under the current Rules, a lawyer must consider both Rule 35 and Rule 40 when petitioning for rehearing; reconciling the differences between the two current rules while combining petitions for panel rehearing and rehearing en banc in one rule would provide clear guidance.

In response to a question by Judge Campbell, Mr. Byron stated that a party seeking only panel rehearing would need to use only Rule 40, but would need to check both Rules. Ms. Dodszeit stated that petitions seeking only panel rehearing are pretty rare, and that in the majority of circuits, both are filed together. Mr. Byron added that most petitions for rehearing seek both.

An attorney member noted that as a practical matter, panel rehearing is a lesser-included request, and many local rules so provide. Perhaps that should be made uniform. He asked, what happens if a panel fixes something in response to the petition? Is it possible to seek en banc rehearing after that?

Judges Chagares said yes, and a judge member said that sometimes the panel will specify whether or not a further en banc petition may be filed. If the panel makes a substantive change, it will state that another petition for rehearing en banc may be filed. If the panel makes a minor correction, it will wait to see if a judge gives notice that the judge is considering calling for an en banc vote. If a judge has already given notice, that judge may say that the change addresses her concern, or that the change doesn't.

An academic member stated that if petitions for panel rehearing and rehearing en banc are treated as so intimately related, the Committee should consider treating them together.

Judge Chagares stated that he may be a minority voice, but he doesn't want to unite both petitions for rehearing in Rule 40, leaving Rule 35 to deal only with initial hearing en banc. Right now, the possibility of initial hearing en banc is buried in Rule 35, and he would not want to encourage such petitions by waving the flag and devoting Rule 35 solely to them. A judge member agreed, noting that there are lots of petitions for panel rehearing, and that initial hearing en banc should be rare; it's good that it's buried in Rule 35. This judge added that if the panel makes a substantive change, the time to petition for rehearing en banc is restarted, and that panels are reluctant to preclude such petitions. There are lots of relevant local rules.

Mr. Byron stated that if initial hearing en banc were dealt with separately, a particularly stringent standard could be set; having the identical standard for both initial hearing and rehearing en banc might encourage initial petitions.

Judge Chagares asked whether any change at all should be made. Perhaps parties should be required to file a single petition rather than separate petitions. A judge member noted that some circuits require separate petitions. Mr. Byron observed that Rule 35(b)(3) allows circuits, by local rule, to require separate petitions. We need to look at local rules.

Judge Campbell said that if it ain't broke, don't fix it. Lots of rules can be improved, but rules committees should resist the impulse to improve them unless there is a real problem.

Judge Chagares stated that we should look at local rules, particularly with regard to the issue of whether to require a single petition. A lawyer member added that we should ask around to learn if there is any problem with regard to panels circumventing the en banc process.

The subcommittee will look at local rules and continue its discussion.

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

Mr. Landau presented the report of the subcommittee regarding whether it would be appropriate to amend Rule 4(a)(5)(C) in light of the Supreme Court's decision in *Hamer v. Neighborhood Housing Services of Chicago*, 138 S. Ct. 13 (2017). (Agenda Book page 187). That Rule used to match the statute governing the time to appeal, but the Rule has not been amended to match a subsequent statutory change. In particular, the Rule still provides that an extension may not exceed 30 days, but the statute no longer has that limitation.

In *Hamer*, the district court granted a 60 day extension, and the court of appeals dismissed the appeal as untimely. The Supreme Court, however, held that the time limit in the Rule—unlike the time limit in the statute—was not jurisdictional, but merely a mandatory claim processing provision. At first, Mr. Landau thought that the Rule had to be amended to match the statute, but is now convinced that it is permissible for a Rule to impose a time limit not in the statute, and the subcommittee reached a general consensus that there is something to be said for having such a Rule-based time limit.

The subcommittee report presented three options. (Agenda Book 188-91). First, delete the time limit in the Rule, so that the Rule tracks the statute. Second, do nothing, leaving the existing time limit in the Rule. Third, an intermediate position, specify some standard for allowing extensions beyond 30 days in limited circumstances.

There is currently a case before the Supreme Court presenting the question of whether there are any equitable exceptions to the time set in Appellate Rule 23(f). As a result, the background rule is in flux.

Judge Chagares stated that he would not want to have the Committee engage in a wheel-spinning exercise, and asked if the Committee should wait and see what the Supreme Court does.

An academic member recommended staying put. A lawyer recommended doing nothing, especially for now, but would also recommend doing nothing even if there weren't a pending Supreme Court case, because it is extremely rare for courts to grant extensions not within the Rule.

