MEMORANDUM

DATE: May 28, 2010

TO: Honorable Lee H. Rosenthal, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Jeffrey S. Sutton, Chair
Advisory Committee on Appellate Rules

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on April 8 and 9, 2010, in Asheville, North Carolina. The Committee gave final approval to proposed amendments to Appellate Rules 4 and 40,[1] removed one item from its study agenda, and discussed a number of other items.

Part II of this report discusses the proposals for which the Committee seeks final approval: proposed amendments to Rules 4 and 40, accompanied by a proposed legislative amendment to 28 U.S.C. § 2107. Part III covers other matters.

The Committee has scheduled its next meeting for October 7 and 8, 2010, in Boston.

Detailed information about the Committee's activities can be found in the Reporter's draft of the minutes of the April meeting[2] and in the Committee's study agenda, both of which are attached to this report.

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[1] The wording of the proposed amendments was finalized and approved after the meeting by an email vote in May 2010.

[2] These minutes have not yet been approved by the Committee.

II. Action Item

The Committee is seeking final approval of proposed amendments to Rules 4 and 40. The Committee also proposes seeking a legislative amendment to 28 U.S.C. § 2107. The proposed amendments would clarify the treatment of the time to appeal or to seek rehearing in cases to which a United States officer or employee is a party.

The Rule 4 and Rule 40 proposals were published for comment in 2007. However, the Committee subsequently noted that the Supreme Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007), raised questions concerning the advisability of pursuing the proposed amendment to Rule 4(a)(1)(B) – a period that is also set by 28 U.S.C. § 2107. Because *Bowles* indicates that statutory appeal time periods are jurisdictional, concerns were raised that amending Rule 4(a)(1)(B)'s 60-day period without a similar statutory amendment to Section 2107 would not remove any uncertainty that exists concerning the scope of the 60-day appeal period. The Department of Justice (which initially proposed the Rule 4(a)(1)(B) and Rule 40(a)(1) amendments) withdrew its proposal to amend Rule 4(a)(1)(B). As a result, the Committee initially decided to pursue the Rule 40(a)(1) amendment without the Rule 4(a)(1) amendment.

The proposed Rule 40(a)(1) amendment was placed before the Standing Committee for discussion rather than action at its January 2009 meeting. Shortly thereafter, the Supreme Court granted certiorari in *United States* ex rel. *Eisenstein v. City of New York*, 129 S. Ct. 988 (2009) – a case that concerned the applicability of Rule 4's and Section 2107's 60-day appeal periods in qui tam actions under the False Claims Act. At its June 2009 meeting, the Standing Committee remanded the Rule 40 proposal to the Appellate Rules Committee for further consideration in the light of the *Eisenstein* decision.

After further discussion, the Committee decided to pursue both the Rule 4 and the Rule 40 amendments, along with a proposed legislative amendment to Section 2107. Amending all three of these provisions will render uniform their treatment of cases in which a United States officer or employee is a party. It will bring clarity to these provisions and allow the United States (and other parties) to rely upon the longer appeal and rehearing periods in many cases where uncertainty (concerning the applicable time period) may currently exist.

There was unanimous support among the Committee members for the general goal of the proposed amendments. There was some division among the Committee members concerning one aspect of the proposals. As discussed below, the proposals set a general principle – namely, that the longer periods apply in cases where a current or former United States officer or employee is sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf. For the reasons discussed in Part II.A.2 below, the Committee decided to specify certain safe harbors that ensure the application of the longer time periods. All members

supported the inclusion of two safe harbors – one that applies when the United States represents the officer or employee at the time of the entry of the relevant judgment, and another that applies when the United States files the appeal for the officer or employee. The Department of Justice also supported including a third safe harbor, which would apply if the United States had paid for private representation for the officer or employee. However, the Committee voted 7-2 in favor of adopting the proposed amendments without that third safe harbor. The two members voting in the minority indicated that even if the third safe harbor were excluded they would support the proposed amendments.

