# ADVISORY COMMITTEE
# ON
# APPELLATE RULES

**Santa Fe, NM**
**April 26-27, 2007**

**Agenda for Spring 2007 Meeting of**
**Advisory Committee on Appellate Rules**
**April 26-27, 2007**
**Santa Fe, New Mexico**

I. Introductions

II. Approval of Minutes of November 2006 Meeting

III. Report on January 2007 Meeting of Standing Committee

IV. Report on Responses to Letter to Chief Judges Regarding Circuit Briefing Requirements

V. Action Items

A. Item No. 05-06 (FRAP 4(a)(4)(B)(ii) — amended NOA after favorable or insignificant change to judgment)

B. Item No. 06-01 (FRAP 26(a) — time-computation template) & Item No. 06-02 (adjust deadlines to reflect time-computation changes)

C. Item No. 06-04 (FRAP 29 – amicus briefs – disclosure of authorship or monetary contribution)

VI. Discussion Items

A. Item No. 06-06 (FRAP 4(a)(1)(B) and 40(a)(1) – extend time for NOA and petitions for rehearing in cases involving state-government litigants)

B. Items Awaiting Initial Discussion

1. Item No. 07-AP-B (Proposed new FRAP 12.1 concerning indicative rulings)*

2. Item No. 07-AP-C (FRAP 4(a)(4) and 22 – proposed changes in light of pending amendments to the Rules Governing Proceedings under 28 U.S.C. §§ 2254 or 2255)*

3. Item No. 07-AP-D (FRAP 1 – definition of "state")*

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* N.B.: As explained in the enclosed materials, Committee action may be requested on Item Nos. 07-AP-B, 07-AP-C, and 07-AP-D.

4. Item No. 06-07 (Proposed new rule concerning advance disclosure of panel composition)

5. Item No. 07-AP-A (Comments concerning FRAP 32.1)

VII. Additional Old Business and New Business (If Any)

A. Status of previously approved amendments

1. Item No. 01-03 (FRAP 26 – clarify operation of three-day rule)

2. Item No. 03-02 (FRAP 7 – clarify reference to "costs")

3. Item No. 03-09 (FRAP 4(a)(1)(B) & 40(a)(1) – treatment of U.S. officer or employee sued in individual capacity)

VIII. Schedule Date and Location of Fall 2007 Meeting

IX. Adjournment

# Advisory Committee on Appellate Rules
# Table of Agenda Items — March 2007

| FRAP Item | Proposal | Source | Current Status |
|---|---|---|---|
| 01-03 | Amend FRAP 26(a)(2) to clarify interaction with "3-day rule" of FRAP 26(c). | Roy H. Wepner, Esq. | Awaiting initial discussion<br>Discussed and retained on agenda 04/01<br>Referred to Civil Rules Committee 04/02<br>Draft approved 11/03 for submission to Standing Committee |
| 03-02 | Amend FRAP 7 to clarify whether reference to "costs" includes only FRAP 39 costs. | Advisory Committee | Awaiting initial discussion<br>Discussed and retained on agenda 05/03<br>Draft approved 11/03 for submission to Standing Committee |
| 03-09 | Amend FRAP 4(a)(1)(B) & 40(a)(1) to clarify treatment of U.S. officer or employee sued in individual capacity. | Solicitor General | Awaiting initial discussion<br>Discussed and retained on agenda 11/03; awaiting revised proposal from Department of Justice<br>Tentative draft approved 04/04<br>Revised draft approved 11/04 for submission to Standing Committee |
| 03-10 | Add new FRAP 25.1 to "protect privacy and security concerns relating to electronic filing of documents," as directed by E-Gov't Act. | E-Government Subcommittee | Awaiting initial discussion<br>Discussed and retained on agenda 04/04<br>Discussed and retained on agenda 11/04<br>Draft approved 04/05 for submission to Standing Committee<br>Approved for publication by Standing Committee 06/05<br>Published for comment 08/05<br>Restyled draft approved 04/06 for submission to Standing Committee, with request that Style Subcommittee reconsider style changes<br>Approved by Standing Committee 06/06<br>Approved by Judicial Conference 09/06 |
| 05-01 | Amend FRAP 21 & 27(c) to conform to Justice for All Act of 2004. | Advisory Committee | Awaiting initial discussion<br>Discussed and retained on agenda 04/05; awaiting proposal from Department of Justice<br>Discussed and retained on agenda 04/06; Department of Justice will monitor practice under the Act |

| FRAP Item | Proposal | Source | Current Status |
|---|---|---|---|
| 05-05 | Amend FRAP 29(e) to require filing of amicus brief 7 *calendar* days after *service* of principal brief of party supported. | Brian Wolfman<br>Public Citizen Litigation Group | Awaiting initial discussion<br>Discussed and retained on agenda 04/06; awaiting report from Department of Justice<br>Further consideration deferred pending consideration of items 06-01 and 06-02, 11/06 |
| 05-06 | Amend FRAP 4(a)(4)(B)(ii) to clarify whether appellant must file amended notice of appeal when court, on post-judgment motion, makes favorable or insignificant change to judgment. | Hon. Pierre N. Leval (CA2) | Awaiting initial discussion<br>Discussed and retained on agenda 04/06 |
| 06-01 | Amend FRAP 26(a) to adopt template proposed by Time-Computation Subcommittee. | Standing Committee | Awaiting initial discussion<br>Discussed and retained on agenda 04/06 |
| 06-02 | Amend various rules to adjust deadlines to compensate for new time-computation method. | Standing Committee | Awaiting initial discussion<br>Discussed and retained on agenda 04/06; deadline subcommittee appointed |
| 06-04 | Amend FRAP 29 to require that amicus briefs indicate whether counsel for a party authored brief and to identify persons who contributed monetarily to preparation or submission of brief. | Hon. Paul R. Michel (C.J., Fed. Cir.) and Hon. Timothy B. Dyk (Fed. Cir.) | Awaiting initial discussion<br>Discussed and retained on agenda 11/06 |
| 06-06 | Extend time for NOA and petitions for rehearing in cases involving state-government litigants. | William E. Thro, Virginia State Solicitor General | Awaiting initial discussion<br>Discussed and retained on agenda 11/06 |
| 06-07 | Add new FRAP rule that would require all federal appellate courts to give at least 10 days' advance notice of the identities of the judges assigned to an oral argument panel. | Howard Bashman, Esq. | Awaiting initial discussion |
| 06-08 | Amend FRAP to provide a rule governing amicus briefs with respect to rehearing en banc. | Mark Levy, Esq. | Awaiting initial discussion |
| 07-AP-A | Amend FRAP 32.1 to permit citation to pre-2007 opinions in certain circumstances, and in various other respects. | Robert Kantowitz, Esq. 2/6/07 | Awaiting initial discussion. |

| FRAP Item | Proposal | Source | Current Status |
|---|---|---|---|
| 07-AP-B | Add new FRAP 12.1 concerning the procedure to be followed when a district court is asked for relief that it lacks authority to grant due to a pending appeal. | Civil Rules Committee 1/07 | Awaiting initial discussion |
| 07-AP-C | Amend FRAP 4(a)(4)(A) and 22 in light of proposed amendments to Rules 11 of the rules governing 2254 and 2255 proceedings. | Criminal Rules Committee 1/07 | Awaiting initial discussion |
| 07-AP-D | Amend FRAP to define the term "state." | Time-computation Subcommittee 3/07 | Awaiting initial discussion |

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March 20, 2007
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March 20, 2007
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# DRAFT

**Minutes of Fall 2006 Meeting of**
**Advisory Committee on Appellate Rules**
**November 15, 2006**
**Washington, DC**

## I. Introductions

Judge Carl E. Stewart called the meeting of the Advisory Committee on Appellate Rules to order on Wednesday, November 15, 2006, at 8:30 a.m. in the Mecham Conference Center of the Thurgood Marshall Federal Judiciary Building, Washington, DC. The following Advisory Committee members were present: Judge Kermit E. Bye, Judge Jeffrey S. Sutton, Justice Randy J. Holland, Judge T.S. Ellis III, Dean Stephen R. McAllister, Mr. Mark I. Levy, and Ms. Maureen E. Mahoney. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice, was present representing the Solicitor General. Also present were Professor Daniel Coquillette, Reporter to the Standing Committee; Mr. Charles R. Fulbruge III, liaison from the appellate clerks; Mr. John K. Rabiej, Mr. James N. Ishida and Mr. Jeffrey N. Barr from the Administrative Office ("AO"); and Mr. Joe S. Cecil from the Federal Judicial Center ("FJC"). Professor Philip A. Pucillo attended as an observer. Prof. Catherine T. Struve, the Reporter, took the minutes.

Judge Stewart welcomed the meeting participants and noted his regret that James Bennett was unable to attend.

## II. Approval of Minutes of April 2006 Meeting

The minutes of the April 2006 meeting were approved, subject to the correction of a previously noted typo.

## III. Report on June 2006 Meeting of Standing Committee and on Status of Pending Amendments (new FRAP 32.1 and amendments to FRAP 25)

Several parts of the Standing Committee's June 2006 meeting were of particular interest to the Appellate Rules Committee. At the June meeting, Joe Cecil reported on the progress of the FJC's study concerning the use of the 28 U.S.C. § 1292(b) mechanism for interlocutory appeals. The study commenced after concerns were raised that the 1292(b) mechanism was under-used in patent cases. A district judge member explained that these concerns arose from the high rate of appellate reversal of district courts' *Markman* determinations. The member noted that some district judges have pointed out other possibilities for addressing that reversal rate: The

rate would fall if the Patent Office wrote better patents and if the appellate courts treated *Markman* determinations as mixed questions of law and fact so as to trigger deference to the district court's determination. Mr. Cecil reported that the FJC study has broadened beyond the context of patent cases to a general study of the use of Section 1292(b); the study will also provide an opportunity to test out certain proxies for measuring cost and efficiency. Mr. Cecil expects that a draft of the study will become available in roughly another six months.

The Appellate Rules Committee had one item on the agenda for the Standing Committee's June 2006 meeting: proposed new Rule 25(a)(5), concerning privacy protection. The Standing Committee approved the new Rule, as did the Judicial Conference at its September 2006 meeting.

The Civil Rules Committee presented a number of notable items at the June 2006 meeting. One significant item, of course, was the package of restyled Rules, which the Standing Committee approved. The Civil Rules Committee also reported on its proposed new Civil Rule 62.1, which would provide a mechanism for structured dialogue between the district court and the Court of Appeals in cases where a party seeks relief in the district court while an appeal is pending. Proposed Civil Rule 62.1 would authorize the district court to indicate that it would (or might) grant the motion for relief if the Court of Appeals were to remand the case. One obvious application of the Rule would be when a party seeks relief under Civil Rule 60(b), but the Rule is written broadly to encompass other situations, such as an interlocutory appeal under 28 U.S.C. § 1292(a)(1) from the grant or denial of an injunction. The Civil Rules Committee is considering two alternative formulations – one authorizing the district court to indicate that it "would" grant relief in the event of a remand, and one authorizing the district court to indicate that it "might" grant relief. The Committee is also open to considering suggested alternatives for the numbering and placement of the Rule (the Committee chose number 62.1 to place the Rule within the section dealing with judgments). The practice that the Rule would formalize does raise a sensitive issue concerning situations when parties are willing to settle pending appeal if and only if the district court will vacate its judgment; but it was pointed out that the Rule itself would only formalize a practice that already exists.

Judge Stewart had noted at the June 2006 meeting that if Rule 62.1 goes forward the Appellate Rules Committee would likely wish to consider adding a cross-reference in the Appellate Rules. At the Appellate Rules meeting, Mr. Letter seconded that point. Mr. Letter recounted that the proposed Rule 62.1 stems from a proposal that Mr. Letter had initially made to the Appellate Rules Committee, on the ground that the provision seemed most appropriate for inclusion in the Appellate Rules. Mr. Letter noted that if instead the provision is to be included in the Civil Rules, it would be helpful to practitioners to include a cross-reference in the Appellate Rules. Mr. Rabiej reported that the Civil Rules Committee has decided to defer requesting Standing Committee approval to publish proposed Rule 62.1 for comment, because it was felt that the bar deserved a break in the pace of rulemaking.

The Civil Rules Committee had also reported to the Standing Committee its decision to

take no further action on a proposal concerning Civil Rules 54(d)(2) and 58(c)(2). The proposal stemmed from the existence of a loophole created by the interplay between the two Rules: Theoretically, a party could make a timely posttrial motion for attorneys' fees, and – long after the time to appeal had otherwise run out – the district court could provide that the attorneys' fee motion extended the time to take an appeal. In 2004, the Appellate Rules Committee had discussed this issue and had referred the matter to the Civil Rules Committee for consideration, with a recommendation that Civil Rule 58(c)(2) be amended to impose a deadline by which a judge must exercise his or her authority to order that a motion for attorney's fees have the same effect under Appellate Rule 4(a)(4) as a timely motion under Civil Rule 59. The Civil Rules Committee asked the FJC to study this question, and the FJC study found little evidence that Rule 58(c)(2) is actually used to grant such extensions. In the light of this study, the Civil Rules Committee concluded that it would be better to live with the existing narrow loophole than to proceed with an amendment that might create further unintended consequences.

The final item of particular note to the Appellate Rules Committee was the Standing Committee's discussion concerning the Time-Computation Project. Judge Kravitz reported on the progress of the Project, and the Committee discussed several revisions to the draft template Rule. The Committee also discussed at considerable length the questions surrounding the Project's effect on statutory deadlines. The Civil Rules Committee reported on its progress in reviewing relevant deadlines in the Civil Rules with a view to lengthening those affected by the change to a days-are-days approach. When lengthening affected deadlines, the Civil Rules Committee has adopted a presumption in favor of selecting new deadlines in increments of 7 days so as to minimize instances when a deadline falls on a weekend day. There was consensus on the Standing Committee that such a presumption was useful.

After the discussion of the June 2006 Standing Committee meeting, the Reporter noted the status of the other two pending Appellate Rules items. New Rule 32.1 (concerning unpublished opinions) and amended Rule 25(a)(2)(D) (authorizing local rules to require electronic filing subject to reasonable exceptions) will take effect on December 1, 2006 absent contrary action by Congress. The Reporter noted that Rule 32.1 will take effect December 1 but that subdivision (a) of that Rule would operate on a null set that month because it applies only to the citation of opinions issued on or after January 1, 2007. A judge member asked the reason for the discrepancy; Mr. Rabiej responded that the limitation to opinions issued in 2007 or later was a product of compromise on the floor of the Judicial Conference.

## IV. Report on Responses to Letter to Chief Judges Regarding Circuit Briefing Requirements

Judge Stewart summarized the genesis of the letter to the Chief Judges of each circuit concerning circuit-specific briefing requirements. The Committee had considered at some length practitioners' concerns about idiosyncratic briefing requirements in the circuits. The FJC prepared a study summarizing those briefing requirements. The Committee decided not to

amend the Appellate Rules in response to those concerns, but instead decided that the Chair of the Committee should write to the Chief Judge of each circuit to express concern over the disparate briefing requirements, to emphasize the need to make each circuit's briefing requirements readily accessible to practitioners, and to urge each circuit to consider whether the circuit's additional briefing requirements are truly necessary. The Committee decided to defer sending the letter until the controversy over Rule 32.1 died down. Accordingly, Judge Stewart sent the letter out this fall. So far, six circuits have responded to the letter. Judge Stewart circulated copies of the responses from the First, Fourth, Tenth, D.C., and Federal Circuits and reported on the oral response from the Fifth Circuit. Judge Stewart observed that the responses spanned a spectrum from the Federal Circuit, which has stated that the likelihood of eliminating any of the listed Federal Circuit rules is "nil," to other circuits that have expressed the intention of considering the matter in the future (for instance, in connection with ongoing local rulemaking efforts or at an upcoming circuit retreat). Judge Stewart wrote a follow-up letter to each of the Chief Judges who responded, thanking them for their response on behalf of their courts and for continuing to consider this issue during future court meetings or retreats as they deemed appropriate.

Professor Coquillette noted the history of the Standing Committee's oversight of local rules. At the time of the 1988 amendments to the Rules Enabling Act, the Judiciary Committee was concerned that local rules had gotten out of hand, and it articulated the principle that such rules were inappropriate unless they could be justified on the basis of variation in relevant local conditions. As to local rules in the district courts, the circuit councils now have responsibility. By contrast, with respect to local rules in the Courts of Appeals, Congress left the task of oversight to the Judicial Conference. Thus, in theory, the Standing Committee has the power to question the propriety of a local appellate rule, to require a response from the relevant Court of Appeals, to hold a hearing on the matter, and, if necessary, to recommend abrogating the rule.

A district judge member stated that he supported the Appellate Rules Committee's decision to take a hortatory approach; local legal cultures vary widely, and forcing nationwide uniformity on all issues would be a Procrustean approach. Mr. Letter observed that as a practical matter an attempt to force the Courts of Appeals to eliminate their briefing requirements would be unsuccessful, and he noted that in a few instances local variation may be appropriate. For example, because the D.C. Circuit deals with so many regulatory issues it makes sense for that court to require a glossary to explain the acronyms used to refer to various agencies. However, Mr. Letter stated that many local appellate briefing requirements do not stem from true variations in local conditions, and he observed that the variation in briefing requirements makes life difficult for national practitioners. A member stated that he agrees with Mr. Letter as a philosophical matter, but he also agrees with Judge Ellis from a pragmatic standpoint. Another member stressed that even if a circuit is unwilling to abandon its idiosyncratic requirements, it would aid practitioners if each circuit were to summarize those requirements; the member also suggested that it might be salutary for a circuit to review other circuits' local requirements with a view to adopting any that merit wider implementation. Judge Stewart noted that the FJC's study is extremely valuable and could aid the circuits in considering best practices. Professor

Coquillette noted that the Standing Committee's main focus has been on local rules that conflict with Rules adopted under the Enabling Act, with statutes, or with the Constitution; apart from such instances of conflict, the Standing Committee has chosen the path of persuasion.

Mr. Letter suggested that Judge Stewart provide closure on this matter by writing a final letter to the Chief Judges of each circuit thanking them for their attention to the briefing requirements, expressing the hope that each circuit will continue to review its additional briefing requirements, and urging each circuit, at a minimum to ensure that practitioners can readily ascertain those requirements. Judge Stewart responded that he would not want to send such a letter before each circuit has had a chance to respond to his initial letter; he observed that some circuits seem likely to take up the question at circuit retreats in the near future. Judge Stewart stated that he would continue to update the Committee about the responses he receives from the circuits and that he would keep the matter on the agenda for the Committee's April 2007 meeting.

## V. Discussion Items

### A. Item No. 05-05 (FRAP 29(e) — timing of amicus briefs)

Judge Stewart invited Mr. Letter to summarize his research relating to the timing of amicus briefs. At the April 2006 meeting, the Committee had discussed concerns raised by Public Citizen, which points out that when an amicus files a brief in support of an appellee, the interaction of Rules 29(e) and 26(a)(2) may leave the appellant with little or no time to incorporate into its reply brief a response to the amicus's contentions. After that discussion, Mr. Letter had undertaken to consult other entities that frequently file amicus briefs (including state governments), and to report to the Committee at its next meeting.

Mr. Letter summarized the results of his research, which he had also circulated to the Committee by letter dated November 13, 2006. Mr. Letter sought to identify major amicus filers, and his office contacted some 24 appellate practitioners – including three state Solicitors General, other government attorneys, private attorneys, and public interest lawyers – to ask their views on possible amendments to the timing rules in FRAP 29(e). Mr. Letter received ten responses. The respondents unanimously opposed eliminating the "stagger" – i.e., the time lag between the due date for a party's brief and the due date for an amicus who supports that party. Those responding argued that the stagger helps the amicus to avoid duplicating the party's arguments and sometimes helps the amicus decide whether to file at all. Some respondents asserted that briefing tends to be less coordinated in the Courts of Appeals than it is in the Supreme Court, and they also observed that potential amici at the Supreme Court level have less need to see the party's brief because they can see the prior briefing. While no respondents supported eliminating the stagger, some did express concern that the opposing party might experience a time crunch in preparing its reply brief; accordingly, a few recommended that the Committee extend the deadline for the reply brief.

The Reporter gave a brief overview of the changes in the timing of amicus briefs. Prior to 1998, FRAP 29 required an amicus to file within the time allowed for the brief of the party supported by the amicus. The 1998 amendment to FRAP 29 adopted the 7-day stagger, with the goal of avoiding duplicative arguments. Public Citizen raised concerns about the new timing framework, but after discussion, and investigation by Mr. Letter, the Committee decided not to act on Public Citizen's concerns. FRAP 29 has not been amended since 1998, but the 2002 amendment to FRAP 26(a)'s time-computation provision has affected Rule 29(e)'s operation. Pre-2002, FRAP 29(e)'s 7-day deadlines were computed using a days-are-days approach; post-2002 amendments, those 7-day deadlines are calculated by skipping all intermediate weekends and holidays. In other words, FRAP 29(e)'s deadlines were 7 *calendar* days pre-2002, and are now 7 *business* days. The effective lengthening of those 7-day deadlines has given rise to Public Citizen's current concerns.

The Reporter noted that this question intersects with the issues raised by the Time-Computation Project. If the Project's recommended days-are-days approach is adopted, then short deadlines currently computed as business days will henceforth be computed as calendar days. As discussed later in the meeting, the Appellate Rules Committee's Deadlines Subcommittee has reviewed all such short appellate deadlines to determine whether any of them should be lengthened to offset the change in computation approach. The Deadlines Subcommittee did not take a position on whether FRAP 29(e)'s stagger should be abandoned; but if the stagger is retained, the Deadlines Subcommittee proposes that the stagger remain 7 days (i.e., revert to 7 calendar days).

Mr. Letter noted his impression that Public Citizen would be satisfied if FRAP 29(e)'s deadlines reverted to 7 calendar days. A judge member expressed skepticism about the appellate practitioners' argument that practice in the Courts of Appeals differs significantly from that in the Supreme Court; but the member stated that he would not object to seeing the stagger revert to 7 calendar days. Mr. Letter observed that if timing crunches arise they can be addressed by motion. He also noted that parties should generally be aware ahead of time that an amicus filing is in the offing, because under FRAP 29(a) amici other than certain government entities must obtain party consent or else move for permission to file.

Another member expressed support for eliminating the stagger, because the FRAP should where possible conform to Supreme Court practice; the member stated that it is not that hard for an amicus to coordinate its briefing with that of the party it supports. Mr. Letter noted, however, that this is not the case when the party in question is the Department of Justice: Because the draft usually undergoes revision up until the last minute, the DOJ almost never shares its draft with potential amici in advance. A practitioner member noted that Supreme Court practice differs because the amici have the benefit of a "preview"of the parties' briefs (based on their filings below and regarding certiorari). The member also argued that having adopted the stagger relatively recently (in 1998), the Committee should follow the principle of "stare decisis" and not alter the rule unless there seems to be a real problem with it. A judge member agreed that the rulemakers should not go back and forth on the issue (though he also found it implausible that

the stagger actually eliminates duplicative arguments).

A practitioner member wondered whether it would be worthwhile to consider addressing the "time crunch" by extending the time for the reply brief. Mr. Letter responded that such a solution would be overbroad, because it would prolong the briefing schedule in many cases where it turns out that no amici file briefs. Mr. Fulbruge noted statistics that support this point: During calendar year 2005 in the Fifth Circuit, there were some 125 amicus filings and a total of some 9,000 appeals. Moreover, many of those amicus filings were at the en banc stage rather than during initial briefing.

A judge member proposed that the Committee wait to see what happens with the Time-Computation Project before considering what, if any, changes to make to FRAP 29(e). If the Time-Computation Project goes forward, that will alter the landscape in significant ways. It was proposed that Judge Stewart write to Mr. Wolfman of Public Citizen to state that the Committee, like other advisory committees, is currently considering changes to the time-computation rules, and that the Committee plans to defer further consideration of Public Citizen's proposal until after the time-computation matter is resolved. The proposal was moved and seconded, and carried by voice vote without opposition.

