Minutes of Spring 2006 Meeting of
Advisory Committee on Appellate Rules
April 28, 2006
San Francisco, CA

I. Introductions

Judge Carl E. Stewart called the meeting of the Advisory Committee on Appellate Rules to order on Friday, April 28, 2006, at 8:30 a.m. at the Park Hyatt San Francisco. The following Advisory Committee members were present: Judge Kermit E. Bye, Judge Jeffrey S. Sutton, Judge T.S. Ellis III, Dean Stephen R. McAllister, Mr. Sanford Svetcov, Mr. Mark I. Levy, Ms. Maureen E. Mahoney, and Mr. James F. Bennett. Neil M. Gorsuch, Principal Deputy Associate Attorney General, and Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice, were present representing the Solicitor General. Also present were Judge J. Garvan Murtha, liaison from the Standing Committee; Mr. Charles R. Fulbruge III, liaison from the appellate clerks; Mr. Peter G. McCabe, Mr. John K. Rabiej, Mr. James N. Ishida and Mr. Jeffrey N. Barr from the Administrative Office ("AO"); and Ms. Marie C. Leary from the Federal Judicial Center ("FJC"). Judge Patrick J. Schiltz, the outgoing Reporter, participated in presenting the agenda items, and Prof. Catherine T. Struve, the incoming Reporter, took the minutes.

During the course of the meeting, Judge Stewart noted three departures from the Committee: Mr. W. Thomas McGough, Jr., Mr. Svetcov, and Judge Schiltz. Judge Stewart expressed the Committee's great appreciation for their service, and presented commendations to Mr. Svetcov and Judge Schiltz (Mr. McGough was unable to be present).

II. Approval of Minutes of April 2005 Meeting

The minutes of the April 2005 meeting were approved.

III. Report on June 2005 and January 2006 Meetings of Standing Committee

At the June 2005 meeting, the Standing Committee approved Rule 32.1 (concerning the citation of unpublished opinions). Judge Schiltz observed that the Standing Committee greatly shortened the Committee Note. Judge Schiltz reported that the Judicial Conference approved Rule 32.1 but rendered it prospective only (i.e., the Rule as approved by the Judicial Conference applies only to decisions issued on or after January 1, 2007); he noted that some Circuits may choose to apply the new Rule's approach retroactively as well. Also at the June 2005 meeting, the Standing Committee approved an amendment to Rule 25(a)(2) (authorizing the adoption of

local rules that require electronic filing), and approved for publication new Rule 25(a)(5) (discussed below).

The Appellate Rules Committee had no items on the agenda for the Standing Committee's January 2006 meeting. Judge Stewart noted that the January meeting included a very interesting discussion on the legacy of Chief Justice Rehnquist.

IV. Action Item

A. Item No. 03-10 (new FRAP 25(a)(5) – electronic filing / privacy protections)

Judge Stewart invited Judge Schiltz to introduce the following proposed amendment and Committee Note:

Rule 25. Filing and Service

(a) Filing.

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(5) **Privacy Protection.** An appeal in a case that was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same rule on appeal. All other proceedings are governed by Federal Rule of Civil Procedure 5.2, except that Federal Rule of Criminal Procedure 49.1 governs when an extraordinary writ is sought in a criminal case.

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Committee Note

Subdivision (a)(5). Section 205(c)(3)(A)(i) of the E-Government Act of 2002 (Public Law 107-347, as amended by Public Law 108-281) requires that the

rules of practice and procedure be amended "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." In response to that directive, the Federal Rules of Bankruptcy, Civil, and Criminal Procedure have been amended, not merely to address the privacy and security concerns raised by documents that are filed electronically, but also to address similar concerns raised by documents that are filed in paper form. *See* FED. R. BANKR. P. 9037; FED. R. CIV. P. 5.2; and FED. R. CRIM. P. 49.1.