A. Rule 4

The proposed amendment to Rule 4 will clarify the applicability of Rule 4(a)(1)(B)'s 60-day appeal deadline. A corresponding proposed amendment to 28 U.S.C. § 2107 is discussed in Part II.C of this report.

1. Text of Proposed Amendment and Committee Note

The Committee recommends final approval of the proposed amendment to Rule 4 as set out in the enclosure to this report.

2. Changes Made After Publication and Comment

The public comments on the proposed amendment are summarized in the enclosure to this report. The Committee made two changes to the proposal after publication and comment.

First, the Committee inserted the words "current or former" before "United States officer or employee." This insertion causes the text of the proposed Rule to diverge slightly from that of Civil Rules 4(i)(3) and 12(a)(3), which refer simply to "a United States officer or employee [etc.]." This divergence, though, is only stylistic. The 2000 Committee Notes to Civil Rules 4(i)(3) and 12(a)(3) make clear that those rules are intended to encompass former as well as current officers or employees. It is desirable to make this clarification in the text of Rule 4(a)(1) because that Rule's appeal time periods are jurisdictional.

Second, the Committee added, at the end of Rule 4(a)(1)(B)(iv), the following new language: "– including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person." During the public comment period, concerns were raised that a party might rely on the longer appeal period, only to risk the appeal being held untimely by a court that later concluded that the relevant act or omission had not actually occurred

in connection with federal duties. The Committee decided to respond to this concern by adding two safe harbor provisions. These provisions make clear that the longer appeal periods apply in any case where the United States either represents the officer or employee at the time of entry of the relevant judgment or files the notice of appeal on the officer or employee's behalf.

B. Rule 40

The proposed amendment to Rule 40 will clarify the applicability of Rule 40(a)(1)'s 45-day period for seeking rehearing.

1. Text of Proposed Amendment and Committee Note

The Committee recommends final approval of the proposed amendment to Rule 40 as set out in the enclosure to this report.

2. Changes Made After Publication and Comment

The public comments on the proposed amendment are summarized in the enclosure to this report. The Committee made two changes to the proposal after publication and comment.

The two changes to the Rule 40(a) proposal correspond to those discussed in Part II.A.2 of this report with respect to the Rule 4(a)(1) proposal. First, the Committee inserted the words "current or former" before "United States officer or employee." Second, the Committee added, at the end of new Rule 40(a)(1)(D), the following new language: "– including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person."

C. 28 U.S.C. § 2107

As noted above, to ensure achievement of the goals of the proposed amendment to Rule 4, it is desirable to request a corresponding statutory amendment to 28 U.S.C. § 2107.

1. Text of Proposed Amendment

The Committee recommends that the Standing Committee approve the goal of seeking legislative amendment of 28 U.S.C. § 2107 as set out in the enclosure to this report.

2. Tentative Draft of Proposed Bill

A tentative draft bill that would accomplish the proposed amendment to Section 2107 is set out in the enclosure to this report.

III. Information Items

The Committee is considering a proposal to amend Appellate Rules 13 and 14 to address interlocutory appeals from the Tax Court. Prior to the Committee's spring 2010 meeting, the Committee informally solicited the views of the Tax Court, the American Bar Association's Tax Section, and the Department of Justice concerning whether such amendments would be useful and, if so, how they should be drafted. Chief Judge Colvin and Judge Thornton of the Tax Court support the idea of amending Rules 13 and 14. In addition, they propose amending Appellate Rule 24 because Rule 24(b) currently groups the Tax Court with administrative agencies (a grouping that they view as inconsistent with the Tax Court's status as a judicial body that is independent of the political branches). The Committee is studying alternative ways of amending Rule 24(b) to respond to this concern.

The Committee is continuing to research issues relating to a proposal to treat federally recognized Native American tribes the same as states for the purpose of amicus filings. Under Rule 29(a), the federal and state governments can file amicus briefs as a matter of course, but tribal amici must seek party consent or court leave. Because this issue also arises with respect to Supreme Court Rule 37.4, the Committee resolved to consult the Supreme Court for its views. The Committee will also consult the Chief Judges of the Eighth, Ninth, and Tenth Circuits, because the Federal Judicial Center's study of tribal amicus filings in the courts of appeals revealed that most such filings occur in those three circuits.

