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

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MEMORANDUM

To: Honorable Jeffrey S. Sutton, Chair
Standing Committee on Rules of Practice and Procedure

From: Honorable Steven M. Colloton, Chair
Advisory Committee on Federal Rules of Appellate Procedure

Date: May 8, 2013

Re: Report of the Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on April 22 and 23, 2013, in Washington, DC. The Committee gave final approval to proposed amendments to Appellate Rule 6. The Committee removed nine items from its study agenda and discussed various other agenda items.

Part II of this Report discusses the proposed amendments to Rule 6, for which the Committee seeks final approval. Part III discusses other matters.

The Committee has scheduled its next meeting for October 3-4, 2013, at the Seton Hall Law School in Newark, NJ.

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] The minutes have not yet been approved by the Committee.

II. Action Item for Final Approval: Proposed Amendments to Appellate Rule 6

As discussed in the report of the Bankruptcy Rules Committee, that Committee seeks final approval of proposed amendments to Part VIII of the Bankruptcy Rules – the rules that govern appeals from bankruptcy court to a district court or bankruptcy appellate panel ("BAP"). In tandem with that project, the Appellate Rules Committee seeks final approval of proposed amendments to Appellate Rule 6 (concerning appeals to the court of appeals in a bankruptcy case).

The proposed amendments to Appellate Rule 6 (which are set out in the enclosure to this report) would (1) update that Rule's cross-references to the Bankruptcy Part VIII Rules, (2) amend Rule 6(b)(2)(A)(ii) to remove an ambiguity dating from the 1998 restyling, (3) add a new Rule 6(c) to address permissive direct appeals from the bankruptcy court under 28 U.S.C. § 158(d)(2), and (4) revise Rule 6 to take account of the range of methods available now or in the future for dealing with the record on appeal.

The Appellate Rules do not expressly address permissive direct appeals from a bankruptcy court to a court of appeals under 28 U.S.C. § 158(d)(2). When Section 158(d)(2) was enacted as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), the Appellate Rules Committee decided that no immediate action was necessary, because BAPCPA established interim procedures for administering the new direct appeals mechanism. Some of those interim procedures were displaced by the 2008 addition of subdivision (f) in Bankruptcy Rule 8001. The Committee now considers it appropriate to specify how the Appellate Rules apply to direct appeals under Section 158(d)(2).

Proposed Appellate Rule 6(c) would treat the record on direct appeals differently than existing Rule 6(b) treats the record on bankruptcy appeals from a district court or BAP. Rule 6(b) contains a streamlined procedure for redesignating and forwarding the record on appeal, because in the appeals covered by Rule 6(b), the appellate record already will have been compiled for purposes of the appeal to the district court or the BAP. In a direct appeal, the record generally will be compiled from scratch. The closest model for the compilation and transmission of the bankruptcy court record is the set of rules chosen by the Bankruptcy Rules Part VIII project for appeals from the bankruptcy court to the district court or the BAP. Thus, proposed Rule 6(c) incorporates the relevant Part VIII rules by reference while making some adjustments to account for the particularities of direct appeals to the court of appeals.

Both the Bankruptcy Rules Part VIII project and the project to revise Appellate Rule 6 have highlighted changes in the treatment of the record. The Appellate Rules were drafted on the assumption that the record on appeal would be available only in paper form. The proposed Part VIII Rules are drafted with a contrary presumption in mind: The default principle under those Rules is that the record will be made available in electronic form. In revising Rule 6(b) and in drafting new Rule 6(c), the Appellate Rules Committee adopted language that can accommodate the various ways in which the lower-court record could be made available to the

court of appeals – e.g., in paper form, in electronic files that can be sent to the court of appeals, or by means of electronic links. Such language seems advisable in the light of the shift to electronic filing; and such language seems particularly salient in the case of proposed Rule 6(c) because that Rule will incorporate by reference the Part VIII Rules that deal with the record on appeal.

A. Text of proposed amendments and Committee Note

The Committee recommends final approval of the proposed amendments to Rule 6 as set out in the enclosure to this report.

B. Changes made after publication and comment

The Committee received one comment on the proposed amendments to Rule 6, from Judge S. Martin Teel, Jr., a United States Bankruptcy Judge in the District of Columbia. Judge Teel's suggestions are described in the enclosure to this report. The Committee decided that the suggestions warrant further study, but that it was not advisable to implement them in the context of the current proposal. Instead, the Committee added Judge Teel's suggestions to its agenda for future consideration. The Committee made no change in the proposal as published.

III. Information Items

At its April 2013 meeting, the Committee reviewed, and removed from its agenda, a number of items that had lingered on the docket for some years. These items concerned the operation of Civil Rule 58(a)'s separate document requirement; the possibility of permitting 1.5-spaced or double-sided briefs; the use of audiorecordings in lieu of transcripts; appendices to petitions for permission to appeal; appellate costs; mandamus practice under the Crime Victims' Rights Act; and an inquiry from the Committee on Federal-State Jurisdiction concerning appellate review of remand orders. Each of these items is discussed in more detail in the minutes of the April meeting.