Appellate Rule 25(a)(5) requires that, in cases that arise on appeal from a district court, bankruptcy appellate panel, or bankruptcy court, the privacy rule that applied to the case below will continue to apply to the case on appeal. With one exception, all other cases — such as cases involving the review or enforcement of an agency order, the review of a decision of the tax court, or the consideration of a petition for an extraordinary writ — will be governed by Civil Rule 5.2. The only exception is when an extraordinary writ is sought in a criminal case — that is, a case in which the related trial-court proceeding is governed by Criminal Rule 49.1. In such a case, Criminal Rule 49.1 will govern in the court of appeals as well.

Judge Schiltz summarized the genesis of proposed new Rule 25(a)(5). The E-Government Act of 2002 directs that the rulemakers address privacy concerns relating to electronic filing. In response, the Standing Committee's E-Government Subcommittee, the Judicial Conference's Committee on Court Administration and Case Management ("CACM"), and the chairs and reporters of the advisory committees have developed proposed privacy rules for use at both trial and appellate levels. Judge Schiltz noted the decision to adopt a "dynamic conformity" approach for the Appellate Rules; under this approach, proposed Rule 25(a)(5) adopts by reference the provisions of the relevant trial-court Rules. Proposed Rule 25(a)(5) was published for comment in August 2005; the Committee received seven public comments, of which three addressed Rule 25(a)(5) (the other four addressed only the trial-court proposals).

Judge Schiltz reported that CACM supports the approach taken in Rule 25(a)(5).

Judge Schiltz next discussed the comments received from the Public Citizen Litigation Group ("Public Citizen"). Public Citizen takes issue with the proposed treatment of Social Security and immigration case records, at both the trial and appellate levels. Judge Schiltz noted the Judicial Conference's policy that privacy protection on appeal should track the privacy protection applicable in the proceeding below. Judge Schiltz observed that the Civil Rules Committee would revisit the issues raised by Public Citizen this spring, and suggested that the Appellate Rules Committee should defer to the judgment reached by CACM and the Civil Rules Committee on these questions.

Third, Judge Schiltz summarized the views of the National Association of Criminal Defense Lawyers ("NACDL"), which asserts that Rule 25(a)(5) requires clarification with respect to habeas and § 2255 proceedings. Judge Schiltz argued that, to the contrary, Rule 25(a)(5) is clear: Under Rule 25(a)(5), appeals in habeas and § 2255 proceedings are governed by Civil Rule 5.2; and Civil Rule 5.2(b)(6) excludes habeas and § 2255 proceedings from the redaction requirements in Civil Rule 5.2(a).

Judge Schiltz then turned to the changes suggested by the Style Subcommittee. Those changes would use language referring to "a case whose privacy protection was governed by" the relevant trial-level privacy rule, rather than language referring to "a case that was governed by" the relevant trial-level privacy rule, thus:

> **Privacy Protection.** An appeal in a case whose privacy protection ~~that~~ was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same rule on appeal. In a~~A~~ll other proceedings, privacy protection is ~~are~~ governed by Federal Rule of Civil Procedure 5.2, except that Federal Rule of Criminal Procedure 49.1 governs when an extraordinary writ is sought in a criminal case.

The Style Subcommittee's concern was that readers might not otherwise know that the cited trial-level rules deal with privacy protections; one member expressed agreement with this concern. Judge Schiltz argued that the Style Committee's proposed language would be redundant and ambiguous; on the other hand, he noted that the proposed changes are stylistic and that this Committee ordinarily defers to the Style Subcommittee on matters of style. Judge Murtha stated that he would place Judge Schiltz's comments before the Style Subcommittee. Mr. Rabiej noted that under the relevant protocol, the Advisory Committees are to defer to the Style Subcommittee on matters of style, but can also send an alternative style suggestion to the Standing Committee for consideration. Judge Stewart proposed that the Advisory Committee approve Rule 25(a)(5) as restyled by the Style Subcommittee, but that the Advisory Committee ask the Style Subcommittee to reconsider its view. This proposal was moved and seconded, and the motion carried (over three dissents).