The Committee has begun to consider possible rulemaking responses to the Court's recent decision in *Mohawk Industries, Inc. v. Carpenter*, 130 S. Ct. 599 (2009), which held that a district court's attorney-client privilege ruling did not qualify for an immediate appeal under the collateral order doctrine. The Committee will consider possible ways to provide for immediate appellate review of attorney-client privilege rulings, as well as possible mechanisms to control such appeals (such as certification requirements or expedited procedures). Some members have also suggested a broader review of the collateral order doctrine, encompassing such topics as appeals from qualified immunity rulings. The Committee will coordinate its efforts with the Civil and Criminal Rules Committees.

The Committee has embarked on a review of the caselaw interpreting Appellate Rule 4(a)(2), which addresses premature notices of appeal in civil cases. Caselaw in this area addresses a range of different fact patterns, and the Committee plans to consider from a policy perspective whether the

Rule and the caselaw appropriately treat the common situations in which questions of prematurity tend to arise.

The Committee is considering whether to modify Rule 28(a)(6)'s requirement that briefs contain a separate "statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below." The Committee will informally consult knowledgeable groups of appellate practitioners for their views.

The Committee removed from its agenda one item, relating to reply brief word limits. The item arose from the suggestion that the Committee consider whether the Supreme Court's recent change to its own limits on reply brief length should prompt a review of the Appellate Rules' limits. After discussion, members concluded that no change is warranted.

A couple of other projects will entail coordination with other advisory committees. The Committee looks forward to working with the Bankruptcy Rules Committee on the latter's project to revise Part VIII of the Bankruptcy Rules (dealing with bankruptcy appeals). And the Committee expects that a future project will bring together the advisory committees to consider the implications, for the Rules, of the transition to electronic filing.

The Committee discussed the possible usefulness of monitoring circuit splits that relate to the Appellate Rules. Though members noted that not all such splits may necessarily warrant a rulemaking response, it seems useful to analyze the splits and consider whether they are amenable to solution through rulemaking. The Committee also continues to monitor the developing caselaw concerning the implications of *Bowles v. Russell*, 551 U.S. 205 (2007), for appeal-related deadlines.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE*

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from ~~is entered~~.

(B) ~~When the United States or its officer or agency is a party, t~~The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from ~~is entered.~~ if one of the parties is:

(i) the United States;

(ii) a United States agency;

(iii) a United States officer or employee sued in an official capacity; or

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*New material is underlined; matter to be omitted is lined through.

(iv) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf – including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person.

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Committee Note

Subdivision (a)(1)(B). Rule 4(a)(1)(B) has been amended to make clear that the 60-day appeal period applies in cases in which an officer or employee of the United States is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States. (A concurrent amendment to Rule 40(a)(1) makes clear that the 45-day period to file a petition for panel rehearing also applies in such cases.)

The amendment to Rule 4(a)(1)(B) is consistent with a 2000 amendment to Civil Rule 12(a)(3)(B), which specified an extended 60-day period to respond to complaints when "[a] United States officer or employee [is] sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf." The Committee Note to the 2000 amendment explained: "Time is needed for the United States to determine whether to provide representation to the defendant officer or employee. If the United States provides representation, the need for an extended answer period is the same as in actions against the United States, a United States agency, or a United States officer sued in an official capacity." The same reasons justify providing additional time to the Solicitor General to decide whether to file an appeal.

