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OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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MEMORANDUM

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

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

RE: Report of Advisory Committee on Appellate Rules

DATE: May 8, 2014

I. Introduction

The Advisory Committee on Appellate Rules met on April 28 and 29 in Newark, New Jersey. The Committee approved for publication five sets of proposed amendments, relating to (1) the inmate-filing provisions under Rules 4(c) and 25(a); (2) tolling motions under Rule 4(a)(4); (3) length limits for appellate filings; (4) amicus briefs in connection with rehearing; and (5) Rule 26(c)'s "three-day rule." The Committee discussed a number of other items and removed seven items from its study agenda.

Part II of this report discusses the proposals for which the Committee seeks approval for publication. Part III covers other matters.

The Committee has scheduled its next meeting for October 20, 2014, in Washington, DC.

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

II. Action Items – for Publication

The Committee seeks approval for publication of five sets of proposed amendments as set forth in the following subsections.

A. Inmate filings: Rules 4(c)(1) and 25(a)(2)(C), Forms 1 and 5, and new Form 7

Under the Federal Rules of Appellate Procedure, documents are timely filed if they are received by the court on or before the due date. Rules 4(c)(1) and 25(a)(2)(C) offer an alternative way for inmates to establish timely filing of documents. If the requirements of the relevant rule are met, then the filing date is deemed to be the date the inmate deposited the document in the institution's mail system rather than the date the court received the document. *See generally Houston v. Lack*, 487 U.S. 266 (1988).

The Committee has studied the workings of the inmate-filing rules since 2007, in light of concerns expressed about conflicts in the case law, unintended consequences of the current language, and ambiguity in the current text. Must an inmate prepay postage to benefit from the rule? There are decisions saying that an inmate need not prepay postage if he uses a prison's system designed for legal mail, but must prepay postage if he does not use that system. Must an inmate file a declaration or notarized statement averring the date of filing to benefit from the rule? One court held, over a dissent from denial of rehearing en banc, that a document is untimely if there is no declaration or notarized statement, even when other evidence such as a postmark shows that the document was timely deposited in the prison mail system. When must an inmate submit a declaration designed to demonstrate timeliness? One circuit has published inconsistent decisions, holding in one case that the declaration must accompany the notice and in another that the declaration may be filed at a later date.

The Committee seeks approval to publish proposed amendments that are designed to clarify and improve the inmate-filing rules. The proposed amendments to Rules 4(c)(1) and 25(a)(2)(C) and Forms 1 and 5, and proposed new Form 7, are set out in the enclosure to this report.

The amendments to Rules 4(c)(1) and 25(a)(2)(C) would make clear that prepayment of postage is required for an inmate to benefit from the inmate-filing provisions, but that the use of an institution's legal mail system is not. The amendments clarify that a document is timely filed if it is accompanied by evidence—a declaration, notarized statement, or other evidence such as postmark and date stamp—showing that the document was deposited on or before the due date and that postage was prepaid. New Form 7 is a suggested form of declaration that would satisfy the Rule. Forms 1 and 5 (which are suggested forms of notices of appeal) are revised to include a reference alerting inmate filers to the existence of Form 7. The amendments also clarify that if sufficient evidence does not accompany the initial filing, then the court of appeals has discretion to permit the later filing of a declaration or notarized statement to establish timely deposit.

B. Tolling motions: Rule 4(a)(4)

The Committee seeks approval to publish the proposed amendment to Appellate Rule 4(a)(4) set out in the enclosure to this report. The amendment addresses a circuit split concerning whether a motion filed outside a non-extendable deadline under Civil Rules 50, 52, or 59 counts as “timely” under Rule 4(a)(4) if a court has mistakenly ordered an “extension” of the deadline for filing the motion.

Caselaw in the wake of *Bowles v. Russell*, 551 U.S. 205 (2007), holds that statutory appeal deadlines are jurisdictional but that nonstatutory appeal deadlines are nonjurisdictional claim-processing rules. The statutory appeal deadline for civil appeals is set by 28 U.S.C. § 2107. The statute does not mention so-called “tolling motions” filed in the district court that have the effect of extending the appeal deadline, but “§ 2107 was enacted against a doctrinal backdrop in which the role of tolling motions had long been clear.” 16A Wright et al., *Federal Practice & Procedure* § 3950.4. At the time of enactment, “caselaw stated that certain postjudgment motions tolled the time for taking a civil appeal.” *Id.* Commentators have presumed, therefore, that Congress incorporated the preexisting caselaw into § 2107, and that appeals filed within a recognized tolling period may be considered timely consistent with *Bowles*.

