

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

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**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

**DATE:** May 13, 2008 (revised July 29, 2008)

**RE:** Report of Advisory Committee on Appellate Rules

**I. Introduction**

The Advisory Committee on Appellate Rules met on April 10 and 11 in Monterey, California. The Committee gave final approval to the package of time-computation amendments, to one new rule, and to three other proposed amendments. The Committee approved for publication three proposed amendments, and removed two items from its study agenda.

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Part II.B. discusses the Committee's requests to publish for comment proposed amendments to Rule 1, Rule 29, and Form 4.

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**II. Action Items**

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**B. Items for Publication**

The Committee is aware that the preferred practice is to hold proposed amendments so that they can be published in groups. The Committee notes, however, the need to amend Form 4 as soon as possible to comply with the privacy rules. The Committee therefore suggests that

Form 4 should be published for comment in summer 2008. Assuming that Form 4 is published for comment in summer 2008, the Committee seeks permission to publish proposed amendments to Rules 1 and 29 at that time as well.

### **1. Rule 1(b)**

Proposed new Rule 1(b) would define the term “state” for the purposes of the Appellate Rules. The proposal to define the term “state” grew out of the time-computation project’s discussion of the definition of “legal holiday”; that definition includes state holidays, and it was thought useful to define “state,” for that purpose, to encompass the District of Columbia and federal territories, commonwealths and possessions. (As published for comment, the proposed amendment to Rule 26(a) included such a definition for purposes of the time-computation rule. However, as noted above, the Advisory Committee has deleted the definition from proposed Rule 26(a) on the assumption that the proposed amendment to Rule 1(b) will be approved for publication in summer 2008.)

As discussed below, the adoption of the proposed definition in Rule 1(b) will permit the deletion of the reference to a “Territory, Commonwealth, or the District of Columbia” from Rule 29(a). The term “state” also appears in Rules 22, 44, and 46. The Committee does not believe that the adoption of proposed Rule 1(b) would require any changes in Rules 22, 44 or 46, but the Committee welcomes public comment on the proposed definition’s effects on those Rules.

### **2. Rule 29**

Rule 29(a) currently provides that “[t]he United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.” If proposed Rule 1(b) is adopted, it will define “state” to include D.C. and U.S. commonwealths or territories. In that event, the reference to a “Territory, Commonwealth, or the District of Columbia” should be deleted from Rule 29(a).

Accordingly, the Committee seeks permission to publish for comment the following proposed amendment to Rule 29(a). The amendment is shown along with the proposed amendment to Rule 29(c) which the Standing Committee approved for publication at its January 2008 meeting. Assuming that the Standing Committee approves the Rule 29(a) amendment for publication, the Advisory Committee suggests that both of the Rule 29 proposals should be published for comment in August 2008.

### **3. Form 4**

The privacy rules which took effect December 1, 2007, require redaction of social security numbers (except for the last four digits) and provide that references to an individual known to be a minor should include only the minor's initials. New Criminal Rule 49.1(a)(5) also requires redaction of individuals' home addresses (so that only the city and state are shown). These rules require changes in Appellate Form 4, which concerns the information that must accompany a motion for permission to appeal in forma pauperis. The Administrative Office ("AO") has made interim changes to the version of Form 4 that is posted on the AO's website, but those interim changes do not remove the need to amend the official version of Form 4 to conform to the privacy requirements.

Moving forward, the Committee will also consider other changes to Form 4. For one thing, an effort is underway to restyle all the forms. More substantively, participants in the Committee's fall 2007 meeting noted that Form 4 requires a lot of detail. Not all i.f.p. applications require so much detail; for example, a much simpler form might be appropriate in the habeas context. In addition, the Committee will consider whether to revise Question 10, which requests the name of any attorney whom the litigant has paid (or will pay) for services in connection with the case, as well as the amount of such payments. The Committee has placed these matters on its study agenda, and plans to consult other Advisory Committees about them because Form 4 is often used in the district courts.

The Committee believes, however, that it is important to take immediate action to bring the official version of Form 4 into compliance with the new privacy requirements. Accordingly, the Committee seeks permission to publish the following proposed amendment.

**PROPOSED AMENDMENTS TO THE FEDERAL  
RULES OF APPELLATE PROCEDURE\***

**Rule 1. Scope of Rules; Definition; Title**

1       **(a) Scope of Rules.**

2           (1) These rules govern procedure in the United States  
3           courts of appeals.

4           (2) When these rules provide for filing a motion or  
5           other document in the district court, the procedure  
6           must comply with the practice of the district court.

7       **(b) ~~[Abrogated.]~~ Definition. In these rules, ‘state’ includes**  
8           the District of Columbia and any United States  
9           commonwealth or territory.

10       **(c) Title.** These rules are to be known as the Federal Rules  
11       of Appellate Procedure.

**Committee Note**

**Subdivision (b).** New subdivision (b) defines the term “state”  
to include the District of Columbia and any commonwealth or

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\*New material is underlined; matter to be omitted is lined through.



14 ~~must include a disclosure statement like that required of~~  
15 ~~parties by Rule 26.1.~~ An amicus brief need not comply  
16 with Rule 28, but must include the following:

- 17 (1) a table of contents, with page references;
- 18 (2) a table of authorities — cases (alphabetically  
19 arranged), statutes and other authorities — with  
20 references to the pages of the brief where they are  
21 cited;
- 22 (3) a concise statement of the identity of the amicus  
23 curiae, its interest in the case, and the source of its  
24 authority to file;
- 25 (4) an argument, which may be preceded by a  
26 summary and which need not include a statement  
27 of the applicable standard of review; and
- 28 (5) a certificate of compliance, if required by Rule  
29 32(a)(7);<sub>1</sub>



**Committee Note**

**Subdivision (a).** New Rule 1(b) defines the term “state” to include “the District of Columbia and any United States commonwealth or territory.” That definition renders subdivision (a)’s reference to a “Territory, Commonwealth, or the District of Columbia” redundant. Accordingly, subdivision (a) is amended to refer simply to “[t]he United States or its officer or agency or a state.”

**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 (8<sup>th</sup> 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 . . .").

**Form 4. Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis**

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7. *State the persons who rely on you or your spouse for support.*

Name [or, if under 18, initials only] Relationship Age

\_\_\_\_\_

\* \* \* \* \*

13. *State the ~~address~~ city and state of your legal residence.*

\_\_\_\_\_

Your daytime phone number: (\_\_\_\_) \_\_\_\_\_

Your age: \_\_\_\_\_ Your years of schooling: \_\_\_\_\_

Your Last four digits of your social-security number: \_\_\_\_\_

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