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 5, 2012

TO: Judge Jeffrey S. Sutton, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Judge Steven M. Colloton, Chair
Advisory Committee on Appellate Rules

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on September 27, 2012, in Philadelphia, Pennsylvania. The Committee saluted your work as chair, and wished you well in your new role as chair of the Standing Committee. You kindly invited me to attend the meeting, and I assumed the chair of the advisory committee on October 1, 2012.

At the September meeting, the Committee removed from its agenda three items (concerning sealed appellate filings, criminal appeal deadlines, and pinpoint citations in briefs), and discussed various other items. The Advisory Committee is not presenting any action items for the Standing Committee's January 2013 meeting.

The Committee has scheduled its next meeting for April 22 and 23, 2013, in Washington, DC. Detailed information about the Committee's activities can be found in the Reporter's draft of the minutes of the September meeting and in the Committee's study agenda, both of which are attached to this report.

II. Information Items

The Committee decided not to proceed with a proposed rule amendment concerning the sealing or redaction of appellate briefs. The circuits take varying approaches to sealing and redaction on appeal. In the D.C. and Federal Circuits, litigants are directed to review the record and determine whether any sealed portions should be unsealed at the time of the appeal. In some other circuits, matters sealed below are presumptively maintained under seal in the record on appeal. In the Seventh Circuit, by contrast, the opposite presumption applies: Unless sealing is directed by statute or rule, sealed items in the record on appeal are unsealed after a brief grace period unless a party seeks the excision of those items from the record or unless a party moves to seal those items on appeal.

The Seventh Circuit's approach arises from a strong presumption that judicial proceedings should be open and transparent. During the Committee's discussions, a number of participants expressed support for the Seventh Circuit's approach. But participants also noted that each circuit currently seems happy with its own approach to sealed filings. Ultimately, the Committee decided not to propose a rule amendment on the topic of sealing on appeal. Committee members, however, felt that each circuit might find it helpful to know how other circuits handle such questions. Shortly after the meeting, you wrote to the Chief Judge and Clerk of each circuit to summarize the concerns that have been raised about sealed filings, the various approaches to those filings in different circuits, and the rationale behind the Seventh Circuit's approach.

The Committee removed from its agenda a proposal that Appellate Rule 4(b) be amended to lengthen from 14 days to 30 days the time for a criminal defendant to file an appeal. The Rule allows 30 days for the government to file an appeal. The Committee considered a similar proposal in 2002-04 and decided that no change was warranted. Participants in the September 2012 discussion observed that there are institutional reasons why the government requires more time, and noted that the period between conviction and sentencing provides time for defense counsel to assess possible grounds for appealing the conviction. They also noted that the district court has discretion under Appellate Rule 4(b)(4) to extend the appeal time for good cause – a standard that could be met, for example, if defense counsel needs additional time to assess possible grounds for appealing the sentence. In light of these considerations, members did not perceive a need to amend the Rule.

The Committee also removed from its agenda a proposal that Appellate Rule 28(e) be amended "to require a pinpoint citation to the appendix or record to support each statement of fact and procedural history anywhere in every brief," rather than "only in the statement of facts." Members noted that Rule 28 already does require specific citations in the argument section of a brief: Rule 28(a)(9)(A) requires that the argument contain "citations to the . . . parts of the record on which the appellant relies." After discussion, the Committee decided not to proceed with a proposed rule amendment on this topic.

Three existing items were retained on the agenda to await future developments. First, the Committee briefly considered whether the Appellate Rules should be amended in light of the shift to electronic filing and service. In particular, some participants viewed as anachronistic Appellate Rule 26(c)'s "three-day rule," which adds three days to a given period if that period is measured after service and service is accomplished electronically or by a non-electronic means that does not result in delivery on the date of service. But the discussion did not disclose any aspects of the Appellate Rules that urgently require revision. Committee members noted that it may make sense to wait until the Advisory Committees feel the time is ripe to address these questions jointly.

Second, the Committee revisited the topic of "manufactured finality," which concerns attempts to "manufacture" a final judgment – in order to appeal the disposition of one or more claims – by dismissing the remaining claims in a case without prejudice or conditionally. The Committee noted that the Supreme Court recently granted certiorari in *SEC v. Gabelli*, 653 F.3d 49 (2d Cir. 2011). In *Gabelli*, the Second Circuit's jurisdiction rested on that circuit's precedent holding that an appealable judgment results if a litigant who wishes to appeal the dismissal of its primary claim dismisses all remaining claims and commits not to reassert those claims if the judgment is affirmed, but reserves the right to reinstate the dismissed claims if the court of appeals reverses. The Committee decided to await the Court's decision in *Gabelli* before deciding what, if anything, to do with respect to the topic of manufactured finality.

Third, the Committee retained on its agenda a proposal to further amend the language of Form 4 (concerning applications to proceed *in forma pauperis*). Proposed amendments to Form 4 are currently before the Supreme Court; if the Court approves them and Congress takes no contrary action, those amendments will take effect December 1, 2013. There was no consensus that another amendment to Form 4 is warranted, but the Committee decided for now to retain the item on the agenda.

The Committee discussed two topics that call for consultation with the Civil Rules Committee. One concerns the treatment of appeal bonds in Civil Rule 62. A Committee member has suggested that it would be useful to clarify a number of aspects of practice under Civil Rule 62. In particular, he notes that Civil Rule 62(b) and Civil Rule 62(d) treat separately the period of time during which postjudgment motions are pending and the period of the appeal itself, and he suggests that it would be preferable to treat both those time periods under one unified framework. As any action on this topic probably would involve an amendment to Civil Rule 62, rather than to an Appellate Rule, it seems unlikely that the matter will proceed unless the Civil Rules Committee deems it worthy of attention.

The other topic concerns appeals by class action objectors. The Committee has received a proposal that Appellate Rule 42 be amended to add a provision that would bar the dismissal of an appeal from a judgment approving a class action settlement or fee award if there is any payment in exchange for the dismissal of the appeal. This proposal implicates themes that previously arose in the Civil Rules Committee's discussions leading up to the 2003 amendments to Civil Rule 23. The proposal to amend Appellate Rule 42, however, would go beyond the provisions of Civil Rule 23(e)(5). Here, too, close consultation with the Civil Rules Committee

will be necessary.

The Committee is considering whether to overhaul the treatment of length limits in the Appellate Rules. Appellate Rules 28.1(e) and 32(a)(7) set the length limits for briefs by means of a type-volume formula, with a (shorter) page limit as a safe harbor. But Rules 5, 21, 27, 35, and 40 still set length limits for other types of appellate filings in pages. Members have reported that the page limits invite manipulation of fonts and margins, and that such manipulation wastes time, disadvantages opponents, and makes filings harder to read. The Committee intends to consider whether the time has come to extend the type-volume approach to these other types of appellate filings.