111th Congress, 2d Session – – – – – – – – – – – – House Document 111–112

AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

COMMUNICATION

FROM

THE CHIEF JUSTICE, THE SUPREME COURT OF THE UNITED STATES

TRANSMITTING

AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE THAT HAVE BEEN ADOPTED BY THE SUPREME COURT, PURSUANT TO 28 U.S.C. 2074

MAY 13, 2010.—Referred to the Committee on the Judiciary and ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE

56–395 WASHINGTON : 2010

SUPREME COURT OF THE UNITED STATES,
Washington, DC, April 28, 2010.

Hon. NANCY PELOSI,
Speaker of the House of Representatives,
Washington, DC.

DEAR MADAM SPEAKER: I have the honor to submit to the Congress the amendments to the Federal Rules of Appellate Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

JOHN G. ROBERTS, Jr.,
Chief Justice.

April 28, 2010

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Appellate Procedure be, and they hereby are, amended by including therein amendments to Appellate Rules 1, 4, and 29, and Form 4.

[See infra., pp. __ __ __.]

2. That the foregoing amendments to the Federal Rules of Appellate Procedure shall take effect on December 1, 2010, and shall govern in all proceedings in appellate cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Appellate Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

Rule 1. Scope of Rules; Definition; Title

(a) Scope of Rules.

(1) These rules govern procedure in the United States courts of appeals.

(2) When these rules provide for filing a motion or other document in the district court, the procedure must comply with the practice of the district court.

(b) Definition. In these rules, 'state' includes the District of Columbia and any United States commonwealth or territory.

(c) Title. These rules are to be known as the Federal Rules of Appellate Procedure.

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

* * * * *

(7) **Entry Defined.**

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58(a) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a); or

(ii) if Federal Rule of Civil Procedure 58(a) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

- the judgment or order is set forth on a separate document, or

- 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a) does not affect the validity of an appeal from that judgment or order.

* * * * *

Rule 29. Brief of an Amicus Curiae

(a) When Permitted. The United States or its officer or agency or a state may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.

* * * * *

(c) Contents and Form. An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. An amicus brief need not comply with Rule 28, but must include the following:

(1) if the amicus curiae is a corporation, a disclosure statement like that required of parties by Rule 26.1;

(2) a table of contents, with page references;

(3) a table of authorities — cases (alphabetically arranged), statutes, and other authorities — with references to the pages of the brief where they are cited;

(4) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;

(5) unless the amicus curiae is one listed in the first sentence of Rule 29(a), a statement that indicates whether:

(A) a party's counsel authored the brief in whole or in part;

(B) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and

(C) a person — other than the amicus curiae, its members, or its counsel — contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person;

(6) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review; and

(7) a certificate of compliance, if required by Rule 32(a)(7).

* * * * *

Form 4. Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis

* * * * *

7. *State the persons who rely on you or your spouse for support.*

Name [or, if under 18, initials only] *Relationship* *Age*

_____ _____ ____

* * * * *

13. *State the city and state of your legal residence.*

_____

Your daytime phone number: (____) _____

Your age: _____ *Your years of schooling:* _____

Last four digits of your social-security number: _____

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

December 18, 2009

MEMORANDUM

To: The Chief Justice of the United States and the Associate Justices of the Supreme Court

From: James C. Duff

RE: TRANSMITTAL OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit herewith for consideration of the Court proposed amendments to Rules 1, 4, and 29, and Form 4 of the Federal Rules of Appellate Procedure, which were approved by the Judicial Conference at its September 2009 session. The Judicial Conference recommends that the amendments be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering the proposed amendments, I am transmitting an excerpt from the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference as well as the Report of the Advisory Committee on the Federal Rules of Appellate Procedure.

Attachments

EXCERPT FROM THE
REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

* * * * *

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules submitted proposed amendments to Rules 1, 4, and 29 and Form 4 with a recommendation that they be approved and transmitted to the Judicial Conference. Except as noted below, the proposed changes were circulated to the bench and bar for comment in August 2008. The scheduled public hearings on the proposed changes were canceled because no one asked to testify.

The proposed amendments to Rule 1 clarify that the word "state" when used in the rules includes the District of Columbia and any United States commonwealth or territory.