### B. Item No. 05-06 (FRAP 4(a)(4)(B)(ii) — amended NOA after favorable or insignificant change to judgment)

The Reporter recapitulated the issue raised by Judge Leval in *Sorensen v. City of New York*, 413 F.3d 292 (2d Cir. 2005). Judge Leval identified ambiguities in FRAP 4(a)(4) as the Rule applies to cases in which a party files a notice of appeal and the district court subsequently alters or amends the judgment. Among other scenarios, Judge Leval raised the possibility that a court might read the Rule to require an appellant to amend a prior notice of appeal after the district court amends the judgment in the appellant's favor. At the April 2006 meeting, the Committee had asked the Reporter to look into the amendment that produced the current language in FRAP 4(a)(4).

The Reporter noted that the current language resulted from the 1998 restyling, but observed that it is useful to go a bit further back, to the 1993 amendments. Prior to 1993, a notice of appeal filed before disposition of a timely post-trial motion had no effect. Lawyers evidently disregarded that fact to their detriment, and the rulemakers decided to address their plight by amending the Rule. The 1993 amendments provided that an initial notice of appeal ripened into effectiveness once the post-trial motions had been resolved. However, if the appellant wished to challenge an alteration or amendment of the judgment, then the appellant had to amend the initial notice of appeal. Specifically, prior to 1998, the Rule provided that "[a] party intending to challenge *an alteration or amendment of the judgment* shall file a notice, or amended notice, of appeal . . . ." The relevant language was altered during the 1998 restyling, and the current Rule reads in relevant part: "A party intending to challenge an order disposing of

any motion listed in Rule 4(a)(4)(A), or *a judgment altered or amended* upon such a motion, must file a notice of appeal, or an amended notice of appeal . . . ." It appears that the restyling deliberations did not focus on the fact that the new reference to "a judgment altered or amended" appeared to broaden the scope of the requirement.

With exceptions not relevant here, the 1998 amendments were intended to be stylistic only, so a court ought to conclude that the current language does not require an appellant to amend a prior notice of appeal when all the appellant wishes to do is to challenge aspects of the judgment that are unchanged by the disposition of the post-trial motion. But one might argue that it should not be necessary to research the pre-restyling law in order to determine the meaning of the current Rule. The Reporter noted that the problem introduced by the restyled language could be addressed by amending Rule 4(a)(4)(B)(ii) to read as follows:

> A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or ~~a judgment altered or amended~~ an alteration or amendment of a judgment upon such a motion, must file a notice of appeal, or an amended notice of appeal–in compliance with Rule 3(c)–within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

One judge member noted that cautious litigants would avoid the trap posed by the current rule by taking the precaution of filing an amended notice of appeal after the disposition of the post-trial motions; another questioned whether the scenarios described in the *Sorensen* opinion have ever actually arisen. An attorney member, however, noted that the restyling inadvertently produced what does appear to be a problem in the current Rule. Judge Stewart noted that this inadvertent change provides a cautionary lesson concerning the need for care in adopting changes for reasons of style. A judge member conceded that the proposed fix is a straightforward one, but questioned the need for an amendment when there are other, more pressing, matters to address. An attorney member moved to adopt the amendment described by the Reporter; the motion was seconded, and carried by a vote of five to four.

### C. Item No. 06-01 (FRAP 26(a) — time-computation template) & Item No. 06-02 (adjust deadlines to reflect time-computation changes)

Judge Stewart noted that at its June 2006 meeting the Standing Committee had extensively discussed the Time-Computation Project, giving particular attention to the question of statutory deadlines. Judge Stewart noted that at the Appellate Rules Committee's April meeting he had appointed a Deadlines Subcommittee to consider short appellate deadlines that would be affected by the proposed change in time-computation approach. The Deadlines Subcommittee is chaired by Judge Sutton and includes Ms. Mahoney, Mr. Levy and Mr. Letter; Professor Struve serves as its reporter. Judge Stewart reported that the Time-Computation Project is moving forward. The goal for the present meeting, he stated, was to discuss where the project stands and to consider the report by the Deadlines Subcommittee. This Committee and

the other advisory committees will report to the Standing Committee at its January meeting and receive feedback at that time. Assuming that the project goes forward, this Committee should plan to consider formal proposals (concerning the time-computation template and any related changes to appellate deadlines) at the April 2007 meeting, with a view to requesting action by the Standing Committee at its June 2007 meeting.

Judge Stewart invited the Reporter to summarize developments in the overall Time-Computation Project. The Reporter noted that in addition to feedback on the current version of the time-computation template, the Time-Computation Subcommittee is interested in receiving feedback on several issues. One concerns after-hours filing. Subdivision (a)(4) of the current template draft explicitly refers to the possibility of filing after hours by personal delivery to a court official. This possibility arises from cases interpreting 28 U.S.C. § 452, which provides that federal courts "shall be deemed always open" for the purpose, inter alia, of filing papers. The problem with the current draft is that it highlights the possibility of in-person after-hours filing, and thereby increases the likelihood that litigants will seek to avail themselves of that method – a prospect that raises obvious security concerns. The Civil Rules Committee has proposed alternative language that omits any reference to in-person after-hours filing; if this language were adopted, the Note could explain that the Rule text is not meant to alter the caselaw that has developed under Section 452. Mr. Fulbruge expressed strong agreement with the view that the Rule text should not refer to after-hours filing; such a reference could encourage such filings by pro se litigants and could raise security concerns.

The Reporter noted that a second issue is whether the time-computation template should attempt to define what "inaccessibility" of the clerk's office means for the electronic filer. Local rules take a variety of approaches to e-filing untimeliness that results from court-end and user-end technical failures. The template could leave the question to be dealt with by those local rules. Alternatively, the template could define inaccessibility for purposes of electronic filing. It might provide, for example, that the clerk's office is inaccessible in the event of court-end system failure, but not in the event of user-end technical failure; under that approach, court-end technical failure would extend deadlines by operation of subdivision (a), but user-end technical failure would only provide a ground for discretionary relief (if appropriate) under subdivision (b). A judge member broadened the discussion by asking why, in the era of electronic filing, the clerk's office should ever be regarded as closed. A district judge member responded that there will still be those who make paper filings, and serious security concerns would arise if one were to allow members of the public to enter the courthouse on weekends or to use drop boxes. He recalled that his court decided to close its drop box and close to the public on weekends due to security concerns. Mr. Fulbruge noted that the appellate courts that are going to go onto CM/ECF are supposed to do so during 2007; he observed that consideration of the proposed time-computation changes should take account of this fact.

The third issue noted by the Reporter is the question of whether the template should deal with dates certain. Currently the template only addresses deadlines that must be computed, and not deadlines set by picking a certain date. A litigator has pointed out to the Subcommittee that

there is a circuit split over whether the current time-computation rules cover the interpretation of date-certain deadlines. It would be relatively straightforward to draft a subdivision addressing date-certain deadlines; the question is whether members feel that such a provision is needed. A member expressed the view that the time-computation rules need not address date-certain deadlines; rather, that question can be left to the courts. A district judge member agreed that there is no need for the rule to address such deadlines.

Mr. Fulbruge noted that the Fifth Circuit recently had to address the 72-hour deadline set by the Justice For All Act, and stated that the deadline had proven problematic in application.

Mr. Fulbruge also raised questions about the inclusion of state holidays in the template definition of legal holiday. Members noted that Rule 26(a)'s definition would differ somewhat from Rule 6(a)'s definition because, in the appellate context, it makes sense to take account of both the state in which the main Court of Appeals Clerk's Office is and also the state within which sits the district court from which the appeal is taken.

Judge Stewart invited Judge Sutton to present the report of the Deadlines Subcommittee. Judge Sutton noted that the report encompassed two main issues: one of mechanics (which short appellate deadlines should be adjusted assuming the time-computation project goes forward) and one of policy (concerning the project's approach to the question of statutory deadlines and the project's overall advisability). Judge Sutton first addressed the Subcommittee's conclusions on the mechanics question. The Deadlines Subcommittee was aware of the Standing Committee's preference for a presumption in favor of 7-day increments, and the Subcommittee did employ that presumption; but Judge Sutton noted that it is a rebuttable presumption and in certain instances the Subcommittee deviated from that presumption.

Judge Sutton next reviewed the question of statutory deadlines; he noted that the problems raised in connection with that issue had prompted the Subcommittee members to wonder whether the project is worth doing. Judge Sutton reported Subcommittee members' views that there doesn't seem to be a problem with the current time-computation approach, and that it may be better to take a wait-and-see approach to time-computation given the advent of electronic filing. Judge Sutton also noted that the two main options for dealing with statutory deadlines – supersession and legislation – seem to have disadvantages. He observed that if legislation is the solution of choice, it will be important to coordinate the adoption and effective dates of the legislative and rules packages.

Professor Coquillette noted that the Standing Committee's working assumption, at this point, is that the rulemakers will present Congress with a package of conforming amendments. An attorney member of the Deadlines Subcommittee expressed the view that the current time-computation system works quite well, but also stated that, in the end, the Appellate Rules should follow the time-computation approach taken in the courts below. A district judge member of the Committee agreed with both these points. Professor Coquillette recalled that the time-computation project was initiated because the ABA's Litigation Section had expressed the view

that the current time-computation system is a mess. Professor Coquillette stated that in his view the main issue facing the Project is whether the rulemakers ought to defer the Project to see how electronic filing plays out. Mr. Letter echoed the views of the other members of the Deadlines Subcommittee; he stated that the proposed days-are-days approach is a terrible idea, but that the Appellate Rules should follow the approach taken in the courts below. Mr. Letter suggested that Judge Stewart relay to Judge Kravitz that the Committee will follow the approach that other advisory committees decide to take but that the Committee views the days-are-days approach as a bad idea. Mr. Fulbruge, however, observed that both members of his staff and pro se litigants have trouble computing time under the current system. Judge Sutton offered two observations: First, he is skeptical whether the current system is really a problem. Second, he questioned whether the rulemakers should undertake at the present time a project that requires so much coordination with Congress, when it is likely that the rulemakers will need to go back to Congress with additional proposals relating to electronic filing. A Committee member seconded the view that the Committee should express skepticism concerning the project; he pointed out that practitioners understand the current system.

Judge Stewart noted that he would provide feedback on the Project at the Standing Committee meeting. Judge Stewart also promised that an update on the time-computation issues would be circulated well in advance of the April 2007 meeting so as to give members an ample opportunity to consider them.

### D. Item No. 06-03 (new FRAP 28(g) — pro se filings by represented parties)

Judge Stewart invited Mr. Letter to review the DOJ's proposal concerning "pro se" filings by represented parties. At the April 2006 meeting, Mr. Letter had undertaken to investigate the approach to this question in the Supreme Court; accordingly, he began by reporting the results of that investigation. The Supreme Court sometimes receives both a certiorari petition written by counsel and a "pro se" certiorari petition; the Court's usual practice is to send the "pro se" petition to the attorney and inquire which of the two briefs the Court should file. Once the Court has granted certiorari, the merits brief is always filed by an attorney. Having reported these results, Mr. Letter stated that the DOJ would like to table its proposal. The motion was made to table the proposal; the motion was seconded, and passed by voice vote.

### E. Items Awaiting Initial Discussion

#### 1. Item No. 06-04 (FRAP 29 – amicus briefs – disclosure of authorship or monetary contribution)

The Reporter described the proposal by Chief Judge Michel and Judge Dyk of the Federal Circuit to amend the FRAP to add a disclosure requirement for amicus briefs. The proposed provision is based upon Supreme Court Rule 37.6, which requires amicus briefs to indicate

whether counsel for a party authored the brief in whole or in part and to identify every person or entity (other than the amicus, its members and its counsel) who contributed monetarily to the brief's preparation or submission. (Supreme Court Rule 37.6 excludes from its disclosure requirement amicus briefs filed by various government entities.) No circuit currently has such a disclosure rule. The rule might deter the practice of ghost-writing amicus briefs in order to circumvent page limits or present an appearance of broad support for a party's position. In a circuit that takes a restrictive approach to motions for leave to file an amicus brief (i.e., the Seventh Circuit), the disclosures could assist the court in determining whether to grant the motion. In all circuits, the disclosures could help the court to assess what weight to give to amicus filings. And adopting such a rule would promote uniformity by conforming the FRAP to the Supreme Court Rules. On the other hand, the evidence of ghost-writing is anecdotal, so the need for the rule may not be clear-cut. And adopting the rule would raise questions concerning how to apply it in borderline cases. However, it is notable that Supreme Court Rule 37.6 was adopted in 1997 and there appear to be no complaints about its operation.

An attorney member stated that clients often ask whether they can contribute money toward the preparation of an amicus brief; the member tells the clients not to do so, citing Supreme Court Rule 37.6 by analogy. This member noted that the proposed rule would provide an answer to a frequently asked question. Another member said that the proposal is a sensible one, and he noted that the general counsel of a very large trade association has told him that ghost-writing of amicus briefs is a very real problem. A member stated that if the Committee proceeds with this proposal, the new provision should track the text of the Supreme Court rule. Professor Coquillette noted that the disclosure, when it denies any party or other involvement in the amicus' brief, actually helps the brief to seem more persuasive. An attorney member noted that no court of appeals has yet adopted such a disclosure requirement, and he wondered whether the proposal is ripe for adoption in the FRAP. Another member countered that the Committee should not encourage local variations. A judge member responded that the need for a disclosure rule might be greater in the Federal Circuit than in other circuits. He also observed that in some instances a party can evade the disclosure rule by becoming a member of the amicus; this would be the case, for instance, when the amicus is a trade association with a membership formed of companies of the litigant's type. An attorney member responded that this would not always be true, because not all parties would be eligible for membership in the relevant amicus. Judge Stewart observed that judges have varying views of the usefulness of amicus briefs. A district judge member stated that it is very important to require disclosure of whether counsel for a party authored the amicus brief.

Mr. Letter observed that he would be guided, in his view of this proposal, by what *judges* think of it, since judges are the intended audience for amicus briefs. Judge Stewart observed that some judges would probably find the disclosure rule useful. A judge member voiced support for the rule, noting that parties frequently solicit an amicus brief and then try to impart to that brief an aura of objectivity. Another judge responded that one can discern who is behind an amicus brief by reading it. A member asked whether adoption of the proposed rule could usefully preempt the proliferation of local rules on the subject. A judge member suggested deferring

consideration of the proposal; another judge member observed that since the rule may be more useful in the Federal Circuit, it makes sense to let that circuit try out the rule. Judge Stewart expressed reluctance to encourage adoption of a local circuit rule on the topic; and he questioned whether delaying consideration of the proposal would enable the Committee to shed any new light on the proposal.

A member moved to adopt the proposed rule; the motion was seconded, and passed by a vote of seven to one. Mr. Rabiej noted that the Committee can follow the practice of requesting publication of the proposed rule at a deferred date, so that consideration of a number of proposals can be bundled together.

### 2. Item No. 06-05 (Statement of issues to be raised on appeal)

The Reporter summarized the proposal by Judge Michael Baylson of the Eastern District of Pennsylvania for a rule modeled on Pennsylvania Rule of Appellate Procedure 1925(b). The proposed rule would permit the district judge to require the appellant to file a statement of issues on appeal within a short time after filing the notice of appeal. That, in turn, would enable the district judge to write an opinion responding specifically to the arguments that will be the focus of the appeal. The Pennsylvania provision is enforced by a waiver rule, and has been controversial (especially because of the strictness with which the waiver rule has been applied); a proposal to alter some features of the Pennsylvania rule was recently published for comment. Some attorneys argue that it is hard for the appellate lawyer to formulate the issues so quickly; the appellate lawyer may not have litigated the case below, and the transcript may not yet be available. Supporters of the proposed rule argue that it could enable the district court to point out key issues to the Court of Appeals; that it may avoid the need for remands; and that it enables the district judge to address issues while they are fresh in his or her mind. On the other hand, the rule could pose a hardship for counsel, could make the trial judge seem less neutral, and might blur the transition from trial to appellate jurisdiction. One possible alternative to the proposed rule might be a requirement that briefs on appeal be provided to the district judge as well as the parties and the Court of Appeals.

A judge member reacted against the proposal, noting that district judges are very busy and that such a rule would lead to debates between the district judge and the appellant. Another judge member observed that he could understand the impetus for the rule, in the sense that it can be frustrating for a district judge when the court of appeals seems to have reviewed on appeal an entirely different case from the one that was litigated at the trial level; but the member stated that he nonetheless opposed the proposal. A third judge member stated opposition to the proposal. By consensus, the proposal was removed from the study agenda.

### 3. Item No. 06-06 (FRAP 4(a)(1)(B) and 40(a)(1) – extend time for NOA and petitions for rehearing in cases involving state-government

**litigants)**

The Reporter described the proposal by William Thro, the Virginia State Solicitor General, to amend FRAP 4(a)(1)(B) and 40(a)(1) so as to treat state-government litigants the same as federal-government litigants for purposes of the time to take an appeal or to seek rehearing. The proposal is supported by Mr. Thro's counterparts in 33 other states, Puerto Rico, and the District of Columbia. The proponents argue that states, like the federal government, need time to review the merits prior to deciding whether to appeal or to request rehearing. These choices may involve complex issues and multiple decisionmakers. It could also be argued that states should enjoy parity with the federal government. However, adopting the new rule would impose some costs. The bench and bar would have to adapt to the amendment; and, in the case of the time to take an appeal, the proposal would require conforming legislation to amend 28 U.S.C. § 2107. In affected cases, the time to take an appeal would double, and the time before the court's mandate issued (once the appeal was decided) would more than double. The universe of cases to which the amendments would apply is a large one. If the Committee pursues these amendments, it will confront a question of scope: Should the amendments extend beyond states, and if so, to what other types of government entities? The proposed amendments would also need to be coordinated with an already-pending proposal to amend FRAP 4(a)(1)(B) and 40(a)(1); the pending proposal clarifies the rules' application to individual-capacity suits against federal officers or employees.

A member stated support for the proposal and noted that in his view the extension of the time to seek rehearing was the more important of the two changes. Mr. Fulbruge noted that he had sent a note to the Clerks of the various Courts of Appeals to seek their views on the proposal. Mr. Fulbruge noted that the figures provided in Mr. Thro's October 31 letter – showing relatively modest numbers of appeals taken by various state-government litigants – failed to give a sense of the likely impact of the proposal: Because the states win the overwhelming majority of habeas and Section 1983 cases, the great majority of appeals in such cases will be taken by the *non-state* party. Marcia Waldron, the Third Circuit Clerk, pointed out that the proposed amendments would raise definitional problems, because they would extend deadlines in cases involving state-government litigants but not local-government litigants, and because the status of the government litigant in a given type of case may vary state-to-state. Thus, for example, the respondent in a state prisoner's habeas case may or may not be a state official.

Professor Coquillette noted that the proposal raises a variety of scope questions, and if the Committee were to proceed with the proposal it would need to justify its decisions concerning scope. A member questioned why the rulemakers should proceed with Mr. Thro's proposal if the appeal time is set by statute. Judge Stewart queried whether a state that needs additional time, under the current system, couldn't seek additional time from the court. A judge member expressed ambivalence concerning the proposal. He could understand why state solicitors general might want states treated equally to federal litigants, and he noted that in some instances the extra time would assist a state solicitor general in persuading the relevant agencies that it was better not to take an appeal. On the other hand, the member expressed curiosity concerning the

fact that the New York and Illinois solicitors general had not joined the proposal; he would want to know their thoughts. Mr. Letter agreed that the extra time would be useful in cases where the state solicitor general wants to persuade the relevant decisionmakers not to take the appeal. As to the extension of the time to seek rehearing, Mr. Letter observed that if the DOJ is unable to decide within the allotted time whether to seek rehearing, it will file the motion as a protective measure – which increases the burden on the court. Another member observed that the symbolism of the proposed amendments would be important, in that they treat states with parity to the federal government.

A member suggested that the proposal might be unripe for a vote. Mr. Letter agreed that it would be useful to take additional time to study the proposal. Mr. Rabiej noted that because legislation would be sought concerning 28 U.S.C. § 2107, it would be important to consider whether there are any groups that would oppose the proposal. Professor Coquillette observed that during the consideration of the proposed legislation, groups excluded from the scope of the Committee's proposal could seek inclusion. A judge member suggested that the Committee consult Richard Ruda, the chief counsel of the State and Local Legal Center. By consensus, the matter was left on the study agenda. Judge Stewart appointed an informal subcommittee to consider the proposal. The subcommittee will be chaired by Dean McAllister and will also include Mr. Letter and Mr. Levy.

## VI. New Business

Judge Stewart invited the Reporter and Mr. Rabiej to update the Committee on a proposal that is making its way through the Criminal Rules Committee. The proposal would amend Rule 11 in the sets of rules governing 2254 and 2255 proceedings, and would necessitate conforming changes to the Appellate Rules. The proposal will likely reach a formal vote during the Criminal Rules Committee's spring meeting. The proposed conforming changes will thus come before the Appellate Rules Committee at its spring meeting.

Mr. Levy suggested that it would be useful to consider amending the FRAP to provide a rule governing amicus briefs with respect to rehearing en banc. Mr. Letter noted that the Ninth Circuit is currently considering a proposed local rule on this issue; Mr. Levy noted that the Eleventh Circuit is also considering such a proposal.

Mr. Letter sought input on whether it would be useful for the Committee to consider addressing a problem that the DOJ has encountered in the Ninth Circuit. The problem arose when the government's appeal in a *Bivens* action was dismissed by a motions panel. The government wished to seek rehearing or rehearing en banc, and was told that its only recourse was to seek reconsideration from the motions panel or to persuade the motions panel to submit the matter to the en banc Court. Mr. Fulbruge noted that while a purely procedural matter would stay with the motions panel, when an appeal is dismissed that is a merits determination and the would-be appellant should be able to seek en banc rehearing.

## VII. Date and Location of Spring 2007 Meeting

The spring 2007 meeting will take place on April 26 and 27, 2007 at a location to be announced.

## VIII. Adjournment

The Committee adjourned at 1:00 p.m.

Respectfully submitted,

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Catherine T. Struve
Reporter

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 11-12, 2007
Phoenix, Arizona
**Draft Minutes**

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## ATTENDANCE

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Phoenix, Arizona on Thursday and Friday, January 11 and 12, 2007. All the members were present:

Judge David F. Levi, Chair
David J. Beck, Esquire
Douglas R. Cox, Esquire
Judge Sidney A. Fitzwater
Chief Justice Ronald M. George
Judge Harris L Hartz
John G. Kester, Esquire
Judge Mark R. Kravitz
William J. Maledon, Esquire
Professor Daniel J. Meltzer
Judge James A. Teilborg
Judge Thomas W. Thrash, Jr.

Joan E. Meyer, Senior Counsel to the Deputy Attorney General, participated in the meeting on behalf of Deputy Attorney General Patrick J. McNulty, *ex officio* member of the committee. The Department of Justice was also represented at the meeting by Elizabeth U. Shapiro of the Criminal Division.

Also in attendance were Justice Charles Talley Wells, Judge J. Garvan Murtha, and Dean Mary Kay Kane (former members of the committee); Judge Patrick E. Higginbotham (former chair of the Advisory Committee on Civil Rules); Justice Andrew D. Hurwitz (member of the Advisory Committee on Evidence Rules); Patricia Lee Refo, Esquire (former member of the Advisory Committee on Evidence Rules); and Professor Stephen C. Yeazell.

Providing support to the committee were: Professor Daniel R. Coquillette, the committee's reporter; Peter G. McCabe, the committee's secretary; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office; James N. Ishida and Jeffrey N. Barr, attorneys in the Office of Judges Programs of the Administrative Office; Joe Cecil of the Research Division of the Federal Judicial Center; Matthew Hall, law clerk to Judge Levi; and Joseph F. Spaniol, Jr., Professor Geoffrey C. Hazard, Jr., and Professor R. Joseph Kimble, consultants to the committee.

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Carl E. Stewart, Chair
Professor Catherine T. Struve, Reporter
Advisory Committee on Bankruptcy Rules —
Judge Thomas S. Zilly, Chair
Professor Jeffrey W. Morris, Reporter
Advisory Committee on Civil Rules —
Judge Lee H. Rosenthal, Chair
Professor Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules —
Judge Susan C. Bucklew, Chair
Professor Sara Sun Beale, Reporter
Advisory Committee on Evidence Rules —
Judge Jerry E. Smith, Chair
Professor Daniel J. Capra, Reporter

## INTRODUCTORY REMARKS

Judge Levi welcomed Chief Justice George, Judge Teilborg, and Professor Meltzer as new members of the committee. He noted that Chief Justice George had served at every level of the California state courts, been a very successful prosecutor, and served on the Judicial Conference's Federal-State Jurisdiction Committee. He explained that Judge Teilborg had built and led a great Arizona law firm and now sits as a U.S. district judge in Phoenix. He pointed out that Professor Meltzer teaches at the Harvard Law School, is a truly gifted legal scholar, authors the Hart and Wechsler text book, and serves on the council of the American Law Institute.

