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

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MEMORANDUM

DATE: May 22, 2006

TO: Judge David F. Levi, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Judge Carl E. Stewart, Chair
Advisory Committee on Appellate Rules

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on April 28, 2006, in San Francisco, California. The Committee approved proposed new Rule 25(a)(5), discussed and retained six items on the study agenda, appointed a subcommittee to address possible changes to deadlines, and discussed three new items (of which one was placed on the study agenda). The Committee will next meet in November 2006.

Detailed information about the Committee's activities can be found in the Reporter's draft of the minutes of the April meeting[1] and in the Committee's study agenda, both of which are attached to this report.

II. Action Item

The Advisory Committee is seeking final approval of proposed new Rule 25(a)(5).

[1] These minutes have not yet been approved by the Committee.

A. Introduction

The Committee proposes to add a new Rule 25(a)(5) that addresses privacy concerns relating to court filings. New Rule 25(a)(5) will take a "dynamic conformity" approach, under which the privacy rules applicable below will also apply on appeal. In proceedings other than appeals from a district court, bankruptcy appellate panel, or bankruptcy court, privacy will be governed by new Civil Rule 5.2 (except that when an extraordinary writ is sought in a criminal case, new Criminal Rule 49.1 will govern).

B. Text of Proposed New Rule and Committee Note

Rule 25. Filing and Service

1 **(a) Filing.**

2 * * * * *

3 (5) **Privacy Protection.** An appeal in a case whose

4 privacy protection was governed by Federal Rule of

5 Bankruptcy Procedure 9037, Federal Rule of Civil

6 Procedure 5.2, or Federal Rule of Criminal

7 Procedure 49.1 is governed by the same rule on

8 appeal. In all other proceedings, privacy protection

9 is governed by Federal Rule of Civil Procedure 5.2,

10 except that Federal Rule of Criminal Procedure 49.1

11 governs when an extraordinary writ is sought in a

12 criminal case.

13 * * * * *

Committee Note

Subdivision (a)(5). Section 205(c)(3)(A)(i) of the E-Government Act of 2002 (Public Law 107-347, as amended by Public Law 108-281) requires that the rules of practice and procedure be amended "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." In response to that directive, the Federal Rules of Bankruptcy, Civil, and Criminal Procedure have been amended, not merely to address the privacy and security concerns raised by documents that are filed electronically, but also to address similar concerns raised by documents that are filed in paper form. *See* FED. R. BANKR. P. 9037; FED. R. CIV. P. 5.2; and FED. R. CRIM. P. 49.1.

Appellate Rule 25(a)(5) requires that, in cases that arise on appeal from a district court, bankruptcy appellate panel, or bankruptcy court, the privacy rule that applied to the case below will continue to apply to the case on appeal. With one exception, all other cases — such as cases involving the review or enforcement of an agency order, the review of a decision of the tax court, or the consideration of a petition for an extraordinary writ — will be governed by Civil Rule 5.2. The only exception is when an extraordinary writ is sought in a criminal case — that is, a case in which the related trial-court proceeding is governed by Criminal Rule 49.1. In such a case, Criminal Rule 49.1 will govern in the court of appeals as well.

C. Changes Made After Publication and Comment

This recommended rule is a modified version of the provision as published. The changes from the published proposal implement suggestions by the Style Subcommittee:

Rule 25. Filing and Service[2]

1 **(a) Filing.**

2 * * * * *

[2] Changes from the proposal published for public comment shown by double-underlining new material and striking through omitted matter.

3 (5) **Privacy Protection.** An appeal in a case whose
4 privacy protection ~~that~~ was governed by Federal
5 Rule of Bankruptcy Procedure 9037, Federal Rule of
6 Civil Procedure 5.2, or Federal Rule of Criminal
7 Procedure 49.1 is governed by the same rule on
8 appeal. In a~~A~~ll other proceedings, privacy
9 protection is ~~are~~ governed by Federal Rule of Civil
10 Procedure 5.2, except that Federal Rule of Criminal
11 Procedure 49.1 governs when an extraordinary writ
12 is sought in a criminal case.

The Style Subcommittee suggested these changes out of concern that readers might not otherwise know the content of the trial-level rules referenced in Rule 25(a)(5). Judge Schiltz, then this Committee's Reporter, argued that the changes were unnecessary, because Rule 25(a)(5)'s caption reads "Privacy Protection." Judge Schiltz also argued that it was superfluous to specify that cases' "privacy protection was governed by" the relevant trial-level rules – rather than just stating that the *cases* were governed by those rules – because the relevant trial-level rules govern nothing but privacy protection. For the same reason, Judge Schiltz feared that the added language might confuse readers by suggesting (incorrectly) that the cited trial-level rules also govern matters other than privacy protection. The Committee, cognizant of the policy to defer to the Style Subcommittee on matters of style, voted to adopt the Style Subcommittee's changes but also to place Judge Schiltz's comments before the Style Subcommittee.

D. Summary of Public Comments

05-AP-001: National Association of Professional Background Screeners: The Association submitted the testimony that it gave before the Criminal Rules Committee in January 2006. That testimony is devoted entirely to Criminal Rule 49.1 – and, in particular, to the likely impact on professional background screeners of Criminal 49.1(a)(3)'s requirement that only the year of birth appear in court records. The Association expresses no views about Rule 25(a)(5).