The federal rule on tolling motions, Appellate Rule 4(a)(4), provides that “[i]f a party timely files in the district court” certain post-judgment motions, “the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion.” A number of circuits have ruled that the Civil Rules’ deadlines for post-judgment motions are nonjurisdictional claim-processing rules. On this view, where a district court mistakenly “extends” the time for making such a motion, and no party objects to that extension, the district court has authority to decide the motion on its merits. But does the motion count as a “timely” one that, under Rule 4(a)(4), tolls the time to appeal? The Third, Seventh, Ninth, and Eleventh Circuits have issued post-*Bowles* rulings stating that such a motion does not toll the appeal time. *E.g.*, *Blue v. Int’l Bhd. of Elec. Workers Local Union 159*, 676 F.3d 579, 582-84 (7th Cir. 2012); *Lizardo v. United States*, 619 F.3d 273, 278-80 (3d Cir. 2010). Pre-*Bowles* caselaw from the Second Circuit accords with this position. The Sixth Circuit, however, has held to the contrary. *Nat’l Ecological Found. v. Alexander*, 496 F.3d 466, 476 (6th Cir. 2007).

The Committee feels it is important to clarify the meaning of “timely” in Rule 4(a)(4), because the conflict in authority arises from arguable ambiguity in the current Rule, and timely filing of a notice of appeal is a jurisdictional requirement. The Committee proposes to publish for comment an amendment to the Rule that would adopt the majority view—i.e., that postjudgment motions made outside the deadlines set by the Civil Rules are not “timely” under Rule 4(a)(4). The proposed amendment would work the least change in current law. And, as Judge Diane Wood noted for the court in *Blue*, 676 F.3d at 583, the majority approach tracks the spirit of the Court’s decision in *Bowles*, which held that the Court has “no authority to create equitable exceptions to jurisdictional requirements.” 551 U.S. at 214.

C. Length limits: Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6

The Committee seeks approval to publish for comment amendments to Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6, as set out in the enclosure to this report.

The genesis of this project was the suggestion that length limits set in terms of pages have been overtaken by advances in technology, and that use of page limits rather than type-volume limits invites gamesmanship by attorneys. The proposal would amend Rules 5, 21, 27, 35, and 40 to impose type-volume limits for documents prepared using a computer. For documents prepared without the aid of a computer, the proposed amendments would maintain the page limits currently set out in those rules.

A change from page limits to type-volume limits requires a conversion ratio from pages to words. The 1998 amendments transmuted the prior 50-page limit for briefs into a 14,000-word limit. This change appears to have been based on the assumption that one page was equivalent to 280 words (or 26 lines). While the estimate of 26 lines per page appears sound, research indicates that the estimate of 280 words per page is too high. A study of briefs filed under the pre-1998 rules shows that 250 words per page is closer to the mark. (See attached letter of D.C. Circuit Advisory Committee on Procedures, July 14, 1993.) The proposed amendments employ a conversion ratio of 250 words per page for Rules 5, 21, 27, 35, and 40. Although there was a division of opinion within the advisory committee about whether to alter the existing limits for briefs, the proposed amendments approved by the committee shorten Rule 32's word limits for briefs so as to reflect the pre-1998 page limits multiplied by 250 words per page. The proposals correspondingly shorten the word limits set by Rule 28.1 for cross-appeals. A court that desired to maintain the longer word limits could choose, of course, to accept longer briefs.

During consideration of the proposed shift to type-volume limits, the Committee also observed that the rules do not provide a uniform list of the items that can be excluded when computing a document's length. The proposed amendments would add a new Rule 32(f) setting forth such a list.

D. Amicus filings in connection with rehearing: Rule 29

The Committee seeks approval to publish for comment proposed amendments to Rule 29, as set out in the enclosure to this report. The amendments would re-number the existing Rule as Rule 29(a) and would add a new Rule 29(b) to set default rules for the treatment of amicus filings in connection with petitions for rehearing. The proposed amendment would not require any circuit to accept amicus briefs, but would establish guidelines for the filing of briefs when they are permitted.

Attorneys who file amicus briefs in connection with petitions for rehearing understandably seek clear guidance about the filing deadlines for, and permitted length of, such briefs. There is no

federal rule on the topic. *See Fry v. Exelon Corp. Cash Balance Pension Plan*, 576 F.3d 723, 725 (7th Cir. 2009) (Easterbrook, C.J., in chambers). Most circuits have no local rule on point, and attorneys have reported frustration with their inability to obtain accurate guidance.

The proposed amendments would establish default rules concerning timing and length of amicus briefs in connection with petitions for rehearing. In addition, they would incorporate (for the rehearing stage) most of the features of current Rule 29, including the authorization for certain governmental entities to file amicus briefs without party consent or court permission. A circuit could alter the default federal rules on timing, length, and other matters by local rule or by order in a case.