V. Discussion Items

A. Item No. 05-01 (FRAP 21 & 27(c) – conform to Justice for All Act)

Mr. Letter described the provisions in the Justice for All Act of 2004 which concern appellate review of district court determinations regarding rights for victims of crime. The Committee had asked Mr. Letter to report on whether the timing constraints imposed by those provisions necessitate changes in the Appellate Rules. Mr. Letter reported that after polling relevant parts of the Department of Justice and United States Attorneys' Offices, he was aware of only one appellate case addressing such timing issues. In *Kenna v. U.S. District Court*, 435

F.3d 1011 (9th Cir. 2006), when the Ninth Circuit Court of Appeals granted a mandamus petition under the Act, it noted and apologized for its failure to comply with the Act's time limits, and stated that it was adopting procedures for handling such petitions in the future. From the Clerk of the Ninth Circuit Mr. Letter learned that the Circuit has adopted a new rule – Rule 21-5 – concerning petitions under the Act. Rule 21-5, however, simply requires notice to the court when a petition will be filed under the Act, so that a panel may then issue orders to promote speedy handling; Rule 21-5 does not itself set such procedures. To Mr. Letter's knowledge, no other Circuits have adopted rules implementing the Act's appellate review provisions. Though the Criminal Rules Committee has proposed rules amendments relating to the Act, Mr. Letter reported that those amendments do not concern appellate review.

Mr. Letter stated the Department of Justice's belief that no new Appellate Rules provisions are warranted at this time; he recommended that the Committee monitor developments under the Act. Mr. Fulbruge reported that the appellate clerks with whom he has discussed this question tell him that timing questions under the Act have not been a big issue. Mr. McCabe noted that the AO is aware of only four instances nationwide in which a district court denied a right asserted by a victim under the Act. A member noted that it is unclear whether the Appellate Rules are truly in tension with the Act, since the Act's provisions may be read in different ways. A member predicted that appellate-review issues under the Act will be very rare, since district judges will be careful not to impinge on victims' rights under the Act, and U.S. attorneys (and probation officers) will be careful to point such issues out to district judges. Mr. McCabe noted that the AO is setting up a computer system to notify crime victims of all relevant court proceedings. Mr. Letter promised that the Department of Justice would continue to monitor practice under the Act, and that he would keep the Reporter updated. Judge Stewart requested that if new issues arise under the Act, Mr. Letter should notify the Committee without waiting until the next meeting.

B. Items Awaiting Initial Discussion

1. Item No. 05-04 (FRAP 41 – *Bell v. Thompson*)

Judge Schiltz outlined the litigation in *Bell v. Thompson*, 125 S. Ct. 2825 (2005), and explained how that case highlighted ambiguities in Rule 41, which governs issuance of the mandate. In *Bell*, Thompson (a capital habeas petitioner) appealed from a district court judgment dismissing his petition. The Sixth Circuit Court of Appeals affirmed, but stayed the issuance of its mandate pending the disposition of Thompson's petition for certiorari. After certiorari was denied, Thompson obtained an order from the Court of Appeals staying issuance of the mandate until the Supreme Court resolved Thompson's petition for rehearing. After the Supreme Court denied rehearing, the Court of Appeals' mandate still failed to issue – but the parties (not noticing this omission) proceeded to litigate other matters (focusing on whether Thompson was competent to be executed). Meanwhile, without notice to the parties, the Court of Appeals reexamined the merits of Thompson's habeas petition, and five months after the Supreme Court denied rehearing the Court of Appeals issued an amended opinion vacating and

remanding for an evidentiary hearing.

On review in the Supreme Court, Thompson contended that the Court of Appeals' failure to issue the mandate (after the Supreme Court's denial of rehearing) in effect constituted a third stay, authorized by Rule 41(b)'s grant of authority to "extend the time" for issuance of the mandate. The state argued that Rule 41(d)(2)(D) required the Court of Appeals to issue its mandate "immediately" after certiorari was denied, and accordingly that both the second and third stays were impermissible. The Supreme Court avoided this broader question, and held for the state on the ground that even if Rule 41 would authorize a stay of the Court of Appeals' mandate following denial of certiorari, and even if the third stay could have taken effect without entry of an order, the issuance of such a stay under the circumstances of *Bell* constituted an abuse of discretion.