Judge Levi expressed regret that the terms of three outstanding members of the committee had expired on October 1, 2006 – Justice Wells, Judge Murtha, and Dean Kane. He presented them with plaques for their service signed by the Chief Justice. He praised Justice Wells for his great wisdom and for the unique perspective that he brought to the committee on issues affecting federalism and the state courts. He thanked Judge Murtha for his enormous contributions to the civil rules restyling project over the last several years, for chairing the committee's style subcommittee, and for his work as advisory committee liaison. He honored Dean Kane for her indefatigable work over several years on the civil rules restyling project and for her outstanding scholarship and uncanny problem-solving ability.

Judge Levi announced that he would be leaving the federal bench on July 1, 2007, to accept the position of dean of Duke Law School. He said that he would sorely miss the challenging work of the federal judiciary. But he would miss even more the people with whom he has worked. He said that the federal judiciary is comprised of the most astonishing group of men and women in the country. He added that he was excited about his new job, but would like to continue to be of assistance to the federal judiciary in the future.

Judge Levi reported that the September 2006 meeting of the Judicial Conference had been uneventful in that all the rule amendments recommended by the committee had been approved on the Conference's consent calendar without discussion. The approved rules included the complete package of restyled civil rules and the amendments to the civil, criminal, bankruptcy, and appellate rules to protect privacy and security interests under the E-Government Act of 2002. Judge Levi also reported that the controversial FED. R. APP. P. 32.1, allowing citation of unpublished opinions in all the circuits, had gone into effect on December 1, 2006.

## APPROVAL OF THE MINUTES OF THE LAST MEETING

**The committee by voice vote voted without objection to approve the minutes of the last meeting, held on June 22-23, 2006.**

## REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported on two legislative matters of interest to the committee. First, he said, Representative F. James Sensenbrenner, Jr., former chairman of the House Judiciary Committee, had asked the Judicial Conference to initiate rulemaking to address certain issues arising from the waiver of evidentiary privileges through disclosure. He reported that the Advisory Committee on Evidence Rules had drafted a proposed new FED. R. EVID. 502 that would explicitly address waivers of attorney-client privilege and work product protection. But, he explained, the Rules Enabling Act specifies that any rule amendment affecting an evidentiary privilege requires the affirmative legislative approval of Congress. Mr. Rabiej added that with the recent change in control of Congress from the Republicans to the Democrats, it will be necessary for representatives of the judiciary to discuss the proposed Rule 502 with the new leadership of the judiciary committees.

Second, Mr. Rabiej reported that on December 6, 2006, the Senate Judiciary Committee had conducted an oversight hearing on implementation of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. He said that the judiciary had not sent a witness to testify at the hearing, but had submitted a statement from Judge Zilly, chair of the Advisory Committee on Bankruptcy Rules. The statement reported on the actions of the advisory committee in developing rules and forms to implement the Act, and it included extensive attachments documenting the enormous efforts made by the judiciary to implement the new statute.

Mr. Rabiej added that Senator Grassley had made a remark at the hearing complaining that the advisory committee had not faithfully carried out the intent of the law in drafting the new means test form for consumer bankruptcy cases. He said that Judge Zilly sent a letter to the senator explaining in detail that the advisory committee had faithfully executed the plain language of the statute in drafting the form. The committee will consider his letter at its April 2007 meeting, along with other suggestions submitted during the public comment period.

Mr. Rabiej reported that the proposed rule amendments approved by the Judicial Conference had been hand-carried to the Supreme Court in December 2006. He added that all the proposed rules, as well as public comments and other committee documents, have been posted on the judiciary's web site. He said that the Administrative Office is

working with the committees' reporters to give them direct access to all the documents in the rules office's electronic document management system.

Mr. McCabe added that all the records of the rules committees since 1992 are in the electronic document management system and fully searchable. In addition, all committee reports and minutes since 1992 have been posted on the judiciary's public web site, and all committee agenda books back to 1992 will soon be posted. In addition, he said, a majority of committee reports and minutes before 1992 have been located, converted to electronic form, and posted on the web site. But, he said, many rules records before 1992 are not available in the files of the Administrative Office. The staff has been searching the archives of law schools and the papers of former reporters and members to locate the missing documents. The ultimate goal of the rules office, he said, is to find and post on the web site all the key rules documents from the beginning of the rules system to the present and to make them readily searchable with a good search engine.

## REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil reported on the status of pending activities of the Federal Judicial Center. He directed the committee's attention to three research projects.

First, he said, judges have a great personal interest in how their courtrooms are being used. He reported that the Center was working with the Court Administration and Case Management Committee of the Judicial Conference on a comprehensive courtroom usage study in response to a specific request from Congress. Among other things, he said, members of Congress have noticed that the number of trials in the district courts has been declining steadily, and they question whether courtrooms are being used fully and effectively.

Second, Mr. Cecil said, the Center is developing educational materials for judges on special case management challenges posed by terrorism cases, based on lessons learned by judges who have already handled terrorism cases.

Third, he reported that the Center is continuing to gather information for the Advisory Committee on Civil Rules regarding summary judgment practices in the district courts. He added that Center researchers are examining summary judgment motions filed in 2006, how they were handled by the district courts, and what their outcomes were.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Stewart and Professor Struve presented the report of the advisory committee, as set forth in Judge Stewart's memorandum and attachment of December 6, 2006 (Agenda Item 5).

*Informational Items*

Judge Stewart reported that the advisory committee had met in November 2006 and had decided to approve in principle amendments to two rules.

First, a proposed amendment to FED. R. APP. P. 4(a)(4)(B)(ii) (effect of a motion on a notice of appeal) would eliminate an ambiguity created in the 1998 restyling of the appellate rules. The current rule might be read to require an appellant to amend its notice of appeal in any case in which the district court amends the judgment after the notice of appeal has been filed. Judge Stewart said that the advisory committee believed that the problem could be cured by fine tuning the language of the rule. He said that the committee would take another look at the exact language at its next meeting.

Second, Judge Stewart reported that the advisory committee had received a suggestion to amend FED. R. APP. P. 29 (brief of an amicus curiae). Modeled after Supreme Court Rule 37, the amended appellate rule would require the filer of an amicus brief to disclose whether the brief is authorized or funded by a party in the case. He said that the advisory committee had decided that a uniform national rule was preferable in this area to a variety of local circuit rules. He reiterated that the committee had approved the Rule 29 amendment in principle, subject to further refinements. One member suggested, though, that the Supreme Court rule may not be particularly helpful and is not strictly enforced.

Judge Stewart noted that the advisory committee had been busy with the time-computation project. He pointed out that Professor Struve, the advisory committee's reporter, was also serving as the reporter for the overall time-computation project and had compiled a huge amount of valuable information. He added that a special Deadlines Subcommittee, chaired by Judge Jeffrey S. Sutton (6th Circuit), had reviewed each time limit in the appellate rules, especially the short periods that would be affected by the change in time-computation approach under the proposed new uniform rule.

Judge Stewart said that the advisory committee had also looked into whether it would be useful for the new time-computation rule to include a provision addressing dates certain, as opposed to dates that require computation, and it had concluded that such a provision was not necessary. He added that some members of the committee had

misgivings about the very need for the time-computation project, particularly with regard to its impact on deadlines set forth in statutes. Nevertheless, he said, the committee would proceed with the project at its April 2007 meeting.

Judge Stewart reported that the advisory committee was continuing to consider whether too many briefing requirements are set forth in the local rules of the courts of appeals. He said that the Federal Judicial Center had completed an excellent study identifying and analyzing all the briefing requirements of the circuits, and he had written a letter to the chief judges of the circuits expressing the advisory committee's concern over local requirements and whether all were necessary. He said that the letter to the chief judges referred to the work of the Federal Judicial Center and emphasized the need to make all local procedural requirements readily accessible to practitioners. He added that the chief judges of six of the circuits had responded to his letter, and the advisory committee would consider the responses at its April 2007 meeting. Professor Capra added that, in the course of reporting the results of the district court local rules project, the chief district judges had been very positive in responding to the letters from the Standing Committee identifying local rules that appeared to be inconsistent with the national rules.

One member pointed out that some local rules are of substantial benefit to the circuit courts, and there will be a great deal of opposition to eliminating them. But, he said, some of the beneficial provisions now contained in local rules might well be incorporated into the national rules. Judge Stewart responded, though, that there are a great many variations among the circuits in their local rules, and it would be very difficult to reach agreement on the contents of the national rules. A member observed that circuit courts do not hear many complaints from the bar about their local rules because attorneys who practice regularly before a particular court get used to the local requirements. Courts, he added, rarely hear from attorneys who have a national practice.

Another member noted that he finds it increasingly difficult as a practitioner to know how to prepare briefs because of the proliferation of local rules. Many local requirements, he said, are little more than busy work and create potential traps for the bar. Moreover, the staff of the clerks' offices waste time kicking the papers back to lawyers for noncompliance with the local rules. He encouraged the advisory committee to continue its work in the area. But he concluded that local briefing requirements, while annoying, do not rise to the level of importance in the overall scheme of the advisory committee's work, for example, as the new FED. R. APP. P. 32.1, which has overridden local circuit rules that had barred lawyers from citing unpublished opinions.

Judge Levi pointed out that the rules committees should continue to be concerned about local rules. He noted that some local rules affect substance, and many increase costs and create confusion for the bar. Professor Coquillette added that Congress, too,

has expressed concerns regarding local court rules – as opposed to the national rules – because local rules do not go through the Rules Enabling Act process, which affords Congress an opportunity to review and reject the rules.

Judge Stewart reported that the advisory committee had on its study agenda a proposal from the Virginia State Solicitor General to amend FED. R. APP. P. 4 (notice of appeal – when taken) and FED. R. APP. P. 40 (petition for panel rehearing) to treat state-government litigants the same as federal-government litigants for the purpose of giving them additional time to take an appeal or to seek rehearing. He mentioned that members of the advisory committee had questioned the need for the changes, as well as the scope of the proposed amendments. He said that the committee would study the proposal further.

## REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Zilly and Professor Morris presented the report of the advisory committee, as set forth in Judge Zilly's memorandum and attachments of November 30, 2006 (Agenda Item 8).

### *Amendments for Publication*

### FED. R. BANK. P. 7052, 7058, and 9021

Judge Zilly reported that the advisory committee was seeking authority to publish amendments to FED. R. BANK. P. 7052 (findings by the court) and FED. R. BANK. P. 9021 (entry of judgment) and a proposed new FED. R. BANK. P. 7058 (entry of judgment). The package of three rules would address the requirement of FED. R. CIV. P. 58(a) that every judgment be set forth on a "separate document" and coordinate the bankruptcy rules with recent revisions to the civil rules.

He explained that when a court fails to enter a judgment on a separate document, revised FED. R. CIV. P. 58 provides a default 150-day appeal period, rather than the normal 30-day appeal period in the civil rules. Bankruptcy matters, he said, usually require prompt finality, and the bankruptcy rules provide for a shorter 10-day appeal period generally. The key questions for the advisory committee, thus, are: (1) whether the bankruptcy rules should continue to contain the separate document requirement; and (2) whether the bankruptcy system can live with the default 150-day appeal period of the civil rules. He explained that the advisory committee had decided to retain the separate document requirement for adversary proceedings because they are similar to civil cases. But the more difficult question is whether to retain the separate document requirement for contested matters.

Judge Zilly noted that the advisory committee had a heated discussion on the matter. Half the members favored enforcing the separate document requirement for all judgments in bankruptcy cases, including judgments in contested matters, because it provides certainty to the litigation process. The other half argued, though, that many bankruptcy courts simply do not comply with the present rule, finding it administratively difficult to enter separate judgments on every matter when bankruptcy judges commonly dispose of large numbers of contested matters on a single calendar. Judge Zilly reported that the committee had decided ultimately, on his tie-breaking vote, that contested matters should no longer be subject to the separate document rule. Thus, in contested matters, the docket entry of the judge's decision will be sufficient to start running the appeal period.

As a matter of drafting, Professor Morris explained that Part VII of the Bankruptcy Rules applies the Federal Rules of Civil Procedure to adversary proceedings. There is, however, no counterpart to FED. R. CIV. P. 58 in Part VII. Instead Civil Rule 58 is made applicable to both adversary proceedings and contested matters through FED. R. BANKR. P. 9021. The advisory committee's proposal would confine the separate document requirement of Rule 58 to adversary proceedings by: (1) creating a new FED. R. BANKR. P. 7058 just for adversary proceedings; and (2) eliminating the reference to Civil Rule 58 in FED. R. BANKR. P. 9021.

Several committee members suggested changes in the language of the proposed amendments, and Judge Zilly agreed that the advisory committee would address the suggestions at its March 2007 meeting.

**Judge Hartz moved to approve the proposed amendments in principle, with the understanding that the advisory committee would consider additional changes in language. The committee by voice vote unanimously approved the motion.**

*Informational Items*

Judge Zilly reported that the advisory committee had published a large package of rules amendments and forms in August 2006 designed to implement the massive Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Most of the rules, he said, were derived from the interim rules used in the bankruptcy courts since October 2005. He noted that the public hearing on the amendments had been cancelled because no witnesses had asked to appear. The committee, he said, would consider all the written public comments at its March 2007 meeting and return to the Standing Committee in June 2007 for final approval of the package.

Judge Zilly reported that the advisory committee had created a subcommittee to apply the proposed new time-computation proposals to the bankruptcy rules. He noted that the subcommittee already had identified more than a hundred time limits in the

bankruptcy rules that would be affected by the proposals. He noted, moreover, that the bankruptcy rules currently differ from the other federal rules because they exclude weekends and holidays in computing time periods of fewer than 8 days, rather than periods of fewer than 11 days.

Judge Zilly explained that the advisory committee would be prepared to present appropriate amendments dealing with time limits for approval at the June 2007 Standing Committee meeting. But, he said, members of the committee had expressed concern over going forward with more changes to the bankruptcy rules so soon after having published a large package of proposed amendments in August 2006. Moreover, many of the time-limit changes arise in rules already being amended for other reasons.

Judge Zilly noted that the advisory committee had also identified a modest number of provisions in the Bankruptcy Code that impose time limits of fewer than 8 days. He said that legislation to amend the Code should be pursued because the new time-computation rules will effectively shorten these short statutory periods even further by including weekends and holidays in the count.

Judge Zilly reported that the advisory committee was considering potential changes in the bankruptcy rules to implement section 319 of the 2005 bankruptcy legislation. Section 319 would enhance the obligations of debtors' attorneys (and pro se debtors) regarding the papers they file with the court and with trustees. It states that it is the sense of Congress that FED. R. CIV. P. 9011 (sanctions) should be modified to require that all documents, including schedules, submitted on behalf of a debtor under all chapters of the Code contain a verification that the debtor's attorney (or a pro se debtor) has "made reasonable inquiry to verify that the information contained in [the] documents" is well grounded in fact and warranted by existing law or a good faith argument to extend, modify, or reverse the law. He noted that the language of the statute is different from that of the current Rule 9011.

Judge Zilly pointed out that a separate section of the new law, now codified at 11 U.S.C. § 707(b)(4)(C) and (D), made similar, but not identical, changes affecting the obligations of attorneys in Chapter 7 cases only. Section 707(b)(4)(C) provides that a debtor's attorney's signature on a Chapter 7 petition, pleading, or written motion constitutes a certification that the attorney has "performed a reasonable investigation into the circumstances that gave rise to the petition, pleading, or written motion" to determine that the document is well grounded. Section 707(b)(4)(D) provides that an attorney's signature on a Chapter 7 petition constitutes a "certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect."

Judge Zilly explained that the advisory committee had decided originally not to propose an amendment to FED. R. CIV. P. 9011 (signing of papers, representations to the court, and sanctions) to mirror the statute because the statute itself is so specific regarding the obligations of debtors' attorneys. But, he said, the committee had agreed to change the official petition form to include a warning alerting attorneys to the new obligations imposed on them by the 2005 legislation.

Judge Zilly added that letters had been received from Senators Grassley and Sessions urging the advisory committee to amend the bankruptcy rules to reinforce the statutory provision. Judge Zilly pointed out that the advisory committee was continuing to study the issue and might change its original position. He noted that because the statute was designed by Congress to push more debtors from Chapter 7 into Chapter 13, the committee might recommend that the same debtor-attorney verification now applicable in Chapter 7 cases by statute be extended by rule to filings under all chapters of the Code.

Judge Zilly reported that a Senate Judiciary Committee subcommittee had held an oversight hearing in December 2006 to review implementation of the 2005 bankruptcy legislation. He noted that he had been invited to speak, but had been tied up in a criminal trial and could not attend. He did, however, submit a written report documenting the enormous efforts of the judiciary to implement all the requirements of the legislation.

At the hearing, he noted, Senator Grassley had submitted written comments criticizing the advisory committee for including an entry on the new means-testing form that allows a debtor to claim certain expenses that the debtor may not have actually incurred. Judge Zilly pointed out, though, that the committee had scrupulously followed the language of the statute in drafting the form. He added that he had sent a response to Senator Grassley explaining that the plain language of the statute compelled the language adopted by the advisory committee. Moreover, he added, the form in question was part of a package of rules and forms still out for public comment.

Judge Levi pointed out that the advisory committee had faithfully complied with its obligation to implement the statute as written. He congratulated Judge Zilly, Professor Morris, and the entire advisory committee for a monumental achievement in producing a comprehensive package of rules and forms to implement the 2005 legislation.

## REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Rosenthal and Professor Cooper presented the report of the advisory committee, as set out in Judge Rosenthal's memorandum and attachments of December 12, 2006 (Agenda Item 9).

Judge Rosenthal pointed out that most of the items in the advisory committee's report had been brought to the Standing Committee's attention previously, some of them in connection with the project to restyle the civil rules. She noted that the advisory committee had delayed moving on the proposals until it had completed its work on the restyling and electronic discovery projects.

### *Amendments for Final Approval*

### SUPPLEMENTAL RULE C(6)(a)

Judge Rosenthal reported that the proposed changes to Supplemental Rule C(6)(a) (statement of interest) were purely technical and did not have to be published. They would correct a drafting omission occurring during the course of adopting Supplemental Rule G, which took effect on December 1, 2006. The new Rule G abrogated portions of other supplemental rules and gathered in one place the various provisions of the supplemental rules dealing with civil forfeiture actions in rem.

In amending Rule C, though, the committee forgot to capitalize the first word of subparagraph (6)(a)(i). Judge Rosenthal explained that the omission could be cured simply by inserting the capital letter, but the advisory committee had decided to make some additional minor changes to improve the way the rule reads and to make it parallel with other subdivisions of the rule.

**The committee without objection by voice vote agreed to send the proposed amendment to the Judicial Conference for final approval.**

### *Amendments for Publication*

### FED. R. CIV. P. 13(f)

Judge Rosenthal reported that the advisory committee was recommending deletion of Rule 13(f) (omitted counterclaim). The committee, she added, had considered eliminating the rule as part of the restyling process, but had decided that the change was substantive in nature.

Rule 13(f) allows a court to permit a party to amend its pleading to add a counterclaim if justice so requires. She explained that it is largely redundant of Rule 15(a) (amended and supplemental pleadings) and is potentially misleading. She noted that the standards in the two rules for permitting amendments to pleadings sound different, but they are administered identically by the courts. Deletion of Rule 13(f), she said, will bring all pleading amendments within Rule 15 and ensure that the same amendment standards apply to all pleading amendments.

**The committee without objection by voice vote approved deletion of Rule 13(f) for publication.**

FED. R. CIV. P. 15 (a)

Judge Rosenthal reported that the advisory committee was proposing a change in Rule 15(a) (amendments to pleadings before trial) that would give a party 21 days after service to make one pleading amendment as a matter of course. The change, she said, would make the process of amending pleadings less cumbersome for the parties and the court. She noted that the committee had also considered making changes to Rule 15(c), dealing with the relation back of amendments to pleadings, but had decided not to do so because the subject matter is enormously complicated and the textual problems in the current Rule 15(c) do not seem to have caused significant difficulties in practice.

Judge Rosenthal pointed out that the proposed revision in Rule 15(a) would set a definite time period within which a party may amend a pleading as a matter of right. Under the current rule, serving a responsive pleading terminates the other party's right to amend as a matter of course. On the other hand, serving a motion attacking the pleading delays the time to file a responsive pleading and thus extends the time within which a party may amend a pleading as a matter of right. The rule causes problems because the party filing a motion attacking the complaint – and the judge – may invest a good deal of work on the motion only to have the pleader amend its pleading as a matter of right. In many cases, he noted, after an opponent points out an error in a pleading, the pleader will simply admit the error and amend the pleading.

Judge Rosenthal said that the advisory committee had decided that there was no reason to continue that distinction. Accordingly, the proposed amendment gives a party the right to amend its pleading within 21 days after service of either a responsive pleading or a motion under Rule 12(b), (e), or (f). She added that the amendment recognizes the current reality that courts readily give pleaders at least one opportunity to amend.

In addition, Judge Rosenthal explained that the advisory committee had extended a party's response time from 20 days to 21 days in light of the general preference of the time-computation project to fix time limits in 7-day intervals. The amended rule also

eliminates the current reference to a "trial calendar" because few courts today maintain a central trial calendar. Finally, she noted, a party may also continue to seek leave to amend under Rule 15(a)(2) or Rule 15(b).

Professor Cooper mentioned that the advisory committee for several years had been looking at recommendations to reconsider notice pleading as one of the basic features of the civil rules. But, he said, it had always decided that the time was not right to make such a change. Allowing the parties great flexibility to amend pleadings reflects the spirit of the current notice-pleading system. Since the courts freely allow parties to amend pleadings, the advisory committee decided that it would make considerable sense to give a pleader 21 days to amend as a matter of course.

Professor Cooper said that the proposed rule would take something away from plaintiffs by cutting off their automatic right to amend after 21 days in all cases. It would also take something away from defendants by eliminating their right to cut off the plaintiffs' automatic right to amend through the filing of an answer. The advisory committee, he said, had concluded that the current distinction may make some sense, but on balance it is not needed. In most cases when a motion to dismiss is filed, it is filed before an answer is filed. The proposed rule, therefore, would only make a difference in the rare case where a motion to dismiss follows, rather than precedes, an answer.

Judge Rosenthal reported that, following the advisory committee meeting, a Standing Committee member had submitted thoughtful comments questioning the wisdom of the proposed amendment. She pointed out that his comments, together with a response from the advisory committee's Rule 15(a) Subcommittee, had been included in the agenda book for the information of the Standing Committee.

The member asserted that it is important for defendants to have the ability, by filing an answer, to cut off a plaintiff's right to amend a complaint without leave of court. He said that the proposed rule takes this right away from defendants, and in so doing alters the current balance between plaintiffs and defendants. He acknowledged that in the normal case, a defendant will challenge a defective pleading by filing a motion to dismiss, rather than an answer. But in the infrequent case where the defendant believes that it has a complete defense on the law, it will file an answer first and only then file a motion to dismiss.

By removing this possibility, the proposed rule would do more than restrict the defendant's options in those infrequent cases where the defendant would file an answer first. The proposed rule would have broader negatives consequences in a wide range of other cases.

He explained that some commercial litigation is initiated by badly drafted, badly conceived complaints, often in complete ignorance of the law. The first motion filed by the defendant is often a treatise in the form of a motion to dismiss, requiring the plaintiff to file a whole new complaint. By this tactic, the plaintiff manages to impose on the defendant the cost of educating the plaintiff about the applicable law. Then the defendant has to incur the further expense of filing a second motion to dismiss the new complaint.

