

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

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MEMORANDUM

DATE: December 7, 2009

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

FROM: Judge Jeffrey S. Sutton, 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 5 and 6 in Seattle, Washington. The Committee removed three items from its study agenda and discussed a number of other items.

The Committee has tentatively scheduled its next meeting for April 8 and 9, 2010.

Detailed information about the Committee's activities can be found in the Reporter's draft of the minutes of the November meeting¹ 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. Information Items

The Committee removed from its agenda three items. One of those items concerned a suggestion that the Committee consider amending Appellate Rule 29(e) to define the 7-day filing deadline for amicus briefs in “calendar days.” The 2009 amendment to Appellate Rule 26(a) imposes a days-are-days approach to computing all time periods, no matter how short, and this change renders the Rule 29(e) proposal moot. The other two items removed from the study agenda concerned proposals to amend Appellate Rule 4(a) to provide that a previously-filed notice of appeal encompasses challenges to later dispositions of postjudgment motions. Such

proposals posed significant drafting challenges, and members did not see a need for the proposed amendment.

The Committee discussed the proposal to amend Rule 40(a) to clarify the time for seeking rehearing in cases where a U.S. officer or employee is sued in his or her individual capacity. This proposal was remanded to the Committee for further consideration in the light of the Supreme Court’s decision in *United States ex rel. Eisenstein v. City of New York*, 129 S. Ct. 988 (2009). The Committee is considering the possibility of recommending a coordinated set of amendments to Appellate Rule 4(a)(1) and 28 U.S.C. § 2107 as well as to Appellate Rule 40(a). The Rule 4(a)(1) and Section 2107 amendments would clarify the applicability of the 30-day and 60-day appeal periods in cases involving U.S. officers or employees. Action on this possibility was deferred until the Committee’s spring meeting to afford the Department of Justice and other participants time to consider whether it is advisable to seek legislation concerning Section 2107 and to consider carefully the wording of any proposed amendment.

The Committee discussed but did not vote on a proposal to amend Title III of the Appellate Rules to address interlocutory appeals from the Tax Court. Prior to the Committee’s spring 2010 meeting, the Committee will informally solicit the views of interested constituencies (such as judges of the Tax Court, relevant bodies within the ABA, and specialists within the Department of Justice) concerning whether such amendments would be useful and, if so, how they should be drafted.

The Committee also discussed, without voting on, a proposal to amend Appellate Rule 4(a)(4) to address a current peculiarity in that Rule. The issue arises from the observation that under Rule 4(a)(4)(B) the time to appeal from an amended *judgment* runs from entry of the *order* disposing of the last remaining postjudgment motion. The proposed amendment would provide that the appeal time runs from the latest of the entry of such an order or the entry of any amended judgment. Working through the Civil / Appellate Subcommittee, the Appellate Rules Committee is coordinating its consideration of this proposal with the Civil Rules Committee. A related amendment to Civil Rule 58(a) is also under consideration.

The meeting provided an occasion to discuss several issues of interest to both the Appellate Rules Committee and the Bankruptcy Rules Committee. The Bankruptcy Rules Committee's project to revise Part VIII of the Bankruptcy Rules will affect practice in the courts of appeals, for example by addressing procedures for direct appeals from the bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2). The Part VIII project will provide an occasion to coordinate the two Committees' work on that issue and other matters of common interest such as a clarifying amendment to Appellate Rule 6.

The Committee continued its discussions of a number of existing agenda items, including proposals to amend Form 4 (concerning applications to proceed *in forma pauperis*); to consider permitting double-sided and/or 1.5-spaced printing of briefs; and to amend Rule 29 with respect to the treatment of amicus filings by Native American tribes.

The Committee discussed a couple of other matters pending before other advisory Committees. The Committee noted the Civil Rules Committee's discussion of the "three-day rule." (In the Appellate Rules, the "three-day rule" is found in Appellate Rule 26(c), which affords additional time if a deadline is measured from service and service is accomplished electronically or by non-electronic means that do not result in delivery on the date of service.) Like the Civil Rules Committee, the Appellate Rules Committee is considering changes to the three-day rule; but the Appellate Rules Committee believes that a wait-and-see approach is currently advisable because the shift to electronic filing is still ongoing in the courts of appeals. The Committee also briefly discussed the Criminal Rules Committee's proposed new Criminal Rule addressing the practice of indicative rulings.