Judge Schiltz pointed out that *Bell* uncovered ambiguities in Rule 41, concerning whether the Court of Appeals has authority to stay issuance of its mandate following denial of certiorari, and if so, under what circumstances. The question, then, is whether it would be worthwhile for the Committee to revisit Rule 41 with a view to clarifying these matters. Judge Schiltz observed that *Bell*'s fact pattern was very unusual. A member concurred in this assessment, and noted that any attempt to clarify the questions aired in *Bell* would raise tough issues regarding many different possible fact patterns. Mr. Fulbruge reported that he did not think appellate clerks see a need for changes in Rule 41 at this point. Another member noted that the lawyer whose position was favored by the Court of Appeals' judgment ordinarily would seek to ensure that the Court of Appeals did in fact issue its mandate. Mr. Letter noted that counsel can readily check whether the mandate has issued by using the PACER system. A district judge member noted that while lawyers may not always think to check whether the mandate has issued, he makes it a practice to check whether the Court of Appeals' mandate has issued before he proceeds. Mr. Fulbruge reported that he gets calls from district judges asking whether the mandate has issued, which indicates that the district judges pay attention to this question.

By consensus, the Committee removed this item from the study agenda. Judge Stewart will write to John Kester (the Standing Committee member who brought this issue to this Committee's attention) to explain that the Committee had considered the issue.

2. Item No. 05-05 (FRAP 29(e) – timing of amicus briefs)

Judge Schiltz summarized the questions raised by Public Citizen regarding the time for filing amicus briefs under Rule 29(e). Public Citizen points out that when an amicus files a brief in support of an appellee, the interaction of Rules 29(e) and 26(a)(2) may leave the appellant with little or no time to incorporate into its reply brief a response to the amicus's contentions.

Mr. Letter agreed that such difficulties could arise, but noted that when they do, the appellant can move for an order granting more time to respond. Mr. Fulbruge agreed that if the issue arose, the Court of Appeals would probably grant such a request. (A member noted that it

would be inefficient to have the party file a supplemental brief responding to an amicus' contentions; Mr. Letter observed that the party could request time to file an amended brief that incorporates a response to the amicus.)

Mr. Letter stated that the Department of Justice would oppose a rule change that shortened the time allotted to amici filing briefs in support of the appellee, and that the Department would not support a change that lengthened the time for filing the appellant's reply brief. Mr. Letter noted that it is often not possible for the government to share its draft briefs with amici in advance of filing. Mr. Letter expressed the hope that timing difficulties would arise less often as electronic filing becomes more prevalent.

A member asked why the Appellate Rules' approach differs from that taken by the Supreme Court rules (which require that amici submit their briefs within the time allowed for filing the brief of the party whom they are supporting).[1] Mr. Letter stated that the rationale for the Appellate Rules' approach was to permit amici to review the party's filing, so as to minimize duplication of arguments. The member responded that the Rules have not been effective in serving this goal. Judge Schiltz noted that the Appellate Rules used to take the same approach as the Supreme Court rules; a member voiced support for a return to this approach. Mr. Letter observed that the government needs time to look at a party's brief before deciding whether to file an amicus brief. A member countered that a private party is free to show the government its brief prior to filing, to facilitate the government's decision. Judge Stewart noted that it is helpful for an amicus brief to state clearly what it adds to the arguments made in the party's brief.

A number of participants voiced the view that these timing questions merit further study. A member pointed out that these issues could be addressed as part of changes to be considered concerning time computation more generally. Mr. Letter undertook to consult other entities that frequently file amicus briefs (including state governments), and to report to the Committee at its next meeting. Judge Stewart observed that it would be useful to consult Justice Randy Holland, a Committee member who was unable to attend this meeting.

By consensus, the Committee retained this item on its discussion calendar.