The current Rule 15, however, gives plaintiffs cause to pause before filing their complaint, because if the defendant files an answer instead of a motion to dismiss, the plaintiff needs leave of court to amend the complaint, and the plaintiff cannot be certain that leave will be granted. Plaintiffs have to take into account the possibility that the defendant can cut off their right to amend their defective complaint by filing an answer first, followed by a motion to dismiss. This, he said, makes some plaintiffs more careful in preparing the complaint. It is a benefit that accrues to the system in a wide range of cases, not only to the particular defendants in those few cases where an answer actually is filed first. The impact is hard to quantify, he said, but it is real. The rules should encourage plaintiffs to put formality and forethought into their filings, and the proposed change would undercut that.

Under the proposed rule, he said, there will be no means by which the defendant can cut off the plaintiff's right to amend, and plaintiffs will know that. The proposed rule will have the effect of requiring defendants, even if they have a strong legal defense, to incur the costs of filing two motions to dismiss without any corresponding burdens on the plaintiff.

Another member pointed out that the problem raises the more fundamental issue of reconsidering the whole concept of notice pleading. Judge Levi responded that the issue was on the long-term agenda of the advisory committee. But, he said, the committee was not inclined to address the matter as a global issue. Rather, he said, it is was looking at modifying the practice of notice pleading in specific situations.

Judge Rosenthal added that the advisory committee had looked at notice pleading when it drafted the 2000 amendments to the discovery rules, tying discovery to the pleadings and encouraging more specific pleadings. She added that the committee was also considering whether motions for a more definite statement under FED. R. CIV. P. 12(e) could be made more vigorous. She said that a motion for a more definite statement is rarely granted today because the standard for granting them is so high. The committee might want to make it more readily available. That way, she said, the committee would address the impact of notice pleading in specific situations without having to rebuild the whole structure.

One member reported that by local rule in his district, discovery does not begin until the defendant files an answer. As a result, defendants simply do not file answers. Instead, they always file motions to dismiss, which leads to a good deal of unnecessary effort on the part of the judges. They are often faced with starting all over again when the plaintiffs exercise their right to file an amended pleading. Thus, he said, the proposed amendments to Rule 15 are enormously attractive to him because they will avoid judges having to waste efforts on motions to dismiss. Second, he complimented the advisory committee for the brevity of the committee note. He said that it was a model of what a note should be – identifying the changes in the rule and succinctly explaining the reasons for the changes.

Judge Rosenthal responded that these anecdotes highlight the incentives and tactics of modern civil litigation and the shifting of costs. It is rare, she said, that both a motion and an answer are filed. She said that the advisory committee would like the Standing Committee to authorize publication of the proposal, and the particular problems raised in the discussion could be highlighted in the publication with an invitation for the public to comment on them. She added that the proposed amendments to Rule 15 do not represent major changes, given the fact that circuit law across the country liberally gives, or requires, one amendment as a matter of right.

Some members agreed with the suggestion to publish the proposals for public comment and said that it could produce valuable information. One shared the concern that the change in Rule 15 might cause a burden to defendants, but only in very rare cases. He concluded that it is probably not a significant issue, but it would be helpful to get more information during the public comment period.

**The committee with one objection voted by voice vote to approve the proposed amendments for publication.**

FED. R. CIV. P. 48

Judge Rosenthal reported that the proposed new Rule 48(c) (polling) would provide a procedure for polling jurors in civil cases. It is modeled after FED. R. CRIM. P. 31(d), but also includes a provision referring to the ability of the parties in a civil case to stipulate to less than a unanimous verdict.

**The committee without objection by voice vote approved the proposed amendment for publication.**

FED. R. CIV. P. 62.1

Judge Rosenthal reported that the proposed new Rule 62.1 (indicative rulings) had its origin in a suggestion several years ago to the Advisory Committee on Appellate Rules from the Solicitor General. Since the basic question addressed by the proposed rule involves the authority of a district judge to act when an appeal is pending, the appellate rules committee concluded that the rule would be better included in the Federal Rules of Civil Procedure.

The proposed rule adopts the practice that most courts follow when a party makes a motion under FED. R. CIV. P. 60(b) (relief from judgment or order) to vacate a judgment that is pending on appeal. The rule, though, goes beyond Rule 60(b) and would apply to all orders that the district court lacks authority to revise because of a pending appeal. It would give a district judge authority to "indicate" that he or she "might" or "would" grant the motion if the appellate court were to remand for that purpose. Judge Rosenthal added that the procedure is well established by case law, but it is not explicit in the current rules and is often overlooked by lawyers. Moreover, some district judges are unaware of its existence.

Judge Rosenthal pointed out that the advisory committee would publish the proposed rule with alternative language in brackets. The choice for public comment would be between having the district court indicate that it "might" grant relief or indicate that it "would" grant relief. She said that good arguments can be made for either formulation. The advantage of the "might" language, she pointed out, is that it would likely preserve judicial resources because the trial judge would not have to do all the work to resolve the motion in advance of remand.

Judge Rosenthal noted that members of the Standing Committee had raised a couple of questions about the proposed rule at the June 2006 meeting. The first was whether the location of the rule as new Rule 62.1 was appropriate. The advisory committee, she said, had considered the location anew and had concluded that Rule 62.1 made the most sense. She noted that it belonged in Part VII of the rules, dealing with judgments, but because of its broad scope, it did not fit in with the other judgment rules – Rules 54, 59, 60, 61, or 62. Moreover, Rule 63 shifts to another topic.

The second concern expressed was whether the title "indicative ruling" was appropriate. She said that it had been selected because it is a term of art familiar to appellate practitioners and embedded in the case law, although it may not be recognized by lawyers whose practice is not centered on appeals. The advisory committee, she noted, had reached no firm conclusion on an alternative caption. One suggestion, she said, was to expand the caption of the rule to "Indicative Ruling on Motion for Relief Barred by Pending Appeal."

Judge Rosenthal noted that the Advisory Committee on Appellate Rules had suggested that it might want to make a cross-reference to the new rule in the appellate rules. She said that this would be very helpful. Judge Stewart said that his committee had discussed the matter and would add a cross-reference. He added that the committee had not expressed a preference between "might" and "would." He noted that the court of appeals would be more likely to remand a case back to the district court if the trial judge were to indicate that he or she "would" grant the relief than if the judge merely indicated that he or she "might" grant it. But, he said, his committee recognized the additional burden that would be imposed on the district judge in the former case.

One member supported the rule and said that it would provide helpful clarification in a difficult area. But he expressed concern that it might provide district judges with open-ended authority once a matter is pending on appeal and could give lawyers an opportunity to amend the record.

Professor Cooper responded that the key point is that the court of appeals remains in control. He noted that the advisory committee had been very cautious in expanding the authority from its basis in Rule 60(b) to other kinds of relief. The district court, he said, should be allowed to deny a motion that does not have merit and get it over with. Judge Rosenthal emphasized that the rule permits better coordination between the two courts.

One participant pointed out that there are a number of limited remands in his court. He asked whether it might be better for the rule to state that the only options for the court of appeals are either to deny the remand or order a limited remand. This would institutionalize the concept of a limited remand, under which the court of appeals keeps the case, but remands solely for the purpose of deciding one issue. He suggested that the language of Rule 62.1(c) might be amended to track the language of the committee note on this point. Professor Cooper agreed that the advisory committee might want to consider adjusting the language.

Judge Levi pointed out that the Standing Committee did not have to approve the rule for publication at the current meeting. Moreover, since the rule involves two advisory committees and some helpful language suggestions had been made, the advisory committee could work further on the language and come back for authority to publish in June 2007.

## REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Bucklew and Professor Beale presented the report of the advisory committee, as set forth in Judge Bucklew's memorandum and attachments of December 18, 2006 (Agenda Item 6).

### *Informational Items*

Judge Bucklew reported that the advisory committee had held its regular autumn meeting in October 2006. It also had held a teleconference meeting in September 2006 specifically to address the proposed amendments to FED. R. CRIM. P. 16 (discovery and inspection).

### FED. R. CRIM. P. 32(h)

Judge Bucklew reported that the Standing Committee in June 2006 had returned a proposed amendment to FED. R. CRIM. P. 32(h) (sentencing – notice of possible departure) to the advisory committee for reconsideration in light of specific comments offered by Standing Committee members. The proposal, she said, was part of a package of amendments designed to conform the criminal rules to the Supreme Court's decision in *United States v. Booker,* 543 U.S. 220 (2005). The current Rule 32(h) requires a court to give reasonable notice to the parties that it is considering imposing a non-guidelines sentence based on factors not identified in the presentence report or raised in pre-hearing submissions. The proposed amendment would also require reasonable notice when the court is considering imposing a non-guideline sentence based on a factor in 18 U.S.C. § 3553(a).

She explained that the Standing Committee had asked for further consideration for a number of reasons. Some members, she said, had pointed to a difference in case law among the circuits, counseling that it would be premature to attempt to codify a rule. Others expressed concerns that the proposed rule might interfere with orderly case management by causing unnecessary continuances and adjournments. Other members suggested that since the sentencing guidelines are now advisory, there should be no expectation of a guideline sentence. Therefore, there is no reason for the court to give notice. Judge Bucklew reported that the advisory committee had taken all these arguments into consideration, and it had specifically considered correspondence from the federal defenders urging the committee to proceed with the proposed amendment. In conclusion, she said, the advisory committee was continuing to review the case law and consider a proposed amendment. Professor Beale added that the Supreme Court had recently granted certiorari in two sentencing cases that might shed some light on the wisdom of proceeding with the amendment.

FED. R. CRIM. P. 49.1

Judge Bucklew reported that the Standing Committee had approved new Rule 49.1 (privacy protections for filings made with the court), but it had asked the advisory committee to give further consideration to two concerns raised by the Court Administration and Case Management Committee. First, that committee had suggested that the new criminal rule require redaction of the grand jury foreperson's name from indictments filed with the court. Second, it had suggested that personal information be redacted from search and arrest warrants filed with the court.

Judge Bucklew said that the advisory committee had decided not to require redaction of the grand jury foreperson's name because the indictment is the formal charging document that initiates the prosecution, and other rules require that it be signed by the foreperson, be returned in open court, and be given to the defendant. Moreover, she pointed out, a recent survey of U.S. attorneys' offices and the U.S. Marshals Service had demonstrated that disclosure of the names of jurors has not created security difficulties. Professor Beale added that the survey had revealed no more than two instances of juror-related threats or inappropriate contacts in any recent year. Fear of juror intimidation, moreover, is most likely to center on the defendant himself or herself – who is entitled to a copy of the indictment in any event – and not from persons discovering a juror's name through an electronic posting by the court.

Judge Bucklew said that the advisory committee was continuing to study whether personal information should be redacted from warrants. She noted that there was strong sentiment among committee members to retain the information in the public file because the public has a right to be aware of government activities and to know who has been arrested and what property has been searched. She added that warrants are not generally filed until they are executed, and the committee was considering the feasibility of redaction once a warrant has been executed. In any event, there may be no need to require redaction in the rule because relief is always available on a case-by-case basis.

FED. R. CRIM. P. 16

Judge Bucklew reported that the advisory committee had met by teleconference on September 5, 2006, to continue work on a proposed amendment to Rule 16 (discovery and inspection) that would require the government, on request, to turn over exculpatory and impeachment evidence favorable to the defendant. The proposal, she noted, had come from the American College of Trial Lawyers in 2003, had been drafted by an ad hoc subcommittee of the advisory committee, and had been discussed at every recent meeting of the advisory committee. She pointed out that the Department of Justice was strongly opposed to the proposal, but had been very helpful in drafting changes to the U.S. Attorneys' Manual to elaborate on the government's disclosure obligations. It had been

suggested, she said, that the manual revisions might serve as an alternative to an amendment to FED. R. CRIM. P. 16.

Judge Bucklew explained that the advisory committee had before it at the teleconference a nearly final revision of the U.S. Attorneys' Manual, as well as a nearly final version of the proposed amendment to Rule 16 and an accompanying committee note. The key question for the committee, therefore, was whether to proceed with the proposed rule or accept the revised text of the manual as a substitute. In the end, she said, the committee voted to go forward with the rule, partly because the revised text of the manual continued to give prosecutors discretion and was not a complete substitute for the proposed rule and also because advice in the manual is entirely internal to the Department of Justice and not judicially enforceable.

Judge Bucklew and Professor Beale said that the revisions to the U.S. Attorneys' Manual were a major achievement, and the Department of Justice deserved a great deal of credit for its efforts. Judge Bucklew added that the advisory committee would likely return to the Standing Committee in June 2007 with a proposed amendment to Rule 16, and the Department of Justice would likely offer its strong objections to the rule.

One member suggested that it was important for the advisory committee to develop sound empirical information to support its proposal. He suggested that the Standing Committee needs to know how serious and widespread the problems of nondisclosure may be in order to justify the rule. Judge Bucklew responded that members of the defense bar can describe individual examples of improper withholding of information, but hard empirical data is very difficult to compile.

Professor Beale added that there is no way to quantify all the cases in which disclosure is not made. The obligations of prosecutors are subjective and depend on the particular facts of a case. Individual acts of nondisclosure are difficult to document because the defense usually has no knowledge of the exculpatory information, which is in the hands solely of the government. The few cases that are litigated are brought after conviction. She explained that the proposed rule goes beyond simply codifying existing *Brady* obligations, and the advisory committee will compare it to the rules of the state courts, the standards of the American Bar Association, and the rules of local federal district courts.

One member pointed out that there are great variations among the rules of the district courts, especially as to the timing of disclosures. He said that one good argument for the proposed rule is the need for national uniformity in the face of the current cacophony in local rules. Another suggested that although the revisions in the U.S. Attorneys' Manual are not judicially enforceable, they are being noticed by the defense bar, as well as by prosecutors, and more issues related to disclosure will be raised.

Judge Levi urged caution. He noted that with an issue as highly contentious as this, the committee's work will be placed under a microscope. The stakes in the matter, he said, are very high, and any proposed rule presented to the Judicial Conference needs to be fail-proof. He pointed out that the proposed rule raises issues that will have to be decided by case law, such as what constitutes impeachment information and how the rule affects the burden of proof on appeal. It is predictable, he said, that some members of the committee, and the Judicial Conference, will see the proposal as a policy shift that needs to be justified clearly. He suggested that the committee might want to monitor experience with the revisions in the U.S. Attorneys' Manual before going forward with the rule.

FED. R. CRIM. P. 37

Judge Bucklew reported that the advisory committee was considering proposals by the Department of Justice for a new FED. R. CRIM. P. 37 (review of the judgment) to restrict the use of ancient writs, and changes in the §§ 2254 and 2255 rules to prescribe deadlines for filing motions for reconsideration. She noted that the committee had appointed a Writs Subcommittee, chaired by Professor Nancy King, that is considering whether it is advisable – or even possible under the Rules Enabling Act – to propose a rule, modeled on FED. R. CIV. P. 60(b), that would abolish all the ancient writs other than coram nobis.

Some participants urged caution and questioned whether there was authority to abolish the writs through the rules process. They also suggested that the writs may have Article III constitutional dimensions. Members also discussed the extent to which the ancient writs, especially coram nobis, are still used in federal and state courts.

FED. R. CRIM. P. 32.2

Judge Bucklew reported that the advisory committee was considering amendments to Rule 32.2 (criminal forfeiture), with the help of a subcommittee chaired by Judge Mark Wolf. She noted that the subcommittee was considering the advice of the Department of Justice, the federal defenders, and the National Association of Criminal Defense Lawyers in this very difficult area.

FED. R. CRIM. P. 41

Judge Bucklew reported that the advisory committee was considering proposed amendments to Rule 41 (search and seizure) to deal with search warrants for information in electronic form. She noted that the members of the committee had attended a full-day tutorial presented by the Department of Justice walking them through the mechanics of how electronic materials may be stored, copied, and searched.

Judge Bucklew noted that the advisory committee was working on implementing the proposed new time-computation rule and considering proposals by the Department of Justice to permit the examination of a witness outside the presence of the court and by the Federal Magistrate Judges Association for a rule to cover warrants for violation of supervised release or probation. Finally, she noted that the committee would be conducting a public hearing in Washington on January 26, 2007, at which five witnesses had signed up to testify on the proposed amendments to the criminal rules published in August 2006.

## REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Smith and Professor Capra presented the report of the advisory committee, as set forth in Judge Smith's memorandum and attachments of December 1, 2006 (Agenda Item 7).

### *Informational Items*

### FED. R. EVID. 502

Judge Smith reported that the advisory committee had been devoting most of its time to the proposed new Rule 502 (attorney-client privilege and work product; limits on production), published for public comment in August 2006. He pointed out that a substantial number of witnesses had signed up to testify at the committee's two scheduled public hearings – one in Phoenix immediately following the Standing Committee meeting and the other in New York on January 29, 2007.

Judge Smith explained that the advisory committee was proceeding in accordance with the limitation of the Rules Enabling Act that any "rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress." 28 U.S.C. § 2074(b). He pointed out that proposed Rule 502 had been drafted in response to a request from former Chairman Sensenbrenner of the House Judiciary Committee asking the committee to initiate rulemaking to address issues arising from disclosure of matters subject to attorney-client privilege or work product protection. He said that the new Democratic leadership of the Congress had not yet been consulted on the proposal.

Judge Smith highlighted four preliminary actions taken by the advisory committee at its November 2006 meeting in response to public comments on the rule. First, he said, the committee had voted to retain the words "should have known" in the proposed language of Rule 502(b). It would condition protection against inadvertent waiver on whether the holder of the privilege took reasonably prompt measures "once the holder

knew or should have known of the disclosure." He said that a comment had been made that the language might give rise to litigation over exactly when the producing party should have known about a mistaken disclosure. But, he said, it was the sense of the committee that the language had substantial merit and should be retained.

Second, Judge Smith pointed out that proposed Rule 502(b) would provide protection from waiver against third parties when a disclosure is "inadvertent" and made "in connection with federal litigation or federal administrative proceedings." Proposed Rule 502(c) would provide protection when the disclosure is "made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority." He said that a comment had recommended that the language of the two provisions be made identical by extending the protection for mistaken disclosures occurring during proceedings to those occurring during investigations.

Judge Smith said that a majority of the advisory committee was of the view that the difference between the language of the two subdivisions was justified. The committee, thus, decided that the protections of Rule 502(b) should continue be limited to mistaken disclosures made during court and administrative proceedings.

Third, Judge Smith said that the advisory committee had not decided whether to approve the "selective waiver" provision set forth in proposed Rule 502(c). It specifies that disclosure of privileged information to a government regulator does not constitute a waiver in favor of third parties. He explained that the committee had published this provision in brackets in order to emphasize that it was undecided about the matter and was seeking the views of the public as to the merits of including it in proposed Rule 502. He noted that the selective waiver provision had attracted strong opposition from lawyers and bar association representatives.

One participant noted that several public comments had opposed the selective waiver proposal on the grounds that it would erode the attorney-client privilege. A number of comments also referred to an alleged "culture of coercion" under which the Department of Justice considers a corporation's cooperation, including waiver of the attorney-client privilege and work product protection, as a factor in deciding whether to prosecute and on which criminal charges.

Judge Smith noted, too, that concern had been expressed by state judges that a federal selective waiver provision would subsume state waiver rules. He pointed out that Justice Hurwitz, a member of the Advisory Committee on Evidence Rules, had attended the most recent meeting of the Federal-State Jurisdiction Committee of the Judicial Conference and had had an opportunity to discuss with fellow state Supreme Court Justices the proposed rule and pertinent federal-state issues.

Fourth, Judge Smith reported that the advisory committee was in general agreement that arbitration proceedings should be covered by the protection of Rule 502 only if they are court-ordered or court-annexed arbitrations.

Judge Smith pointed out that these issues – and others listed in the agenda book and raised in the public comments and hearings – would be taken up again at the advisory committee's April 2007 meeting.

ADAM WALSH CHILD PROTECTION ACT

Judge Smith reported that the Adam Walsh Child Protection Act of 2006 had directed the advisory committee and the Standing Committee to "study the necessity and desirability of amending the Federal Rules of Evidence to provide that the confidential marital communications privilege and the adverse spousal privilege shall be inapplicable in any Federal proceeding in which a spouse is charged with a crime against 1) a child of either spouse; or 2) a child under the custody or control of either spouse."

The statutory provision, he said, appears to have been motivated by one aberrant circuit court decision allowing a criminal defendant's wife to refuse to testify even though the defendant had been charged with harming a child in the household. He said that the advisory committee had concluded that the case was of questionable authority and was even contrary to the precedent of its own circuit. Therefore, the Federal Rules of Evidence need not be amended to take account of it. Almost all other reported opinions, he said, have held that the protections provided by the marital privileges do not apply in cases where the defendant is charged with harm to a child.

Professor Capra noted that he had reached out to advocates for battered women for their views on whether it is good policy to have an exception to the privileges in a case where there may be harm to a child. He awaits responses from them.

Professor Capra added that the advisory committee would prepare a report for the Standing Committee to send to Congress. The report, he said, would include appropriate draft language of a rule amendment in case Congress disagrees with the conclusion that no rule change is necessary.

RESTYLING THE EVIDENCE RULES

Judge Smith reported that Chief Justice Rehnquist had expressed opposition to restyling the rules of evidence. Nevertheless, in light of the success in restyling the other federal rules and the presence of awkward language in the evidence rules, the advisory committee was taking a second look at the advisability of proceeding with a restyling effort. He noted that a couple of evidence rules had been restyled as samples for the

advisory committee's review, and it was the general sense of the members that the committee should continue with the effort at a modest pace, as long as the new chief justice agrees. Professor Capra added that an important argument in favor of restyling is that the evidence rules are strongly geared to the use of paper. Judge Levi asked whether it would be possible at the next Standing Committee meeting for the advisory committee to bring forward a couple of examples of restyled evidence rules. Judge Smith agreed to do so.

Judge Smith said that the advisory committee was doubtful that there was any need for changes in the evidence rules to take account of the new time-computation rules. He suggested that a reference to the evidence rules might better be included in the other rules. He also reported that the advisory committee was continuing to monitor the case law in the wake of *Crawford v. Washington,* 541 U.S. 36 (2004), dealing with testimonial hearsay. He observed that the courts are addressing the issues in a very professional manner, and it is far too early for the advisory committee to act.

## REPORT OF THE TIME-COMPUTATION SUBCOMMITTEE

Judge Kravitz and Professor Struve presented the report of the subcommittee, as set forth in Judge Kravitz's memorandum of December 14, 2006 (Agenda Item 11).

Judge Kravitz reported that a great deal of work had been undertaken on the time-computation project by the subcommittee, the advisory committees, and the committee reporters. He pointed to the text of the proposed template rule in the agenda book and said that it would be adopted in essentially identical form for the civil, criminal, appellate, and bankruptcy rules. Its central focus is to simplify counting for the bench and bar by eliminating the current two-tier system of computing time deadlines, under which weekends and holidays are excluded in calculating time periods of fewer than 11 days (8 days in bankruptcy), but included in calculating periods of 11 (or 8) days or more. Under the new template rule, all days will be counted as days. Only the last day of a time period will be excluded if it happens to falls on a weekend or holiday.

Judge Kravitz noted that the template rule provides a method for counting both forward and backward and a method for counting time periods expressed in hours. The rule defines the "last day" for filing as: (1) midnight, in the case of electronic filing; and (2) the time the clerk's office is scheduled to close, in the case of filing by other means.

He also noted that there are some issues that the new rule does not address. For example, the rule applies only when a time period must be computed. It does not apply when a court fixes a specific time to act. It also does not change the "three-day rule," under which a party served by mail or certain other forms of service is given three extra

days to respond. Moreover, it does not address explicitly whether litigants can file papers at a judge's home or a clerk's home after hours in light of 28 U.S.C. § 452, which states that courts "shall be deemed always open for the purpose of filing proper papers." He pointed out that Professor Struve had prepared an excellent memorandum on that particular issue in the agenda book.

The proposed rule, he said, also does not attempt to define the "inaccessibility" of a clerk's office for filing, although it does eliminate language that limits "inaccessibility" to weather conditions. He reported that the Standing Committee had asked the subcommittee to consider defining the term, but the subcommittee's memorandum to the Standing Committee contained a lengthy explanation as to why additional time and experience are needed in the electronic filing world before this issue can be addressed properly. He noted that most courts have adopted a local rule specifying what lawyers should do when there is a technical failure of the court's computers. The local rules vary greatly, but most require affidavits by lawyers and permission by the court on a case-by-case basis. They do not give parties an automatic extension for filing.

