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: May 8, 2009

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 April 16 and 17 in Kansas City, Missouri. The Committee gave final approval to proposed amendments to Appellate Rules 1 and 29 and Appellate Form 4. The Committee discussed a number of other items and removed three items from its study agenda.

Part II of this report discusses the proposals for which the Committee seeks final approval: proposed amendments to Rules 1, 29 and 40 and to Form 4. Part III covers other matters.

The Committee has scheduled its next meeting for November 5 and 6, 2009, in Seattle, Washington.

Detailed information about the Committee's activities can be found in the Reporter's draft of the minutes of the April meeting[1] and in the Committee's study agenda, both of which are attached to this report.

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

II. Action Items – for Final Approval

The Committee is seeking final approval of proposed amendments to Rules 1, 29 and 40 and to Form 4.

A. Rule 1

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"; Rule 26(a)'s definition of "legal holiday" includes certain 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 discussed below, the adoption of the proposed definition in Rule 1(b) permits 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) requires any changes in Rules 22, 44 or 46.

1. Text of Proposed Amendment and Committee Note

The Committee recommends final approval of the proposed amendment to Rule 1 as set out in the enclosure to this report.

2. Changes Made After Publication and Comment

No changes were made to the proposed amendment to Rule 1 after publication and comment.

The public comments on the proposed amendment are summarized in the enclosure to this report. The Committee discussed the suggestion by Daniel I.S.J. Rey-Bear that Rule 1(b)'s definition of "state" should also include federally recognized Indian tribes. Noting that this suggestion deserves careful consideration, the Committee placed the suggestion on its study agenda as a new item. Treating Mr. Rey-Bear's suggestion as a new study item will enable the Committee to consider the implications of that suggestion for the operation of Rules 22, 26, 29, 44 and 46, all of which use the term "state."

B. Rule 29

The proposed amendments would alter Rule 29(a) in the light of new Rule 1(b) and would add a new disclosure requirement to Rule 29(c).

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." Proposed Rule 1(b) will define "state" to include the District of Columbia and U.S. commonwealths or territories. Accordingly, the reference to a "Territory, Commonwealth, or the District of Columbia" should be deleted from Rule 29(a).

The proposed amendments would add a new disclosure requirement to Rule 29(c). The new provision, which is modeled on Supreme Court Rule 37.6, would require 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.

1. Text of Proposed Amendment and Committee Note

The Committee recommends final approval of the proposed amendments to Rule 29 as set out in the enclosure to this report.

2. Changes Made After Publication and Comment

No changes were made to the proposed amendment to Rule 29(a). However, the Committee made a number of changes to Rule 29(c) in response to the comments.

One change concerns the third subdivision of the authorship and funding disclosure requirement. As published, that third subdivision would have directed the filer to "identif[y] every person — other than the amicus curiae, its members, or its counsel — who contributed money that was intended to fund preparing or submitting the brief." A commentator criticized this language as ambiguous, because the commentator argued that the provision as drafted did not make clear whether it is necessary for the brief to state that no such persons exist (if that is the case). The Committee accordingly revised this portion of the requirement to require a statement that indicates whether "a person – other than the amicus curiae, its members, or its counsel – contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person."

Another set of changes concerns the placement of the disclosure requirement. As published, the Rule 29(c) proposal would have placed the new authorship and funding disclosure requirement in a new subdivision (c)(7) and would have moved the requirement of a corporate disclosure statement from the initial block of text in Rule 29(c) to a new subdivision (c)(6). New subdivision (c)(7) would have directed that the authorship and funding disclosure be made "in the first footnote on the first page." Commentators criticized this directive as ambiguous and suggested that a better approach would be to direct that the authorship and funding disclosure follow the statement currently required by existing Rule 29(c)(3). The Committee found merit in

these suggestions and decided to move the authorship and funding disclosure provision up into Rule 29(c)(3). Having made that change, the Committee abandoned (as unnecessary) its proposal to move the corporate-disclosure provision to a new subdivision (c)(6). However, as described below, the proposed numbering of the subdivisions in Rule 29(c) was further changed in light of style guidance from Professor Kimble.

