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 16, 2013

**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

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## I. Introduction

The Advisory Committee on Appellate Rules canceled its meeting scheduled for October 3-4, 2013, due to the lapse in appropriations. Thus, rather than report on actions taken by the Committee, I highlight in Part II of this Report some of the Committee's current projects on which it would welcome input from the Standing Committee.

The Committee's full study agenda is attached. The Committee's next meeting is scheduled for April 28-29, 2013.

## II. Highlights of the Committee's current work

Parts II.A and II.B discuss two projects that address possible amendments to Rule 4's treatment of the deadlines for filing notices of appeal. Parts II.C and II.D discuss two projects concerning requirements for filings in the courts of appeals – one concerning length limits, and one concerning amicus filings in connection with petitions for panel rehearing and/or rehearing en banc.

**A. Rule 4(a)(4)**

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 Appellate Rule 4(a)(4), and the Committee is considering whether and how to amend the Rule to answer this question.

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. 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." The statutory provision setting the deadlines for civil appeals – 28 U.S.C. § 2107 – does not mention such tolling motions.

A number of circuits have ruled that the Civil Rules' deadlines for post-judgment motions are nonjurisdictional claim-processing rules. In this view, where a district court purports to extend 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 Appellate 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, and pre-*Bowles* caselaw from the Second Circuit accords with this position. However, the Sixth Circuit has held to the contrary.

There is substantial support among Committee members for clarifying the meaning of "timely" in Rule 4(a)(4). This provision tolls a jurisdictional appeal period, and its meaning should be clear and uniform across the circuits. The first and most basic question in considering such an amendment is whether to implement the majority approach (i.e., that postjudgment motions made outside the deadlines set by the Civil Rules are never "timely" under Rule 4(a)(4)) or the minority approach (i.e., that a motion made – without a timeliness objection – within a purported extension of the relevant deadline can qualify as "timely" under Rule 4(a)(4)).

An amendment adopting the majority approach would work the least change in current law. It would also make the answer explicit in the Rule's text, and thus more accessible to pro se litigants and less-experienced lawyers. Such an amendment arguably tracks the spirit of the Court's decision in *Bowles*, which overruled the Court's prior decisions concerning the "unique circumstances" doctrine "to the extent they purport to authorize an exception to a jurisdictional rule." Of the initial trio of Supreme Court cases establishing the unique circumstances doctrine, two involved erroneous district court assurances concerning the timeliness of postjudgment motions that were in fact untimely; thus, interpreting "timely" in Rule 4(a)(4) to require compliance with the relevant Civil Rules deadline seems to accord with the *Bowles* Court's overruling of the unique circumstances doctrine with respect to jurisdictional appeal deadlines. Drafting such an amendment would be

relatively straightforward, and some Committee members have noted that such an amendment would help to clarify and simplify the computation of appeal deadlines. Here is a sketch of a possible new Rule 4(a)(4)(C) that would implement the majority view:

> (C) **Timely Defined.** For purposes of Rule 4(a)(4)(A), a motion is timely if it is made within the time allowed by the Federal Rules of Civil Procedure. A motion made after that time is not rendered timely for purposes of Rule 4(a)(4)(A) by:
>
> (i) a court order that exceeds the court's authority (if any) to extend the deadline for the motion under the Federal Rules of Civil Procedure, or
>
> (ii) another party's consent or failure to object.

