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

DATE: December 11, 2008

TO: Judge Lee H. Rosenthal, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Judge Carl E. Stewart, Chair
Advisory Committee on Appellate Rules

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on November 13 and 14, 2008, in Charleston, South Carolina. The Committee gave final approval to a proposed amendment to Rule 40(a)(1), and it removed one item from its study agenda.

Part II of this report discusses the Committee's request for final approval of the proposed amendment to Rule 40(a)(1). Part III sets forth a discussion item concerning the Committee's recommendation that appropriate steps be taken to improve district court compliance with Civil Rule 58's separate document requirement. Part IV covers other matters.

The Committee has tentatively scheduled its next meeting for April 16-17, 2009.

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

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

II. Action Item: Request for Final Approval of Proposed Amendment to Rule 40(a)(1)

The Committee proposes to amend Rule 40(a)(1) to 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*, 127 S. Ct. 2360 (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, 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Accordingly, the Department of Justice (which initially proposed the Rule 4(a)(1)(B) and Rule 40(a)(1) amendments) has withdrawn its proposal to amend Rule 4(a)(1)(B).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.

A. Text of Proposed Amendment and Committee Note

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

B. 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 which 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).

III. Discussion Item: Recommendation Concerning District Court Compliance With Civil Rule 58

At its November meeting, the Committee voted to recommend to the Standing Committee that appropriate steps be taken to improve district court compliance with Civil Rule 58's separate document requirement. The Committee's concerns arise from its discussion of the possible effects of noncompliance with the separate document requirement in a case where an appeal is filed and then a belated motion is made which suspends the effect of the appeal. The concern would arise in cases where a separate document is required but not provided; an appeal is commenced; and a party subsequently files a tolling motion which is timely (due to the lack of a separate document) and which suspends the effectiveness of the notice of appeal.

The Committee's discussion of this issue at its spring 2008 meeting led to several lines of inquiry by some of those who had participated in that discussion. Over the summer, the importance of compliance with the separate document requirement was raised with the district clerks in the Tenth Circuit, and this led to a salutary increase in the level of compliance in that circuit. Inquiries by a member of the Committee within his own district (not in the Tenth Circuit) led him to conclude that compliance with the requirement could be improved in that district.

Committee members believe that the best way to approach this issue at this time is through outreach efforts to improve compliance rates rather than through a rule amendment. Members noted the importance of coordinating, on this issue, with the Civil Rules Committee and the Bankruptcy Rules Committee. Meeting participants suggested that it would be useful if the Director of the Administrative Office were to write to district judges and district clerks to highlight the importance of complying with the separate document requirement. The letter might enclose sample documents which show how easy it is to comply. In addition to a letter from the Director, other measures could also help to raise awareness of the issue; for example, it could be discussed in newsletters. And perhaps a feature might be added to the CM/ECF system that would prompt judges or clerks to provide a separate document when required.

IV. Information Items

The Committee continues to discuss the implications of *Bowles v. Russell*, 127 S. Ct. 2360 (2007), for appeal-related deadlines. In the lower courts, a few trends can be identified. Appeal deadlines set by statute – such as the 30-day and 60-day time periods set by 28 U.S.C. § 2107 for civil appeals – are jurisdictional. Appeal deadlines set entirely by Rule rather than statute – such as a criminal defendant's appeal deadline under Appellate Rule 4(b)(1)(A) – appear likely to be non-jurisdictional claim-processing rules. And there is a developing circuit split concerning hybrid deadlines which implicate both a rule-based and a statutory time period; one example is the treatment of the Civil Rules' deadlines for making postjudgment motions which, if timely made, suspend the time for taking a civil appeal. The Committee has resolved to consider – in coordination with the other Advisory Committees – the possibility of drafting proposed legislation that could rationalize the treatment of appeal deadlines by making clear which existing and future appeal deadlines are to be treated as jurisdictional and which are not.

The Committee discussed and retained on its agenda a number of proposals. The Committee is considering whether to amend Rule 4(c) to clarify various aspects of practice with respect to the timeliness of inmates' notices of appeal. The Committee is considering possible changes to Form 4 (concerning applications to proceed in forma pauperis); these changes would be in addition to the privacy-related amendments to Form 4 that are currently out for comment. The Committee is taking a wait-and-see approach to certain proposals that are not yet ripe for action, such as a proposal to amend Rule 3(d) concerning service of the notice of appeal (in light of the ongoing shift to electronic filing); an item concerning the Rules implications of the Judicial Conference's mandatory conflict screening policy; and an item concerning Rule 25(a)(5) and the publication of alien registration numbers in judicial opinions. The Committee intends to seek the input of the Bankruptcy Rules Committee concerning a possible amendment to remove an ambiguity in Rule 6(b)(2)(A)(ii) (which addresses the effect of motions under Bankruptcy Rule 8015 on the time to appeal from a judgment of a district court or bankruptcy appellate panel exercising appellate jurisdiction in a bankruptcy case). The Committee is considering the Rules framework for interlocutory appeals in tax cases. The Committee has discussed, but has not taken any action on, a proposal to address amicus briefs with respect to rehearing. At the Committee's November meeting some members expressed support for the view that local rules on the amicus-brief topic would be useful, but other members argued that the Committee itself should not take action to seek the adoption of such local rules; a motion to direct that a proposed letter on the subject be drafted (for consideration at the Committee's spring meeting) failed.

The Committee looks forward to collaborating with the Civil Rules Committee on several issues that are of interest to both Committees. One such issue is whether to amend Rule 4(a)(4) to refine the timing and scope of notices of appeal (with respect to challenges to the disposition of post-judgment motions). Another such item concerns the possibility of a Rule change to address the doctrine of "manufactured finality" – i.e., whether rulemaking is desirable to address the possibility of avenues (other than Civil Rule 54(b) or 28 U.S.C. § 1292(b)) for taking an appeal when the district court has dismissed a plaintiff's most important claims but the plaintiff's other, peripheral, claims survive. The Committee removed from its study agenda a proposal to

amend Rule 7 to clarify the scope of "costs" for which an appeal bond may be required; but the Committee will follow with interest any further consideration by the Civil Rules Committee of the related topic of appeals by class action objectors.

A number of Appellate Rules amendments are currently on track to take effect on December 1, 2009, assuming that the Supreme Court approves them and assuming that Congress takes no contrary action. The set of amendments includes the proposed clarifying amendment to Rule 26(c)'s three-day rule; new Rule 12.1 (and new Civil Rule 62.1) concerning indicative rulings; an amendment that removes an ambiguity in Rule 4(a)(4)(B)(ii); an amendment to Rule 22 that parallels amendments to the habeas and Section 2255 rules; and the package of time-computation amendments.

Among the proposed amendments published for comment this past August were three Appellate Rules items: a proposed amendment to Rule 1 that would define the term "state" for purposes of the Appellate Rules; proposed amendments to Rule 29 that would revise that Rule in the light of the proposed Rule 1 amendment and that would impose an amicus brief disclosure requirement modeled on Supreme Court Rule 37.6; and proposed amendments to Form 4 to bring that form into compliance with the new privacy requirements. The Committee looks forward to discussing at its spring 2009 meeting the comments submitted on these proposals.

PROPOSED AMENDMENT TO THE FEDERAL RULES OF APPELLATE PROCEDURE*

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

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

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

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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*, 127 S. Ct. 2360 (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).)