05-AP-002: Committee on Court Administration and Case Management of the Judicial Conference of the United States: CACM supports Rule 25(a)(5): "Th[e] approach [taken in Rule

25(a)(5)] is consistent with the [Judicial Conference] Privacy Policy's statement that appellate cases are to be treated the same way the cases were treated below and [CACM] supports the rule as proposed." CACM also approves of the fact that Rule 25(a)(5) "gives more specific guidance than does the privacy policy" in addressing not only appeals from the lower courts, but "matters that originate in the court of appeals or that come from an administrative agency or entity other than a lower court."

05-AP-003: Peter A. Winn, Esq.: Mr. Winn, an Assistant United States Attorney and adjunct professor at the University of Washington School of Law, generally supports the privacy rules and addresses his suggestions solely to the trial-court provisions.

05-AP-004: Public Citizen Litigation Group: Public Citizen generally supports the privacy rules, although it believes that, in some respects, the trial-court provisions go too far in protecting sensitive information. For example, Public Citizen opposes Civil Rule 5.2(c), which prohibits remote electronic access to the records of Social Security and immigration cases, but permits access to those same records at the courthouse. Public Citizen believes that more information should be available by remote electronic access and less information should be available at the courthouse.

As for Rule 25(a)(5), Public Citizen "generally supports" the decision to protect "private information on appeal to the same extent it is protected in the district court." But Public Citizen opposes exempting the records of Social Security and immigration cases from remote electronic access in the appellate courts, just as Public Citizen opposes the exemption in the trial courts. Public Citizen stresses the importance of the appellate record to the outcome of a case on appeal and argues that appellate filings "are less likely to contain private information than filings in the district court because the issues on appeal are often narrower in scope and legal rather than factual in nature."

Public Citizen argues that, if the exemptions for Social Security and immigration cases are retained, then Rule 25(a)(5) should at least provide that "appellate briefs and potentially dispositive motions should be remotely available to the public in these cases, absent a court's decision to the contrary."

05-AP-005: Electronic Privacy Information Center: The Center directs its comments solely to the trial-court provisions. It does not comment on Rule 25(a)(5).

05-AP-006: National Association of Criminal Defense Lawyers ("NACDL"): The NACDL generally agrees with the approach taken in Rule 25(a)(5), but it argues that the rule or the Committee Note needs to be clarified "with respect to appellate filings in habeas corpus and 2255 matters." Such matters, NACDL points out, "are governed in the district courts by special sets of federal rules and only in the court's discretion by the civil or criminal rules." According to NACDL, this makes it difficult to know to what extent privacy protection is extended to such cases on appeal. Rule 25(a)(5) "would appear to say that habeas appeals (not being otherwise mentioned) are subject to proposed Fed. R. Civ. P. 5.2, and yet that rule by its own terms excludes filings in such cases." NACDL argues that "the appellate rule should be made clear by adding either to the Rule or to the

Committee Note a proviso which states whether the exemptions of Civil Rule 5.2(b) continue to apply in appeals from decisions in matters that were subject to those exemptions in the district court."

05-AP-007: Judge William G. Young (D. Mass.): Judge Young directs his comments solely to the trial-court provisions. He does not comment on Rule 25(a)(5).

III. Information Items

A. Time-Computation Issues

The Committee discussed the work of the Standing Committee's Time-Computation Subcommittee. The Committee had a generally positive reaction to the Subcommittee's proposed approach. Members emphasized, however, that particular deadlines would require revision in the light of the new computation approach. Members also noted that changes in computation would affect time periods set by statute as well as those set by rule; our Reporter will compile a list of statutory deadlines that would be affected. Members expressed concern that, unlike rule deadlines, statutory deadlines could not (as a practical matter) be adjusted through the Rules Enabling Act process, and thus those deadlines may become unreasonably short. We have formed a subcommittee to review existing deadlines in light of the new time-computation approach.

The Standing Committee also asked us to consider whether the concept of "inaccessibility" of the clerk's office (in time-computation rules such as Appellate Rule 26(a)(3)) should be revised to take account of issues arising from electronic service and filing. The Committee believes that these issues warrant review, and we would like to offer Mr. Charles R. Fulbruge, III, to serve on the subcommittee that considers this issue. Mr. Fulbruge – the Fifth Circuit Clerk and our liaison from the appellate clerks – was in charge of organizing the Fifth Circuit's response to Hurricane Katrina.

In addition, the Standing Committee asked us whether we would recommend changes to the "three-day rule" found in Appellate Rule 26(c). Participants in our discussion raised a number of concerns. For example, one suggested that this question merits a wait-and-see approach, given the fact that practices relating to electronic service are still in flux. Another noted that any change in the "three-day rule" for electronic service would have to address what would happen if electronic service took place on a weekend or holiday. After consideration, the Committee voted unanimously not to recommend changes in the "three-day rule."

B. Other Issues

The Committee discussed and retained a number of matters on the study agenda. The Committee will consider whether language in Rule 4(a)(4) (concerning notices of appeal) might pose a trap for a litigant who files a notice of appeal prior to the district court's disposition of a post-trial motion; it has been suggested that one possible interpretation of Rule 4(a)(4)(B) would require such

a litigant to file an amended notice of appeal (after the grant of that post-trial motion) even if the litigant does not challenge the aspects of the judgment that were amended by the court's disposition of the post-trial motion. The Committee decided to study further a proposal by the Solicitor General concerning limitations on the filing of "pro se" briefs by represented parties. The Committee will study two proposals with respect to amicus briefs: One addresses the timing of such briefs under Rule 29(e), and the other would require a disclosure statement similar to that required by Supreme Court Rule 37.6 (concerning monetary and other contributions to the preparation of an amicus brief).