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



# 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:** December 15, 2014

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## I. Introduction

The Advisory Committee on Appellate Rules met on October 20, 2014 in Washington, D.C. The Committee discussed four projects, removed one of those projects from its study agenda, and discussed (but did not add to its agenda) an additional proposal.

The Committee has scheduled its next meeting for April 23 and 24, 2015, in Philadelphia.

Part II of this report provides an overview of the Committee's projects. Detailed information about the Committee's activities can be found in the Reporter's draft of the minutes of the October meeting and in the Committee's study agenda, both of which are attached to this report.

## II. Information Items

The Committee is considering whether to propose amending the Appellate Rules to require disclosures in addition to those currently required by Appellate Rules 26.1 and 29(c). A number of circuits have local provisions that require such additional disclosures, and the question is whether such disclosures elicit information that may affect a judge's analysis of his or her recusal obligations. Topics on which the Committee is focusing include disclosures in bankruptcy matters; disclosures concerning victims in criminal cases; disclosures by intervenors and amici; and disclosures by non-governmental, non-human entities other than corporations. The Committee is working in close coordination with the Committee on Codes of Conduct and will likely seek additional guidance from that Committee as the project progresses.

The Committee is also considering the possibility of amending Rule 41 to address whether a court of appeals has authority to stay its mandate following a denial of certiorari, and whether such a stay requires an order or can result from the court's inaction. Rule 41 provides in relevant part as follows:

> **Rule 41. Mandate: Contents; Issuance and Effective Date; Stay**
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> (b) WHEN ISSUED. The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.
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> (d) STAYING THE MANDATE.
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> (2) *Pending Petition for Certiorari.*
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> (D) The court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed.

The Supreme Court twice has reserved judgment on whether Rule 41(d)(2)(D) requires a court of appeals to issue its mandate immediately after the Supreme Court files an order denying a petition for certiorari, or whether Rule 41(b) allows a court of appeals to "extend the time" for

issuing a mandate even after certiorari is denied. The Court also has noted an open question whether Rule 41(b) allows a court of appeals to "extend the time" for issuing its mandate by mere inaction, or whether an order is required.

A number of Committee members have expressed support for adopting language that would require that stays be effected "by order." As to the authority of the court of appeals to stay the mandate after denial of certiorari, the Supreme Court, in *Ryan v. Schad*, 133 S. Ct. 2548 (2013) (per curiam), and *Bell v. Thompson*, 545 U.S. 794 (2005), held that if such authority exists it can be exercised only in extraordinary circumstances. In *Calderon v. Thompson*, 523 U.S. 538 (1998), the Court opined that the courts of appeals are recognized to have an inherent power *to recall* their mandates, in extraordinary circumstances, subject to review for an abuse of discretion.

The Committee is considering whether to propose incorporating the extraordinary-circumstances requirement into Rule 41; whether to propose instead amending Rule 41 to ban stays of the mandate after the denial of certiorari; or whether to propose no amendment addressing the court's authority to stay the mandate after the denial of certiorari. The opinions concurring in and dissenting from the grant of rehearing en banc in *Henry v. Ryan*, 766 F.3d 1059 (9th Cir. 2014), illustrate the continuing salience of these issues.

The Committee, like the other advisory committees, has been considering the possibility of amendments that would take account of the shift to electronic filing and service. Committee members have expressed interest in adopting the first part of the template rule prepared by the Case Management / Electronic Case Filing ("CM/ECF") Subcommittee; such a rule would define "information in written form" to include electronic materials. Committee members have also expressed interest in considering the possibility of amending the Appellate Rules to mandate electronic filing and authorize electronic service, subject to an exception based on good cause and an additional exception based on local rules that permit or require paper filing or service. The Committee will also consider whether to amend Appellate Rule 25(d) so that it would no longer require a proof of service in instances when service was effected by means of the notice of docket activity generated by CM/ECF.

The Committee looks forward to working with the Civil Rules Committee on matters of mutual interest. The Civil / Appellate Subcommittee has been reconstituted and will consider two projects in the near future. One of those projects concerns the doctrine of "manufactured finality" – i.e., the doctrine that addresses instances when a would-be appellant seeks to manufacture appellate jurisdiction over an appeal from the disposition of fewer than all the claims in an action by dismissing the remaining claims. The Subcommittee will also consider possible amendments to Civil Rule 62's treatment of supersedeas bonds. Meanwhile, the Committee anticipates that the mini-conferences currently being planned by the Civil Rules Committee's Rule 23 Subcommittee will provide an opportunity to gather further information concerning appeals by class action objectors.

The Committee removed from its agenda an item relating to appeals from orders concerning attorney-client privilege. In the wake of the Supreme Court's decision in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009), the Committee received a suggestion that it draft a rule that would authorize permissive interlocutory appeals from attorney-client privilege rulings. The Committee gave this proposal serious consideration and noted the difficulty that a litigant can face in seeking immediate appellate review of such rulings. However, members foresaw challenges in drafting appropriately tailored language. And some members questioned the need for rulemaking on this topic, particularly in light of the possibility of mandamus review.

The Committee discussed, but decided not to add to its agenda, a suggestion that the Appellate Rules be amended to state that Appellate Rule 29 furnishes the sole means by which a non-litigant may communicate with the court about a pending case. The suggestion arose after an incident in which such communications had been made directly to judges of a court of appeals. Participants in the Committee's discussion felt that there exist other, less formal means for channeling such communications to the clerk's office, and participants also questioned whether the conduct of non-party non-lawyers is an appropriate topic for treatment in the Appellate Rules.