Subsequent to the Appellate Rules Committee's meeting, the language adopted by the advisory committee was circulated to Professor Kimble for style review. Professor Kimble argued that the authorship and funding disclosure provision should be placed in a separate subdivision rather than being placed in existing subdivision (c)(3). In the light of the Appellate Rules Committee's goal of listing the required components in the order in which they should appear in the brief, the decision was made to place the authorship and funding disclosure provision in a new subdivision following existing subdivision (c)(3). Though this will require renumbering the subparts of Rule 29(c), those subparts have only existed for about a decade (since the 1998 restyling) and citations to the specific subparts of Rule 29(c) do not appear in the caselaw. Given that this change entails renumbering some subparts of Rule 29(c), it also seems advisable to move the corporate disclosure provision into a new subdivision (c)(1) and to renumber the subsequent subdivisions accordingly. Professor Kimble also suggested two stylistic changes to the language of what will now become new subdivision (c)(5). First, instead of using the language "unless filed by an amicus curiae listed in the first sentence of Rule 29(a)," the provision now reads "unless the amicus curiae is one listed in the first sentence of Rule 29(a)." Second, the words "indicates whether" have been moved up into the introductory text in 29(c)(5) instead of being repeated at the outset of the three subsections (29(c)(5)(A), (B) and (C)). Also, a comma has been added to what will become Rule 29(c)(3).

Commentators made a number of other suggestions concerning the proposed authorship and funding disclosure requirement, and the Committee gave each of those suggestions careful consideration. A detailed record of the Committee's discussions can be found in the draft minutes.

C. Rule 40

The proposed amendment to Rule 40(a)(1) would clarify the treatment of the time to seek rehearing in cases to which a United States officer or employee is a party. This proposal was published for comment in 2007 along with a proposal to make a similar clarifying amendment to Rule 4(a)(1)(B). However, the Committee subsequently noted that the Supreme Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007), raises questions concerning the advisability of pursuing the proposed amendment to Rule 4(a)(1)(B). That amendment would address the scope of the 60-day appeal period in Rule 4(a)(1)(B) – a period that is also set by 28 U.S.C. § 2107. Because *Bowles* indicates that statutory appeal time periods are jurisdictional, concerns were raised that amending Rule 4(a)(1)(B)'s 60-day period without a similar statutory amendment to Section 2107 would not remove any uncertainty that exists concerning the scope of the 60-day appeal period. Accordingly, the Department of Justice (which initially proposed the Rule 4(a)(1)(B) and Rule 40(a)(1) amendments) withdrew its proposal to amend Rule 4(a)(1)(B). A

similar issue does not arise with respect to Rule 40(a)(1), because the deadlines for seeking rehearing are not set by statute. The Committee therefore determined to abandon the proposed amendment to Rule 4(a)(1)(B), but it voted without opposition to give final approval to the proposed amendment to Rule 40(a)(1). The Rule 40(a)(1) amendment will clarify the applicability of the extended (45-day) period for seeking rehearing, and it will render Rule 40(a)(1)'s language parallel to similar language in Civil Rule 12(a) concerning the time to serve an answer.

The proposed Rule 40(a)(1) amendment was placed before the Standing Committee for discussion rather than action at its January 2009 meeting. Shortly thereafter, the Supreme Court granted certiorari in *United States* ex rel. *Eisenstein v. City of New York*, 129 S. Ct. 988 (2009). The question presented in *Eisenstein* reads as follows: "Where the United States elects not to proceed with a qui tam action under the False Claims Act, and the relator instead conducts the action for the United States, must a notice of appeal be filed within the 60-day period provided for in Fed. R. App. P. 4(a)(1)(B), applicable when the United States is a 'party,' or the 30-day period provided for in Fed. R. App. P. 4(a)(1)(A)?" *Eisenstein* was argued on April 21, and as of the writing of this report the case has not yet been decided. The upcoming decision in *Eisenstein* seems likely to inform any future consideration by the Committee of the 30-day and 60-day periods in Rule 4(a)(1) and 28 U.S.C. § 2107.

1. Text of Proposed Amendment and Committee Note

The Committee recommends final approval of the proposed amendment to Rule 40(a)(1) as set out in the enclosure to this report.

2. Changes Made After Publication and Comment

As noted above, after publication and comment the Committee decided to abandon the proposed amendment to Rule 4(a)(1)(B) and to proceed with the proposed amendment to Rule 40(a)(1) on a standalone basis. That decision led the Committee to delete from the Note to Rule 40(a)(1) a reference to the proposed amendment to Rule 4(a)(1)(B). Apart from that, the Committee made no changes to the proposed Rule 40(a)(1) amendment after publication and comment. The Committee is of the view that these changes do not require republication.