E. Amending the “three-day rule”: Rule 26(c)

The Committee seeks approval to publish for comment the proposed amendment to Rule 26(c) that is set out in the enclosure to this report. The amendment would implement a recommendation by the Standing Committee’s CM/ECF Subcommittee that the “three-day rule” in each set of national Rules be amended to exclude electronic service. The three-day rule adds three days to a given period if that period is measured after service and service is accomplished by certain methods. Now that electronic service is well-established, it no longer makes sense to include that method of service among the types of service that trigger application of the three-day rule.

The proposed amendment to Rule 26(c) accomplishes the same result as the proposed amendments to Civil Rule 6, Criminal Rule 45, and Bankruptcy Rule 9006, but does so using different wording in light of Appellate Rule 26(c)’s current structure. Under that structure, the applicability of the three-day rule depends on whether the paper in question is delivered on the date of service stated in the proof of service; if so, then the three-day rule is inapplicable. The change would thus be accomplished by amending the rule to state that a paper served electronically is deemed (for this purpose) to have been delivered on the date of service stated in the proof of service.

III. Information Items

The Committee is studying proposals to amend the Rules to address appeals by class-action objectors. The Committee has 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. The Committee has benefited from informative research by Marie Leary of the FJC, who has studied class-action-objector appeals in three circuits. The Committee intends to consider the matter further, in consultation with the Civil Rules Committee’s Rule 23 Subcommittee.

The Committee is considering whether to clarify the operation of Appellate Rule 41,

concerning issuance of the mandate. Two recent cases – *Ryan v. Schad*, 133 S. Ct. 2548 (2013) (per curiam), and *Bell v. Thompson*, 545 U.S. 794 (2005), raise several issues concerning Rule 41. One issue is whether Rule 41 requires (or should require) a court of appeals to issue the mandate immediately after the filing of the Supreme Court’s order denying the petition for writ of certiorari in a case. Another is whether a court of appeals may extend the time for the mandate to issue through mere inaction or must act by order. A third is whether Rule 41(d) should be amended to clarify whether a stay of the mandate continues through denial of a petition for rehearing by the Supreme Court.

The Committee is also considering whether the disclosure provisions in Appellate Rules 26.1 and 29 elicit all the information that a judge would wish to know in considering recusal or disqualification issues. Exploration of this topic likely would benefit from consultation with the Judicial Conference Committee on Codes of Conduct.

The Committee has received a suggestion to consider the appealability of orders concerning attorney-client privilege. This agenda 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. Recognizing that a project aimed at a global overhaul of interlocutory appeal jurisdiction would be unmanageable, the Committee intends to focus more narrowly on specific categories of appeals where a proponent urges an amendment to the rules.

The Committee removed seven items from its agenda. One of those items related to a proposal that Appellate Rules 3 and 6 be amended in light of the shift to electronic filing; although that proposal may eventually merit consideration as part of a broader package of e-filing-related amendments, the Committee decided to focus for the moment on matters prioritized by the CM/ECF Subcommittee, such as the three-day rule amendment noted in Part II.E of this memo. Two items related to the Appellate Rules’ disclosure requirements, but raised particular issues that did not warrant continued study in connection with the Committee’s ongoing consideration (noted above) of possible changes to those requirements. A fourth item concerned a suggestion by Justices Ginsburg, Scalia, and Breyer that the Rules Committees consider ways to expedite proceedings under the International Child Abduction Remedies Act. The Committee’s consensus is that this issue is best addressed, in the first instance, by judicial education rather than by an attempt to establish docket priorities by court rule.

The Committee also removed from its agenda an item concerning audiorecordings of appellate arguments. Although Committee members point out the desirability of prompt online posting of such audiorecordings, this matter appears to fall within the primary jurisdiction of the Judicial Conference Committee on Court Administration and Case Management. The Committee considered, and removed from its agenda, a proposal to peg the due date for amicus briefs to the due date, rather than the filing date, of the brief of the party supported by the amicus. The Committee

reasoned that putative amici have ready access to electronic dockets in cases of interest, and that the proposed change would pose a significant risk of interfering with the parties' briefing schedule, given the default rule that the appellee's deadline runs from the date of service (not the due date) of the appellant's brief. The Committee also rejected a proposal to permit party consent to extend the amicus's filing deadline, out of concern that such a change was not needed and could meet with opposition by judges who wish to avoid delay in case processing. Finally, the Committee removed from its agenda an item relating to a proposal by Judge Jon O. Newman to amend Criminal Rule 52 concerning the standard of appellate review for sentencing errors. The Committee noted that the Criminal Rules Committee has appointed a subcommittee to study this proposal, and felt that the proposal to amend a Criminal Rule is within the jurisdiction of that Committee.