Finally, Judge Kravitz reported that the subcommittee had decided to continue to include state holidays in the rule, but he noted that it had seriously considered eliminating them because federal courts tend to remain open on state holidays. A member of the Standing Committee repeated his earlier view that state holidays should not be included in the definition of a "legal holiday." Judge Levi suggested that the subcommittee's decision to retain state holidays as an exception in the rule might be highlighted in the publication as a means of soliciting the views of the public on the issue. Other members suggested that the committee note also include a reference to national days of mourning.

Judge Kravitz added that additional suggestions for improvement in the language of the proposed rule had been offered recently by Professor Kimble, the committee's style consultant. He noted that the advisory committees were using the template and revising the specific time limits in their respective rules to make sure that the ultimate net effect of the new rule would be neutral to attorneys. Thus, the advisory committees will likely increase the 10-day time limits in their rules to 14 days because a 10-day deadline in the current rule normally gives a party 14 days to act because of intervening weekends. Judge Kravitz pointed out that the advisory committees were also attempting to express rules deadlines in multiples of 7 days, for all deadlines of fewer than 30 days.

He pointed out that some reservations had been expressed as to the wisdom of proceeding further with the time-computation project. He noted, in particular, that some members of the appellate rules committee had suggested that the current system for counting time is not broken, the proposed changes are not needed, and problems are created with regard to deadlines expressed in statutes. Nevertheless, even though some members believe that the project is unnecessary, the appellate advisory committee was

proceeding to make appropriate changes in the appellate rules in light of the proposed template rule.

Judge Kravitz reported that the Federal Rules of Bankruptcy Procedure pose a number of additional complications. First, he said, there are many more short deadlines in bankruptcy. Second, bankruptcy is heavily impacted by statutory deadlines, including the many deadlines set forth in the Bankruptcy Code and state statutes. Third, he explained, the bankruptcy advisory committee had been extremely active recently in publishing a large number of rules changes and making wholesale revisions in the bankruptcy forms in order to implement the omnibus 2005 bankruptcy legislation. In light of all the proposed changes already underway, he said, more rule changes at this point would impose an additional burden both on the advisory committee and on the bankruptcy bench and bar.

Judge Kravitz suggested the possibility of proceeding with the time-computation changes in the civil, criminal, and appellate rules at this point, but delaying any changes to the bankruptcy rules. This approach would not be ideal, though, since it would make the bankruptcy rules inconsistent with the other rules for a while. Nonetheless, it might be the most practical approach in light of the sheer volume of rule changes being presented to the bankruptcy community.

Judge Kravitz noted that a good deal of angst had been expressed at the last Standing Committee meeting over the issue of changing the method of counting time limits fixed in statutes. He noted that, except for the criminal rules, the federal rules specify that the method of counting time applies to national rules, local court rules, and statutes. In addition, he said, case law in bankruptcy holds that the counting method prescribed by the bankruptcy rules applies when counting deadlines set forth in statutes. Professor Morris noted the additional complexity that the Rules Enabling Act does not extend its supersession authority to the bankruptcy rules.

Judge Kravitz noted that the feedback received from the bar – other than the bankruptcy bar – is that lawyers generally do not rely on the counting method specified in the federal rules when calculating statutory deadlines – unless they miss a deadline and have to argue to a court for additional time. Therefore, although statutory deadlines are a concern to the rules committees, a large body of the bar does not in fact rely on the two-tiered rules method for counting statutory deadlines. He added that the subcommittee was considering preparing a list of the most common short statutory deadlines that actually arise in court proceedings and then drafting a package of legislative amendments for Congress to consider. He noted that the chair had raised the issue of potential statutory amendments, on a preliminary basis, with leadership of the former Congress and had received a good reception.

Judge Kravitz noted another complication flowing from the text of the current rule. FED. R. CIV. P. 6(a) specifies a method for computing time for both rules and statutes. The next subdivision of the rule, FED. R. CIV. P. 6(b), gives a court authority to extend deadlines for cause, but it applies on its face only to rules, not statutes. He said that the committee might want to give a court explicit authority for good cause shown to extend a deadline set forth in a statute.

Judge Kravitz concluded that the committee needed to make three decisions: (1) whether to keep moving forward and present a package of amendments to the Standing Committee in June 2007 for publication; (2) whether to include the bankruptcy rules in that package or defer them for publication at a later date; and (3) whether to amend the rules to give a court explicit authority to grant extensions of statutory deadlines for good cause shown.

Judge Zilly reported that the Advisory Committee on Bankruptcy Rules had not yet decided whether to make all the time-computation changes at its March 2007 meeting. The committee, he said, had been very much concerned about further publication of rule changes and possible confusion in light of the proposed changes to 40 rules just published in August 2006. Moreover, he said, more than 100 changes in about 75 rules would be impacted by the time-computation changes – many of them the same rules that had just been published. He added, though, that it would be relatively easy for the advisory committee to make all the changes, adding that it would make the changes in the revised rules out for publication, rather than in the existing rules. The advisory committee, he said, would not ask for an extension of time, and it could have the changes ready for the June 2007 Standing Committee meeting. But, he explained, the key decision was whether to risk creating confusion by publishing another large package of bankruptcy rule changes on the heels of a comprehensive package of changes approved by the Judicial Conference in September 2006 to implement the 2005 legislation.

As for statutory deadlines, Judge Zilly reported, the advisory committee had identified 10 statutes imposing short time limits in bankruptcy cases, most of them deadlines of 5 days. One approach, he said, would be to specify in the bankruptcy rules that the existing counting method will continue to be used for those specific code sections. An alternative would be to ask Congress to change all the 5-day deadlines to 7 days in order to reflect the new counting method, because 5 days actually means 7 days under current bankruptcy case law. He said that some additional confusion had been added in the 2005 bankruptcy legislation because Congress had used the term "business days" in a couple of sections, but not in other places.

Judge Levi suggested that the bankruptcy advisory committee should discuss all these matters further at its March 2007 meeting. He saw no problem with delaying the

changes in the bankruptcy rules for a year or two in light of the practical difficulties and confusion that might result from publishing additional bankruptcy changes now.

One member pointed out that proposed template FED. R. CIV. P. 6(a) mandates that all time periods be computed according to Rule 6. Thus, the rule would trump any other time period specified in the federal rules, any statute, local rule, or court order. Thus, he questioned the purpose of proposed Rule 6(a)(4), defining the end of the last day of a time period "unless a different time is set by statute, local rule, or court order." Judge Kravitz and Professor Struve responded that the provision takes account of 28 U.S.C. § 452, which states that all federal courts "shall be deemed always open for the purpose of filing proper papers . . . . " Some court decisions, they noted, have held that section 452 and FED. R. CIV. P. 77(a) (district courts always open) permit a paper to be filed after hours by handing it to a judge or clerk at their home. In addition, Judge Kravitz noted that some courts maintain a box at the courthouse for lawyers to drop pleadings after hours. He explained that Rule 6(a)(4) was designed to deal with the ordinary course of events, and it does not address explicitly a court's authority to permit after-hours filings under the statute. The language "unless a different time is set by statute, local rule, or court order" was intended to leave room for particular courts to treat issues of after-hours filing as they see fit.

One member suggested that the last sentence of the first paragraph of the committee note was not needed. It specifies that a local rule of court may not direct that a deadline be computed in a manner inconsistent with Rule 6(a). He said that this might imply that other local rules can conflict with the national rules, given that the same limitation on local authority is not repeated in every other committee note. Judge Kravitz responded that the subcommittee simply wanted to emphasize the importance of national uniformity and to make it clear that local rules cannot alter the time-computation method specified in the new rule. But, he said, if the sentence causes any confusion, it could be eliminated. Another member suggested substitute language for the committee note that would reiterate the general principle that local rules may not conflict with national rules, but point out that a court may specify a time for the end of the last day.

Another member said that the proposed rule does not work in counting backwards when the last day of a time period is one in which the clerk's office is inaccessible. Under the proposed rule, one must continue to count backwards. This produces the impossible result that if the office is not accessible, the filing is due yesterday. As a matter of logic, one should count forward to the next accessible day, rather than continue to count backwards. Professor Struve responded that the subcommittee had struggled with that situation and would be open to suggestions for better language. Judge Kravitz cautioned, however, that it would be difficult for the rule to deal with every conceivable situation.

Professor Capra pointed out that there are no time-computation provisions and no relevant time deadlines in the Federal Rules of Evidence. Thus, he asserted, there was no need for the proposed time-computation template rule to be added to the evidence rules. He added that, nevertheless, the evidence advisory committee could draft a variation of the template rule and include it as FED. R. EVID. 1104. But, he said, time computation issues do not arise in evidence, and there is no need for any provision in the evidence rules.

Judge Levi suggested that it would be helpful to have the sense of the Standing Committee that the time-computation project is beneficial before asking the advisory committees to proceed with proposing specific amendments.

**The committee without objection by voice vote agreed to encourage the advisory committees to proceed with the project.**

PANEL DISCUSSION ON THE DECLINE IN THE NUMBER OF CIVIL TRIALS

The committee participated in a panel discussion on the decline in the number of civil trials and whether anything can, or should, be done to amend the federal rules to address the phenomenon. The panel was moderated by Patricia Lee Refo, Esquire of Snell & Wilmer in Phoenix – a prominent member of the Arizona bar and the American Bar Association and a former member of the Advisory Committee on Evidence Rules. The other panelists were: Judge Patrick E. Higginbotham of the U.S. Court of Appeals for the Fifth Circuit, former chair of the Advisory Committee on Civil Rules; Professor Stephen C. Yeazell of the University of California at Los Angeles Law School; and Justice Andrew D. Hurwitz of the Supreme Court of Arizona, a member of the Advisory Committee on Evidence Rules.

Ms. Refo distributed a series of tables and charts documenting the "vanishing trial." She showed that from 1962 to 2005, the number of civil cases disposed of by the federal district courts increased more than five-fold, but the number of civil trials actually decreased by a third. Bench trials have declined by 45% since 1985, and consent civil trials by magistrate judges have decreased by nearly 50% since 1996. As a result, the percentage of civil cases resolved by a trial has dropped from 11.5% in 1962 to the current rate of 1.4%.

She showed tables breaking out cases by nature of suit. Civil rights cases are the most likely category of civil cases to go to trial in the federal courts, counting for 33% of all civil trials in 2002. Nevertheless, only 3.8% of civil rights cases were decided after a trial. Tort cases accounted for 23% of all civil trials in 2002, although only 2% of tort cases went to trial. And in 2005, she said, almost no contract cases went to trial.

She noted that fewer cases are being terminated during the course of a trial, and the data strongly suggest that trials are not increasing in length. She noted, too, that the decline in trials has also occurred in criminal cases, though for different reasons. She pointed out that during the same time period that trials have declined, the country has experienced substantial population growth and increases in gross domestic product, the number of lawyers, the number of pages in federal court opinions, and the number of pages in the Federal Register. Finally, she showed a table demonstrating that civil trials have also declined noticeably in the state courts.

Judge Higginbotham reported that in the early 1970s, federal district judges were conducting over 30 trials per judge each year, many more than today. Even so, the time for filing to trial was shorter than it is now. Although there has been a decline in both bench and jury trials, he noted, there has been a reversal in the proportions between the two. Bench trials used to predominate by 2-1, but jury trials now outnumber bench trials by 2-1. In criminal cases, he said, the number of guilty pleas has increased substantially, as a direct result of the additional power given to prosecutors over charging decisions by the federal sentencing guidelines.

Judge Higginbotham attributed the decline in trials to the growth of the "administrative model" of decision-making – a set of administrative alternatives to the traditional civil trial. He traced this trend to enactment of the Administrative Procedure Act in 1946, regularizing administrative decision-making in the executive branch, leading to great growth in administrative law judges and an administrative, bureaucratized approach to case-by-case decision-making. He said that the trend began to spread to the federal judiciary in the 1970s with the growth of the federal magistrate judges system. Since then, the court system itself has been moving more and more to this kind of administrative, bureaucratized decision-making, as part of which judges have adopted a series of procedures designed to avoid trials. In this sense, trials are not "vanishing," but moving – from the traditional approach to an administrative model. He noted that most observers account for this phenomenon, including the decline of trials, by pointing to the high costs of civil litigation in the federal courts, the fear of juries, and the indeterminacy of the judicial process.

He warned that this trend has dangerous effects. Lawyers and judges, he said, used to focus on fact questions and present them to the jury at trial. Outcomes, therefore, tended to depend very closely on the applicable normative standards of law. But now, the system has abandoned trials in order to focus on settlements, which are strongly affected by factors other than normative standards. The system, thus, has distanced itself from normative standards of law.

He complained that courts have become hostile to the trial of cases. He referred to two seminars for judges in which the faculty had expressed the attitude that a trial

represents a "failure" of the system. The judges were instructed by the faculty to work hard at obtaining settlements. An agreed-upon settlement is seen as better than a trial. In addition, there is now a much greater focus on alternative dispute resolution. He acknowledged that a settlement in the face of an impending trial may be perfectly acceptable – because it will be strongly influenced by normative standards of law – but not a settlement that occurs in the absence of any likelihood that there will ever be a trial.

Judge Higginbotham pointed out that the federal court system has been a great success because of its fairness, independence, and transparency. But, he said, there is a fundamental lack of transparency in both settlements and arbitration. Discovery materials, moreover, are not filed. Ms. Refo added that many cases that used to be disposed of with bench trials have now migrated to arbitration for largely this reason, because the parties do not have to reveal information to the public. Judge Higginbotham lamented that the courts have validated and embraced arbitration.

Professor Yeazell said that most of what would need to be done to produce a substantially increased rate of trials probably lies beyond the power of the rules process to affect. He strongly endorsed Judge Higginbotham's comments regarding the lack of transparency in settlements and the resulting diminishment of the integrity and legitimacy of the legal system. He noted, though, that it might be possible to address the transparency problem to some extent through rules.

He emphasized two points based on the empirical data presented by Ms. Refo. First, he said, the rate of trials has also been dropping in the state courts. But the rate of trials in state courts is still several times higher than in the federal courts, including the 35 states that use the federal rules as their procedural code. That, he said, leads one to believe that the principal causes of the decline lie in something beyond the federal rules and what rule changes might accomplish.

Second, he noted that the federal sentencing guidelines, with all their perceived defects, are superior to civil settlement practices as far as transparency is concerned. A criminal defendant, he said, may not think that his sentence is fair, but he knows that it will be probably the same sentence that the defendant in the next courtroom receives for the same offense.

That consistency, however, is simply not the case with civil settlements. There are enormous differences from case to case. The results may well be acceptable in individual cases because they are based on the consent of the parties. But for the legal system as a whole, the lack of uniformity and norms is very troubling. He pointed out that a great deal of research has been undertaken in this area. In these studies, a standard set of facts is given to experienced judges, lawyers, and insurance representatives, and they are asked what the case should settle for. They all believe that they know from

experience the value of a case. But the settlement figures they produce are in fact very different from each other. And the differences among similar cases are compounded by the lack of transparency, as no one really knows what other similar cases have settled for.

Professor Yeazell said that this is one problem that the rules process might be able to address in some manner. The justice system ought to be able to provide some notion of what similar cases have settled for. The federal rules might provide that settling parties must register, in some form, the outcome of a settlement in order to provide some notion to third parties regarding the range of settlement outcomes. This would bring about a greatly needed increase in transparency, and it may be something that could properly be done within the ambit of the Rules Enabling Act. The philosophy would be that however much some parties may want to keep outcomes private, this level of transparency would be the price – and an appropriate price – of entering the civil justice system.

Ms. Refo pointed out that there are now certain categories of cases in which trials never take place. Accordingly, a civil litigator has no benchmarks to determine what a case is worth or what the risks of trial may be. As a result, settlements are uninformed, and the uncertainty is a factor in the decline of civil trials.

Judge Hurwitz suggested that trying to pinpoint the causes for the decline in trials is akin to distinguishing between the chicken and the egg. The most important factor in the decline of trials, he said, is cost. He noted that when he and his colleagues used to try cases 30 years ago, they routinely tried small cases at low cost. Today, he said, the cost of litigation is so high that lawyers no longer try any small cases. They have become non-trial lawyers. As a result, a trial is scary to them because they have no experience in trying cases. So it is hard to tell whether uncertainty is the cause or the other factors that have led to the uncertainty. All have been combined to create a culture that avoids trials and views them as a failure. He noted from his personal experience in Arizona that many distinguished candidates applying for state judgeships have had many years of legal experience, but no trials.

Justice Hurwitz noted that trials in state courts are also decreasing, but they are declining at a lesser rate than in the federal courts. He suggested that the perceived unfriendliness of the federal forum is responsible in part for chasing cases from the federal courts into the state courts. He said that a civil case can normally be tried in the Arizona state courts in one year – a much shorter time than in the federal court. So, when plaintiffs have a choice of forum, they will normally choose the state court. Many of the cases, moreover, will remain in the state courts and not be removed to the federal court. He explained that when a case is filed in the federal court, it is randomly assigned to one of 13 very busy district judges, some of whom do not come from a civil background. On the other hand, in Maricopa County, a complex civil case in state court will be assigned to

a judge with substantial civil trial experience. That special procedure of guaranteeing experienced judges for complex cases also offers an attractive choice for plaintiffs.

Judge Higginbotham observed that there is a clear relationship between the decline in the number of trials and the increase in the amount of time it takes to get a case to trial. He noted the example of a federal district judge in Texas who receives an unusually large number of patent cases because he is able to bring them to trial very quickly. The attraction for the bar is the certainty that the judge will give them a firm trial date and a good trial.

Justice Hurwitz raised the fundamental question of whether the decline in civil trials is really a bad thing at all. Surely, he said, fewer lawyers today are able to try a civil case, but maybe all those small civil cases that used to be tried in the past would have been better resolved through settlement. In the past, moreover, lawyers almost never asked for summary judgment in small cases. He said that the legal culture had changed fundamentally, and it may be that not much can be done to change it through the rules process. He suggested that judges and lawyers may be overly nostalgic. Just because they liked the good old days does not mean that the system should return to them.

Ms. Refo pointed out that it was very difficult to conduct empirical research in this area, but her sense was that corporate America has lost confidence in jury results. She said that jury trials cost too much, and the results are too uncertain. She said that consideration might be given to two possible rules changes. First, the pretrial rules might be amended to move the parties to trial faster and more efficiently. Second, something might be done through rules changes to improve the fact finding at trials.

Judge Higginbotham said that the emphasis today is on summary judgment, rather than trial. He said that the traditional way of running a docket is the most effective. The judge makes key decisions early in the case after asking the lawyers when the case will be ready for trial. The judge sets a real trial date, and the parties concentrate on moving forward towards it. If the case is complex, the judge and the parties focus on the specific questions that are going to be asked in front of the jury, rather than on the details of the discovery process. The lawyers and the judge focus on the trial as the end target and work backwards from there. He recognized that most civil cases will settle in any event, but the whole process, he said, should be refocused from discovery to the trial.

As for juries, he said, all the literature proves that a 12-person jury is much more reliable than a smaller jury. He noted that the Standing Committee had approved an amendment to the civil rules that would have mandated a return to 12-person juries in civil cases, but it was not approved by the Judicial Conference. Ms. Refo added that the American Bar Association had issued jury principles in 2005 that urge a return to 12-person juries, and it is actively encouraging the states to return to 12-person juries.

Judge Higginbotham also pointed out that substantive developments have had an impact on the decline in trials, particularly punitive damages. The uncertainty of a jury result has been intensified by the very real fear of substantial punitive damages. He noted that court decisions have been cutting back on punitive damages, but the risk of them continues to deter corporations from opting for a jury trial. Corporate officers, he concluded, generally do what they are told to do by their lawyers, most of whom have not tried any cases themselves.

He suggested that the federal district courts are losing their distinctiveness and are becoming part of a bureaucratic enterprise. The phenomenon presents a serious challenge to Article III of the Constitution and to judicial independence. Increasingly, he said, trial judges are becoming processors of paper, and the court system has become more of an administrative process than a trial process. The bureaucratization, moreover, feeds on itself. He noted that the federal sentencing guidelines in criminal cases have contributed to uniformity in sentencing, but they have created a large bureaucracy in Washington that produces a large volume of manuals and statistics. He noted that the sentencing guidelines have led to substantially more appeals in federal criminal cases, but he pointed out that the Supreme Court's decision in *Apprendi v. New Jersey,* 530 U.S. 466 (2000) was very helpful because the Supreme Court has helped to put the focus back on the jury.

Ms. Refo asked the panelists to compare state court rules with the federal rules to see whether any differences might be of help in revitalizing trials in the federal courts. For one thing, she noted, Arizona requires much broader disclosure in civil cases. And it has different rules on how trials are conducted, including a provision allowing juries to ask questions.

Justice Hurwitz said that the Arizona state rules were basically similar to the federal rules, but a number of innovations in Arizona might help the federal courts, at least at the margin. The size of the jury, he said, is a factor, but most plaintiffs do not want a 12-person jury. He noted that in the state court, unlike the federal court, the parties can pick the judge. Guaranteeing federal lawyers that they will get an experienced judge would be a very helpful improvement, but he noted that there is a price to pay for it in terms of judicial independence.

One of the members echoed the observation that there is a culture of hostility to trying cases – both in the federal courts and the state courts. He noted that substantial pressure had been placed on him by judges to settle, even in cases that have deserved to go to trial. He also noted that it takes much too long to reach trial in the federal court, and cases go to trial much more quickly in the state courts. Clients, he said, are resistant to waiting so long and facing uncertainty.

He noted that Arizona had organized a specialized civil court division for complex civil cases – as in New York, Delaware, North Carolina, and California – staffed by very experienced, highly regarded judges. The state bar, he said, has made the decision not to remove cases to federal court because they are pleased to have them stay in the complex civil division of the state courts. He noted that the judges in the special court conduct an early pretrial conference to lock in all dates. They also impose limits on disclosure and discovery that would otherwise apply in normal civil cases. The bar believes that the system works, at least in complex civil cases, both for plaintiffs and defendants. He noted that a similar system works very well in California.

Another member suggested that lawyers on both sides see state courts as much more lawyer-friendly places than federal courts. Federal courts are seen as very formal, and the lawyers do not have an opportunity to see the judge in person until late in the process. Another difference between the state and federal courts is that the lawyers get to select the jury in state courts, a matter of great importance to them.

Judge Rosenthal observed that the Advisory Committee on Civil Rules had drafted a set of simplified procedural rules to expedite smaller federal cases and provide prompt, economical trials. Under the proposal, parties opting into the simplified rules would be guaranteed a prompt trial, less discovery, fewer motions, and fewer expert witnesses. But, she said, when the advisory committee floated the idea, it encountered resistance from virtually every quarter. She said that the draft rules had substantial merit, and the advisory committee might wish to revisit them. She noted, too, that specialized rules are becoming more common in certain kinds of cases, such as patent cases.

One member suggested that the courts lose a great deal if complex civil cases vanish from the judicial system. He noted that California, Arizona, and New York make special provision for complex civil cases, including special courtrooms and training for the judges. One of the dangers of settlements, he said, that there is no development of stare decisis and no transparency in the system. Large cases simply are diverted to alternative dispute resolution, and small cases remain in the courts, creating a dual system of justice. Corporations, he said, need to see themselves as stakeholders in the court system. Because of the special efforts now being made in some states, lawyers and corporations are preferring to keep complex civil cases in the state courts, rather than removing them to the federal courts or turning to arbitration or other alternative dispute resolution.

Another member echoed the theme that it is bad for the country when litigants believe that the court system is more of a dispute resolution mechanism than a justice system. It is also wrong, he said, when lawyers and clients believe that a judge will punish them for not settling a case and when corporations choose private litigation over the court system. The net result, he said, is that the judicial system is losing social

capital. One of the foundations of the American judicial system, he emphasized, is that the public participates in it. But that participation has been declining, as courts have reduced the number of jurors used in civil cases and have reduced the number of trials. He suggested that there may be problems in the future when the courts need public support.