The public comments on the proposed amendment are summarized in the enclosure to this report. The Committee discussed, but ultimately decided not to implement, two suggestions concerning the wording of the proposed amendment. The Committee concluded that Chief Judge Easterbrook's comment concerning the use of the term "United States" as an adjective is a question of style; and the Committee noted that adopting Chief Judge Easterbrook's proposed change would cause the language used in the Rule 40(a)(1) amendment to diverge from the language employed in restyled Civil Rule 12(a). The Committee also discussed the Public Citizen Litigation Group's view that the wording of the amendment should be changed so that the extended time period's applicability turns on the nature of the act as alleged by the plaintiff

rather than on the nature of the act as ultimately found by the court. A meeting participant expressed opposition to this suggestion, arguing that the time period for rehearing should not turn on the way in which the complaint was framed. It was also noted that the uncertainty that concerns Public Citizen would presumably be less in connection with Rule 40(a)(1) than it would have been in connection with the Rule 4(a)(1)(B) amendment concerning appeal time, because where the question is the time to seek rehearing, there will already be a panel opinion which will indicate the panel's view of the facts. Finally, it was noted that Public Citizen's proposed language would diverge from the language used in Civil Rule 12(a).

D. Form 4

The privacy rules that 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, not all i.f.p. applications require the detail specified in current Form 4; 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 final approval of the proposed amendment.

1. Text of Proposed Amendment

The Committee recommends final approval of the proposed amendment to Form 4 as set out in the enclosure to this report.

2. Changes Made After Publication and Comment

No changes were made to the proposed amendment to Form 4 after publication and comment.

III. Information Items

The Appellate Rules Committee and the Civil Rules Committee have formed a new Civil / Appellate Subcommittee. This subcommittee will investigate issues of common interest to the Civil and Appellate Rules Committees and will provide a framework for those two Committees to share insights and engage in joint study. To represent the Civil Rules Committee, Judge Kravitz has named Judge Steven Colloton, Chief Judge Vaughn Walker, and Peter Keisler as members of the subcommittee. Judge Kermit Bye, Maureen Mahoney and Douglas Letter have agreed to serve as the Appellate Rules Committee's representatives on the subcommittee. Judge Colloton will likely serve as the subcommittee's chair. The subcommittee is likely to conduct its deliberations by telephone and email rather than by meeting in person. Professors Cooper and Struve will serve as reporters to the subcommittee.

The Civil / Appellate Subcommittee will facilitate the consideration of a number of current issues. One concerns the implications of *Bowles v. Russell*, 551 U.S. 205 (2007), for the nature of appeal deadlines (as well as other litigation deadlines). Another set of issues concerns Rule 4(a)(4)'s treatment of timing with respect to tolling motions. One commentator has pointed out that there can sometimes be a time gap between the entry of an order resolving a tolling motion and the entry of an amended judgment pursuant to that order; a possible way to address this issue would be to amend Civil Rule 58(a) to explicitly include orders granting postjudgment motions among the orders for which a separate document is required. Other commentators have suggested amending Rule 4(a) so that an initial notice of appeal encompasses appeals from any subsequent order disposing of postjudgment motions. A third topic to be considered by the Subcommittee concerns the viability of "manufactured finality" as a means of securing appellate review. Roughly speaking, the term "manufactured finality" refers to a plaintiff's attempt to "manufacture" a final judgment – so as to secure immediate appellate review of an order dismissing some of the litigant's claims – by voluntarily dismissing all remaining claims.

The Committee has asked its reporter to prepare a proposed draft of amendments to Rules 13 and 14 that would address the treatment of petitions for permission to bring interlocutory appeals from Tax Court orders. The Committee is also studying proposals to amend Rule 5 to provide for the inclusion (in the appendix to a petition for permission to appeal) of key documents from the district court record; to amend Rule 32 to provide for 1.5-spaced as opposed to double-spaced briefs and to provide for briefs to be printed on both sides of the page; and to amend the Rules to allow the use of digital audiorecordings in place of written transcripts for the purposes of the record on appeal. As noted elsewhere in this report, the Committee recently added to its study agenda a proposal to amend Rule 1(b) to include federally recognized Indian tribes within the definition of the term "state."

The Committee discussed and retained two other items on its agenda. One of those items relates to Rule 4(c)'s inmate-filing provision. Judge Diane Wood asked the Committee to consider whether Rule 4(c)(1)'s "prison mailbox rule" should be clarified. At its three most recent meetings, the Committee has discussed a number of relevant questions, including whether Rule 4(c)(1) requires prepayment of postage when the institution in question has no legal mail system; whether the answer changes when the institution has a legal mail system and the inmate