The proposed amendments to Rule 4(a)(7) correct cross-references to Civil Rule 58(a), which was renumbered as part of the restyling of the Civil Rules, effective December 1, 2007. The amendments were not published for public comment because they are technical and conforming.

The proposed amendments to Rule 29(a) delete the reference to a "Territory, Commonwealth, or the District of Columbia" as unnecessary in light of the new definition in Rule 1(b).

The proposed amendments to Rule 29(c) require an amicus curiae to disclose whether counsel for a party authored the brief in whole or in part and whether a party or a party's counsel contributed money with the intention of funding the preparation or submission of the brief, and to

identify every person (other than the amicus, its members, and its counsel) who contributed money that was intended to fund the brief's preparation or submission. The disclosure requirement, which is modeled on Supreme Court Rule 37.6, serves to deter counsel from using an amicus brief to circumvent page limits on the parties' brief. It also is intended to help judges assess whether the amicus itself considers the issue sufficiently important to justify the cost and effort of filing an amicus brief.

The proposed revision of Form 4, Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis, limits the disclosure of personal-identifier information on the form consistent with the privacy provisions of Rule 25(a)(5).

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference —

Approve the proposed amendments to Appellate Rules 1, 4, and 29 and Form 4 and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

* * * * *

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

Agenda E-19 (Appendix A)
Rules
September 2009

LEE H. ROSENTHAL
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

CARL E. STEWART
APPELLATE RULES

LAURA TAYLOR SWAIN
BANKRUPTCY RULES

MARK R. KRAVITZ
CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

ROBERT L. HINKLE
EVIDENCE RULES

DATE: **May 8, 2009 (revised June 8, 2009)**

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

FROM: **Judge Carl E. Stewart, 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 16 and 17 in Kansas City, Missouri. The Committee gave final approval to proposed amendments to Appellate Rules 1 and 29 and Appellate Form 4[1].

* * * * *

Part II of this report discusses the proposals for which the Committee seeks final approval: proposed amendments to Rules 1 and 29 and to Form 4[2].

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[1]The Standing and Appellate Rules Committees by email ballot taken after the committees' meetings approved technical and conforming amendments to Appellate Rule 4(a)(7) to correct cross-references to Civil Rule 58(a), which had been renumbered as part of the restyling of the Civil Rules effective December 1, 2007.

[2]At the time this report was first written, the Appellate Rules Committee also planned to request final approval of a proposed amendment to Rule 40. However, prior to the Standing Committee's meeting on June 1-2, 2009, the determination was reached to recommend to the Standing Committee that it hold the Rule 40 proposal in abeyance rather than sending it forward for final approval. The Appellate Rules Committee was informed of this determination by email prior to the meeting and no member voiced disapproval. This is discussed further in Part II.C. of the report.

* * * * *

II. Action Items – for Final Approval

The Committee is seeking final approval of proposed amendments to Rules 1 and 29 and to Form 4[3].

A. Rule 1

Proposed new Rule 1(b) would define the term "state" for the purposes of the Appellate Rules. The proposal to define the term "state" grew out of the time-computation project's discussion of the definition of "legal holiday"; Rule 26(a)'s definition of "legal holiday" includes certain state holidays, and it was thought useful to define "state," for that purpose, to encompass the District of Columbia and federal territories, commonwealths and possessions.

As discussed below, the adoption of the proposed definition in Rule 1(b) permits the deletion of the reference to a "Territory, Commonwealth, or the District of Columbia" from Rule 29(a). The term "state" also appears in Rules 22, 44, and 46. The Committee does not believe that the adoption of proposed Rule 1(b) requires any changes in Rules 22, 44 or 46.

1. Text of Proposed Amendment and Committee Note

The Committee recommends final approval of the proposed amendment to Rule 1 as set out in the enclosure to this report.

2. Changes Made After Publication and Comment

No changes were made to the proposed amendment to Rule 1 after publication and comment.

