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 12, 2007

TO: Judge Lee H. Rosenthal, 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 1 and 2 in Atlanta, Georgia. The Committee approved for publication two proposed amendments, but on further consideration decided to present only one of those proposals to the Standing Committee at its January 2008 meeting.

Part II of this report describes the Committee's proposed amendment to Rule 29 concerning amicus brief disclosures.

Part III covers other matters. The Committee approved a new Rule 1(b) that would define the term "state" for purposes of the Appellate Rules, but the Committee intends to further refine the proposal at its spring 2008 meeting. The Committee discussed the need to adopt interim changes to Form 4 to conform to new privacy requirements. The Committee discussed and retained four additional items on the study agenda, and removed one other item. The Committee also discussed correspondence relating to circuit-specific briefing requirements.

The Committee has tentatively scheduled its next meeting for April 10 and 11, 2008.

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.

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

II. Action Item

At our November 2007 meeting, the Advisory Committee unanimously approved the following proposed amendment to Rule 29. The amendment would add a new subdivision (c)(7) requiring amicus briefs to indicate whether counsel for a party authored the brief in whole or in part and whether a party or a party's counsel contributed money that was intended to fund the preparation or submission of the brief, and to identify every person (other than the amicus, its members and its counsel) who contributed money that was intended to fund the brief's preparation or submission. The provision would exempt from the disclosure requirement amicus filings by various government entities. The amendment also moves the requirement of a corporate disclosure statement from the initial block of text in Rule 29(c) to a new subdivision (c)(6).

This proposal differs from the one that was presented at the Standing Committee's June 2007 meeting. Shortly before that June meeting, the Supreme Court published for comment a proposed amendment to Supreme Court Rule 37.6 that would have required amicus briefs to disclose whether a party or its counsel was a member of the amicus or contributed money to the preparation or submission of the brief. Because the Rule 29 proposal was modeled on Supreme Court Rule 37.6, the Appellate Rules Committee decided to present two alternative amendments to the Standing Committee – one for publication if the proposed amendment to Supreme Court Rule 37.6 were adopted, and the other for publication if the Rule 37.6 proposal were not adopted. However, after that decision, comments were submitted on the proposed Supreme Court Rule amendment that were highly critical; commenters asserted, among other things, that the proposed amendment, if adopted, would deter lawyers from joining groups that might be amici and would deter groups from seeking amicus status. Because the Appellate Rules Committee had not had a chance to consider those comments, and because it was not yet known what action the Supreme Court would take with respect to the Rule 37.6 amendment, the Standing Committee decided to hold off rather than publish the Rule 29 proposal in August 2007.

In late July, the Supreme Court adopted a revised version of Rule 37.6, which took effect October 1, 2007. The revised version requires the amicus to disclose whether a party or its counsel contributed money intended to fund the preparation or submission of the brief The revisions clearly respond to the criticisms voiced during the public comment period, and response to the Supreme Court's Rule amendment seems to be favorable. Accordingly, the Appellate Rules Committee approved a redrafted Rule 29 proposal that tracks the language adopted in the Supreme Court's October 2007 amendment to Rule 37.6. The wording of the Rule 29 proposal differs in some respects from that of Rule 37.6, due to style input from Professor Kimble.

Rule 29. Brief of an Amicus Curiae

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(c) **Contents and Form.** An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. ~~If an amicus curiae is a corporation, the brief must include a disclosure statement like that required of parties by Rule 26.1.~~ An amicus brief need not comply with Rule 28, but must include the following:

(1) a table of contents, with page references;

(2) a table of authorities — cases (alphabetically arranged), statutes and other authorities — with references to the pages of the brief where they are cited;

(3) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;

(4) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review; ~~and~~

(5) a certificate of compliance, if required by Rule 32(a)(7)~~.~~;

(6) if filed by an amicus curiae that is a corporation, a disclosure statement like that required of parties by Rule 26.1; and

(7) unless filed by an amicus curiae listed in the first sentence of Rule 29(a), a statement that, in the first footnote on the first page:

(A) indicates whether a party's counsel authored the brief in whole or in part;

(B) indicates whether a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and

(C) identifies every other person — other than the amicus curiae, its members, or its counsel — who contributed money that was intended to fund preparing or submitting the brief.