uses it; and whether, when the Rule requires prepayment of postage, that requirement is jurisdictional. Participants in the Committee's most recent discussion suggested that it could be beneficial to await further development of the caselaw as well as developments in the use of electronic filing systems for filings by prison inmates. Accordingly, the Committee retained the inmate-filing issue on its agenda while directing the reporter to monitor those developments. The Committee also discussed as a separate agenda item suggestions made by Chief Judge Frank H. Easterbrook and the ABA's Council of Appellate Lawyers as part of their respective comments on the pending proposal to amend Rule 29(c) (discussed earlier in this report). These commentators suggest that the Committee should rethink the scope of Rule 26.1's disclosure requirement. They also suggest that the Committee revise the part of Rule 29(c) that requires amicus briefs filed by a corporation to include "a disclosure statement like that required of parties by Rule 26.1." Participants in the Committee's spring 2009 meeting noted the need for coordination with the other advisory committees in considering any such changes. Participants also noted that the Codes of Conduct Committee has recently raised a number of questions concerning disclosure requirements and that future discussions of those questions might provide a context for considering the commentators' suggestions. Thus, the Committee resolved to retain this item on the study agenda and to monitor the topic for further developments.

The Committee removed from its agenda three items. One of those items concerned a suggestion that the Committee consider amending the Appellate Rules to clarify the procedure for amicus briefs with respect to rehearing. Another concerned a question raised by Professor Daniel Meltzer during a prior Standing Committee meeting about postjudgment motion practice. The third item concerned a suggestion that Rule 31 be amended to clarify briefing deadlines in appeals involving multiple parties on a side.

Enclosures

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE[**]

Rule 1. Scope of Rules; Definition; Title

(a) Scope of Rules.

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

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

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

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

Committee Note

Subdivision (b). New subdivision (b) defines the term "state" to include the District of Columbia and any commonwealth or territory of the United States. Thus, as used in these Rules, "state" includes the District of Columbia, Guam, American Samoa, the U.S. Virgin Islands, the Commonwealth of Puerto Rico, and the Commonwealth of the Northern Mariana Islands.

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

CHANGES MADE AFTER PUBLICATION AND COMMENT

No changes were made after publication and comment.

SUMMARY OF PUBLIC COMMENTS

08-AP-001: Benjamin J. Butts. Benjamin J. Butts, of Butts & Marrs in Oklahoma City, Oklahoma, writes to express general support for the proposed amendments to the Appellate Rules.

08-AP-007: Daniel I.S.J. Rey-Bear. Daniel I.S.J. Rey-Bear, a partner at Nordhaus Law Firm, LLP, in Albuquerque, New Mexico, wrote after the close of the comment period to suggest a revision to the proposed amendment to Rule 1(b). He argues that the definition of "state" should also include federally recognized Indian tribes. He points out that Native American tribes, like states, are sovereign governments. That all three branches of the federal government recognize this fact, he suggests, "support[s] classification of federally recognized Indian tribes as 'states' along with the District of Columbia, federal territories, commonwealths, and possessions." He notes the interpretive canon that provides that statutes should be liberally construed in favor of Native American tribes, and he cites court decisions that "have found tribes to qualify as 'territories' under various statutes." He notes that tribes "have greater status than territories."

Mr. Rey-Bear also focuses his arguments on the proposed definition's effect on the operation of Rules 22, 29, 44 and 46. He asserts that it would be appropriate for Rule 22 to apply to habeas proceedings under the Indian Civil Rights Act by petitioners seeking to challenge their detention by an Indian tribe. He argues that Native American tribes should be treated like states for purposes of Rule 29's amicus-filing provisions, and notes that this concern "is the main reason" for his submission of the comment. He points out that "[l]ike states, Indian tribes often find the need to submit amicus briefs in important cases affecting their sovereign interests," and he argues that tribes should not be required to seek party consent or court permission for such filings. Noting the proposed amendment to Rule 29(c), Mr. Rey-Bear argues that treating tribes like states "is especially warranted given the further disclosure requirements that the proposed revision to Rule 29 will impose on nongovernmental amicus briefs." Turning to Rule 44, Mr. Rey-Bear argues that "[i]t would be very appropriate and valuable for Indian tribes to be included in the notice and certification provided for in this Rule." Finally, Mr. Rey-Bear asserts that the inclusion of Indian tribes

within Rule 1(b)'s definition would also function appropriately in connection with Rule 46's attorney-admission provision; "tribally licensed attorneys should be entitled to the same eligibility as attorneys who are admitted to practice solely in a territory."

Rule 29. Brief of an Amicus Curiae

(a) When Permitted. The United States or its officer or agency~~,~~ or a state ~~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.