However, because of the greater need for clarity of application when appeal rights are at stake, the amendment to Rule 4(a)(1)(B), and the corresponding legislative amendment to 28 U.S.C. § 2107 that is simultaneously proposed, include safe harbor provisions that parties can readily apply and rely upon. Under new subdivision 4(a)(1)(B)(iv), a case automatically qualifies for the 60-day appeal period if (1) a legal officer of the United States has appeared in the case, in an official capacity, as counsel for the current or former officer or employee and has not withdrawn the appearance at the time of the entry of the judgment or order appealed from or (2) a legal officer of the United States appears on the notice of appeal as counsel, in an official capacity, for the current or former officer or employee.

CHANGES MADE AFTER PUBLICATION AND COMMENT

The Committee made two changes to the proposal after publication and comment.

First, the Committee inserted the words "current or former" before "United States officer or employee." This insertion causes the text of the proposed Rule to diverge slightly from that of Civil Rules 4(i)(3) and 12(a)(3), which refer simply to "a United States officer or employee [etc.]." This divergence, though, is only stylistic. The 2000 Committee Notes to Civil Rules 4(i)(3) and 12(a)(3) make clear that those rules are intended to encompass former as well as current officers or employees. It is desirable to make this clarification in the text of Rule 4(a)(1) because that Rule's appeal time periods are jurisdictional.

Second, the Committee added, at the end of Rule 4(a)(1)(B)(iv), the following new language: "– including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person." During the public comment period, concerns were raised that a party might rely on the longer appeal period, only to risk the appeal being held untimely by a court that later concluded that the relevant act or omission had not actually occurred in connection with federal duties. The Committee decided to respond to this concern by adding two safe harbor provisions. These provisions make clear that the longer appeal

periods apply in any case where the United States either represents the officer or employee at the time of entry of the relevant judgment or files the notice of appeal on the officer or employee's behalf.

SUMMARY OF PUBLIC COMMENTS

The following comments were received on the jointly-published proposals to amend Rules 4(a)(1)(B) and 40(a)(1).

07-AP-003; 07-BR-015; 07-CR-003; 07-CV-003: Chief Judge Frank H. Easterbrook. Chief Judge Easterbrook criticized the proposals' "stylistic backsliding." He asserted that "[t]reating a proper noun as an adjective ('a United States agency') is not correct; it is an example of noun plague." Instead, he suggested, "[f]ederal agency' is better, using a real adjective as an adjective. If you have some compelling need to used 'United States,' then say 'agency of the United States' (etc.)."

07-AP-011: Public Citizen Litigation Group. Brian Wolfman wrote on behalf of Public Citizen Litigation Group to express general support for the proposed amendments, but to suggest one change. Public Citizen was concerned that proposed Rule 4(a)(1)(B)(iv) and proposed Rule 40(a)(1)(D) could be read to exclude instances when the court of appeals ultimately concludes that the federal officer's or employee's act did *not* occur "in connection with duties performed on the United States' behalf." Public Citizen argued that this possibility creates a risk that appellants might rely on the longer appeal time only to have their appeals dismissed due to a ruling by the court of appeals on this factual question. Public Citizen argued that the wording should be changed to make clear that the extended time periods' availability (under 4(a)(1)(B)(iv) and 40(a)(1)(D)) turns on the nature of the act *as alleged by the plaintiff* rather than on the nature of the act *as ultimately found by the court.* Public Citizen suggested that this could be achieved by changing "an act or omission occurring in connection with" to read "an act or omission alleged to have occurred in connection with."

07-AP-014: United States Solicitor General. United States Solicitor General Paul D. Clement wrote in support of the proposed amendments to Rules 4(a)(1) and 40(a)(1). He argued that these amendments "would be consistent with the rules governing the district courts, and will serve important policy interests."

Rule 40. Petition for Panel Rehearing

(a) Time to File; Contents; Answer; Action by the Court if Granted.

(1) **Time.** Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment. But in a civil case, ~~if the United States or its officer or agency is a party, the time within which any party may seek rehearing is 45 days after entry of judgment,~~ unless an order shortens or extends the time~~.~~, the petition may be filed by any party within 45 days after entry of judgment if one of the parties is:

(A) the United States;

(B) a United States agency;

(C) a United States officer or employee sued in an official capacity; or

(D) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf – including all instances in which the

United States represents that person when the court of appeals' judgment is entered or files the petition for that person.