3. Item No. 05-06 (FRAP 4(a)(4) – amended NOA after favorable or insignificant change to judgment)

Judge Schiltz described the decision in *Sorensen v. City of New York*, 413 F.3d 292 (2d Cir. 2005), in which Judge Leval raised questions concerning the operation of Rule 4(a)(4) in cases where a party files a notice of appeal and the district court subsequently alters or amends the judgment. In *Sorensen*, the district court initially entered a judgment which awarded relief on certain claims and dismissed others. The plaintiff filed a notice of appeal, and the district

[1] *See* Supreme Court Rule 37.3(a).

court subsequently granted a posttrial motion dismissing one of the claims on which it had initially awarded relief. The plaintiff failed to file a timely notice of appeal that encompassed the judgment that ultimately resulted after this grant of posttrial relief. The Court of Appeals held that the plaintiff failed properly to preserve her challenge to the district court's dismissal of the relevant claim. In particular, the court held that under Rule 4(a)(4)(B) the plaintiff's initial notice of appeal did not effect an appeal from the court's later dismissal (on the posttrial motion) of one of the plaintiff's claims. Writing for the court, Judge Leval characterized Rule 4(a)(4) and its Note as ambiguous and contradictory, and raised the possibility that problems could also arise for an appellant who fails to file a new or amended notice of appeal after the district court amends the judgment in the appellant's *favor*.

Judge Schiltz reported that he had done a quick search of the caselaw and had failed to find other opinions reading Rule 4 in the same way as the *Sorensen* court. A member noted that lawyers tend to file a new notice of appeal just in case, and stated that *Sorensen* is the only case he knows of in which this issue has arisen. Mr. Fulbruge, too, stated that he had not come across such cases. Another member questioned how often the timing configuration would be such as to permit the issue to arise at all (given the time limits for filing postjudgment motions and the fact that a postjudgment motion tolls the time for filing a notice of appeal).

A member asked whether the Note could be amended to clarify the issue, without amending the Rule; Judge Schiltz responded that he did not think so. Mr. Rabiej noted that there had been a similar desire to clarify the operation of certain Evidence Rules without amending the Rules themselves, and that the FJC had responded by producing an explanatory pamphlet.

A member expressed disbelief that any court would interpret Rule 4(a)(4) to require an appellant to file an amended notice of appeal just because the district court had amended the judgment *in the appellant's favor*. Another member agreed that such an interpretation would be absurd. Mr. Letter observed, though, that if such a situation arose, his office would file a new notice of appeal to be on the safe side.

By consensus, the Committee decided to leave the matter on the study agenda. The Reporter will inquire into the background of the 1998 amendments (which produced the relevant language in Rule 4(a)(4)).

4. Item Nos. 06-01 (FRAP 26(a) – time-computation template) and 06-02 (adjust deadlines to reflect time-computation changes)

Judge Schiltz described the work of the Standing Committee's Time-Computation Subcommittee, for which he has served as reporter. The Subcommittee's goals are to simplify and reconcile the time-computation provisions in the Appellate, Bankruptcy, Civil, and Criminal Rules. The Subcommittee has circulated to the Advisory Committees a template showing the proposed approach; that template will be presented to the Standing Committee for approval at its June 2006 meeting. Assuming approval of the template, the Advisory Committees will consider

conforming amendments to their respective Rules, and will also undertake a revision of relevant deadlines to address issues raised by the change in computation approach. The goal is to publish the proposed Rules amendments for public comment, as a package, in August 2007.

A notable feature of the proposed template is that it takes a "days are days" approach – i.e., all intermediate days are counted when computing a deadline. By contrast, current Appellate Rule 26(a)(2) excludes intermediate weekend days and holidays when computing periods less than eleven days (unless the period is stated in calendar days).

Mr. Fulbruge noted that the appellate clerks favor the proposed approach. An attorney member cautioned that such changes would be acceptable so long as relevant periods were extended to take account of the change in computation method; otherwise, the member warned that the amendments could be seriously problematic. The member noted that some periods may require significant lengthening, and also noted that the "three-day rule" (discussed below) will impact the analysis. Another attorney member expressed agreement.