* * * * *

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

~~(1)~~(2) a table of contents, with page references;

~~(2)~~(3) a table of authorities — cases (alphabetically arranged), statutes, and other authorities — with references to the pages of the brief where they are cited;

~~(3)~~(4) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;

(5) unless the amicus curiae is one listed in the first sentence of Rule 29(a), a statement that indicates whether:

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

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

(C) a person – other than the amicus curiae, its members, or its counsel – contributed money that was intended to fund preparing or

submitting the brief and, if so, identifies each such person;

~~(4)~~**(6)** an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review; and

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

* * * * *

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). The subparts of subdivision (c) are renumbered due to the relocation of an existing provision in new subdivision (c)(1) and the addition of a new provision in new subdivision (c)(5). Existing subdivisions (c)(1) through (c)(5) are renumbered, respectively, (c)(2), (c)(3), (c)(4), (c)(6) and (c)(7). The new ordering of the subdivisions tracks the order in which the items should appear in the brief.

Subdivision (c)(1). 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)(1) for ease of reference.

Subdivision (c)(5). New subdivision (c)(5) sets certain disclosure requirements concerning authorship and funding. Subdivision (c)(5) exempts from the authorship and funding

disclosure requirements entities entitled under subdivision (a) to file an amicus brief without the consent of the parties or leave of court. Subdivision (c)(5) 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)(5) also requires amicus briefs to state whether any other "person" (other than the amicus, its members, or its counsel) contributed money with the intention of funding the brief's preparation or submission, and, if so, to identify all such persons. "Person," as used in subdivision (c)(5), 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)(5). *Cf.* Eugene Gressman et al., Supreme Court Practice 739 (9th ed. 2007) (Supreme Court Rule 37.6 does not "require disclosure of any coordination and discussion between party counsel and amici counsel regarding their respective arguments . . . .").

CHANGES MADE AFTER PUBLICATION AND COMMENT

No changes were made to the proposed amendment to Rule 29(a). However, the Committee made a number of changes to Rule 29(c).

One change concerns the third subdivision of the authorship and funding disclosure requirement. As published, that third subdivision would have directed the filer to "identif[y] every person — other than the amicus curiae, its members, or its counsel — who contributed money that was intended to fund preparing or submitting the brief." A commentator criticized this language as ambiguous, because the commentator argued that the provision as drafted did not make clear whether it is necessary for the brief to state that no such persons exist (if that is the case). The Committee revised this portion of the requirement to require a statement that indicates whether "a person – other than the amicus curiae, its members, or its counsel – contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person."

Another set of changes concerns the placement of the disclosure requirement. As published, the Rule 29(c) proposal would have placed the new authorship and funding disclosure requirement in a new subdivision (c)(7) and would have moved the requirement of a corporate disclosure statement from the initial block of text in Rule 29(c) to a new subdivision (c)(6). New subdivision (c)(7) would have directed that the authorship and funding disclosure be made "in the first footnote on the first page." Commentators criticized this directive as ambiguous and suggested that a better approach would be to direct that the authorship and funding disclosure follow the statement currently required by existing Rule 29(c)(3). The Committee found merit in these suggestions and decided to add the authorship and funding disclosure provision to existing subdivision (c)(3). However, a further revision to the structure of subdivision (c) was later made in response to style guidance from Professor Kimble, as discussed below.

Subsequent to the Appellate Rules Committee's meeting, the language adopted by the advisory committee was circulated to Professor Kimble for style review. Professor Kimble argued that the authorship and funding disclosure provision should be placed in a separate subdivision rather than being placed in existing subdivision (c)(3). In the light of the Appellate Rules Committee's goal of listing the required components in the order in which they should appear in the brief, the decision was made to place the authorship and funding disclosure provision in a new subdivision following existing subdivision (c)(3). Though this requires renumbering the subparts of Rule 29(c), those subparts have only existed for about a decade (since the 1998 restyling) and citations to the specific subparts of Rule 29(c) do not appear in the caselaw. Given that this change entails renumbering some subparts of Rule 29(c), it also seems advisable to

move the corporate disclosure provision into a new subdivision (c)(1) and to renumber the subsequent subdivisions accordingly. Professor Kimble also suggested two stylistic changes to the language of what will now become new subdivision (c)(5). First, instead of using the language "unless filed by an amicus curiae listed in the first sentence of Rule 29(a)," the provision now reads "unless the amicus curiae is one listed in the first sentence of Rule 29(a)." Second, the words "indicates whether" have been moved up into the introductory text in 29(c)(5) instead of being repeated at the outset of the three subsections (29(c)(5)(A), (B) and (C)). Also, a comma has been added to what will become Rule 29(c)(3).

SUMMARY OF PUBLIC COMMENTS

08-AP-001: Benjamin J. Butts. Benjamin J. Butts, of Butts & Marrs in Oklahoma City, Oklahoma, writes to express general support for the proposed amendments to the Appellate Rules.