Judge Campbell asked how the limitation could really be mandatory, if he as a district judge could grant an extension beyond that provided in the Rule. The Reporter responded that the decision in *Hamer* merely meant that the time limit was not jurisdictional—a limit that the court was obligated to notice and enforce on its own—but was subject to waiver and forfeiture. If a party insisted on compliance with the Rule—that is, did not waive or forfeit compliance—a district court would be bound to enforce the time limit. A lawyer member added that a district judge would not be allowed to grant an extension beyond that provided in the Rule, and an academic member added that it would be legal error. The Reporter added that *Hamer* also left open a number of questions, including whether equitable exceptions, especially 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—were also permitted, and whether a litigant who objected to a district court's grant of an overlong extension would have to file a cross-appeal.

The Committee then discussed that the current Rule allows for some motions for an extension of time to be made *ex parte*. Ms. Dodszeit noted that the reason that the extension was needed might be confidential. The Reporter stated that one revision that the Committee might consider, now that it is clear that the time limit in the Rule is forfeitable, is to require that a motion for an extension be served on all parties, and state the length of an extension sought.

The Committee decided to table this matter for now.

V. Discussion of Recent Suggestions

A. Use of Names in Social Security & Immigration Opinions (18-AP-C)

Judge Chagares noted that Judge Hodges, the Chair of the Committee on Court Administration and Case Management, had sent a memo regarding privacy concerns in Social Security and immigration opinions. (Agenda Book page 197). He stated that the Reporter had prepared a memo observing that the relevant Federal Rule of Appellate Procedure piggybacks on the Civil Rule 5.2, and that there was no need at this point for this Committee to take any action. (Agenda Book page 203).

He asked if there was any dissent from this view, and there was none.

B. Counting of Votes by Departed Judges (18-AP-D)

Professor Sachs discussed an issue that he raised for the Committee's consideration: how to handle the vote of a judge who leaves the bench, whether by death, resignation, conviction at an impeachment trial, or expiration of a recess appointment. (Agenda Book page 207). This is a recurrent issue, and—unlike other issues before this Committee—received significant press coverage when Judges Reinhardt and Pregerson died. He added that the practice in this area should be the same across the circuits, rather than being ad hoc or manipulable.

A judge member asked how a dead judge could vote. Professor Sachs responded that the question arose when an opinion was drafted or a judge voted in conference, but no opinion had yet been sent to the clerk for filing before the judge died. Counting a vote in this situation forecloses a dissenting or concurring judge from convincing his colleagues, an option that would otherwise remain open. He proposed a Rule that would define when the court acted, and that the best definition is when the opinion is delivered to the clerk for publication; if in some circuits an opinion is delivered to the clerk for some work to be done before the opinion is finalized, the best definition may be when the judges give a final go-ahead to the clerk.

Judge Chagares noted that a petition for certiorari presenting this question is pending, and that if the petition is denied, the Committee should go forward with its consideration of this proposal.

A judge member asked if this is an appropriate matter for rulemaking, or should be left to statute. Professor Sachs responded that determining when a vote vests is a matter of practice or procedure under the Rules Enabling Act, although, as noted in the Reporter's memo, there may be a legal limit on the possible choices rulemaking could make. (Agenda Book page 219). The Reporter added that there was a somewhat analogous Civil Rule (Rule 63), which addresses what happens when a district judge is unable to proceed.

A lawyer member stated that this is an important issue that goes to the legitimacy of courts, and warrants further discussion.

Judge Chagares asked for volunteers for a subcommittee. The subcommittee consists of Judge Jay Bybee, Justice Judith French, Patricia S. Dodszeit, and Danielle Spinelli.

VI. New Business and Updates on Other Matters

Judge Chagares provided an update on one of the more controversial amendments to the Federal Rules of Appellate Procedure: the reduction in the length of briefs to 13,000 words, with a local opt-out. He reported that all circuits abide by

the new limit, except the Second, Seventh, and Federal. Mr. Byron added that he thought the Ninth also opted-out.

The Reporter provided an update regarding the Supreme Court decision in *Hall v. Hall*, 138 S. Ct. 1118 (2018), which held that cases consolidated under Fed. R. Civ. P. 42(a) retain their separate identities at least to the extent that a final decision in one is immediately appealable. At the last meeting, the Committee decided that any response to *Hall* would be best handled by the Civil Rules Committee. The Agenda Book for the Fall 2018 meeting of the Civil Rules Committee has material raising the possibility of amending either Civil Rule 42 (perhaps to specify the nature of an order of consolidation) or Civil Rule 54 (perhaps to treat consolidated cases the way separate claims joined in a single action are treated) or both. The Agenda Book also counsels coordination with this Committee. The Reporter noted that if the dispatching role performed by the district court under Rule 54(b) works well from the perspective of the courts of appeals, then this approach might also work well for consolidated actions. On the other hand, if there are problems with practice under the current Rule 54(b), then that would be a reason to shy away from this approach. The Reporter invited feedback on the issue.