The public comments on the proposed amendment are summarized in the enclosure to this report. The Committee discussed the suggestion by Daniel I.S.J. Rey-Bear that Rule 1(b)'s definition of "state" should also include federally recognized Indian tribes. Noting that this suggestion deserves careful consideration, the Committee placed the suggestion on its study agenda as a new item. Treating Mr. Rey-Bear's suggestion as a new study item will enable the Committee to consider the implications of that suggestion for the operation of Rules 22, 26, 29, 44 and 46, all of which use the term "state."

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[3]See supra note 2.

B. Rule 29

The proposed amendments would alter Rule 29(a) in the light of new Rule 1(b) and would add a new disclosure requirement to Rule 29(c).

Rule 29(a) currently provides that "[t]he United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing." Proposed Rule 1(b) will define "state" to include the District of Columbia and U.S. commonwealths or territories. Accordingly, the reference to a "Territory, Commonwealth, or the District of Columbia" should be deleted from Rule 29(a).

The proposed amendments would add a new disclosure requirement to Rule 29(c). The new provision, which is modeled on Supreme Court Rule 37.6, would require amicus briefs to indicate whether counsel for a party authored the brief in whole or in part and whether a party or a party's counsel contributed money that was intended to fund the preparation or submission of the brief, and to identify every person (other than the amicus, its members and its counsel) who contributed money that was intended to fund the brief's preparation or submission. The provision would exempt from the disclosure requirement amicus filings by various government entities.

1. Text of Proposed Amendment and Committee Note

The Committee recommends final approval of the proposed amendments to Rule 29 as set out in the enclosure to this report.

2. Changes Made After Publication and Comment

No changes were made to the proposed amendment to Rule 29(a). However, the Committee made a number of changes to Rule 29(c) in response to the comments.

One change concerns the third subdivision of the authorship and funding disclosure requirement. As published, that third subdivision would have directed the filer to "identif[y] every person — other than the amicus curiae, its members, or its counsel — who contributed money that was intended to fund preparing or submitting the brief." A commentator criticized this language as ambiguous, because the commentator argued that the provision as drafted did not make clear whether it is necessary for the brief to state that no such persons exist (if that is the case). The Committee accordingly revised this portion of the requirement to require a statement that indicates whether "a person – other than the amicus curiae, its members, or its counsel – contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person."

Another set of changes concerns the placement of the disclosure requirement. As published, the Rule 29(c) proposal would have placed the new authorship and funding disclosure requirement in a new subdivision (c)(7) and would have moved the requirement of a corporate disclosure statement from the initial block of text in Rule 29(c) to a new subdivision (c)(6). New subdivision (c)(7) would have directed that the authorship and funding disclosure be made "in the first footnote on the first page." Commentators criticized this directive as ambiguous and suggested that a better approach would be to direct that the authorship and funding disclosure follow the statement currently required by existing Rule 29(c)(3). The Committee found merit in these suggestions and decided to move the authorship and funding disclosure provision up into Rule 29(c)(3). Having made that change, the Committee abandoned (as unnecessary) its proposal to move the corporate-disclosure provision to a new subdivision (c)(6). However, as described below, the proposed numbering of the subdivisions in Rule 29(c) was further changed in light of style guidance from Professor Kimble.

Subsequent to the Appellate Rules Committee's meeting, the language adopted by the advisory committee was circulated to Professor Kimble for style review. Professor Kimble argued that the authorship and funding disclosure provision should be placed in a separate subdivision rather than being placed in existing subdivision (c)(3). In the light of the Appellate Rules Committee's goal of listing the required components in the order in which they should appear in the brief, the decision was made to place the authorship and funding disclosure provision in a new subdivision following existing subdivision (c)(3). Though this will require renumbering the subparts of Rule 29(c), those subparts have only existed for about a decade (since the 1998 restyling) and citations to the specific subparts of Rule 29(c) do not appear in the caselaw. Given that this change entails renumbering some subparts of Rule 29(c), it also seems advisable to move the corporate disclosure provision into a new subdivision (c)(1) and to renumber the subsequent subdivisions accordingly. Professor Kimble also suggested two stylistic changes to the language of what will now become new subdivision (c)(5). First, instead of using the language "unless filed by an amicus curiae listed in the first sentence of Rule 29(a)," the provision now reads "unless the amicus curiae is one listed in the first sentence of Rule 29(a)." Second, the words "indicates whether" have been moved up into the introductory text in 29(c)(5) instead of being repeated at the outset of the three subsections (29(c)(5)(A), (B) and (C)). Also, a comma has been added to what will become Rule 29(c)(3).