08-AP-002: Washington Legal Foundation. Richard A. Samp writes on behalf of the Washington Legal Foundation to suggest that the language of proposed Rule 29(c)(7) should be clarified. As he states, "[w]hile WLF has no objection to the objective of the proposed change, it is concerned by a potential ambiguity in its wording." As published, Rule 29(c)(7)(C) requires the relevant footnote to "identif[y] every person — other than the amicus curiae, its members, or its counsel — who contributed money that was intended to fund preparing or submitting the brief." WLF is concerned that this language could be read in two ways: it could be read to permit the footnote to remain silent on the subject if no such person exists, but it could alternatively be read to require an affirmative statement that no such person exists. WLF asserts that the latter interpretation is the one that the U.S. Supreme Court Clerk's Office has conveyed to Mr. Samp and others in response to inquiries about the meaning of the similar language in Supreme Court Rule 37.6. WLF notes that compliance with the Supreme Court's interpretation of Rule 37.6 does not pose a problem. But WLF expresses concern that different circuits could vary in their interpretations of the language in proposed Appellate Rule 29(c)(7)(C), and that circuit-to-circuit variation on this point could result in "unsuspecting amicus filers ... hav[ing] their briefs bounced." WLF does not take a position concerning whether Rule 29(c)(7)(C) should require an affirmative statement if no such person exists; it merely suggests that the Rule should be drafted so as to make the answer to that question clear. For instance, WLF suggests,

proposed Rule 29(c)(7)(C) could be re-drafted to read "~~identifies every~~ indicates whether a person — other than the amicus curiae, its members, or its counsel — ~~who~~ contributed money that was intended to fund preparing or submitting the brief; and, if so, identifies all such persons."

08-AP-003. Chief Judge Frank H. Easterbrook. Chief Judge Easterbrook makes stylistic comments about the proposed new provision in Rule 29(c)(7) and a substantive comment about existing language that would be placed in Rule 29(c)(6).

In proposed Rule 29(c)(7)(A), Chief Judge Easterbrook asserts that "author" is a noun rather than a verb, and he suggests replacing "authored" with "wrote." Chief Judge Easterbrook finds proposed Rule 29(c)(7)(B) wordy and vague. He asks, "[d]oes this language suggest that a cash contribution used to prepare an amicus brief need not be reported if the donor did not 'intend' to support the brief?" He suggests changing Rule 29(c)(7)(B) to read as follows: "indicates whether a party or a party's counsel contributed money ~~that was intended to fund preparing or submitting~~ toward the cost of the brief ..." (Chief Judge Easterbrook does not mention Rule 29(c)(7)(C) specifically, but this comment would seem to apply equally to that subsection.)

Rule 29(c) currently states that "[i]f an amicus curiae is a corporation, the brief must include a disclosure statement like that required of parties by Rule 26.1." For ease of reference and to parallel the structure of new Rule 29(c)(7), the proposed amendments (as published) would move this statement to a new Rule 29(c)(6) stating that amicus briefs must include, "if filed by an amicus curiae that is a corporation, a disclosure statement like that required of parties by Rule 26.1." Chief Judge Easterbrook suggests that this requirement is both overinclusive (because it covers entities such as municipalities, educational institutions, and prelates) and underinclusive (because it fails to cover entities such as partnerships, trusts and limited liability companies). Chief Judge Easterbrook notes that Rule 26.1's disclosure requirement likewise targets corporate parties, and he argues that both Rules' focus on corporations "needs some attention."

08-AP-004. Luther T. Munford. Luther T. Munford, a partner at Phelps Dunbar LLP in Jackson, Mississippi, suggests a number of changes in the proposed Rule.

Mr. Munford notes that the directive that the Rule 29(c)(7) statement be placed "in the first footnote on the first page" is ambiguous "because typically briefs have a page 'i' as well as a page '1'." And in contrast to Supreme Court briefs, in which page 'i' is the page for the question(s) presented, page 'i' in briefs in the courts of appeals will feature the table of contents (though if a corporate disclosure statement is required it will appear on page i). Mr. Munford suggests directing that the Rule 29(c)(7) statement appear "in a footnote to the Rule 29(c)(3) statement."

More substantively, Mr. Munford takes issue with the proposed Rule's approach. Instead of merely requiring disclosure, Mr. Munford suggests that the Rule "should prohibit parties from authoring or paying for amicus briefs." Merely imposing a disclosure requirement, he argues, "implies that in some circumstances it might be acceptable for a party to contribute to an amicus brief." To implement his preferred approach, Mr. Munford suggests that the required disclosure include a statement "that no counsel for a party authored the brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief." Alternatively, if this prohibition is not adopted, Mr. Munford suggests that the rule "simply require the disclosure of funding sources (and authorship if desired) without any special discussion of party sponsorship."