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Committee Note

Subdivision (a)(1). Rule 40(a)(1) has been amended to make clear that the 45-day period to file a petition for panel rehearing applies in cases in which an officer or employee of the United States is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States. (A concurrent amendment to Rule 4(a)(1)(B) makes clear that the 60-day period to file an appeal also applies in such cases.) In such cases, the Solicitor General needs adequate time to review the merits of the panel decision and decide whether to seek rehearing, just as the Solicitor General does when an appeal involves the United States, a United States agency, or a United States officer or employee sued in an official capacity.

To promote clarity of application, the amendment to Rule 40(a)(1) includes safe harbor provisions that parties can readily apply and rely upon. Under new subdivision 40(a)(1)(D), a case automatically qualifies for the 45-day period if (1) a legal officer of the United States has appeared in the case, in an official capacity, as counsel for the current or former officer or employee and has not withdrawn the appearance at the time of the entry of the court of appeals' judgment that is the subject of the petition or (2) a legal officer of the United States appears on the petition as counsel, in an official capacity, for the current or former officer or employee.

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Second, the Committee added, at the end of Rule 40(a)(1)(D), the following new language: "– including all instances in which the United States represents that person when the court of appeals' judgment is entered or files the petition for that person." During the public comment period, concerns were raised that a party might rely on the longer period for filing the petition, only to risk the petition being held untimely by a court that later concluded that the relevant act or omission had not actually occurred in connection with federal duties. The Committee decided to respond to this concern by adding two safe harbor provisions. These provisions make clear that the longer period applies in any case where the United States either represents the officer or employee at the time of entry of the relevant judgment or files the petition on the officer or employee's behalf.

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to have their appeals dismissed due to a ruling by the court of appeals on this factual question. Public Citizen argued that the wording should be changed to make clear that the extended time periods' availability (under 4(a)(1)(B)(iv) and 40(a)(1)(D)) turns on the nature of the act *as alleged by the plaintiff* rather than on the nature of the act *as ultimately found by the court.* Public Citizen suggested that this could be achieved by changing "an act or omission occurring in connection with" to read "an act or omission alleged to have occurred in connection with."

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PROPOSED AMENDMENT TO
28 U.S.C. § 2107

§ 2107. Time for appeal to court of appeals

(a) Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

(b) In any such action, suit or proceeding ~~in which the United States or an officer or agency thereof is a party~~, the time as to all parties shall be sixty days from such entry if one of the parties is:

(1) the United States;

(2) a United States agency;

(3) a United States officer or employee sued in an official capacity; or

(4) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf – including all instances in which the United States represents that person when the judgment, order, or decree is entered or files the appeal for that person.

(c) The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal,

extend the time for appeal upon a showing of excusable neglect or good cause. In addition, if the district court finds--

(1) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and

(2) that no party would be prejudiced,

the district court may, upon motion filed within 180 days after entry of the judgment or order or within 14 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

(d) This section shall not apply to bankruptcy matters or other proceedings under Title 11.

* * *

A BILL

To clarify appeal time limits in civil cases to which United States officers or employees are parties.

Be it enacted by the Senate and House of Representatives of the United States of America
in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Appeal Time Clarification Act of 2011.'

SEC. 2. AMENDMENT RELATED TO TITLE 28, UNITED STATES CODE.

Section 2107(b) is amended by striking its current contents and substituting the following: 'In any such action, suit or proceeding, the time as to all parties shall be sixty days from such entry if one of the parties is:

(1) the United States;
(2) a United States agency;
(3) a United States officer or employee sued in an official capacity; or
(4) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf – including all instances in which the United States represents that person when the judgment, order, or decree is entered or files the appeal for that person.

SEC. 3. EFFECTIVE DATE

The amendment made by this Act shall take effect on December 1, 2011, and shall govern appeals from judgments, orders, or decrees entered on or after November 1, 2011.