A cross-reference to this new provision could be added in Rule 4(a)(4)(A) itself:

> (A) If a party ~~timely~~ files in the district court any of the following motions under the Federal Rules of Civil Procedure and the motion is timely as defined in Rule 4(a)(4)(C), the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

As noted above, an amendment adopting the minority approach could be seen as an effort to change one effect of the *Bowles* decision. Some Committee members have expressed hesitancy to attempt to countermand via a rule amendment a result that the Supreme Court adopted via decisional law. On the other hand, there have been past instances where a rule amendment was designed to change the result of a Supreme Court decision; one example is the 1993 amendment to Appellate Rule 3(c), which responded to *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988). And some Committee members have expressed support for an approach that would preserve appeal rights for litigants who delay filing a notice of appeal in reliance upon a court order purporting to extend a deadline for a postjudgment motion. Drafting such an amendment seems more challenging than drafting an amendment to implement the majority approach, in part because the amendment would need to make clear what sort of errors can be forgiven and what sort cannot. Here is a sketch of one possible alternative:

> **(C) Timely Defined.** For purposes of Rule 4(a)(4)(A), a motion is timely if it is:
>
> (i) made within the time allowed by the relevant Federal Rule of Civil Procedure; or
>
> (ii) made within the time designated for making the motion by a court order, if the court order is entered within the time limit prescribed by this

Rule 4(a) for filing a notice of appeal.

**B. Rule 4(c)'s inmate-filing provision**

This 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.

Appellate Rule 4(c)(1) provides:

> If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

The original impetus for the Committee's study of this rule was Judge Diane Wood's suggestion that the Committee consider clarifying whether Rule 4(c)(1)'s inmate-filing rule requires prepayment of postage. The Seventh Circuit has held that when the institution has no legal mail system, the third sentence of Rule 4(c)(1) requires that postage be prepaid. *See United States v. Craig*, 368 F.3d 738, 740 (7th Cir. 2004). By contrast, the Seventh and Tenth Circuits have indicated that, if the institution has a legal mail system and the inmate uses that system, prepayment of postage is not required for timeliness. *See Ingram v. Jones*, 507 F.3d 640, 644 (7th Cir. 2007), and *United States v. Ceballos-Martinez*, 387 F.3d 1140, 1144 (10th Cir. 2004). The Committee has discussed the possibility of eliminating the postage-prepayment requirement, either for all inmates, or for inmate filers who certify that they are indigent, but has not reached a consensus in support of either of those approaches. Both Supreme Court Rule 29.2 and Rule 4(c) always have required inmates to prepay postage, and some Committee members are reluctant to eliminate that requirement. The Constitution requires the state or federal government to provide indigent inmates with stamps to mail certain legal documents to court, *Bounds v. Smith*, 430 U.S. 817, 824-25 (1977), so an inmate presumably would have a remedy if enforcement of the prepayment requirement interfered with the inmate's constitutional right of access to the courts.

The Committee also has discussed whether to amend the Rule to make clear that the declaration mentioned in the Rule suffices to show timely filing but is not required if timeliness can be shown by other evidence. Participants in the Committee's discussions have observed that it is

useful for the Rule to include a directive to the inmate to submit the declaration, because the declaration provides helpful information and preserves that information while recollections are fresh. But participants noted it may be better policy to allow an inmate to provide proof of timely deposit even if the inmate initially did not provide a declaration. One possible approach might be to permit the inmate to show good cause why the absence of the declaration should be excused. A "good cause" standard, however, could give rise to satellite litigation. Instead, one might add language that explicitly contemplates alternative means of showing timeliness: "Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746, or by a notarized statement, ~~either of which must~~ that sets forth the date of deposit and states that first-class postage has been prepaid. Timely filing also may be shown by other [proof] [evidence] that the notice was timely deposited with first-class postage prepaid."

Committee members also have discussed the possibility of promulgating an official form that would walk an inmate through statements that would suffice to establish eligibility for the inmate-filing rule. These Committee members recognize that there is a trend away from reliance on official forms, as evidenced by the published proposals to abrogate Civil Rule 84 and almost all of the Official Forms that accompany the Civil Rules. But the Civil Rules proposal seems consistent with an approach that retains a few select forms as an official part of the Rules, and that selects those forms for retention on the basis of their salience to and entwinement with a particular mechanism set by a Rule. Forms may be especially useful to pro se litigants. And assisting pro se litigants in turn assists the Clerk's Office that must process their filings. Use of an official form could reduce the time needed for a clerk or a judge to review the filing.