Commentators made a number of other suggestions concerning the proposed authorship and funding disclosure requirement, and the Committee gave each of those suggestions careful consideration. A detailed record of the Committee's discussions can be found in the draft minutes.

C. Rule 40

Part II.C. of this report as originally drafted discussed a proposed amendment to Rule 40(a)(1). At the time this report was first written, the Committee planned to request final approval of that proposed amendment. But prior to the Standing Committee's June 1, 2009

meeting, the determination was reached to recommend to the Standing Committee that it hold the Rule 40 proposal in abeyance rather than sending it forward for final approval. The Appellate Rules Committee was informed of this determination by email prior to the meeting and no member voiced disapproval.

The proposed amendment to Rule 40(a)(1) would clarify the treatment of the time to seek rehearing in cases to which a United States officer or employee is a party. This proposal was published for comment in 2007 along with a proposal to make a similar clarifying amendment to Rule 4(a)(1)(B). However, the Committee subsequently noted that the Supreme Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007), raises questions concerning the advisability of pursuing the proposed amendment to Rule 4(a)(1)(B). That amendment would address the scope of the 60-day appeal period in 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. Accordingly, 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). A similar issue did not arise with respect to Rule 40(a)(1), because the deadlines for seeking rehearing are not set by statute. The Committee therefore determined to abandon the proposed amendment to Rule 4(a)(1)(B), but it voted without opposition to give final approval to the proposed amendment to Rule 40(a)(1). The Rule 40(a)(1) amendment would clarify the applicability of the extended (45-day) period for seeking rehearing, and it would render Rule 40(a)(1)'s language parallel to similar language in Civil Rule 12(a) concerning the time to serve an answer.

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). The question presented in *Eisenstein* read as follows: "Where the United States elects not to proceed with a qui tam action under the False Claims Act, and the relator instead conducts the action for the United States, must a notice of appeal be filed within the 60-day period provided for in Fed. R. App. P. 4(a)(1)(B), applicable when the United States is a 'party,' or the 30-day period provided for in Fed. R. App. P. 4(a)(1)(A)?" *Eisenstein* was argued on April 21, and as of the first writing of this report the case had not yet been decided. The decision in *Eisenstein* seemed likely to inform any future consideration by the Committee of the 30-day and 60-day periods in Rule 4(a)(1) and 28 U.S.C. § 2107.

When the Appellate Rules Committee met in April 2009, members discussed the grant of certiorari in *Eisenstein* and the advisability of affording the Department of Justice – as the original proponent of the Rule 4 and 40 proposals – the opportunity to consider whether it would prefer to seek coordinated amendments of both Rules 4 and 40. At the meeting, the Department of Justice representative undertook to consult with the Solicitor General and provide input on these questions prior to the Standing Committee meeting. The Committee determined by

consensus that, in the meantime, the Rule 40(a)(1) amendment would be placed on the Standing Committee's agenda for action at the June 2009 meeting.

Prior to the June 2009 meeting, the Department of Justice reported its intention to urge the Standing Committee to put the Rule 40 amendment on hold pending the Supreme Court's decision in *Eisenstein*. The Department suggested that the best course of action would be to await the *Eisenstein* decision and then to consider whether it is best to act on the Rule 40 issue alone or whether the Rule 40 issue should be linked to a possible change to Rule 4. In the light of this report, I decided to recommend to the Standing Committee that the Rule 40 proposal be held in abeyance for the present. I informed the Appellate Rules Committee members of this decision by email prior to the meeting and no members voiced dissent from this course of action.

Due to the decision not to recommend the Rule 40 proposal for final approval at the June 2009 meeting, Parts II.C.1. and II.C.2. of this report are omitted from this revised version of the report. Those parts addressed the text of the proposed Rule 40 amendment, its Note, and the changes made after publication and comment.