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. A lawyer member asked about the practice in some circuits of presumptively requiring all parties on the same side of an appeal to join in one brief. Ms. Dodszeit stated that the practice in the Third Circuit is to encourage but not require joint briefs. Mr. Byron stated that the Fourth Circuit requires joint briefing, absent a court order permitting separate briefs, and the government resists jointly filing with others. Judge Chagares said that he was always satisfied with the way the Clerk handles it. Ms. Dodszeit stated that there are so many variants that a rule would be difficult, and that in mega cases, issues can be lined up and groupings required. The lawyer member responded that it seems to be working fine, no one is complaining, and if there is a problem in a particular circuit, it can be handled by a local rule.

Judge Campbell, relaying a suggestion from Professor Struve, advised including Ed Cooper, Co-reporter for the Civil Rules Committee, in discussions regarding Rule 3, either with the subcommittee or the Reporter. He also noted major projects in other committees: The Bankruptcy Committee is working on restyling, a project that had been postponed because of the close ties between the Bankruptcy Rules and statute. Response to a sample has been positive. The Criminal Rules and Evidence Rules Committees are working on forensic expert evidence, and considering expanding the scope of expert discovery under Criminal Rule 16 and whether a separate *Daubert* rule would be appropriate. A change to the residual exception to the hearsay rule is now before the Supreme Court. The Civil Rules Committee is considering MDL rules: some 40% of the entire docket of the country (except for pro se cases) is before 20 judges. Third-party litigation funding is also an issue. In

addition, rules for Social Security appeals are under consideration; there is a very wide range of reversal rates in different districts.

Judge Chagares called the Committee's attention to the list of pending legislation. (Agenda Book page 29).

A lawyer member observed that third-party litigation funding is relevant to recusal. Judge Campbell stated that if the Civil Rules Committee acts in this area, this Committee can piggyback.

VII. Adjournment

Judge Chagares again thanked Ms. Womeldorf and her team for organizing the dinner and the meeting. He thanked the members of the Committee for their participation, including in subcommittees, and their ideas. He announced that the next meeting would be held on April 5, 2019, in San Antonio, Texas.

The Committee adjourned at approximately 12:20 p.m.

TAB 2C

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**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF APPELLATE PROCEDURE¹**

1 **Rule 35. En Banc Determination**

2 * * * * *

3 **(b) Petition for Hearing or Rehearing En Banc.** A party

4 may petition for a hearing or rehearing en banc.

5 * * * * *

6 (2) Except by the court's permission:

7 (A) a petition for an en banc hearing or rehearing

8 produced using a computer must not exceed

9 3,900 words; and

10 (B) a handwritten or typewritten petition for an

11 en banc hearing or rehearing must not

12 exceed 15 pages.

13 * * * * *

¹ New material is underlined in red; matter to be omitted is lined through.

2 FEDERAL RULES OF APPELLATE PROCEDURE

14 (e) **Response.** No response may be filed to a petition for
15 an en banc consideration unless the court orders a response.

16 The length limits in Rule 35(b)(2) apply to a response.

17 * * * * *

Committee Note

The amendment to Rule 35(e) clarifies that the length limits applicable to a petition for hearing or rehearing en banc also apply to a response to such a petition, if the court orders one.

1 **Rule 40. Petition for Panel Rehearing**

2 * * * * *

3 **(a) Time to File; Contents; ~~Answer~~Response; Action**
4 **by the Court if Granted.**

5 * * * * *

6 (3) ~~Answer~~Response. Unless the court requests, no
7 ~~answer~~response to a petition for panel rehearing is
8 permitted. ~~But ordinarily,~~ rehearing will not be
9 granted in the absence of such a request. If a
10 response is requested, the requirements of
11 Rule 40(b) apply to the response.

12 * * * * *

13 **(b) Form of Petition; Length.** The petition must comply
14 in form with Rule 32. Copies must be served and filed
15 as Rule 31 prescribes. Except by the court's
16 permission:

4 FEDERAL RULES OF APPELLATE PROCEDURE

- 17 (1) a petition for panel rehearing produced using a
18 computer must not exceed 3,900 words; and
19 (2) a handwritten or typewritten petition for panel
20 rehearing must not exceed 15 pages.

Committee Note

The amendment to Rule 40(a)(3) clarifies that the provisions of Rule 40(b) regarding a petition for panel rehearing also apply to a response to such a petition, if the court orders a response. The amendment also changes the language to refer to a “response,” rather than an “answer,” to make the terminology consistent with Rule 35; this change is intended to be stylistic only.