Ms. Refo noted that, as a practical matter, lawyers today almost never try a case. Associates, moreover, never get fired for taking depositions or serving interrogatories. They can only get in trouble for not taking depositions or serving interrogatories. In effect, the culture encourages too much discovery. She added that the system as a whole has lost a great deal through the growth of private litigation. Among other things, she said, great strides have been made to diversify the federal bench. The same development, however, has not occurred in private litigation, as only white males seem to preside. That, she said, is another hidden cost to the system.

Judge Higginbotham added that the privacy implications of discovery are a serious problem. He said that there is a value in openness and important social benefits in trials. Cases, he said, do not belong solely to the litigants. Even in private litigation, he said, the parties want discovery. What they want to avoid is public disclosure of their records and activities.

One participant noted that his court is moving towards allowing fewer matters to be filed under seal. On the one hand, he said, disclosure of documents and depositions may encourage parties to leave the court system for private litigation. But on the other hand, there is also a fundamental value in openness and public records.

One member said that his clients increasingly are resisting arbitration. The arbitration alternative, he said, was sold to parties on the basis of its being cheaper and faster. But, he said, it is neither. Moreover, decisions in arbitration usually involve the arbitrator splitting the baby, and there is no appeal from the decision. As one suggestion for change, he said that the committee might want to consider amending 28 U.S.C. § 1292(b) to allow more decisions to be brought to the courts of appeals.

NEXT COMMITTEE MEETING

The next meeting of the committee will be held in Washington, D.C. on June 11-12, 2007.

Respectfully submitted,

Peter G. McCabe,
Secretary

# UNITED STATES COURT OF APPEALS
# FOR THE FIFTH CIRCUIT

CHAMBERS OF
EDITH H. JONES
CHIEF JUDGE

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February 22, 2007

Honorable Carl E. Stewart
Chair, Advisory Committee on the
Federal Rules of Appellate Procedure
2299 United States Court House
300 Fannin Street
Shreveport, Louisiana 71101

Re: September 13, 2006 letter request of Appellate Rules Committee Concerning Fifth Circuit local briefing rules and requirements

Dear Judge Stewart:

As you are aware, the Fifth Circuit took up the above matter at its January 22, 2007 meeting. Led by the excellent efforts of Judge Will Garwood, formerly a member of the Appellate Rules Committee, we respond as follows to your inquiry.

Concerning the Appellate Rules Committee's recommendation that every circuit collect all requirements regarding briefing in one clearly identified place on its website, the court concluded, from the second complete paragraph on page 2 of the September 13 letter, that the Fifth Circuit's website was deemed adequate in this respect.

The Appellate Rules Committee's letter also requested that the court consider whether certain requirements for briefing imposed by local rules, in addition to those imposed by the Federal Rules of Appellate Procedure, might be reduced or eliminated. The seven particular Fifth Circuit local rules specified in this connection are identified on page 2 of the September 13 letter and in the Federal Judicial Center's October 2004 report referenced in the September 13 letter.

At its meeting on January 22, the court voted to entirely repeal three of these seven local rules, namely Fifth Circuit Rules 28.2.2 (summary of argument page limitations), 28.2.5 (jurisdictional statement citation of authority), and 28.2.6 (separate heading for standard of review). It is anticipated that formal action repealing these local rules will be taken so as to be effective in the fall of 2007 when amendments to the Federal Rules are generally effective.

At the referenced meeting, the court voted to retain the other four identified local rules (namely Fifth Circuit Rules 28.2.1, 28.2.3, 28.2.4 and 28.3), generally for the following reasons.

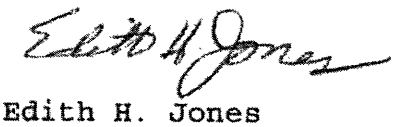
- *Local Rule 28.2.1. Certificate of Interested Persons.* It was important to keep this because it includes (as well as all information required by the corporate disclosure statement) non-corporate parties (not covered by the corporate disclosure statement) that may cause recusal, and is hence necessary for proper calendaring of cases and avoidance of improper judicial participation. Three other courts (D.C., Federal and Eleventh) also require disclosure broader than FRAP 26.1.

- *Local Rule 28.2.3. Citations to record.* Our local rule requires "every assertion in briefs regarding matters in the record must be supported by a reference to the page number of the original record." This is broader than FRAP 28(a)(7) which requires only "appropriate references to the record" and applies only to the "statement of facts" section of the brief (FRAP 28(e) also requires, where reference is made to evidence whose admissibility is in controversy, specific citation to where the evidence appears, is offered, and is ruled on). The Eleventh Circuit has a rule similar to our 28.2.3 (the Tenth Circuit also has its own rule). It was felt that FRAP's "appropriate reference" was too vague (and limited), and that greater specificity was a help to the court and encouraged needed accuracy in briefing.

- *Local Rule 28.2.4. Statement regarding oral argument.* While nothing in FRAP 28 requires such a statement, FRAP 34(a)(1) specifically allows a court to "require by local rule, a statement explaining why oral argument should, or need not, be permitted." The Eighth, Tenth and Eleventh Circuits have requirements similar to our 28.2.4. This local rule is important to our screening system (and to help ensure compliance with our IOP following Rule 34 which provides, properly in our view, that dissents or special concurrences are not allowed on screeners where oral argument has been requested).

- *Local Rule 28.3. Order of brief contents.* This is essentially the same as FRAP 28(a), but is necessary to cover our certificate of interested persons and statement regarding oral argument, as well as the signature on the brief, none of which are addressed by FRAP 28(a). Otherwise, our 28.3 is essentially the same as FRAP 28(a).

Very truly yours,



Edith H. Jones

EHJ/bn

cc: Mr. Peter G. McCabe
Secretary to the Rules Committee

**MEMORANDUM**

**DATE:** March 27, 2007

**TO:** Advisory Committee on Appellate Rules

**FROM:** Catherine T. Struve, Reporter

**RE:** Item No. 05-06

At the November 2006 meeting, the Committee voted (5 to 4) to amend Rule 4(a)(4) to remedy a problem that dates from the 1998 restyling. (A copy of my October 16, 2006 memo on this question is enclosed.) In November, the Committee had before it the proposed amendment to the text of Rule 4(a)(4), but did not have before it a note to accompany the proposed amendment. The proposed text and note follow. The text differs slightly from that proposed in my prior memo: Instead of changing the text to refer to "an alteration or amendment of a judgment," the amendment now refers to "a judgment's alteration or amendment." This results from style advice provided by Professor Kimble.

**Rule 4. Appeal as of Right--When Taken**

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

* * * * *

**(4) Effect of a Motion on a Notice of Appeal.**

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**(B)(i)** If a party files a notice of appeal after the court announces or enters a judgment — but before it disposes of any motion listed in Rule 4(a)(4)(A) — the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

**(ii)** A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a ~~judgment altered or amended~~ judgment's alteration

or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal — in compliance with Rule 3(c) — within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

* * * * *

**Committee Note**

**Subdivision (a)(4)(B)(ii).** Subdivision (a)(4)(B)(ii) is amended to address problems that stemmed from the adoption — during the 1998 restyling project — of language referring to "a judgment altered or amended upon" a post-trial motion.

Prior to the restyling, subdivision (a)(4) instructed that "[a]ppellate review of an order disposing of any of [the post-trial motions listed in subdivision (a)(4)] requires the party, in compliance with Appellate Rule 3(c), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment shall file a notice, or amended notice, of appeal within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last such motion outstanding." After the restyling, subdivision (a)(4)(B)(ii) provided: "A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal — in compliance with Rule 3(c) — within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion."

One court has explained that the 1998 amendment introduced ambiguity into the Rule: "The new formulation could be read to expand the obligation to file an amended notice to circumstances where the ruling on the post-trial motion alters the prior judgment in an insignificant manner or in a manner favorable to the appellant, even though the appeal is not directed against the alteration of the judgment." *Sorensen v. City of New York*, 413 F.3d 292, 296 n.2 (2d Cir. 2005). The current amendment removes that ambiguous reference to "a judgment altered or amended upon" a post-trial motion, and refers instead to "a judgment's alteration or amendment" upon such a motion.

Encl.

# MEMORANDUM

**DATE:** October 16, 2006

**TO:** Advisory Committee on Appellate Rules

**FROM:** Catherine T. Struve, Reporter

**RE:** Item No. 05-06

In Sorensen v. City of New York, 413 F.3d 292 (2d Cir. 2005), the court raised questions concerning the operation of Rule 4(a)(4) in cases where a party files a notice of appeal and the district court subsequently alters or amends the judgment.[1] In particular, the court held that under Rule 4(a)(4)(B) the plaintiff's initial notice of appeal did not effect an appeal from the court's later dismissal (on the posttrial motion) of one of the plaintiff's claims. Writing for the court, Judge Leval characterized Rule 4(a)(4) and its Note as ambiguous and contradictory, and raised the possibility that problems could also arise for an appellant who fails to file a new or amended notice of appeal after the district court amends the judgment in the appellant's favor. *See id.* at 296 & n.2.

At the April 2006 meeting, the Committee decided to leave this matter on the study agenda, and requested that I look into the amendment that produced the current language in Rule 4(a)(4). As the Committee is aware, the current language dates from the 1998 restyling. However, to understand the questions raised by the *Sorensen* court, I thought it helpful to go back to the 1993 amendments. The attached chart shows the evolution of the Rule from the pre-1993 version to the current version.

## I. The 1993 amendments to Rule 4

In 1993, Rule 4(a)(4) was amended to eliminate a trap for the untutored litigant. The then-current version of the Rule provided in relevant part: "A notice of appeal filed before the disposition of any of the above [timely post-trial] motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above." Under this provision, a notice of appeal filed while a timely

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[1] In *Sorensen*, the district court initially entered a judgment which awarded relief on certain claims and dismissed others. *See* 413 F.3d at 294. The plaintiff filed a notice of appeal, and the district court subsequently granted a posttrial motion dismissing one of the claims on which it had initially awarded relief. *See id.* The plaintiff failed to file a timely notice of appeal that encompassed the judgment that ultimately resulted after this grant of posttrial relief. *See id.* at 294-95. The Court of Appeals held that the plaintiff failed properly to preserve her challenge to the district court's dismissal of the relevant claim. *See id.* at 296.

post-trial motion was pending was ineffective. To take an appeal, the appellant had to file a notice of appeal after the disposition of the motion.

As the 1993 Advisory Committee Note explains, "[m]any litigants, especially pro se litigants, fail to file the second notice of appeal, and several courts have expressed dissatisfaction with the rule." Accordingly, the 1993 amendments altered Rule 4(a)(4) to read in relevant part:

> A notice of appeal filed after announcement or entry of the judgment but before disposition of any of the above motions is ineffective to appeal from the judgment or order, or part thereof, specified in the notice of appeal, until the entry of the order disposing of the last such motion outstanding. Appellate review of an order disposing of any of the above motions requires the party, in compliance with Appellate Rule 3(c), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment shall file a notice, or amended notice, of appeal within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last such motion outstanding.

The text of this version of the Rule accomplished a number of things. First, it eliminated the requirement for a second notice of appeal, so long as the appellant wished only to challenge the initial judgment or other orders specified in the initial notice of appeal. This was clearly true of a judgment left unchanged, or substantially unchanged, by the disposition of the posttrial motions. It was also true of a judgment that was altered by the disposition of a posttrial motion, so long as the aspects challenged by the appellant on appeal existed in the initial judgment. As the 1993 Advisory Committee Note explained:

> Because a notice of appeal will ripen into an effective appeal upon disposition of a posttrial motion, in some instances there will be an appeal from a judgment that has been altered substantially because the motion was granted in whole or in part. Many such appeals will be dismissed for want of prosecution when the appellant fails to meet the briefing schedule. But, the appellee may also move to strike the appeal. When responding to such a motion, the appellant would have an opportunity to state that, even though some relief sought in a posttrial motion was granted, the appellant still plans to pursue the appeal. Because the appellant's response would provide the appellee with sufficient notice of the appellant's intentions, the Committee does not believe that an additional notice of appeal is needed.

Second, the version adopted in 1993 made clear that if a party wished to challenge the disposition of a posttrial motion, or otherwise wished to challenge any alteration or amendment of the initial judgment, the party had to file a new or amended notice of appeal. This was clear from the text of the Rule, and it was underscored by the Committee Note, which explained: "If the judgment is altered upon disposition of a posttrial motion, however, and if a party wishes to

appeal from the disposition of the motion, the party must amend the notice to so indicate."

Thus, Rule 4(a)(4) as it existed prior to the 1998 restyling[2] provided straightforward answers to each of the questions posed by the *Sorensen* court in footnote 2 of its opinion:

- "[W]hether the requirement of a new or amended notice to appeal the ruling on the post-trial motion arises only when the ruling on the post-judgment motion alters the judgment, as opposed to when the ruling declines to alter the judgment":
    - Clearly, the answer under the pre-1998 version of the Rule was that no new or amended notice of appeal was necessary when the post-judgment motion was denied.[3] The clear intention of the 1993 amendment – apparent from the face of the pre-1993 and post-1993 Rule text – is to provide that a notice of appeal filed while a timely post-trial motion is pending takes effect after the disposition of that motion. If a new or amended notice of appeal were required even when the post-trial motion was denied, then the clear intent of the amendment would have failed, because the cases to which it could apply would be a null set.
- "[W]hether a new or amended notice is required when the ruling on the post-trial motion alters the judgment in a manner favorable to the appellant, or alters it only in an insignificant manner, or supersedes the original judgment without alteration, so that the merits of the appeal do not depend on differences between the earlier judgment and the later one":

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[2] Rule 4(a)(4) was amended slightly in 1995 to read in relevant part:

> Appellate review of an order disposing of any of the above motions requires the party, in compliance with Appellate Rule 3(c), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment shall file ~~an amended notice~~ a notice, or amended notice, of appeal within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last such motion outstanding.

The 1995 Committee Note explains that this amendment was designed "to clarify the fact that a party who wants to obtain review of an alteration or amendment of a judgment must file a notice of appeal or amend a previously filed notice to indicate intent to appeal from the altered judgment." There is no reason to think that this change in the Rule's text would alter the answers to the questions posed by the *Sorensen* court. Thus, if those questions are currently problematic, it must be because of the language adopted in the 1998 restyling.

[3] Of course, an appellant who wishes also to challenge the denial of the post-trial motion must amend the notice of appeal to encompass that issue.

- The text of the pre-1998 Rule required a new or amended notice of appeal if the litigant wished to challenge an order disposing of a post-trial motion or to challenge an alteration or amendment of the judgment. Neither situation is present when the ruling on the post-trial motion alters the judgment in a manner favorable to the appellant, so no new notice of appeal would have been required.[4]

- Likewise, if the post-trial motion resulted in an "insignificant" alteration of the judgment, presumably the appellant would not be seeking to challenge that particular alteration on appeal, but rather would continue to seek appellate review of some aspect that existed in the original judgment. No new or amended notice of appeal would be necessary.

- If a ruling on the post-trial motion resulted in the entry of a new judgment, which was precisely the same as the prior judgment, the appellant would not be seeking to challenge an alteration or amendment of the judgment.

## II. The 1998 restyling of Rule 4

The Advisory Committee appears to have begun the restyling process circa 1994. It considered the first chunk of proposed restyled rules at its October 1994 meeting. The proposed restyling was published for comment in 1996. The package of restyled rules ultimately took effect December 1, 1998. I have reviewed the Advisory Committee minutes available on the AO website for meetings from 1994 through 1998, but those minutes do not discuss the restyling of the language with which this memo is particularly concerned.

Restyled Rule 4(a)(4)(B), as published for comment, read as follows:

> (i) If a party files a notice of appeal after the court announces or enters a judgment – but before it disposes of any motion listed in Rule 4(a)(4)(A) – the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.
>
> (ii) To challenge an order disposing of the motion, or a judgment altered or amended upon such a motion, a party must file a notice of appeal, or an amended notice of appeal – in compliance with Rule 3(c) – within the time prescribed by

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[4] Admittedly, if the appellant still wishes to take the appeal, it is likely that this is because some aspect of the appellant's post-trial motion has been denied – so that the appellant could be viewed as challenging the disposition – i.e., denial – of that part of the post-trial motion. But that clearly can't be what is meant by the disposition of a post-trial motion, because if it were, then that would be true any time that the ruling declines to alter a challenged aspect of the judgment.

this Rule measured from the entry of the order disposing of the last such remaining motion.

The wording of the Rule was altered in some respects after the comment period, but the language that concerns us was already part of the proposed restyled Rule as published: Unlike the pre-1998 version – which referred to *challenges to "an alteration or amendment* of the judgment" – the proposed restyled version referred to *challenges to "a judgment* altered or amended" upon a post-trial motion. The implications of this shift are reviewed in more detail in Part III below.

The Advisory Committee's May 1997 report to the Standing Committee attaches a summary of the comments submitted on the restyling package. Evidently, at least two commentators questioned the proposed language in restyled Rule 4(a)(4)(B). As described in the summary, Francis Fox stated that

> he . . . does not understand new Rule 4(a)(4)(B). He also notes that he does not know what the phrase "in whole or in part" does in (B)(i). He says that the prematurely filed notice of appeal will be effective to save the appeal, in whole or in part, once a pending motion has been decided; but then (B)(ii) requires another notice of appeal where the particular motion has amended something. He says that one would think that the amended something would be part of the judgment or order that has already been appealed "in whole or in part" by (B)(i).

May 1997 Report to Standing Committee at 21. Cathy Catterson, the Ninth Circuit Clerk, forwarded comments from members of the Ninth Circuit Advisory Committee; the summary stated that those comments included the following:

> Rule 4(a)(4)(B) may inject an ambiguity into whether an amended notice must be filed. The ambiguity arises because (B)(i) now provides that an early notice "becomes effective" when the order disposing of the last remaining motion is entered, and then (B)(ii) states that once the order disposing of the motion is entered the challenging party must file a notice or amended notice. One might read the rule to suggest that because you filed an earlier notice that is now "effective" that notice qualifies as the notice required by (B)(ii). The commentator suggests rephrasing the rule to clarify that the earlier filed notice is ineffective, but upon the district court's action on the pending motion, the party can either file a new notice or simply amend the earlier one.

Id. at 25.

Though both these comments critiqued the proposed language of 4(a)(4)(B), neither focused on the use of the language concerning challenges to "a judgment altered or amended upon" a post-trial motion – i.e., neither focused on the change giving rise to the difficulties

discussed in this memo. Thus, when the language of Rule 4(a)(4)(B) was changed after the comment period, the change did not address that difficulty. "To challenge an order disposing of the motion, or a judgment altered or amended upon such a motion, a party must file a notice of appeal . . . ." became "A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal . . . ." Report at 27. But though the Gap Report asserts that this change was adopted "to help clarify the meaning," *id.*, the change did nothing to address the difficulty that would be caused by the use of the "judgment altered or amended" language.

## III. Current Rule 4(a)(4)(B): Interpretation and assessment

As a result of the restyling, Rule 4(a)(4)(B) currently provides, in relevant part:

> (B)(i) If a party files a notice of appeal after the court announces or enters a judgment--but before it disposes of any motion listed in Rule 4(a)(4)(A)--the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.
>
> (ii) A party **intending to challenge an order** disposing of any motion listed in Rule 4(a)(4)(A), **or a judgment altered or amended upon such a motion**, must file a notice of appeal, or an amended notice of appeal--in compliance with Rule 3(c)--within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

The restyled Rule's reference to challenges to "a judgment altered or amended upon" a post-trial motion is the source of the confusion noted by the *Sorensen* court. If one were to read Rule 4(a)(4)(B)(ii) in isolation, one might conclude that any time a court's disposition of a post-trial motion alters or amends a judgment, the Rule requires any and all appellants to file a new or amended notice of appeal after that disposition of the post-trial motion. Nor would recourse to Rule 4(a)(4)(B)(i) necessarily dispel this impression: The suggested reading of Rule 4(a)(4)(B)(ii) would not render (4)(a)(4)(B)(i) surplusage, because that subdivision would still cover situations where all the post-trial motions are denied.

If such a reading of the current Rule were correct, then the 1998 restyling would have produced a substantive change: The Rule would now require an appellant to file a new or amended notice of appeal even if the intervening disposition of the post-trial motion altered the judgment only insignificantly, or in a way that was favorable to the appellant. But such a reading should be rejected. The 1998 Advisory Committee Note stresses that (with exceptions not relevant here) the 1998 amendments to Rule 4 were "intended to be stylistic only."

A court that is willing to give weight to Advisory Committee Notes when interpreting the

Rules[5] should continue to answer the questions posed by footnote 2 of the *Sorensen* opinion in the same way that they would have been answered under the pre-restyling version of the Rule.[6] Indeed, even a court that is normally unwilling to give weight to the Notes should be willing to consult them (and thus employ them to reach the appropriate interpretation of Rule 4(a)(4)(B)(ii)) when confronted with a circumstance in which the text's application would result in absurdity[7] – as it would if Rule 4(a)(4)(B)(ii) were read to require an amended notice of appeal when a judgment has been altered in a way that *benefits* the appellant.

However, the existence of a persuasive argument that the restyling did not alter Rule 4(a)(4)(B)(ii)'s effects does not mean that the language is unproblematic. One might argue that readers of Rule 4(a)(4)(B)(ii) should not have to research the pre-restyling version of the Rule in order to discern the meaning of the current version. It is thus worth considering whether there is a simple way to clear up the confusion. One possibility would be to amend Rule 4(a)(4)(B)(ii) to read as follows:

> A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or ~~a judgment altered or amended~~ an alteration or amendment of a

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[5] *See* Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. Pa. L. Rev. 1099, 1159 (2002) (arguing that "the main textualist objections to the use of legislative history lack bite when applied to the Advisory Committee Notes").

[6] At least one treatise appears to interpret the current version of the Rule in this way. Discussing the current Rule, that treatise observes that "the premature notice of appeal will not be effective to challenge the district court's rulings on the post-trial motions. To review those decisions, or any part of the judgment amended as a result of such a decision, one must amend the notice of appeal already filed, or file a new notice of appeal." Michael E. Tigar & Jane B. Tigar, Federal Appeals Jurisdiction and Practice § 6.03, at 336-37 (3d ed. 1999). (The quoted language is, I realize, ambiguous – but read in context, I think this text suggests the view that challenges to an unchanged portion of the judgment do not require amendment of the notice of appeal.) Though it does not refer specifically to the language of the current Rule, Moore's takes a similar view: "[W]hen a post-decisional motion is made in a civil case, and a notice of appeal is filed before it is decided, if a party wants to have the disposition of that motion, or any change in the judgment made as a result of that motion, reviewed on appeal, that party must file an amended notice of appeal." 20 Moore's Federal Practice - Civil § 304.13[1]. The Federal Practice & Procedure treatise is less informative on the question at hand, because it focuses on the pre-1998 language. *See* 16A Wright, Miller, Cooper & Schiltz, Federal Practice & Procedure § 3950.4.