* * * * *

Committee Note

Subdivision (c). Two items are added to the numbered list in subdivision (c). The items are added as subdivisions (c)(6) and (c)(7) so as not to alter the numbering of existing items. The disclosure required by subdivision (c)(6) should be placed before the table of contents, while the disclosure required by subdivision (c)(7) should appear in the first footnote on the first page of text.

Subdivision (c)(6). The requirement that corporate amici include a disclosure statement like that required of parties by Rule 26.1 was previously stated in the third sentence of subdivision (c). The requirement has been moved to new subdivision (c)(6) for ease of reference.

Subdivision (c)(7). New subdivision (c)(7) sets certain disclosure requirements for amicus briefs, but exempts from those disclosure requirements entities entitled under subdivision (a) to file an amicus brief without the consent of the parties or leave of court. Subdivision (c)(7) requires amicus briefs to disclose whether counsel for a party authored the brief in whole or in part and whether a party or a party's counsel contributed money with the intention of funding the preparation or submission of the brief. A party's or counsel's payment of general membership dues to an amicus need not be disclosed. Subdivision (c)(7) also requires amicus briefs to identify every other "person" (other than the amicus, its members, or its counsel) who contributed money with the intention of funding the brief's preparation or submission. "Person," as used in subdivision (c)(7), includes artificial persons as well as natural persons.

The disclosure requirement, which is modeled on Supreme Court Rule 37.6, serves to deter counsel from using an amicus brief to circumvent page limits on the parties' briefs. *See Glassroth v Moore*, 347 F.3d 916, 919 (11th Cir. 2003) (noting the

majority's suspicion "that amicus briefs are often used as a means of evading the page limitations on a party's briefs"). It also may help judges to assess whether the amicus itself considers the issue important enough to sustain the cost and effort of filing an amicus brief.

It should be noted that coordination between the amicus and the party whose position the amicus supports is desirable, to the extent that it helps to avoid duplicative arguments. This was particularly true prior to the 1998 amendments, when deadlines for amici were the same as those for the party whose position they supported. Now that the filing deadlines are staggered, coordination may not always be essential in order to avoid duplication. In any event, mere coordination – in the sense of sharing drafts of briefs – need not be disclosed under subdivision (c)(7). *Cf.* Robert L. Stern et al., Supreme Court Practice 662 (8th ed. 2002) (Supreme Court Rule 37.6 does not "require disclosure of any coordination and discussion between party counsel and *amici* counsel regarding their respective arguments . . .").

III. Information Items

At the November meeting, the Committee also approved a new Rule 1(b) that would define the term "state" to include the District of Columbia and any commonwealth, territory or possession of the United States. This item reached the Committee's agenda at the suggestion of the time-computation subcommittee. The proposed amendment to Rule 26(a) that is currently out for comment includes a similar definition of the term "state" for purposes of Rule 26; the proposed new Rule 1(b) would provide the same definition for purposes of all the Appellate Rules. The Committee intends to refine the proposal further at its April 2008 meeting

In the wake of the E-Government Act, new privacy rules have been adopted that require redaction of certain personal identifiers Form 4, which concerns the information that must accompany a motion for permission to appeal in forma pauperis, requires immediate revision to conform to those privacy requirements. Aspects requiring attention include the Form's request for the applicant's full social security number and home address, and a question relating to dependents (including minor children) The Committee will work with CACM and other Committees and with Mr. Rabiej and Mr. McCabe to get the word out to the district courts and courts of appeals. Mr. Fulbruge, the Committee's liaison to the appellate clerks, has already reached out to his colleagues to alert them to these issues. Going forward, the Committee will consider permanent revisions to Form 4.