Mr. Letter queried why Rule 26(a)(4) treats state holidays (of the state in which is found the relevant district court or the circuit court's principal office) as legal holidays for purposes of time computation. Mr. Fulbruge reported that federal courts in Texas, Mississippi and Louisiana do not close on state holidays; he also noted Louisiana's practice of having half-holidays (which vary parish-to-parish). Judge Stewart observed that the federal court in New Orleans is obliged to close on Mardi Gras because its employees cannot get to work. Judge Schiltz agreed that there are some federal courts that do close on some state holidays. Judge Schiltz recalled that the rationale previously given for the state-holiday rule is that its application (which is likely to be rare) will protect litigants in the unusual circumstances where that may be necessary.

On the general topic of revisions to the deadlines, a member emphasized that everyone recognizes that revising the time-computation approach will necessitate changes in the deadlines. The member stressed that right now, all the Committee would be doing is approving the approach in principle.

Another member observed that changes in the time-computation approach could also impact deadlines set by court order or by statute. A district judge member noted that when he sets deadlines by court order he picks a date rather than setting a number of days, and he pointed out that this approach would leave deadlines set by court order unaffected by time-computation changes. Statutory time periods, however, were noted (such as that set by 28 U.S.C. § 1292(b)[2]

[2] *See* 28 U.S.C. § 1292(b) (authorizing certain interlocutory appeals based on certification by district court and permission by court of appeals, so long as the application for permission "is made to [the court of appeals] within ten days after the entry" of the district court order containing certification).

and that set by the Class Action Fairness Act[3]). Mr. Letter noted that, under 28 U.S.C. § 2072(b), rules promulgated under the Rules Enabling Act supersede any previously enacted statutory provisions that conflict. Members expressed concern that, unlike rule deadlines, statutory deadlines could not (as a practical matter) be adjusted through the Rules Enabling Act process, and thus those deadlines may become unreasonably short.

Judge Schiltz observed that other Advisory Committees have set up subcommittees to reconsider all relevant deadlines. Judge Stewart thereupon named a subcommittee to reconsider deadlines in the Appellate Rules. The subcommittee includes Judge Sutton (as chair), Ms. Mahoney, and Mr. Letter.[4] By consensus, the Committee decided that: (1) The concerns aired above (with respect to supersession of statutory provisions and with respect to the concerns over revision of deadlines) should be raised with Judge Kravitz (the Chair of the Time-Computation Subcommittee) and/or the Standing Committee; (2) Judge Sutton's Deadlines Subcommittee will study the relevant deadlines; and (3) The Committee will continue to look at these issues during the fall.

Next, the Committee discussed questions relating to the accessibility of the clerk's office. Judge Schiltz noted that the Standing Committee has asked the Advisory Committees for guidance on whether rules such as 26(a)(3) (concerning inaccessibility of the clerk's office) should be changed in the light of the advent of electronic filing. How should the rules treat a situation where the clerk's office is physically inaccessible but electronically accessible? How should the rules treat the converse situation? A member pointed out that so long as paper filings are permitted the courthouse's physical accessibility will remain significant. Mr. Fulbruge stated that the issue requires attention; he reported that after Hurricane Katrina, his court faced challenges relating to electrical power, the electronic docket and email capability for the judges. Mr. Fulbruge noted that the courts are looking into the feasibility of using backup servers to avoid outages in the future, and he observed that a well-functioning system of backup servers could moot some issues concerning court accessibility. By consensus, the Committee determined the following: (1) The Committee agrees that these issues warrant review, and (2) the Committee will offer Mr. Fulbruge to serve on the relevant subcommittee.

Judge Schiltz noted that the Standing Committee has also requested input from the Advisory Committees on whether changes are warranted in the "three-day rule" set by Appellate Rule 26(c) and certain other rules. This rule provides that, when a party is to act within a set

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[3] *See* 28 U.S.C. § 1453(c)(1) (providing with respect to removals under Section 1453 that "a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand ... if application is made to the court of appeals not less than 7 days after entry of the order").