[7] See Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527 (1989) (Scalia, J., concurring in the judgment) (conceding that legislative history may be consulted "to verify that what seems to us an unthinkable disposition . . . was indeed unthought of").

judgment upon such a motion, must file a notice of appeal, or an amended notice of appeal–in compliance with Rule 3(c)–within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

## IV. Conclusion

The *Sorensen* court has identified difficulties in the interpretation of current Rule 4(a)(4)(B)(ii). Those difficulties stem largely from the adoption – during the 1998 restyling project – of language concerning "a judgment altered or amended upon" a post-trial motion. A return to the pre-1998 phrase "an alteration or amendment of" the judgment could alleviate the confusion.

| Pre-1993 amendment | Pre-1995 amendment | Pre-1998 restyling | Current Rule 4(a)(4) |
|---|---|---|---|
| (4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. **A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above.** No additional fees shall be required for such filing. | (4) If any party makes a timely motion of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion under the Federal Rules of Civil Procedure:<br><br>(A) for judgment under Rule 50(b);<br>(B) to amend or make additional findings of fact under Rule 52(b), whether or not granting the motion would alter the judgment;<br>(C) to alter or amend the judgment under Rule 59;<br>(D) for attorney's fees under Rule 54 if a district court under Rule 58 extends the time for appeal;<br>(E) for a new trial under Rule 59; or<br>(F) for relief under Rule 60 if the motion is served within 10 days after the entry of judgment.<br><br>A **notice of appeal** filed after announcement or entry of the judgment but before disposition of any of the above motions **is ineffective** to appeal from the judgment or order, or part thereof, specified in the notice of appeal, **until the date of the entry of the order disposing of the last such motion outstanding. Appellate review of an order disposing of any of the above motions requires the party, in compliance with Appellate Rule 3(c), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment shall file an amended notice of appeal within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last such motion outstanding.** No additional fees will be required for filing an amended notice. | (4) If any party files a timely motion of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion under the Federal Rules of Civil Procedure:<br><br>(A) for judgment under Rule 50(b);<br>(B) to amend or make additional findings of fact under Rule 52(b), whether or not granting the motion would alter the judgment;<br>(C) to alter or amend the judgment under Rule 59;<br>(D) for attorney's fees under Rule 54 if a district court under Rule 58 extends the time for appeal;<br>(E) for a new trial under Rule 59; or<br>(F) for relief under Rule 60 if the motion is filed no later than 10 days after the entry of judgment.<br><br>**A notice of appeal** filed after announcement or entry of the judgment but before disposition of any of the above motions **is ineffective** to appeal from the judgment or order, or part thereof, specified in the notice of appeal, **until the entry of the order disposing of the last such motion outstanding. Appellate review of an order disposing of any of the above motions requires the party, in compliance with Appellate Rule 3(c), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment shall file a notice, or amended notice, of appeal within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last such motion outstanding.** No additional fees will be required for filing an amended notice. | (4) Effect of a Motion on a Notice of Appeal.<br>(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:<br><br>(i) for judgment under Rule 50(b);<br>(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;<br>(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;<br>(iv) to alter or amend the judgment under Rule 59;<br>(v) for a new trial under Rule 59; or<br>(vi) for relief under Rule 60 if the motion is filed no later than 10 days after the judgment is entered.<br><br>(B)(i) If a party files a notice of appeal after the court announces or enters a judgment--but before it disposes of any motion listed in Rule 4(a)(4)(A)--**the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.**<br>(ii) **A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal**--in compliance with Rule 3(c)--within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.<br>(iii) No additional fee is required to file an amended notice. |

**MEMORANDUM**

**DATE:** March 23, 2007

**TO:** Judge Carl E. Stewart

**FROM:** Appellate Rules Deadlines Subcommittee

**RE:** Time-Computation Project

We write to summarize our recommendations relating to the Time-Computation Project. Part I presents the template, adapted to the context of the Appellate Rules. Part II presents our recommendations concerning changes to time periods set by the Appellate Rules. Those recommendations are also summarized in the enclosed chart. Part III considers the question of statutory deadlines, and lists the statutory periods that we would recommend including on the list of statutes that Congress should be asked to change if the Time-Computation Project goes forward.

## I. Amending Appellate Rule 26(a) to adopt the template

This Part sets forth the draft amended Rule 26(a), in two redlined versions. The first is redlined to show the changes from current Rule 26(a). The second is redlined to show ways in which the draft amended Rule and Note differ from the current template Rule and Note provided by the Time-Computation Subcommittee; these differences arise from the need to adapt the template to the particular context of the Appellate Rules.

Here is the proposed draft of amended Rule 26(a), redlined to show how it differs from the current Rule 26(a). Subdivision (a)(6)(B) includes a bracketed sentence that defines "state." This sentence would not be necessary if the Committee were to adopt a new provision defining "state" for purposes of the Appellate Rules in general; the need for the definition, and the choice

between placing the definition in Rule 26(a) and placing it elsewhere in the Rules, are discussed in a separate memo.[1]

**Rule 26. Computing and Extending Time**

**(a) Computing Time.** The following rules apply in computing any time period ~~of time~~ specified in these rules ~~or~~, in any local rule, or court order, or ~~applicable statute:~~

~~(1) Exclude~~in any statute that does not specify a method of computing time.

(1) ***Period Stated in Days or a Longer Unit.*** When the period is stated in days or a longer unit of time:

(A) exclude the day of the ~~act, event, or default~~ that ~~begins~~triggers the period~~.~~;

~~(2~~**B)** ~~Exclude~~count every day, including intermediate Saturdays, Sundays, and legal holidays ~~when the period is less than 11 days, unless stated in calendar days.~~

~~(3) Include~~; and

(C) include the last day of the period ~~unless it~~, but if the last day is a Saturday, Sunday, ~~legal holiday, or if the act to be done is filing a paper in court a day on which the weather or other conditions make the clerk's office inaccessible.~~

~~(4) As used in this rule, "legal holiday" means New Year's~~or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(2) ***Period Stated in Hours.*** When the period is stated in hours:

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[1] Reporter's note: See memo concerning Item No. 07-AP-D.

(A) begin counting immediately on the occurrence of the event that triggers the period;

(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(C) if the period would end on a Saturday, Sunday, or legal holiday, then continue the period until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(3) ***Inaccessibility of Clerk's Office.*** Unless the court orders otherwise, if the clerk's office is inaccessible:

(A) on the last day for filing under Rule 26(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday; or

(B) during the last hour for filing under Rule 26(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

(4) ***"Last Day" Defined.*** Unless a different time is set by a statute, local rule, or order in the case, the last day ends:

(A) for electronic filing, at midnight in the court's time zone; and

(B) for filing by other means, when the clerk's office is scheduled to close.

(5) ***"Next Day" Defined.*** The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(6) ***"Legal Holiday" Defined.*** "Legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King, Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; and

(B) any other day declared a holiday by the President, Congress, or the state in which is located either the district court that rendered the challenged judgment or order, or the circuit clerk's principal office. [The word 'state,' as used in this Rule, includes the Territories, the District of Columbia and the Commonwealth of Puerto Rico.][2]

Here is the proposed draft, redlined to show how it differs from the text and note of the template rule. The alterations from the template rule are designed to adapt to the context of the Appellate Rules. In the note's discussion of subdivision (a)(2), the times used in the examples have been changed to rounder times. This change arose because the times in the template note (e.g., 2:17 p.m.) struck one of us as incongruous. (The choice of 2:17 p.m. in the template draft had been made at the suggestion of one of the participants in the time-computation project, who suggested that it was important to illustrate that times are not to be "rounded up.")

**Rule 626. Computing and Extending Time**

**(a) Computing Time.** The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.

**(1)** ***Period Stated in Days or a Longer Unit.*** When the period is stated in days or a longer unit of time:

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[2] Reporter's note: After the subcommittee finalized this memo, I performed further research concerning the definition of the term "state," and I would now propose slightly different language: "The word 'state,' as used in this Rule, includes the District of Columbia and any commonwealth, territory, or possession of the United States." The subcommittee has not yet reviewed this proposed change in the definition.

**(A)** exclude the day of the event that triggers the period;

**(B)** count every day, including intermediate Saturdays, Sundays, and legal holidays; and

**(C)** include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

**(2)** ***Period Stated in Hours.*** When the period is stated in hours:

**(A)** begin counting immediately on the occurrence of the event that triggers the period;

**(B)** count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

**(C)** if the period would end on a Saturday, Sunday, or legal holiday, then continue the period until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

**(3)** ***Inaccessibility of Clerk's Office.*** Unless the court orders otherwise, if the clerk's office is inaccessible:

**(A)** on the last day for filing under Rule ~~6~~26(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday; or

**(B)** during the last hour for filing under Rule ~~6~~26(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

(4) ***"Last Day" Defined.*** Unless a different time is set by a statute, local rule, or order in the case, the last day ends:

(A) for electronic filing, at midnight in the court's time zone; and

(B) for filing by other means, when the clerk's office is scheduled to close.

(5) ***"Next Day" Defined.*** The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(6) ***"Legal Holiday" Defined.*** "Legal holiday" means:

**(A)** the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; and

**(B)** any other day declared a holiday by the President, Congress, or the state ~~where~~in which is located either the district court ~~is located~~that rendered the challenged judgment or order, or the circuit clerk's principal office.

[The word 'state,' as used in this Rule, includes the Territories, the District of Columbia and the Commonwealth of Puerto Rico.][3]

**Committee Note**

**Subdivision (a).** Subdivision (a) has been amended to simplify and clarify the provisions that describe how deadlines are computed. Subdivision (a) governs the computation of any time period found in a Federal Rule of ~~Civil~~Appellate Procedure, a statute, a local rule, or a court order. In accordance with Rule ~~8~~3~~4~~7(a)(1), a local rule may not direct that a deadline be computed in a manner inconsistent with subdivision (a).

[3] Reporter's note: Please see footnote 2 for my proposal concerning a slight revision to the proposed definition of "state."

The time-computation provisions of subdivision (a) apply only when a time period must be computed. They do not apply when a fixed time to act is set. The amendments thus carry forward the approach taken in *Violette v. P.A. Days, Inc.*, 427 F.3d 1015, 1016 (6th Cir. 2005) (holding that Civil Rule 6(a) "does not apply to situations where the court has established a specific calendar day as a deadline"), and reject the contrary holding of *In re American Healthcare Management, Inc.*, 900 F.2d 827, 832 (5th Cir. 1990) (holding that Bankruptcy Rule 9006(a) governs treatment of date-certain deadline set by court order). If, for example, the date for filing is "no later than November 1, 2007," subdivision (a) does not govern. But if a filing is required to be made "within 10 days" or "within 72 hours," subdivision (a) describes how that deadline is computed.

Subdivision (a) does not apply when computing a time period set by a statute if the statute specifies a method of computing time. *See, e.g.*, [CITE].

**Subdivision (a)(1).** New subdivision (a)(1) addresses the computation of time periods that are stated in days. It also applies to time periods that are stated in weeks, months, or years. ~~See, e.g., Rule 60(b~~; though no such time period currently appears in the Federal Rules of Appellate Procedure, such periods may be set by other covered provisions such as a local rule. *See, e.g.*, Third Circuit Local Appellate Rule 46.3(c)(1). Subdivision (a)(1)(B)'s directive to "count every day" is relevant only if the period is stated in days (not weeks, months or years).

Under former Rule ~~6~~26(a), a period of 11 days or more was computed differently than a period of less than 11 days. Intermediate Saturdays, Sundays, and legal holidays were included in computing the longer periods, but excluded in computing the shorter periods. Former Rule ~~6~~26(a) thus made computing deadlines unnecessarily complicated and led to counterintuitive results. For example, a 10-day period and a 14-day period that started on the same day usually ended on the same day — and the 10-day period not infrequently ended later than the 14-day period. *See Miltimore Sales, Inc. v. Int'l Rectifier, Inc.*, 412 F.3d 685, 686 (6th Cir. 2005).

Under new subdivision (a)(1), all deadlines stated in days (no matter the length) are computed in the same way. The day of the event that triggers the deadline is not counted. All other days — including intermediate Saturdays, Sundays, and legal holidays — are counted, with only one exception: If the period ends on a Saturday, Sunday, or legal holiday, then the deadline falls on the next day that is not a Saturday, Sunday, or legal holiday. An illustration is provided below in the discussion of subdivision (a)(5). Subdivision (a)(3) addresses filing deadlines that expire on a day when the clerk's office is inaccessible.

Where subdivision (a) formerly referred to the "act, event, or default" that triggers the deadline, new subdivision (a) refers simply to the "event" that triggers the deadline; this change in terminology is adopted for brevity and simplicity, and is not intended to change meaning.

Periods previously expressed as less than 11 days will be shortened as a practical matter by the decision to count intermediate Saturdays, Sundays, and legal holidays in computing all periods. Many of those periods have been lengthened to compensate for the change. See, e.g., [CITE].

Most of the 10-day periods were adjusted to meet the change in computation method by setting 14 days as the new period. A 14-day period corresponds to the most frequent result of a 10-day period under the former computation method — two Saturdays and two Sundays were excluded, giving 14 days in all. A 14-day period has an additional advantage. The final day falls on the same day of the week as the event that triggered the period — the 14th day after a Monday, for example, is a Monday. This advantage of using week-long periods led to adopting 7-day periods to replace some of the periods set at less than 10 days, and 21-day periods to replace 20-day periods. Thirty-day and longer periods, however, were ~~generally~~ retained without change.

**Subdivision (a)(2).** New subdivision (a)(2) addresses the computation of time periods that are stated in hours. No such deadline currently appears in the Federal Rules of ~~Civil~~Appellate Procedure. But some statutes contain deadlines stated in hours, as do some court orders issued in expedited proceedings.

Under subdivision (a)(2), a deadline stated in hours starts to run immediately on the occurrence of the event that triggers the deadline. The deadline generally ends when the time expires. If, however, the time period expires at a specific time (say, 2:~~17~~30 p.m.) on a Saturday, Sunday, or legal holiday, then the deadline is extended to the same time (2:~~17~~30 p.m.) on the next day that is not a Saturday, Sunday, or legal holiday. Periods stated in hours are not to be "rounded up" to the next whole hour. Subdivision (a)(3) addresses situations when the clerk's office is inaccessible during the last hour before a filing deadline expires.

Subdivision (a)(2)(B) directs that every hour be counted. Thus, for example, a 72-hour period that commences at 10:~~23~~00 a.m. on Friday, November 2, 2007, will run until 9:~~23~~00 a.m. on Monday, November 5; the discrepancy in start and end times in this example results from the intervening shift from daylight saving time to standard time.

**Subdivision (a)(3).** When determining the last day of a filing period stated in days or a longer unit of time, a day on which the clerk's office is not accessible because of the weather or another reason is treated like a Saturday, Sunday, or legal holiday. When determining the end of a filing period stated in hours, if the clerk's office is inaccessible during the last hour of the filing period computed under subdivision (a)(2) then the period is extended to the same time on the next day that is not a weekend, holiday or day when the clerk's office is inaccessible.

Subdivision (a)(3)'s extensions apply "[u]nless the court orders otherwise." In some circumstances, the court might not wish a period of inaccessibility to trigger a full 24-hour extension; in those instances, the court can specify a briefer extension.

The text of the rule no longer refers to "weather or other conditions" as the reason for the inaccessibility of the clerk's office. The reference to "weather" was deleted from the text to underscore that inaccessibility can occur for reasons unrelated to weather, such as an outage of the electronic filing system. Weather can still be a reason for inaccessibility of the clerk's office. The rule does not attempt to define inaccessibility. Rather, the concept will continue to develop through caselaw, *see, e.g.*, *Tchakmakjian v. Department of Defense*, 57 Fed. Appx. 438, 441 (Fed. Cir. 2003) (unpublished per curiam opinion) (inaccessibility "due to anthrax concerns"); *cf.*

William G. Phelps, *When Is Office of Clerk of Court Inaccessible Due to Weather or Other Conditions for Purpose of Computing Time Period for Filing Papers under Rule 6(a) of Federal Rules of Civil Procedure*, 135 A.L.R. Fed. 259 (1996) (collecting cases). In addition, ~~many~~ local provisions may address inaccessibility for purposes of electronic filing~~, *see, e.g.*, D. Kan. Rule 5.4.11 ("A Filing User whose filing is made untimely as the result of a technical failure may seek appropriate relief from the court.")~~.

**Subdivision (a)(4).** New subdivision (a)(4) defines the end of the last day of a period for purposes of subdivision (a)(1). Subdivision (a)(4) does not apply in computing periods stated in hours under subdivision (a)(2), and does not apply if a different time is set by a statute, local rule, or order in the case. A local rule may provide, for example, that papers filed in a drop box after the normal hours of the clerk's office are filed as of the day that is date-stamped on the papers by a device in the drop box.

28 U.S.C. § 452 provides that "[a]ll courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders." A corresponding provision exists in Rule 77(a). Some courts have held that these provisions permit an after-hours filing by handing the papers to an appropriate official. *See, e.g.*, *Casalduc v. Diaz*, 117 F.2d 915, 917 (1st Cir. 1941). Subdivision (a)(4) does not address the effect of the statute on the question of after-hours filing; instead, the rule is designed to deal with filings in the ordinary course without regard to Section 452.

**Subdivision (a)(5).** New subdivision (a)(5) defines the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C). The Federal Rules of ~~Civil~~Appellate Procedure contain both forward-looking time periods and backward-looking time periods. A forward-looking time period requires something to be done within a period of time *after* an event. *See, e.g.*, Rule ~~59(b) (motion for new trial "shall be filed no later than 10 days after entry of the judgment"~~4(a)(1)(A) (subject to certain exceptions, notice of appeal in a civil case must be filed "within 30 days after the judgment or order appealed from is entered"). A backward-looking time period requires something to be done within a period of time *before* an event. *See, e.g.*, Rule ~~26(f) (parties must hold Rule 26(f) conference "as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b)~~31(a)(1) ("[A] reply brief must be filed at least 7 days before argument, unless the court, for good cause, allows a later filing."). In determining what is the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C), one should continue counting in the same direction — that is, forward when computing a forward-looking period and backward when computing a backward-looking period. If, for example, a filing is due within 10 days *after* an event, and the tenth day falls on Saturday, September 1, 2007, then the filing is due on Tuesday, September 4, 2007 (Monday, September 3, is Labor Day). But if a filing is due 10 days *before* an event, and the tenth day falls on Saturday, September 1, then the filing is due on Friday, August 31.

**Subdivision (a)(6).** New subdivision (a)(6) defines "legal holiday" for purposes of the Federal Rules of ~~Civil~~Appellate Procedure, including the time-computation provisions of subdivision (a).

## II. Proposed changes to time periods in the Appellate Rules

We recommend the following changes to time periods in the Appellate Rules, in order to offset the shift to a days-are-days time-computation method. Our recommendations are also listed in the enclosed chart. The chart is sorted by Rule number, and it shows how our current recommendations differ from those that we made in our memo last fall: The far right-hand column shows our current proposals, while the column to the left of that one shows our proposals as of last fall. The main change that we have made since last fall stems from the fact that the other Advisory Committees are applying a fairly robust presumption in favor of extending deadlines to multiples of 7 days (though periods over 21 days are exempt from this presumption). This was not the approach that we took last fall; at that time, our subcommittee felt that, as to existing 10-day deadlines, the fact that the deadlines had existed in their current nominal form prior to 2002 (i.e., when a days-are-days approach applied to 10-day deadlines) weighed in favor of keeping the 10-day periods at 10 days. On consideration, we feel that this approach is out of step with that taken by the other Committees, and our current recommendations apply the 7-day-multiple presumption unless there is a strong reason not to do so.

### A. Conforming amendments – removing "calendar" from "calendar days"

Some rules currently specify that a time period is counted in "calendar days." Under the proposed "days are days" approach, "calendar" will be redundant. Accordingly, we propose the following amendments:

**Rule 25. Filing and Service**

**(a) Filing.**

* * * * *

**(2) Filing: Method and Timeliness**

* * * * *

**(B) A brief or appendix.** A brief or appendix is timely filed, however, if on or before the last day for filing, it is:

(i) mailed to the clerk by First-Class Mail, or other class of mail that is at least as expeditious, postage prepaid; or

(ii) dispatched to a third-party commercial carrier for delivery to the clerk within 3 ~~calendar~~ days.

* * * * *

**(c) Manner of Service.**

(1) Service may be any of the following:

* * * * *

(C) by third-party commercial carrier for delivery within 3 ~~calendar~~ days;

or

* * * * *

**Committee Note**

Under former Rule 26(a), short periods that span weekends or holidays were computed without counting those weekends or holidays. To specify that a period should be calculated by counting all intermediate days, including weekends or holidays, the Rules used the term "calendar days." Rule 26(a) now takes a "days-are-days" approach under which all intermediate days are counted, no matter how short the period. Accordingly, "3 calendar days" in subdivisions (a)(2)(B)(ii) and (c)(1)(C) is amended to read simply "3 days."

**Rule 26. Computing and Extending Time**

* * * * *

**(c) Additional Time after Service.** When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 ~~calendar~~ days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service.

**Committee Note**

**Subdivision (c).** To specify that a period should be calculated by counting all intermediate days, including weekends or holidays, the Rules formerly used the term "calendar days." Because new subdivision (a) takes a "days-are-days" approach under which all intermediate days are counted, no matter how short the period, "3 calendar days" in subdivision (c) is amended to read simply "3 days."

**Rule 41. Mandate: Contents; Issuance and Effective Date; Stay**

* * * * *

**(b) When Issued.** The court's mandate must issue 7 ~~calendar~~ days after the time to file a petition for rehearing expires, or 7 ~~calendar~~ 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.

* * * * *

**Committee Note**

Under former Rule 26(a), short periods that span weekends or holidays were computed without counting those weekends or holidays. To specify that a period should be calculated by counting all intermediate days, including weekends or holidays, the Rules used the term "calendar days." Rule 26(a) now takes a "days-are-days" approach under which all intermediate days are counted, no matter how short the period. Accordingly, "7 calendar days" in subdivision (b) is amended to read simply "7 days."

### B. Adjusting time periods in the light of the change in computation approach

We considered the deadlines that would be affected by the change in time computation, and concluded that the following deadlines should be lengthened.

In Rule 4(a)(6), we propose lengthening the 7-day period to 14 days. Though this more than offsets the shift in computation approach, we chose 14 days due to the presumption in favor of 7-day multiples. Lengthening this period to 14 days would not unduly threaten any principle of repose. A party anxious to be confident about the expiration of appeal time can protect itself by giving notice of the judgment to other parties. The Committee should be aware that Rule 4(a)(6) is mirrored in 28 U.S.C. § 2107(c), which was amended in 1991 in order to conform the statute to the FRAP. Thus, if the 7-day period in Rule 4(a)(6) becomes 14 days, it would be necessary to seek a corresponding amendment of the statute (or to risk some confusion on the part of practitioners). If we proceed with the amendment proposed by the Virginia Solicitor General (to treat litigation involving state government entities the same as litigation involving federal government entities for purposes, inter alia, of the time to take an appeal), then we will need to seek legislation amending Section 2107 in any event. That being so, the need to seek conforming legislation when lengthening the 7-day period may be less of a concern.

In Rules 5(b)(2), 19, and 27(a)(3)(A), we departed from the 7-day-multiple presumption because lengthening to 14 days would provide significantly more time (in real terms) than is provided under the current system, and because we felt that in the contexts covered by those rules the need for prompt responses outweighs the policy justifications for 7-day multiples. Thus, we propose lengthening those periods only to 10 days, not to 14 days.

In Rule 6(b)(2)(B), we recommend lengthening the 10-day periods to 14 days. We have consulted with Professor Morris, who advises that in his view the Bankruptcy Rules Committee would be unlikely to object if we propose lengthening these periods to 14 days: The strong finality concerns that attach to the deadline for taking an appeal in bankruptcy cases are not implicated by these subsequent deadlines. Assuming that this is the prevailing view in the Bankruptcy Committee, then – in light of the presumption in favor of 7-day multiples – it would seem to make sense to lengthen these periods to 14 days.

**Rule 4. Appeal as of Right–When Taken**

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

* * * * *

**(4) Effect of a Motion on a Notice of Appeal.**

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

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than ~~10~~ 30 days after the judgment is entered.

* * * * *

**(5) Motion for Extension of Time.**

* * * * *

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or ~~10~~ 14 days after the date when the order granting the motion is entered, whichever is later.

**(6) Reopening the Time to File an Appeal.** The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

* * * * *

(B) the motion is filed within 180 days after the judgment or order is entered or within ~~7~~ 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and

* * * * *

**(b) Appeal in a Criminal Case.**

**(1) Time for Filing a Notice of Appeal.**

(A) In a criminal case, a defendant's notice of appeal must be filed in the district court within ~~10~~ 14 days after the later of:

(i) the entry of either the judgment or the order being appealed; or

(ii) the filing of the government's notice of appeal.

* * * * *

**(3) Effect of a Motion on a Notice of Appeal.**

(A) If a defendant timely makes any of the following motions under the Federal Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within ~~10~~ 14 days after the entry of the order disposing of the last such remaining motion, or within ~~10~~ 14 days after the entry of the judgment of conviction, whichever period ends later. This provision applies to a timely motion:

(i) for judgment of acquittal under Rule 29;

(ii) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than ~~10~~ 14 days after the entry of the judgment; or

(iii) for arrest of judgment under Rule 34.

* * * * *

**Committee Note**

**Subdivision (a)(4)(A)(vi).** Subdivision (a)(4) provides that certain timely post-trial motions extend the time for filing an appeal. Lawyers sometimes move under Civil Rule 60 for relief that is still available under another rule such as Civil Rule 59. Subdivision (a)(4)(A)(vi) provides for such eventualities by extending the time for filing an appeal so long as the Rule 60 motion is filed within a limited time. Formerly, the time limit under subdivision (a)(4)(A)(vi) was 10 days, reflecting the 10-day limits for making motions under Civil Rules 50(b), 52(b), and 59. Subdivision (a)(4)(A)(vi) now contains a 30-day limit to match the revisions to the time limits in the Civil Rules.