In 2003 the Committee approved an amendment to Rule 7 to resolve a circuit split by making clear that attorney's fees are not among the "costs on appeal" that may be secured by a Rule 7 bond. This amendment was held for later submission to the Standing Committee due to the Committee's practice of "bundling" proposed amendments. In the years since then, the

circuit split grew lopsided, with four out of six circuits taking the position that a Rule 7 bond can include at least some kinds of attorney fees. In the light of the developing caselaw, the Committee decided that the proposed amendment warrants further review. The Committee is undertaking empirical research (with advice and support from the Federal Judicial Center) to illuminate the relevant issues.

The Committee discussed and retained on its agenda three other items. First, the Committee considered issues raised by the Supreme Court's recent decision in *Bowles v. Russell*, 127 S. Ct. 2360 (2007). In *Bowles*, the Court held that Rule 4(a)(6)'s 14-day time limit on reopening the time to take a civil appeal is mandatory and jurisdictional, and barred the application of the "unique circumstances" doctrine to excuse violations of jurisdictional deadlines. Second, the Committee analyzed a proposal concerning amicus briefs with respect to panel rehearing and rehearing en banc. It has been suggested that the Appellate Rules could usefully address whether such amicus briefs can be filed at all; whether they can be filed with the consent of the parties, or whether court permission is required; and the length and timing requirements for such briefs. Third, the Committee discussed a proposal that Rule 35(e) should be amended to state that ordinarily the court will not grant rehearing en banc without first allowing a response to the request

The Committee discussed for a third time a proposal by the Virginia State Solicitor General to 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. The Committee had appointed an informal subcommittee to study the relevant issues, and had sought additional input from Virginia and other states. Based on that additional input, the Committee decided not to proceed further with the proposal; it was, therefore, removed from the study agenda. Following the November meeting, I wrote a letter to the Virginia State Solicitor General informing him of the Committee's decision not to proceed further with the proposal and thanking him and his colleagues for the input and cooperation that the Committee received while it considered the proposal.

So far, all but three circuits have responded to my letter to the Chief Judges of each circuit expressing the Committee's concern over circuit-specific briefing requirements. It may take some time for all the circuits to process the Committee's suggestions; some circuits may be most likely to do so as they review their rules in connection with the transition to the new electronic filing regime. In any event, the letter has already served the purpose of making the circuits aware of the issues relating to circuit-specific briefing requirements.

A member suggested that the Tenth Circuit's recent opinion in *Warren v. American Bankers Insurance of Florida*, 2007 WL 3151884 (10th Cir. 2007), raises significant issues concerning the operation of the separate document rule The Reporter will investigate the matter and report on it at the Committee's spring meeting. In addition, two questions have arisen since the time of the November meeting and will likely be discussed at the spring meeting. One concerns a suggestion that the wording of Rule 4(c)(1)'s "prisoner mailbox" rule is ambiguous.

Another concerns a question raised by the Bankruptcy Rules Committee regarding the timing of counter-designations of the transcript under Rule 10.

Among the proposed amendments published for comment this past August were six Appellate Rules items: the time-computation template and deadlines package; new Appellate Rule 12.1 concerning indicative rulings; an amendment to Appellate Rule 22(b) concerning certificates of appealability (which corresponds to the Criminal Rules Committee's proposed amendment to Rule 11(a) of the rules governing proceedings under 28 U.S.C. §§ 2254 and 2255); an amendment to Appellate Rule 4(a)(4)(B)(ii) that is designed to correct a technical difficulty that crept into Rule 4 as a result of the 1998 restyling; amendments to Appellate Rules 4(a)(1)(B) and 40(a)(1) pertaining to the treatment of suits in which a federal officer or employee is sued in his or her individual capacity; and an amendment to Appellate Rule 26(c) designed to parallel Civil Rule 6's treatment of the "three-day rule." The Committee looks forward to considering the resulting comments at its April 2008 meeting.