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 6, 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 November 15, 2006, in Washington, DC. The Committee approved in principle a proposed amendment to Rule 4(a)(4)(B)(ii) and a proposed new rule requiring disclosures concerning drafting and funding of amicus briefs; the Committee will vote on the text and notes of these amendments at its next meeting. The Committee discussed and retained two additional items on the study agenda, and removed two other items. The Committee also discussed the progress of the time-computation project and discussed correspondence relating to circuit-specific briefing requirements. The Committee will next meet in April 2007.

Detailed information about the Committee's activities can be found in the Reporter's draft of the minutes of the November meeting[1] and in the 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.

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

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 in principle (some details remain to be worked out and will be the subject of a vote at the Advisory Committee's next meeting):

- An amendment to Rule 4(a)(4)(B)(ii) that would eliminate an ambiguity that resulted from the 1998 restyling. The Rule's current language might be read to require the appellant to amend a prior notice of appeal if the district court amends the judgment after the notice of appeal is filed, even if the amendment is in the appellant's favor. This ambiguity would be removed by replacing the current reference to challenging "a judgment altered or amended upon" a timely post-trial motion with a reference to challenging "an alteration or amendment of a judgment upon" such a motion.

- An amendment to Rule 29 that would be modeled on Supreme Court Rule 37.6. The amendment would require amicus briefs to indicate whether counsel for a party authored the brief in whole or in part and to identify every person or entity (other than the amicus, its members and its counsel) who contributed monetarily to the brief's preparation or submission. The provision would exempt from the disclosure requirement amicus filings by various government entities.

B. Time-Computation Issues

The Committee discussed the ongoing Time-Computation Project and received a report from the Committee's Deadlines Subcommittee. Through the Reporter's oral presentation at our meeting, the Time-Computation Subcommittee sought input from our Committee on three questions. First, we were asked to consider whether the text of the template Rule should refer to the possibility of after-hours filing by personal delivery to a court official. Mr. Fulbruge, our liaison from the appellate clerks, expressed strong support for the view that the Rule text should not refer to that possibility, because such a reference could encourage litigants (including pro se litigants) to engage in such after-hours filing and could raise security concerns. No participant disagreed with this view. Second, we were asked to consider whether the template should define what "inaccessibility" of the clerk's office means for the electronic filer. The Committee discussed this issue but did not reach a view on it. Third, we were asked whether it would be useful for the template to include a provision addressing dates certain (rather than only addressing, as the current template does, time periods that require computation). The Committee's consensus was that such a provision is not needed.

Judge Sutton, who chairs our Deadlines Subcommittee, reported on that Subcommittee's deliberations. The Subcommittee has reviewed all the short appellate periods that would be affected by the proposed change in time-computation approach, and has arrived at a set of recommendations concerning whether, and by how much, to lengthen each such period. The Committee did not review the Subcommittee's recommendations in detail at our November meeting, but we are well positioned to do so at our April 2007 meeting.

The Deadlines Subcommittee also reported its views on the project as a whole. Subcommittee members are concerned about the question of statutory deadlines and they note that the two main options for dealing with statutory deadlines – supersession and legislation – seem to have disadvantages. Subcommittee members acknowledge that the set of statutory appellate deadlines that require adjustment appears to be relatively small. However, Subcommittee members believe that the statutory deadlines question is likely to loom larger for deadlines within the purview of other Advisory Committees. If a satisfactory method of resolving the question does not materialize, Subcommittee members question whether it is worth while to shift to a days-are-days time-computation approach. Subcommittee members observe that there does not seem to be a problem with the current time-computation approach, and that it may be better to take a wait-and-see approach to time-computation given the advent of electronic filing. Two Committee members who are not on the Deadlines Subcommittee echoed the Subcommittee's skepticism concerning the overall desirability of the project. On the other hand, Mr. Fulbruge observed that members of his staff, and pro se litigants, have trouble computing time under the current system. Members who expressed skepticism about the project's desirability nonetheless stated that the Appellate Rules should follow the time-computation approach taken in the courts below, and thus that if the other Advisory Committees support the shift to a days-are-days method, the Appellate Rules should also adopt that method.

C. Other Issues

The Committee discussed and retained two items on its study agenda, and also reviewed the responses to my recent letter on the Committee's behalf concerning circuit-specific briefing requirements.

As you know, the Committee has extensively discussed practitioners' concerns about idiosyncratic briefing requirements in the circuits. This fall I wrote to the Chief Judge of each circuit to express the Committee's concern over circuit-specific briefing requirements, to emphasize the need to make each circuit's briefing requirements readily accessible to practitioners, and to urge each circuit to consider whether the circuit's additional briefing requirements are truly necessary. By the time of the Committee's November meeting, six circuits had responded to the letter; the responses from some of the circuits suggest reason to hope that some circuits may consider reducing the number of additional briefing requirements.

A pending proposal by Public Citizen concerns the timing of amicus briefs; because the Time-Computation Project's proposed shift to a days-are-days approach will affect this timing

question, the Committee voted to defer further consideration of the proposal until after the time-computation matter is resolved. Another proposal, by the Virginia State Solicitor General, would amend Rules 4(a)(1)(B) and 40(a)(1) so as to treat state-government litigants the same as federal-government litigants for purposes of the time to take an appeal or to seek rehearing. Some members voiced support for this proposal, but members noted that the proposal presents a number of issues. One such issue concerns the scope of the proposal; the current proponents would limit the proposed amendments to suits in which the parties include a state, the Commonwealth of Puerto Rico, the Northern Mariana Islands, or the District of Columbia. The Committee intends to consider whether the proposal, if adopted, ought also to encompass suits involving any additional types of government entities. The Committee retained this item on its study agenda and appointed an informal subcommittee to study the relevant issues.