D. Form 4

The privacy rules that took effect December 1, 2007, require redaction of social security numbers (except for the last four digits) and provide that references to an individual known to be a minor should include only the minor's initials. New Criminal Rule 49.1(a)(5) also requires redaction of individuals' home addresses (so that only the city and state are shown). These rules require changes in Appellate Form 4, which concerns the information that must accompany a motion for permission to appeal in forma pauperis. The Administrative Office ("AO") has made interim changes to the version of Form 4 that is posted on the AO's website, but those interim changes do not remove the need to amend the official version of Form 4 to conform to the privacy requirements.

Moving forward, the Committee will also consider other changes to Form 4. For one thing, an effort is underway to restyle all the forms. More substantively, not all i.f.p. applications require the detail specified in current Form 4; for example, a much simpler form might be appropriate in the habeas context. In addition, the Committee will consider whether to revise Question 10, which requests the name of any attorney whom the litigant has paid (or will pay) for services in connection with the case, as well as the amount of such payments. The Committee has placed these matters on its study agenda, and plans to consult other Advisory Committees about them because Form 4 is often used in the district courts.

The Committee believes, however, that it is important to take immediate action to bring the official version of Form 4 into compliance with the new privacy requirements. Accordingly, the Committee seeks final approval of the proposed amendment.

1. Text of Proposed Amendment

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

2. Changes Made After Publication and Comment

No changes were made to the proposed amendment to Form 4 after publication and comment.

* * * * *

Enclosures

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE*

Rule 1. Scope of Rules; Definition; Title

1 **(a) Scope of Rules.**

2 (1) These rules govern procedure in the United States

3 courts of appeals.

4 (2) When these rules provide for filing a motion or

5 other document in the district court, the procedure

6 must comply with the practice of the district court.

7 **(b)** ~~[Abrogated.]~~ **Definition.** In these rules, 'state' includes

8 the District of Columbia and any United States

9 commonwealth or territory.

10 **(c) Title.** These rules are to be known as the Federal Rules

11 of Appellate Procedure.

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

Committee Note

Subdivision (b). New subdivision (b) defines the term "state" to include the District of Columbia and any commonwealth or territory of the United States. Thus, as used in these Rules, "state" includes the District of Columbia, Guam, American Samoa, the U.S. Virgin Islands, the Commonwealth of Puerto Rico, and the Commonwealth of the Northern Mariana Islands.

CHANGES MADE AFTER PUBLICATION AND COMMENT

No changes were made after publication and comment.

Rule 4. Appeal as of Right — When Taken

1 **(a) Appeal in a Civil Case.**

2 * * * * *

3 (7) **Entry Defined.**

4 (A) A judgment or order is entered for purposes

5 of this Rule 4(a):

6 (i) if Federal Rule of Civil Procedure

7 58(a)~~(1)~~ does not require a separate

8 document, when the judgment or order

9 is entered in the civil docket under
10 Federal Rule of Civil Procedure 79(a);
11 or
12 (ii) if Federal Rule of Civil Procedure
13 58(a)~~(1)~~ requires a separate document,
14 when the judgment or order is entered
15 in the civil docket under Federal Rule
16 of Civil Procedure 79(a) and when the
17 earlier of these events occurs:
18 • the judgment or order is set forth
19 on a separate document, or
20 • 150 days have run from entry of
21 the judgment or order in the civil
22 docket under Federal Rule of Civil
23 Procedure 79(a).
24 (B) A failure to set forth a judgment or order on
25 a separate document when required by

26 Federal Rule of Civil Procedure 58(a)~~(1)~~
27 does not affect the validity of an appeal from
28 that judgment or order.
29 * * * * *

Committee Note

Subdivision (a)(7). Subdivision (a)(7) is amended to reflect the renumbering of Civil Rule 58 as part of the 2007 restyling of the Civil Rules. References to Civil Rule "58(a)(1)" are revised to refer to Civil Rule "58(a)." No substantive change is intended.

The amendments are technical and conforming. In accordance with established Judicial Conference procedures they were not published for public comment.