[4] Reporter's note: Subsequently, Mr. Levy – who is a member of the Standing Committee's Time Computation Subcommittee – also agreed to serve on the Deadlines Subcommittee.

period after service of a paper on the party, and the paper is served by means other than personal service, the party gets an additional three days in which to act. Judge Schiltz recounted that electronic service was included in the "three-day rule" in order to induce parties to consent to its use,[5] and he suggested that when electronic service no longer required party consent, such a rationale would no longer apply. A member suggested that a wait-and-see approach may make sense at this time. Mr. McCabe noted that when electronic filing is used, the other parties get an electronic notification from the court, with a link to the electronic copy of the filing. Mr. Letter queried what would happen if electronic filing and service were removed from the three-day rule and a party decided to e-file on a weekend or holiday. A member cautioned that there will always (for the foreseeable future) be small practitioners who lack the ability to file electronically; he suggested that there is no reason to tackle the three-day rule in addition to the calendar-days issue. The member noted that the practicing bar would prefer moderation in the rate of rule-making. Mr. Fulbruge observed that the district courts have followed the lead of the bankruptcy courts in implementing electronic case filing; but Mr. Fulbruge noted that the large volume of pro se filings will continue to be made in hard copy rather than electronically.

By a unanimous vote, the Committee determined to recommend no action on the "three-day rule" in Rule 26(c).

5. Item No. 06-03 (new FRAP 28(g) – pro se filings by represented parties)

Mr. Letter described a proposal approved by the Solicitor General for a new Rule 28(g) which would generally bar the Courts of Appeals from accepting "pro se briefs" filed by represented parties. The proposed rule would contain exceptions for situations where counsel has moved to withdraw under *Anders v. California*, 386 U.S. 738 (1967), or where the party seeks appointment of new counsel. The proposal would require the clerk to forward any such pro se filing to the party's attorney.

Mr. Letter stated that such "pro se" filings by represented parties are a major problem for U.S. Attorneys' offices, because of the burden imposed when the U.S. Attorney feels obliged to respond to multifarious arguments raised in the additional "pro se" filing. He also posited that such filings could burden the courts, and might harm the "pro se" filer by distracting from stronger arguments selected by the party's counsel.

A member recounted his experience as appointed counsel in CJA cases. He recalled that sometimes he refused to raise issues because he considered them frivolous. Often, that was the end of the matter; but sometimes his client would submit a "pro se" brief. In his experience, when that occurred, the court usually accepted the "pro se" filing; the U.S. Attorney usually did

[5] Judge Schiltz noted that under Rule 25(c)(1)(D), parties can consent to service by electronic means.

not respond; and the arguments in the "pro se" brief would get only a passing mention during the oral argument.

Mr. Letter responded that he would be unwilling to take the approach the member described: As he put it, the U.S. Attorney's Office ignores an issue in the pro se brief at its peril. A member suggested that if a court felt that a point in a pro se brief warranted attention, it could call on the U.S. Attorney for a response. The member questioned whether the proposed Rule 28(g) might encourage requests for appointment of new counsel. The member also suggested that permitting the filing of pro se briefs could head off some claims of ineffective assistance of counsel.

A district judge member observed that "pro se" briefs are frequently filed in the district court, and that the court reviews those filings to make sure that it is not missing anything. A member then asked why the rule on "pro se" filings in the Courts of Appeals should differ from the practice in the district courts. Mr. Letter responded that in appellate practice, there is a greater expectation that the lawyer will play a role in winnowing out weaker arguments. A member noted that under *Martinez* there is no *Faretta* right to self-representation on appeal.[6] Judge Sutton observed that the Sixth Circuit accepts "pro se" briefs. Judge Stewart noted the need to consider practicality; he observed that "pro se" briefs can be difficult to scan electronically, and that such briefs generally employ a "shotgun" approach rather than zeroing in on new or particularly strong issues.

A member suggested that an alternative approach would be to provide that the Court of Appeals will not act upon an argument in a "pro se" brief without giving the government an opportunity to respond to the relevant argument. Mr. Fulbruge noted the Fifth Circuit's rule that a represented party cannot file a "pro se" brief without leave of court.[7] When a represented party attempts to make such a filing, the clerk's office notifies the party of the rule, encourages the party to contact his or her counsel, and notes that the party can make a motion for leave to file. If the Court of Appeals grants the party leave to file the brief, the order can provide the other side with a chance to respond. Mr. Fulbruge argued against the provision in proposed Rule 28(g) that would require the clerk's office to send the party's filing to the party's counsel.