Mr. Munford acknowledges that his suggestions would cause Rule 29(c)(7) to diverge from Supreme Court Rule 37.6. He suggests that the rulemakers could "give the Supreme Court an explicit choice by sending the Court a 'preferred rule' along with one based on Rule 37.6, and allowing the Supreme Court to choose between them."

08-AP-005. Council of Appellate Lawyers. The Council of Appellate Lawyers (a bench-bar organization that is part of the Appellate Judges Conference of the American Bar Association's Judicial Division) offers detailed suggestions on the proposed amendment.

The Council's comments address the placement of both the corporate disclosure statement and the brief-preparation disclosure statement. As to the corporate disclosure statement, the Council does not appear to disagree with the Committee Note's directive that the statement should be placed before the table of contents. But the Council argues that the guidance on placement should appear in the text of the Rule, not just in the Note. The Council suggests "that the proposed subdivision (c)(6) prescribe the same location for this

disclosure, and in substantially the same language, as Rule 28(a)(1) does for a party." As to the disclosure required (in the published Rule) by subdivision (c)(7), the Council argues that the disclosure should appear in the text (not in a footnote) directly after the amicus-interest statement required by Rule 29(c)(3). The Council suggests that the contents of proposed subdivision (c)(7) "could be added to subdivision (c)(3), which would preserve the logical ordering of the brief's contents without disturbing the existing numbering of the subdivisions." For the future, the Council suggests that the Committee consider "revising Rule 29(c) along the lines of Rule 28(b), and then specifying the placement of those contents that are specific to amicus curiae briefs."

The Council suggests expanding the coverage of Rule 26.1's disclosure requirement "to apply to any person filing or moving for permission to file a brief as amicus curiae. Otherwise, a judge may consider a motion for permission to file a brief as amicus curiae without being aware of facts that might cause the judge to consider recusal." If this change is made in Rule 26.1, then the Council also suggests revising Rule 29(c) to refer to "the same disclosure statement" as that required of parties by Rule 26.1 rather than the current wording, which refers to "a disclosure statement like that required of parties by Rule 26.1." The Council is concerned that the current use of the word "like" might be read to permit "some degree of difference" between the amicus's and the party's disclosures.

The Council suggests that in subdivision (c)(7)(A) and (B) "states" should replace "indicates." In subdivision (c)(7)(A), the Council believes further guidance is necessary on the meaning of "authored the brief ... in part." The Council argues that the topic "is too important to be left to a Committee Note." The Council suggests that the text of the Rule incorporate the explanation from the Supreme Court Practice treatise, which states that authorship entails "an active role in writing or rewriting a substantial or important 'part' of the amicus brief, ... something more substantial than editing a few sentences."

The Council suggests that subdivision (c)(7)(A) "might be broadened to read, 'whether a *party or the* party's counsel *or other representative* authored the brief in whole or in part."

The Council asserts that "subdivision (c)(7)(B) is embraced within subdivision (c)(7)(C)," and thus that "the two subdivisions can be merged to require disclosure of whether there was outside funding

... and, if so, to require identification of each person who provided funding."

The Council suggests that the Committee Note cite the current edition of the Supreme Court Practice treatise rather than the prior edition (which was the current edition at the time the Committee Note was first prepared).

08-AP-006. Steven Finell. Mr. Finell, who chairs the Rules Committee of the ABA's Council of Appellate Lawyers, concurs in the Council's comments and writes separately to add his "personal views ... on policy and draftsmanship."

As to policy, Mr. Finell agrees with Mr. Munford that "it is improper for a party to fund or write any substantial part" of an amicus brief. However, Mr. Finell suggests that "prohibition by rule could provoke a legal challenge of the rule, either under the First Amendment or as exceeding the rule-making authority conferred by the Rules Enabling Act." He notes that requiring disclosure is likely to have the same effect, in practice, as a prohibition. He suggests, however, that Rule 29 could be improved by the addition of text that expresses the view in Supreme Court 37.1, which provides: "An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored."

As to drafting, Mr. Finell suggests that the Advisory Committee "might [have] done better [by] drafting the proposed disclosure amendments to Rule 29 on a clean slate, rather than following so closely the text of" Supreme Court Rule 37.6. He objects that proposed Rule 29(c)(7) departs from the "established style" of the Appellate Rules. He contrasts the proposed Rule's use of "indicates" with the use of the verb "state" elsewhere in the Appellate Rules. And he contrasts the proposed Rule's use of "authored" with the use of the verb "prepare" elsewhere in the Appellate Rules.