Participants in the Committee's discussions have questioned the usefulness of the current Rule's requirement that "[i]f an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule." The 1998 Committee Note provided this rationale for the requirement: "Some institutions have special internal mail systems for handling legal mail; such systems often record the date of deposit of mail by an inmate, the date of delivery of mail to an inmate, etc. The Advisory Committee amends the rule to require an inmate to use the system designed for legal mail, if there is one, in order to receive the benefit of this subdivision."

Use of a mail system that logs the date of the inmate's deposit is desirable. But the Rule itself does not actually refer to a mail system that logs the date; it instead refers to "a system designed for legal mail." Given that inmates are unlikely to consult the 1998 Committee Note when applying Rule 4(c)(1), it might be desirable to revise the Rule to provide a functional definition. For example, the Rule could state: "If the institution has a mail system that will log the date when an inmate deposits a piece of mail with the institution for mailing, the inmate must use that system to receive the benefit of this rule." Another alternative is to delete this sentence altogether – a change that would bring Rule 4(c)(1) into closer parallel with Supreme Court Rule 29.2.

### C. Length limits

The Appellate 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, and the Committee is considering whether to propose changes in the Rules that set those length limits.

The Committee is focusing on two possible options. One would replace the page limits with a type-volume-plus-safe-harbor provision modeled on the Rules' length limits for briefs. Under that approach, the existing page limits in Rules 5, 21, 27, 35, and 40 would be shortened, and an alternative would be added in each rule that would approximate the existing page limits through the use of type-volume limits. The Committee would need to determine how much to shorten the page limits; the goal would be to provide a workable page limit for those who would find it difficult to compute a type-volume limit, without introducing an incentive for lawyers to circumvent the type-volume limits by using the page limits. One principal concern with this approach is that pro se filers and others who must file typewritten or handwritten pleadings would be allowed fewer pages than under the current rules.

The other option would retain the current page limits for papers prepared without the aid of a computer, but would set roughly equivalent type-volume limits for papers prepared on computers. The idea here is that attorneys who typically prepare pleadings by computer would have little incentive to shift to typewritten or handwritten pleadings in order to circumvent the type-volume limitation by using page limits. But an amendment that applies type-volume limitations to computer-aided papers would not disadvantage pro se filers. Research discovered at least one set of state rules that distinguishes between papers prepared by computer and papers prepared by other means. *See* Cal. Rules of Court Rule 8.204(c) ("(1) A brief produced on a computer must not exceed 14,000 words, including footnotes.… (2) A brief produced on a typewriter must not exceed 50 pages.").

The Committee's inquiries have also disclosed evidence suggesting that the 1998 amendments to Rule 32(a)(7), adopting a type-volume limitation of 14,000 words for a principal brief to replace the former 50-page limit, caused an increase in the permitted length of a brief. One participant observed that, prior to 1998, the D.C. Circuit had adopted a word limit and had chosen 12,500 words as the appropriate limit. The Committee's liaison to the Circuit Clerks researched this question further. Based on the average word count per page in 210 briefs filed by attorneys during the last four years in which old Rule 28(g) was in effect, the equivalent of 50 pages would have been 13,000 words. The clerk also used CM/ECF to research the word length of principal briefs filed in 2008 under the current type-volume limits. In a set of more than 1,000 briefs, only some 15 percent were more than 12,500 words. The Committee may consider whether the word count should be adjusted as part of the length-limit project.

**D. Amicus briefs on rehearing**

The second brief-related project concerns the possibility of addressing amicus filings in connection with petitions for panel rehearing and/or rehearing en banc. Matters that could be addressed by a proposed rule include length, timing, and other topics that Rule 29 addresses with respect to amicus filings at the merits-briefing stage.