The Committee also discussed, and decided to remove from its agenda, an item that arose from *Chafin v. Chafin*, 133 S. Ct. 1017 (2013). The opinions in *Chafin* underscore the need for prompt disposition of proceedings under the International Child Abduction Remedies Act. The Committee felt, however, that this issue is best addressed by judicial education rather than by an attempt to establish docket priorities by court rule.

The Committee is considering two possible amendments to Rule 4's treatment of the deadlines for filing notices of appeal. One project arises from the circuits' differing interpretations of the term "timely" in Rule 4(a)(4) (which tolls the time to take a civil appeal "[i]f a party timely files" certain motions). A lopsided circuit split has developed concerning whether a motion filed within a purported extension of a non-extendable deadline under Civil Rules 50, 52, or 59 counts as "timely" under Rule 4(a)(4), and the Committee is considering

whether and how to amend the Rule to answer this question.

A second project concerns Rule 4(c)(1)'s inmate-filing provision for notices of appeal. The Committee is considering amendments to the Rule that might address, *inter alia*, whether an inmate must prepay postage in order to benefit from the inmate-filing rule; whether and when an inmate must provide a declaration attesting to the circumstances of the filing; whether the inmate must use a legal mail system when one exists in the relevant institution; and whether a represented inmate can benefit from the inmate-filing rule.

The Committee is considering two projects that would address requirements for filings in the courts of appeals. The first concerns length limits. The Rules set length limits for briefs using a type/volume formula plus a safe harbor in the form of a (shorter) page limit. But the length limits for rehearing petitions and some other papers are set in pages. The Committee is considering two possible options. One option would replace the page limits with a type/volume-plus-safe-harbor provision modeled on the Rules' length limits for briefs. The other option would set type/volume limits for briefs prepared on computers and would set an equivalent limit, denoted in pages, for briefs prepared without the aid of a computer. The Committee's deliberation also brought to light the potential that the 1998 amendments to Rule 32(a)(7), adopting a type/volume limitation of no more than 14,000 words for a principal brief, may have caused an increase in the length of the average appellate brief. The Committee may consider whether that word count should be adjusted as part of the length-limit project.

The second brief-related project concerns the possibility of addressing amicus filings in connection with petitions for panel rehearing and/or rehearing en banc. The proposal that is under consideration would not require a court of appeals to accept such filings, but would specify length and timing rules for those filings when a court chooses to permit them.

The Committee has on its docket two items concerning appellate jurisdiction that require coordination with other Advisory Committees. One item concerns the possibility of adopting a rule amendment to address the practice of "manufactured finality" – roughly speaking, the practice whereby an appellant seeks to render the ruling on its primary claim final and appealable by dismissing all other remaining claims. There is a conflict in authority about what procedure is sufficient to achieve finality, and this item was the subject of prior discussions in the Civil / Appellate Subcommittee. The Appellate Rules Committee reviewed the topic at its April meeting in an effort to reach a decision on how to proceed. A substantial majority of the committee favored an approach that would amend the Rules to make clear that a party can establish a final judgment only through Federal Rule of Civil Procedure 54(b) or by dismissing with prejudice all remaining claims and parties. This approach appears to be in accord with the majority of the circuits that have addressed dismissals without prejudice and dismissals with "conditional prejudice." The Committee resolved to ask the Civil Rules Committee to consider such a possible amendment.

The second appellate-jurisdiction item arises from the Court's observation in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009), and *Swint v. Chambers County Commission*, 514 U.S. 35 (1995), that the rulemaking process is the preferred means for determining whether and when prejudgment orders should be immediately appealable. The committee will perform initial research aimed at determining whether it would be useful and practical to undertake a larger project that might specify by rule the universe of interlocutory orders that should be appealable. Alternatively, the committee may deem it appropriate to consider only the appealability of particular categories of orders that are brought to the committee's attention, such as the attorney-client privilege ruling at issue in *Mohawk Industries*.

Another project that will entail close coordination with the Civil Rules Committee concerns a proposal to amend the Rules to address appeals by class-action objectors. At the April meeting, the Committee heard from proponents of two different approaches. The first proposal would amend Appellate Rule 42 to bar the dismissal of an objector appeal if the objector received anything of value in exchange for dismissing the appeal. The second proposal would authorize the requirement of a cost bond (and the later imposition of costs) reflecting the full costs of delay in implementation of the class settlement as a result of the appeal. Members of the Civil Rules Committee's Rule 23 Subcommittee have agreed that the topic deserves consideration, although they initially expressed reservations about both of these approaches. The Committee intends to study the matter further over the summer and to consult again with the Rule 23 Subcommittee.