Rule 29. Brief of an Amicus Curiae

1 **(a) When Permitted.** The United States or its officer or
2 agency~~;~~ or a state ~~State, Territory, Commonwealth, or~~
3 ~~the District of Columbia~~ may file an amicus-curiae brief
4 without the consent of the parties or leave of court. Any

5 other amicus curiae may file a brief only by leave of
6 court or if the brief states that all parties have consented
7 to its filing.
8 * * * * *
9 **(c) Contents and Form.** An amicus brief must comply
10 with Rule 32. In addition to the requirements of Rule
11 32, the cover must identify the party or parties supported
12 and indicate whether the brief supports affirmance or
13 reversal. ~~If an amicus curiae is a corporation, the brief~~
14 ~~must include a disclosure statement like that required of~~
15 ~~parties by Rule 26.1.~~ An amicus brief need not comply
16 with Rule 28, but must include the following:
17 (1) if the amicus curiae is a corporation, a disclosure
18 statement like that required of parties by Rule 26.1;
19 ~~(1)~~(2) a table of contents, with page references;
20 ~~(2)~~(3) a table of authorities — cases (alphabetically
21 arranged), statutes, and other authorities —

22 with references to the pages of the brief
23 where they are cited;
24 ~~(3)~~(4) a concise statement of the identity of the
25 amicus curiae, its interest in the case, and the
26 source of its authority to file;
27 (5) unless the amicus curiae is one listed in the first
28 sentence of Rule 29(a), a statement that indicates
29 whether:
30 (A) a party's counsel authored the brief in whole
31 or in part;
32 (B) a party or a party's counsel contributed
33 money that was intended to fund preparing or
34 submitting the brief; and
35 (C) a person — other than the amicus curiae, its
36 members, or its counsel — contributed
37 money that was intended to fund preparing or

38 submitting the brief and, if so, identifies each
39 such person;
40 ~~(4)~~(6) an argument, which may be preceded by a
41 summary and which need not include a
42 statement of the applicable standard of
43 review; and
44 ~~(5)~~(7) a certificate of compliance, if required by
45 Rule 32(a)(7).
46 * * * * *

Committee Note

Subdivision (a). New Rule 1(b) defines the term "state" to include "the District of Columbia and any United States commonwealth or territory." That definition renders subdivision (a)'s reference to a "Territory, Commonwealth, or the District of Columbia" redundant. Accordingly, subdivision (a) is amended to refer simply to "[t]he United States or its officer or agency or a state."

Subdivision (c). The subparts of subdivision (c) are renumbered due to the relocation of an existing provision in new subdivision (c)(1) and the addition of a new provision in new subdivision (c)(5). Existing subdivisions (c)(1) through (c)(5) are renumbered, respectively, (c)(2), (c)(3), (c)(4), (c)(6) and (c)(7). The

new ordering of the subdivisions tracks the order in which the items should appear in the brief.

Subdivision (c)(1). The requirement that corporate amici include a disclosure statement like that required of parties by Rule 26.1 was previously stated in the third sentence of subdivision (c). The requirement has been moved to new subdivision (c)(1) for ease of reference.

Subdivision (c)(5). New subdivision (c)(5) sets certain disclosure requirements concerning authorship and funding. Subdivision (c)(5) exempts from the authorship and funding disclosure requirements entities entitled under subdivision (a) to file an amicus brief without the consent of the parties or leave of court. Subdivision (c)(5) requires amicus briefs to disclose whether counsel for a party authored the brief in whole or in part and whether a party or a party's counsel contributed money with the intention of funding the preparation or submission of the brief. A party's or counsel's payment of general membership dues to an amicus need not be disclosed. Subdivision (c)(5) also requires amicus briefs to state whether any other "person" (other than the amicus, its members, or its counsel) contributed money with the intention of funding the brief's preparation or submission, and, if so, to identify all such persons. "Person," as used in subdivision (c)(5), includes artificial persons as well as natural persons.

The disclosure requirement, which is modeled on Supreme Court Rule 37.6, serves to deter counsel from using an amicus brief to circumvent page limits on the parties' briefs. *See Glassroth v. Moore*, 347 F.3d 916, 919 (11th Cir. 2003) (noting the majority's suspicion "that amicus briefs are often used as a means of evading the page limitations on a party's briefs"). It also may help judges to assess whether the amicus itself considers the issue important enough to sustain the cost and effort of filing an amicus brief.