A principal policy question is whether the federal rules should address this matter at all. Attorneys who file briefs in support of petitions for rehearing understandably seek clear guidance about the filing deadlines for, and permitted length of, such briefs. Most circuits have no local rule on the topic, and attorneys have reported frustration with their inability to obtain accurate guidance. From the perspective of the courts, however, the Committee has heard expressions of concern that a new appellate rule concerning amicus briefs at the rehearing stage may encourage a proliferation of filings at that stage. The Committee will consider these competing views in its evaluation.

A related question is whether any new rule on this subject should permit a circuit to opt out of any its provisions by local rule or by order in a case. The Committee is aware of the Rules Committees' general reluctance to encourage local rulemaking. But in this instance, there may well be reasons for local variation, given that rules concerning amicus filings need to mesh with the rules and practices concerning the parties' filings and with the court's internal practices in connection with rehearing petitions.

As to the particulars of a possible new rule, one issue is length. Appellate Rule 29(d) provides that amicus filings in connection with the merits briefing of an appeal are presumptively limited to half the permissible length of "a party's principal brief." Appellate Rules 35(b) and 40(b) presumptively limit a party's rehearing petition to 15 pages; thus, if one were to apply the same half-length approach to amicus filings in support of a rehearing petition, such filings would be limited to 7 ½ pages. The few existing local circuit provisions allow greater lengths, ranging roughly from 10 to 15 pages. The Committee's discussions may focus on whether to follow the half-length approach (which, rounding up, would produce a limit of 8 pages), or whether to choose a length limit within the 10- to 15-page range. The Committee may also discuss whether to specify length limits for amicus filings in opposition to a rehearing petition.

Another question is timing. Appellate Rule 29(e) provides that an amicus must file its brief and motion "no later than 7 days after the principal brief of the party being supported is filed." The Appellate Rules set a presumptive deadline (in most cases) of 14 days (after entry of judgment) for a party to file a petition for hearing and/or rehearing en banc. For amicus filings at the rehearing stage, questions arise whether the deadline should be the same as the party's deadline or a certain number of days later than the party's deadline. Using the later deadline would track Rule 29's approach and also would accord with three of the four local circuit rules on point. Some participants have suggested that amicus briefs will be more useful and less redundant if the amici have an

opportunity to review the party's brief before filing a brief in support. On the other hand, courts of appeals may dislike any rule that extends the time for resolving rehearing petitions, and a later deadline for amicus briefs could do so. *Cf. Fry v. Exelon Corp. Cash Balance Pension Plan*, 576 F.3d 723, 725 (7th Cir. 2009) (Easterbrook, Chief Judge, in chambers). If the Committee proceeds in this area, then it also would have to consider whether to address amicus filings in support of the party opposing rehearing and amicus filings that support neither party.

The Committee may also consider whether a proposed rule should address other questions concerning amicus filings in connection with rehearing. See for example the following provisions concerning merits briefs: Rules 29(a) (requirement of court leave or party consent, plus exceptions); 29(b) (content of motion for leave to file); 29(c) (requirements of disclosure and form); 29(g) (oral argument). Should a new rule on amicus filings incorporate, as default provisions, some or all of Rules 29(a) – (c)? The Committee might, for example, consider subjecting later amicus filings to the disclosure requirements set by Rule 29(c). It may be less urgent to address matters of form than matters of disclosure; on the other hand, the application of Rule 32's form requirements to amicus filings in connection with rehearing could be relatively uncontroversial. A national rule could also set default rules addressing whether an amicus must obtain court permission in order to file a brief. One option would be to apply current Rule 29(a), thus allowing certain governmental amici to file without party consent or court leave and allowing any amicus to file without court leave if the parties consent. Another option would be to require all amici to obtain court leave in order to file a brief in connection with a rehearing petition.

The Committee would also need to consider where to place any such provisions. Placing the new provisions in Rule 29 would allow would-be amici to find all of the amicus-specific provisions in one rule, although some renumbering would be required. An alternative would be to add the new provisions to Rules 35 and 40, though that could cause some redundancy.