A judge member observed that the filing of a "pro se" brief can occasion awkwardness for the party's counsel; but he also noted that sometimes the "pro se" brief is better than counsel's brief. The member stated that the Fifth Circuit's approach (requiring court permission) might be a good solution. Mr. Letter expressed a tentative view that the government would

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[6] *See* Faretta v. California, 422 U.S. 806, 836 (1975) (holding that criminal defendant has Sixth Amendment right to represent self at trial); Martinez v. Court of Appeal of California, 528 U.S. 152, 154 (2000) (holding that the *Faretta* right does not extend to appeals).

[7] *See* Fifth Circuit Rule 28.7 ("Unless specifically directed by court order, pro se motions, briefs or correspondence will not be filed if the party is represented by counsel.").

prefer the Fifth Circuit approach to a more permissive one.

Mr. Letter undertook to investigate further (by ascertaining the Supreme Court's rule, and by canvassing colleagues in the Justice Department for their views on various options), and to email his findings to the Committee in advance of its next meeting. Mr. Fulbruge agreed to contact clerks in the First, Second, Fourth and Sixth Circuits to learn what their experience has been.[8]

VI. Additional Old Business and New Business

There was no additional old business. Under new business, a member raised three issues.

First, the member noted that some of the Appellate Rules treat states in the same way as the U.S.,[9] but that state and federal government litigants receive different treatment with respect to the time limit for filing a notice of appeal[10] and the time limit within which to petition for panel rehearing or rehearing en banc.[11] The member reported that some state solicitors general would like states to be accorded the same treatment as the U.S. A member expressed support for this idea. Another member observed that if the states were given more time to decide whether to appeal, they might be more likely to forgo appeals in some cases. The item was not placed on the agenda, however, because the committee will wait to see whether a formal recommendation on the matter results from the summer meeting of the National Association of Attorneys General.

Second, the member reported that some judges on the Federal Circuit would favor adoption of a rule that requires amici to disclose whether any other entity contributed monetarily to the preparation or submission of the amicus brief and whether counsel for a party worked on the amicus brief. (The Supreme Court has such a rule – Rule 37.6.) A member asked why the Federal Circuit could not impose such a requirement by local rule. Another member, though, pointed out that an Appellate Rule on the topic could provide welcome clarity. This item was put on the study agenda.

Third, the member reported that some Federal Circuit judges would favor a decrease in

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[8] A member suggested that it would be important to canvass the views of practitioners outside the Justice Department, and that it could be helpful to ask the AO and/or the FJC to study courts' experiences with different approaches. Judge Stewart observed that these measures could be taken after the Committee has had an opportunity for further discussion.

[9] *See, e.g.*, Rule 29(a) (permitting federal and state governments to "file an amicus-curiae brief without the consent of the parties or leave of court").

[10] *See* Rule 4(a)(1).

[11] *See* Rules 40(a)(1) (panel rehearing) and 35(c) (rehearing en banc).

the permitted length of reply briefs from 7,000 words to 3,500 words. An attorney member expressed skepticism, arguing that such a reduction would not improve the resulting briefs and would cause great opposition from the bar. A judge member noted that the current length did not cause him concern (because he skims portions that seem unhelpful) and that some cases are complex enough that they really require the full 7,000-word length. Another attorney member strongly opposed shortening the limit, noting that it would create an extra hassle for attorneys who would have to move for leave to enlarge the length. By consensus, this item was not placed on the study agenda.

VII. Date and Location of Fall 2006 Meeting

Mr. Rabiej will circulate to the Committee suggestions for a meeting date in November 2006; Friday will be the preferred day of the week for the meeting.

V. Adjournment

The Committee adjourned at 11:40 a.m.

Respectfully submitted,

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Catherine T. Struve
Reporter