It should be noted that coordination between the amicus and the party whose position the amicus supports is desirable, to the extent that it helps to avoid duplicative arguments. This was particularly true prior to the 1998 amendments, when deadlines for amici were the same as those for the party whose position they supported. Now that the filing deadlines are staggered, coordination may not always be essential in order to avoid duplication. In any event, mere coordination — in the sense of sharing drafts of briefs — need not be disclosed under subdivision (c)(5). *Cf.* Eugene Gressman et al., Supreme Court Practice 739 (9th ed. 2007) (Supreme Court Rule 37.6 does not "require disclosure of any coordination and discussion between party counsel and amici counsel regarding their respective arguments . . . .").

CHANGES MADE AFTER PUBLICATION AND COMMENT

No changes were made to the proposed amendment to Rule 29(a). However, the Committee made a number of changes to Rule 29(c).

One change concerns the third subdivision of the authorship and funding disclosure requirement. As published, that third subdivision would have directed the filer to "identif[y] every person — other than the amicus curiae, its members, or its counsel — who contributed money that was intended to fund preparing or submitting the brief." A commentator criticized this language as ambiguous, because the commentator argued that the provision as drafted did not make clear whether it is necessary for the brief to state that no such persons exist (if that is the case). The Committee revised this portion of the requirement to require a statement that indicates whether "a person – other than the amicus curiae, its members, or its counsel – contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person."

Another set of changes concerns the placement of the disclosure requirement. As published, the Rule 29(c) proposal would have placed the new authorship and funding disclosure requirement in a new subdivision (c)(7) and would have moved the requirement of a corporate disclosure statement from the initial block of text in Rule 29(c) to a new subdivision (c)(6). New subdivision (c)(7) would have directed that the authorship and funding disclosure be made "in the first footnote on the first page." Commentators criticized this directive as ambiguous and suggested that a better approach would be to direct that the authorship and funding disclosure follow the statement currently required by existing Rule 29(c)(3). The Committee found merit in these suggestions and decided to add the authorship and funding disclosure provision to existing subdivision (c)(3). However, a further revision to the structure of subdivision (c) was later made in response to style guidance from Professor Kimble, as discussed below.

Subsequent to the Appellate Rules Committee's meeting, the language adopted by the advisory committee was circulated to Professor Kimble for style review. Professor Kimble argued that the authorship and funding disclosure provision should be placed in a separate subdivision rather than being placed in existing subdivision (c)(3). In the light of the Appellate Rules Committee's goal of listing the required components in the order in which they should appear in the brief, the decision was made to place the authorship and funding disclosure provision in a new subdivision following existing subdivision (c)(3). Though this requires renumbering the subparts of Rule 29(c), those subparts have only existed for about a decade (since the 1998 restyling) and citations to the specific subparts of Rule 29(c) do not appear in the caselaw. Given that this change entails renumbering some subparts of Rule 29(c), it also seems advisable to move the corporate disclosure provision into a new subdivision (c)(1) and to renumber the subsequent subdivisions accordingly. Professor Kimble also suggested two stylistic changes to the language of what

will now become new subdivision (c)(5). First, instead of using the language "unless filed by an amicus curiae listed in the first sentence of Rule 29(a)," the provision now reads "unless the amicus curiae is one listed in the first sentence of Rule 29(a)." Second, the words "indicates whether" have been moved up into the introductory text in 29(c)(5) instead of being repeated at the outset of the three subsections (29(c)(5)(A), (B) and (C)). Also, a comma has been added to what will become Rule 29(c)(3).

Form 4. Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis

1 * * * * *

2 7. *State the persons who rely on you or your spouse for support.*

3 Name [or, if under 18, initials only] Relationship Age

4 _____ _____ ____

5 * * * * *

6 13. *State the ~~address~~ city and state of your legal residence.*

7 _____

8 Your daytime phone number: (____) _____

9 Your age: _____ Your years of schooling: _____

10 ~~Your~~ Last four digits of your social-security number: _____

CHANGES MADE AFTER PUBLICATION AND COMMENT

No changes were made after publication and comment.