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: December 13, 2004

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 9, 2004, in Miami, Florida. The Committee approved three amendments for publication, removed five items from the Committee's study agenda, and, at the request of the E-Government Subcommittee, discussed again a draft rule intended to protect sensitive information in court filings. The Committee also gave extended attention to the fact that all of the courts of appeals use their local rules to impose requirements on briefs — requirements that are not found in Appellate Rule 28 and, in some cases, conflict with Appellate Rule 28.

Detailed information about the Committee's activities can be found in the minutes of the November meeting and in the Committee's study agenda, both of which are attached to this report.

II. Action Items

The Advisory Committee is not seeking Standing Committee action on any items.

III. Information Items

A. Amendments Approved for Expedited Submission to the Standing Committee

At the request of the Standing Committee and the Committee on Court Administration and Case Management ("CACM"), the Advisory Committee approved for publication on an expedited schedule a proposed amendment to Appellate Rule 25(a)(2)(D) that would authorize courts to require papers to be filed by electronic means.

B. 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 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 4(a)(1)(B) that will make clear that the extended 60-day appeal period applies in cases in which an officer or employee of the United States is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States.

- An amendment to Rule 40(a)(1) that will make clear that the extended 45-day period to file a petition for panel rehearing applies in cases in which an officer or employee of the United States is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States.

C. Electronic Privacy

We were fortunate that Prof. Daniel Capra was able to join our November meeting via speaker phone and give us a progress report on the efforts to develop the privacy rules required by the E-Government Act of 2002. Prof. Capra brought us up to date on the actions of the Bankruptcy, Civil, and Criminal Rules Committees, all of whom met before we did. Prof. Capra also outlined for us some of the policy choices that confront the rules committees as we go forward.

Following a lengthy discussion, the Appellate Rules Committee tentatively decided that it will take an approach to this issue that differs from the approach being taken by the Bankruptcy, Civil, and Criminal Rules Committees. At this point, we are inclined to believe that the Appellate Rules should simply incorporate by reference the privacy provisions of the Bankruptcy, Civil, and Criminal Rules. We need to give more thought to the precise wording of the Appellate Rules, but they will likely provide that, for purposes of the privacy rules, a case filed in the court of appeals will be treated as

though it had been filed in the district court — and thus that the Bankruptcy, Civil, and Criminal Rules on privacy will apply just as they would if the case was pending in the district court.

For obvious reasons, privacy and security issues concern the trial courts more than the courts of appeals. The Appellate Rules Committee believes that the policy choices should therefore be made by CACM and the Bankruptcy, Civil, and Criminal Rules Committees; the Appellate Rules Committee has no interest in second-guessing those decisions. At the same time, it would be difficult for the Appellate Rules Committee to continually amend the Appellate Rules to keep up with every change made to the privacy provisions of the Bankruptcy, Civil, or Criminal Rules. Moreover, gaps would develop, as "conforming" changes to the Appellate Rules would often lag behind changes to the other rules of practice and procedure. By simply incorporating the other rules by reference, the Appellate Rules can take a "dynamic conformity" approach — that is, the decisions of the other advisory committees will automatically become the decisions of the Appellate Rules Committee, and changes in the other rules of practice and procedure will automatically be reflected in the Appellate Rules.

D. Local Rules on Briefs

As I have reported in the past, the Advisory Committee continues to receive complaints from the bar about variations in local rules regarding briefs. Appellate Rule 32(e) provides 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 on 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."

The Committee decided that, before giving further consideration to this matter, it needed to be better informed about precisely how many variations are in existence, the history of those variations, and the degree to which those variations are enforced in practice. The Federal Judicial Center ("FJC") kindly agreed to assist the Committee in gathering this information.

At our November meeting, Marie Leary from the FJC presented a comprehensive report entitled, "Analysis of Briefing Requirements in the United States Courts of Appeals." Ms. Leary's report indicated that every one of the courts of appeals — without exception — imposes briefing requirements that are not found in Rule 28. She found that over half of the courts of appeals impose seven or more such requirements, and that some of those requirements flatly contradict Rule 28.

The Committee discussed Ms. Leary's report at length. Members of the Committee disagreed about whether the variations in circuit practices represent a serious problem. Some members

expressed deep frustration with the numerous local rules on briefs, arguing that they substantially undermine the central purpose of the rules of practice and procedure and impose a considerable hardship on practitioners. Other members questioned the degree of hardship and argued that differences in the briefing requirements reflect the fact that the circuits differ substantially in the size and nature of their caseloads, in the number and geographical dispersion of their judges, in their local legal cultures, and in many other ways.

Despite their differences, Committee members agreed that bringing about uniformity or near-uniformity in the rules regarding briefs would be impossible. Rightly or wrongly, the circuits feel very strongly about their local rules on this topic, and any attempt by the Committee to sweep away those rules is unlikely to succeed. That said, the Committee nevertheless hopes to promote uniformity by proposing, from time to time, discrete changes to Rule 28. More importantly, the Committee has tentatively decided to mail a copy of Ms. Leary's report to the chief judges, circuit executives, clerks, and circuit advisory committees, along with a letter that encourages each circuit to examine the local rules identified by Ms. Leary and, where possible, to revoke those rules or make them more consistent with Rule 28. The letter will also encourage circuits to identify in one readily accessible place — preferably on their websites — all of their local rules on briefing.

I should stress that the Committee's plan is tentative, and we will revisit this issue at our April 2005 meeting. I should also stress that no letter to the circuits will be sent until after the dispute over proposed Rule 32.1 is resolved. The Committee would welcome any advice or guidance that the Standing Committee would care to give about this topic.