08-AP-007: Daniel I.S.J. Rey-Bear. Daniel I.S.J. Rey-Bear, a partner at Nordhaus Law Firm, LLP, in Albuquerque, New Mexico, wrote after the close of the comment period to suggest a revision to the proposed amendment to Rule 1(b). Mr. Rey-Bear's comments are discussed above in connection with the proposal concerning Rule 1(b). Mr. Rey-Bear states that the main reason for his comments is to advocate the inclusion of federally recognized Indian tribes among the entities authorized, by Rule 29(a), to file amicus briefs without

party consent or leave of court. Among other considerations, Mr. Rey-Bear states that "the classification of Indian tribes along with other governments under the Appellate Rules is especially warranted given the further disclosure requirements that the proposed revision to Rule 29 will impose on nongovernmental amicus briefs."

Rule 40. Petition for Panel Rehearing

(a) Time to File; Contents; Answer; Action by the Court if Granted.

(1) **Time.** Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment. But in a civil case, ~~if the United States or its officer or agency is a party, the time within which any party may seek rehearing is 45 days after entry of judgment,~~ unless an order shortens or extends the time~~.~~, the petition may be filed by any party within 45 days after entry of judgment if one of the parties is:

(A) the United States;

(B) a United States agency;

(C) a United States officer or employee sued in an official capacity; or

(D) a United States officer or employee sued in an individual capacity for an act or omission

occurring in connection with duties performed on the United States' behalf.

* * * * *

Committee Note

Subdivision (a)(1). Rule 40(a)(1) has been amended to make clear that the 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. In such cases, the Solicitor General needs adequate time to review the merits of the panel decision and decide whether to seek rehearing, just as the Solicitor General does when an appeal involves the United States, a United States agency, or a United States officer or employee sued in an official capacity.

CHANGES MADE AFTER PUBLICATION AND COMMENT

The proposed amendment to Rule 40(a)(1) was published for comment in 2007 along with a proposal to make a similar clarifying amendment to Rule 4(a)(1)(B). But due to possible complications as a result of the Supreme Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007), the Committee decided not to proceed with the proposed amendment to Rule 4(a)(1)(B) and to proceed with the proposed amendment to Rule 40(a)(1) on a standalone basis. That decision led the Committee to delete from the Note to Rule 40(a)(1) a reference to the proposed amendment to Rule 4(a)(1)(B). Apart from that, the Committee made no changes to the proposed Rule 40(a)(1) amendment as released for public comment.

SUMMARY OF PUBLIC COMMENTS

The following comments were received on the jointly-published proposals to amend Rules 4(a)(1)(B) and 40(a)(1).

07-AP-003; 07-BR-015; 07-CR-003; 07-CV-003: Chief Judge Frank H. Easterbrook. Chief Judge Easterbrook criticized the proposals' "stylistic backsliding." He asserted that "[t]reating a proper noun as an adjective ('a United States agency') is not correct;

it is an example of noun plague." Instead, he suggested, "[f]ederal agency' is better, using a real adjective as an adjective. If you have some compelling need to used 'United States,' then say 'agency of the United States' (etc.)."

07-AP-011: Public Citizen Litigation Group. Brian Wolfman wrote on behalf of Public Citizen Litigation Group to express general support for the proposed amendments, but to suggest one change. Public Citizen was concerned that proposed Rule 4(a)(1)(B)(iv) and proposed Rule 40(a)(1)(D) could be read to exclude instances when the court of appeals ultimately concludes that the federal officer's or employee's act did *not* occur "in connection with duties performed on the United States' behalf." Public Citizen argued that this possibility creates a risk that appellants might rely on the longer appeal time only to have their appeals dismissed due to a ruling by the court of appeals on this factual question. Public Citizen argued that the wording should be changed to make clear that the extended time periods' availability (under 4(a)(1)(B)(iv) and 40(a)(1)(D)) turns on the nature of the act *as alleged by the plaintiff* rather than on the nature of the act *as ultimately found by the court.* Public Citizen suggested that this could be achieved by changing "an act or omission occurring in connection with" to read "an act or omission alleged to have occurred in connection with."

07-AP-014: United States Solicitor General. United States Solicitor General Paul D. Clement wrote in support of the proposed amendments to Rules 4(a)(1) and 40(a)(1). He argued that these amendments "would be consistent with the rules governing the district courts, and will serve important policy interests." (The Department of Justice subsequently withdrew its support for the proposed amendment to Rule 4(a)(1)(B).)

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

* * * * *

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: _____

CHANGES MADE AFTER PUBLICATION AND COMMENT

No changes were made after publication and comment.

SUMMARY OF PUBLIC COMMENTS

08-AP-001: Benjamin J. Butts. Benjamin J. Butts, of Butts & Marrs in Oklahoma City, Oklahoma, writes to express general support for the proposed amendments to the Appellate Rules.