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

MEMORANDUM

DATE: December 2, 2003

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

FROM: Judge Samuel A. Alito, Jr., Chair
Advisory Committee on Appellate Rules

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on November 7, 2003, in San Diego, California. At its meeting, the Advisory Committee approved two proposed amendments, removed four items from its study agenda, and agreed to give further study to six items. Detailed information about the Advisory Committee's activities can be found in the minutes of the November 7 meeting and in the Advisory Committee's study agenda, both of which are attached to this report.

II. Action Items

The Advisory Committee will not be seeking Standing Committee action on any items in January.

III. Information Items

A. Amendments Approved for Later Submission to the Standing Committee

The Advisory Committee is continuing to consider and approve proposed amendments to the Appellate Rules, although, pursuant to the directive of the Standing Committee, the Advisory Committee will not forward these amendments in piecemeal fashion, but will instead present a package of amendments at a later date. At its November meeting, the Advisory Committee approved the following proposed amendments for publication:

- An amendment to Rule 26(c) that would clarify precisely how deadlines are to be calculated when parties are given 3 additional calendar days to respond to a paper that was not delivered on the date that it was served (e.g., a paper served by mail). Like the pending amendment to Civil Rule 6(e), the amendment to Rule 26(c) would direct that a party should first calculate the "prescribed period," without reference to the 3-day extension. After the party has identified the date on which the prescribed period would expire but for the operation of Rule 26(c), the party should add 3 calendar days. The party must act by the third day of the extension, unless that day is a Saturday, Sunday, or legal holiday, in which case the party must act by the next day that is not a Saturday, Sunday, or legal holiday.

  Although the amendment to Rule 26(c) is identical in substance to the pending amendment to Civil Rule 6(e), it uses a slightly different formulation. The amendment to Civil Rule 6(e) simply directs that the 3 days be added "after the period." The amendment to Rule 26(c) directs that the 3 days be added "after the prescribed period would otherwise expire under Rule 26(a)." The Appellate Rules Committee believes that its formulation is clearer and that clarity and ease of use are particularly important with respect to time-calculation rules.

- An amendment to Rule 7 that would resolve a circuit split over whether attorney's fees are included among the "costs on appeal" that may be secured by a Rule 7 bond when those fees are defined as "costs" under a fee-shifting statue. The amendment provides that such attorney's fees may not be secured by a cost bond.

B. Long-Term Projects

As noted, the Advisory Committee is continuing to study several proposed changes to the Appellate Rules. I wish to bring three of those proposals to your attention:

- The bench and bar too often run into difficulty in trying to determine whether an appeal from a particular order is an "appeal in a civil case" governed by the deadlines of Rule 4(a) or an "appeal in a criminal case" governed by the deadlines of Rule 4(b). At least two circuit splits have resulted from this confusion, one of which (involving appeals from orders disposing of applications for a writ of error *coram nobis*) was resolved by the 2002 addition of subdivision (C) to Rule 4(a)(1), and another of which (involving appeals from orders disposing of requests for attorney's fees under the Hyde Amendment) is the subject of a proposal now pending before the Advisory Committee. Rather than continuing to address these problems on a case-by-case basis, the Advisory Committee is exploring whether

Rule 4 might be amended to provide a global solution. For example, the Advisory Committee is considering whether Rule 4 might be amended to provide that every appeal is "civil" except a direct appeal from a judgment of conviction entered under Criminal Rule 32(k) (and perhaps a couple of additional precisely defined appeals).

- The Advisory Committee is considering whether the Appellate Rules might be amended to make it easier for clerks and parties to identify who are the parties to an appeal and whether each party is an "appellant" or "appellee." Unlike the Supreme Court Rules, nothing in the Appellate Rules defines "parties." This omission leads to extra work for clerks and occasional confusion for parties. The Advisory Committee is studying the possibility of implementing a national "notice of appearance" system, under which all parties to the case before the district court would initially be deemed parties to the case on appeal, but those who did not file a notice of appearance within 10 days would be deemed to have withdrawn. Such a system is in use in several circuits and seems to work well in producing a definitive identification of all parties before briefs or other papers have to be served.

- The Advisory Committee continues to receive complaints from the bar about variations in local rules regarding briefs. Rule 32(e) mandates that every court of appeals must accept briefs that meet the requirements of Rule 32 — regarding such matters as binding, paper size, typeface, type styles, and length. But no such "local variation" provision exists with respect to the requirements of Rule 28 — regarding such matters as the contents of briefs, references to the record, and the reproduction of statutes and rules. As a result, every circuit imposes different requirements upon briefs, and parties have no alternative but to comply with those requirements. The situation is aggravated by the fact that some clerks' offices reportedly ignore the dictate of Rule 25(a)(4) that "[t]he clerk must not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required . . . by any local rule or practice." Before giving further consideration to this matter, the Advisory Committee wishes to be better informed about precisely how many variations are in existence, the history of those variances, and the degree to which those variances are enforced in practice. The Federal Judicial Center will be assisting the Advisory Committee in gathering this information.