**Subdivision (a)(5)(C).** The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 26.

**Subdivision (a)(6)(B).** The time set in the former rule at 7 days has been revised to 14 days. Under the time-computation approach set by former Rule 26(a), "7 days" always meant at least 9 days and could mean as many as 11 or even 13 days. Under current Rule 26(a),

intermediate weekends and holidays are counted. Changing the period from 7 to 14 days offsets the change in computation approach. See the Note to Rule 26.

**Subdivisions (b)(1)(A) and (b)(3)(A).** The times set in the former rule at 10 days have been revised to 14 days. See the Note to Rule 26.

**Rule 5. Appeal by Permission**

* * * * *

**(b) Contents of the Petition; Answer or Cross-Petition; Oral Argument.**

* * * * *

(2) A party may file an answer in opposition or a cross-petition within ~~7~~ 10 days after the petition is served.

* * * * *

**(d) Grant of Permission; Fees; Cost Bond; Filing the Record.**

(1) Within ~~10~~ 14 days after the entry of the order granting permission to appeal, the appellant must:

(A) pay the district clerk all required fees; and

(B) file a cost bond if required under Rule 7.

* * * * *

**Committee Note**

**Subdivision (b)(2).** Subdivision (b)(2) is amended in the light of the change in Rule 26(a)'s time computation rules. Subdivision (b)(2) formerly required that an answer in opposition to a petition for permission to appeal, or a cross-petition for permission to appeal, be filed "within 7 days after the petition is served." Under former Rule 26(a), "7 days" always meant at least 9 days and could mean as many as 11 or even 13 days. Under current Rule 26(a), intermediate weekends and holidays are counted. Changing the period from 7 to 10 days offsets the change in computation approach. See the Note to Rule 26.

**Subdivision (d)(1).** The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 26.

**Rule 6. Appeal in a Bankruptcy Case From a Final Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel**

* * * * *

**(b) Appeal From a Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel Exercising Appellate Jurisdiction in a Bankruptcy Case.**

* * * * *

**(2) Additional Rules.** In addition to the rules made applicable by Rule 6(b)(1), the following rules apply:

* * * * *

**(B) The record on appeal.**

(i) Within ~~10~~ 14 days after filing the notice of appeal, the appellant must file with the clerk possessing the record assembled in accordance with Bankruptcy Rule 8006 — and serve on the appellee — a statement of the issues to be presented on appeal and a designation of the record to be certified and sent to the circuit clerk.

(ii) An appellee who believes that other parts of the record are necessary must, within ~~10~~ 14 days after being served with the appellant's designation, file with the clerk and serve on the appellant a designation of additional parts to be included.

* * * * *

**Committee Note**

**Subdivision (b)(2)(B).** The times set in the former rule at 10 days have been revised to 14 days. See the Note to Rule 26.

**Rule 10. The Record on Appeal**

* * * * *

**(b) The Transcript of Proceedings.**

**(1) Appellant's Duty to Order.** Within ~~10~~ 14 days after filing the notice of appeal or entry of an order disposing of the last timely remaining motion of a type specified in Rule 4(a)(4)(A), whichever is later, the appellant must do either of the following:

(A) order from the reporter a transcript of such parts of the proceedings not already on file as the appellant considers necessary, subject to a local rule of the court of appeals and with the following qualifications:

(i) the order must be in writing;

(ii) if the cost of the transcript is to be paid by the United States under the Criminal Justice Act, the order must so state; and

(iii) the appellant must, within the same period, file a copy of the order with the district clerk; or

(B) file a certificate stating that no transcript will be ordered.

* * * * *

**(3) Partial Transcript.** Unless the entire transcript is ordered:

(A) the appellant must — within the ~~10~~ 14 days provided in Rule 10(b)(1) — file a statement of the issues that the appellant intends to present on the appeal and must serve on the appellee a copy of both the order or certificate and the statement;

(B) if the appellee considers it necessary to have a transcript of other parts of the proceedings, the appellee must, within ~~10~~ 14 days after the service of the order or certificate and the statement of the issues, file and serve on the appellant a designation of additional parts to be ordered; and

(C) unless within ~~10~~ 14 days after service of that designation the appellant has ordered all such parts, and has so notified the appellee, the appellee may within the following ~~10~~ 14 days either order the parts or move in the district court for an order requiring the appellant to do so.

* * * * *

**(c) Statement of the Evidence When the Proceedings Were Not Recorded or When a Transcript Is Unavailable.** If the transcript of a hearing or trial is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement must be served on the appellee, who may serve objections or proposed amendments within ~~10~~ 14 days after being served. The statement and any objections or proposed amendments must then be submitted to the district court for settlement and approval. As settled and approved, the statement must be included by the district clerk in the record on appeal.

* * * * *

**Committee Note**

**Subdivisions (b)(1), (b)(3) and (c).** The times set in the former rule at 10 days have been revised to 14 days. See the Note to Rule 26.

**Rule 12. Docketing the Appeal; Filing a Representation Statement; Filing the Record**

* * * * *

(b) Filing a Representation Statement. Unless the court of appeals designates another time, the attorney who filed the notice of appeal must, within ~~10~~ 14 days after filing the notice, file a statement with the circuit clerk naming the parties that the attorney represents on appeal.

* * * * *

**Committee Note**

**Subdivision (b).** The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 26.

**Rule 15. Review or Enforcement of an Agency Order--How Obtained; Intervention**

* * * * *

**(b) Application or Cross-Application to Enforce an Order; Answer; Default.**

(1) An application to enforce an agency order must be filed with the clerk of a court of appeals authorized to enforce the order. If a petition is filed to review an agency order that the court may enforce, a party opposing the petition may file a cross-application for enforcement.

(2) Within ~~20~~ 21 days after the application for enforcement is filed, the respondent must serve on the applicant an answer to the application and file it with the clerk. If the respondent fails to answer in time, the court will enter judgment for the relief requested.

* * * * *

**Committee Note**

**Subdivision (b)(2).** The time set in the former rule at 20 days has been revised to 21 days. See the Note to Rule 26.

**Rule 19. Settlement of a Judgment Enforcing an Agency Order in Part**

When the court files an opinion directing entry of judgment enforcing the agency's order in part, the agency must within 14 days file with the clerk and serve on each other party a proposed judgment conforming to the opinion. A party who disagrees with the agency's proposed judgment must within ~~7~~ 10 days file with the clerk and serve the agency with a proposed judgment that the party believes conforms to the opinion. The court will settle the judgment and direct entry without further hearing or argument.

**Committee Note**

Rule 19 formerly required a party who disagreed with the agency's proposed judgment to file a proposed judgment "within 7 days." Under former Rule 26(a), "7 days" always meant at least 9 days and could mean as many as 11 or even 13 days. Under current Rule 26(a), intermediate weekends and holidays are counted. Changing the period from 7 to 10 days offsets the change in computation approach. See the Note to Rule 26.

**Rule 27. Motions**

**(a) In General.**

* * * * *

**(3) Response.**

**(A) Time to file.** Any party may file a response to a motion; Rule 27(a)(2) governs its contents. The response must be filed within ~~8~~ 10 days after service of the motion unless the court shortens or extends the time. A motion authorized by Rules 8, 9, 18, or 41 may be granted before the ~~8-day~~ 10-day period runs only if the court gives reasonable notice to the parties that it intends to act sooner.

* * * * *

**(4) Reply to Response.** Any reply to a response must be filed within 5 7 days after service of the response. A reply must not present matters that do not relate to the response.

* * * * *

**Committee Note**

**Subdivision (a)(3)(A).** Subdivision (a)(3)(A) formerly required that a response to a motion be filed "within 8 days after service of the motion unless the court shortens or extends the time." Prior to the 2002 amendments to Rule 27, subdivision (a)(3)(A) set this period at 10 days rather than 8 days. The period was changed in 2002 to reflect the change from a time-computation approach that counted intermediate weekends and holidays to an approach that did not. (Prior to the 2002 amendments, intermediate weekends and holidays were excluded only if the period was less than 7 days; after those amendments, such days were excluded if the period was less than 11 days.) Under current Rule 26(a), intermediate weekends and holidays are counted for all periods. Accordingly, revised subdivision (a)(3)(A) once again sets the period at 10 days.

**Subdivision (a)(4).** Subdivision (a)(4) formerly required that a reply to a response be filed "within 5 days after service of the response." Prior to the 2002 amendments, this period was set at 7 days; in 2002 it was shortened in the light of the 2002 change in time-computation approach (discussed above). Under current Rule 26(a), intermediate weekends and holidays are counted for all periods, and revised subdivision (a)(4) once again sets the period at 7 days.

**Rule 28.1. Cross-Appeals**

* * * * *

**(f) Time to Serve and File a Brief.** Briefs must be served and filed as follows:

(1) the appellant's principal brief, within 40 days after the record is filed;

(2) the appellee's principal and response brief, within 30 days after the appellant's principal brief is served;

(3) the appellant's response and reply brief, within 30 days after the appellee's principal and response brief is served; and

(4) the appellee's reply brief, within 14 days after the appellant's response and reply brief is served, but at least ~~3~~ 7 days before argument unless the court, for good cause, allows a later filing.

**Committee Note**

**Subdivision (f)(4).** Subdivision (f)(4) formerly required that the appellee's reply brief be served "at least 3 days before argument unless the court, for good cause, allows a later filing." Under former Rule 26(a), "3 days" could mean as many as 5 or even 6 days. See the Note to Rule 26. Under revised Rule 26(a), intermediate weekends and holidays are counted. Changing "3 days" to "7 days" alters the period accordingly. Under revised Rule 26(a), when a period ends on a weekend or holiday, one must continue to count in the same direction until the next day that is not a weekend or holiday; the choice of the 7-day period for subdivision (f)(4) will minimize such occurrences.

**Rule 30. Appendix to the Briefs**

* * * * *

**(b) All Parties' Responsibilities.**

**(1) Determining the Contents of the Appendix.** The parties are encouraged to agree on the contents of the appendix. In the absence of an agreement, the appellant must, within ~~10~~ 14 days after the record is filed, serve on the appellee a designation of the parts of the record the appellant intends to include in the appendix and a statement of the issues the appellant intends to present for review. The appellee may, within ~~10~~ 14 days after receiving the designation, serve on the appellant a designation of additional parts to which it wishes to direct the court's attention. The appellant must include the designated parts in the appendix. The parties must not engage in unnecessary designation of parts of the record, because the entire record is available to the court. This paragraph applies also to a cross-appellant and a cross-appellee.

* * * * *

**Committee Note**

**Subdivision (b)(1).** The times set in the former rule at 10 days have been revised to 14 days. See the Note to Rule 26.

**Rule 31. Serving and Filing Briefs**

**(a) Time to Serve and File a Brief.**

(1) The appellant must serve and file a brief within 40 days after the record is filed. The appellee must serve and file a brief within 30 days after the appellant's brief is served. The appellant may serve and file a reply brief within 14 days after service of the appellee's brief but a reply brief must be filed at least ~~3~~ 7 days before argument, unless the court, for good cause, allows a later filing.

* * * * *

**Committee Note**

**Subdivision (a)(1).** Subdivision (a)(1) formerly required that the appellant's reply brief be served "at least 3 days before argument, unless the court, for good cause, allows a later filing." Under former Rule 26(a), "3 days" could mean as many as 5 or even 6 days. See the Note to Rule 26. Under revised Rule 26(a), intermediate weekends and holidays are counted. Changing "3 days" to "7 days" alters the period accordingly. Under revised Rule 26(a), when a period ends on a weekend or holiday, one must continue to count in the same direction until the next day that is not a weekend or holiday; the choice of the 7-day period for subdivision (a)(1) will minimize such occurrences.

**Rule 39. Costs**

* * * * *

**(d) Bill of Costs: Objections; Insertion in Mandate.**

(1) A party who wants costs taxed must — within 14 days after entry of judgment — file with the circuit clerk, with proof of service, an itemized and verified bill of costs.

(2) Objections must be filed within ~~10~~ 14 days after service of the bill of costs, unless the court extends the time.

* * * * *

**Committee Note**

**Subdivision (d)(2).** The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 26.

## III. Statutory time periods

Most of the statutory periods that would be affected by a change in Appellate Rule 26(a)'s time-computation approach are periods that existed prior to 2002 and that would have been calculated, prior to 2002, using a days-are-days approach.[4] We are currently aware of eight deadlines that either (1) did not exist prior to the 2002 rules amendments or (2) would not have qualified for a days-are-days approach under Appellate Rule 26(a) prior to 2002. The Time-Computation Subcommittee has asked the Advisory Committees to develop a list of statutory periods that should be lengthened in order to avoid hardship as a result of the shift to a days-are-days computation method.

Here are the statutory provisions containing time periods that may require alteration:[5]

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[4] Some of those periods set 10-day deadlines for taking an appeal to a U.S. Court of Appeals from an agency determination, see 12 U.S.C. §§ 1817(j)(5) & 4623(a). Others set 10-day periods for taking an appeal to a U.S. Court of Appeals from a lower court determination, see 26 U.S.C. § 7482(a)(2)(A); 28 U.S.C. §§ 1292(b), 1292(d)(1), 1292(d)(2); 38 U.S.C. § 7292(b)(1); 45 U.S.C. § 159; and CIPA § 7(b), 18 U.S.C.A. App. 3. Another sets a presumptive time limit within which a Court of Appeals is to act, see 29 U.S.C. § 2937(a)(2). Another sets the time when the consequences of a challenged agency action take effect after judicial review, see 7 U.S.C. § 18(f). See also 28 U.S.C. § 2107(c) (provision mirroring Appellate Rule 4(a)(6), regarding reopening of time for appeal).

[5] We do not believe that the following periods require alteration:

- 28 U.S.C. § 2349(b) (when petitioner, seeking review of order by certain agencies, requests interlocutory relief from court of appeals, "at least 5 days' notice of the hearing thereon shall be given to the agency and to the Attorney General").

- 47 U.S.C. § 402(d) (regarding appeals to D.C. Circuit from orders of Federal Communications Commission, providing that "the appellant shall, not later than five days after the filing of [the notice of appeal], notify each person shown by the records of the Commission to be interested in said appeal").

- 18 U.S.C. § 3771(d)(3) (providing, with respect to the review of a district court's denial of certain rights of crime victims, that "[t]he court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed"); *see also id.* (with respect to appellate review of district court's denial of rights asserted by crime victim in criminal prosecution, providing that "[i]n no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter"); *id.* § 3771(d)(5) (with respect to crime victims' rights, providing that "[a] victim may make a motion to re-open a plea or sentence only if-- (A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied; (B) the victim petitions the court of appeals for a writ of mandamus within 10 days; and (C) in the case of a plea, the accused has not pled to the highest offense charged").

    - The 72-hour deadline imposed by Section 3771(d)(3) has already been the subject of discussion in the Advisory Committee. At the April 2006 meeting, the Advisory Committee concluded that the 72-hour deadline did not require any changes to the FRAP at the current time, though developments under Section 3771 would continue to be monitored. It arguably would be useful for Congress to extend the 72-hour deadline; that will be particularly true under the new time-computation approach.

    - Section 3771(d)(3)'s five-day limit on stays and continuances presumably concerns stays and continuances of trial-level proceedings. We should therefore consult the Criminal Rules Committee for its views on this time period.

    - We do not propose an extension of the 10-day period set by Section 3771(d)(5).

- Classified Information Procedures Act, § 7(b), 18 U.S.C.A. App. 3 (if interlocutory appeal under CIPA is taken during trial, "the court of appeals (1) shall hear argument on such appeal within four days of the adjournment of the trial, [and] (3) shall render its decision within four days of argument on appeal").

    - An extension of these four-day periods arguably would be advisable in the light of the switch to a days-are-days approach.

- 28 U.S.C. § 1453(c)(1) (providing with respect to removals under Section 1453 that "a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand . . . if application is made to the court of appeals not less than 7 days after entry of the order")[6]; *see also id.* § 1453(c)(3) (providing that absent consent of all parties, 60-day deadline for the court of appeals to "complete all action on" a covered appeal can be extended by at most 10 days).

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[6] Though "not less than 7 days" is not a limit if read literally, courts have read it as setting a deadline of "not more than 7 days." *See, e.g., Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1093 n.2 (10th Cir. 2005).

- Section 1453(c)(1) is evidently flawed (it presumably ought to read "not more than 7 days"). We believe that the provision should be amended to correct the error, and also to set a period longer than 7 days.

- We do not feel as strongly about Section 1453(c)(3)'s 10-day limit on extensions of the 60-day time limit for the court of appeals to complete its action on the appeal.

| Number of days | Rule | Subpart | Provision | Change deadlines subcommittee proposed last fall: | Change we propose now |
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| 30 | 4 | (a)(1)(A) | R. 4(a)(1)(A) – Appeal as of right in civil case within 30 days from entry of judgment or order. | None | None |
| 60 | 4 | (a)(1)(B) | R. 4(a)(1)(B) – Appeal as of right 60 days from entry of judgment or order in cases in which the United States or its officers, agencies are parties. | None. (Cf. Item No. 06-06, concerning appeals involving state-government litigants.) | None |
| 14 | 4 | (a)(3) | R. 4(a)(3) – Appeal by other parties, within 14 days of filing of first notice of appeal, or within the time otherwise prescribed by App.R. 4(a), whichever last expires. | None | None |
| 10 | 4 | (a)(4)(A) | R. 4(a)(4)(A) – If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion: (i) for judgment under Civil Rule 50(b); (ii) to amend or make additional factual findings under Civil Rule 52(b), whether or not granting the motion would alter the judgment; (iii) for attorney's fees under Civil Rule 54 if the district court extends the time to appeal under Civil Rule 58; (iv) to alter or amend the judgment under Civil Rule 59; (v) for a new trial under Civil Rule 59; or (vi) for relief under Civil Rule 60 if the motion is filed no later than 10 days after the judgment is entered. | Change 4(a)(4)(A)(vi)'s 10-day limit to 30 days, in light of likely changes in Civil Rules deadlines for post-trial motions | Change 4(a)(4)(A)(vi)'s 10-day limit to 30 days, in light of likely changes in Civil Rules deadlines for post-trial motions |
| 30 | 4 | (a)(5) | R. 4(a)(5) – District court may extend time to file appeal for excusable neglect or good cause upon motion filed not later than 30 days after expiration of time prescribed by R. 4(a); no extension to exceed 30 days past prescribed time or 10 days from entry of order granting motion, whichever occurs later. | None | None |

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| 10 | 4 | (a)(5)(C) | R. 4(a)(5) – District court may extend time to file appeal for excusable neglect or good cause upon motion filed not later than 30 days after expiration of time prescribed by R. 4(a); no extension to exceed 30 days past prescribed time or 10 days from entry of order granting motion, whichever occurs later. | None | Extend 10-day limit to 14 days. The current 10-day limit has effectively been at least 14 days since 2002, and there seems no strong reason to stick with 10 days. Thus, apply presumption in favor of 7-day multiples |
| 7 | 4 | (a)(6) | R. 4(a)(6) – The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied: (A) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice of the entry, whichever is earlier; (B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry; and (C) the court finds that no party would be prejudiced. | Undecided; sought advice from Civil Rules Committee Reporter | Extend 7-day period to 14 days. |

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| 14 | 4 | (a)(6) | R. 4(a)(6) – The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied: (A) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice of the entry, whichever is earlier; (B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry; and (C) the court finds that no party would be prejudiced. | None | None |
| 21 | 4 | (a)(6) | R. 4(a)(6) – The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied: (A) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice of the entry, whichever is earlier; (B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry; and (C) the court finds that no party would be prejudiced. | None | None |

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| 180 | 4 | (a)(6) | R. 4(a)(6) – The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied: (A) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice of the entry, whichever is earlier; (B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry; and (C) the court finds that no party would be prejudiced. | None | None |
| 150 | 4 | (a)(7)(A) | R. 4(a)(7)(A) – Entry of a judgment or order in the civil docket under Civ.R. 79(a) is entry for purposes of App.R. 4, unless Civ.R. 58(a)(1) requires a separate document, in which case entry occurs when the judgment or order is entered under Civ.R. 79(a) and either 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. | None | None |
| 10 | 4 | (b)(1)(A) | R. 4(b)(1)(A) – In a criminal case, a defendant's notice of appeal must be filed in the district court within 10 days after the later of the entry of either the judgment or the order being appealed, or the filing of the government's notice of appeal. | None | Change 4(b)(1)(A)'s 10-day deadline to 14 days. Since 2002, the 10-day deadline has effectively been at least 14 days. The 7-day-multiple presumption weighs in favor of 14 days. It may also be possible in some rare cases that the Criminal Rules Committee's possible change in the time limits for post-verdict motions may weigh in favor of moving to 14 days. |

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| 30 | 4 | (b)(1)(B) | R. 4(b)(1)(B) – When the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days after the later of the entry of the judgment or order being appealed, or the filing of a notice of appeal by any defendant. | None | None |
| 10 | 4 | (b)(3)(A) | R. 4(b)(3)(A) – If a defendant timely makes any of the following motions under the Federal Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within 10 days after the entry of the order disposing of the last such remaining motion, or within 10 days after the entry of the judgment of conviction, whichever period ends later. This provision applies to a timely motion: (i) for judgment of acquittal under Criminal Rule 29; (ii) for a new trial under Criminal Rule 33, but if based on newly discovered evidence, only if the motion is made no later than 10 days after the entry of the judgment; or (iii) for arrest of judgment under Criminal Rule 34. | Undecided; sought advice from Criminal Rules Committee Reporter | Change 4(b)(3)(A)'s 10-day limits to 14 days. Since 2002, the 10-day deadline has effectively been at least 14 days. The 7-day-multiple presumption weighs in favor of 14 days. |
| 30 | 4 | (b)(4) | R. 4(b)(4) – Upon a finding of excusable neglect or good cause, the district court may, before or after the time has expired, with or without motion and notice, extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by R. 4(b). | None | None |
| 7 | 5 | (b)(2) | R. 5(b)(2) – A party may file an answer in opposition or a cross-petition within 7 days after the petition for permission to appeal is served. | Lengthen from 7 to 10 days. | Lengthen from 7 to 10 days. The multiples-of-seven presumption here seems outweighed by the fact that lengthening to 14 days would extend the period significantly. (Under the current time-counting approach, 7 days usually means either 9 or 11 days, depending on whether one or two weekends intervene.) |

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| 10 | 5 | (d)(1) | R. 5(d)(1) – Within 10 days after the entry of the order granting permission to appeal interlocutory decision, the appellant must pay the district clerk all required fees, and file a cost bond if required under R. 7. | None | Extend 10-day limit to 14 days. The current 10-day limit has effectively been at least 14 days since 2002, and there seems no strong reason to stick with 10 days. Thus, apply presumption in favor of 7-day multiples |
| 10 | 6 | (b)(2)(B) | [re bankruptcy cases]<br>(i) Within 10 days after filing the notice of appeal, the appellant must file with the clerk possessing the record assembled in accordance with Bankruptcy Rule 8006--and serve on the appellee--a statement of the issues to be presented on appeal and a designation of the record to be certified and sent to the circuit clerk.<br>(ii) An appellee who believes that other parts of the record are necessary must, within 10 days after being served with the appellant's designation, file with the clerk and serve on the appellant a designation of additional parts to be included. | Undecided; sought advice from Bankruptcy Rules Reporter | Prof. Morris advises that he anticipates Bankruptcy Rules Committee would have no objection to lengthening these 10-day periods to 14 days. Thus, extend 10-day limit to 14 days. The current 10-day limit has effectively been at least 14 days since 2002, and there seems no strong reason to stick with 10 days. Thus, apply presumption in favor of 7-day multiples |

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| 10 | 10 | (b)(1) | Within 10 days after filing the notice of appeal or entry of an order disposing of the last timely remaining motion of a type specified in Rule 4(a)(4)(A), whichever is later, the appellant must do either of the following:<br>(A) order from the reporter a transcript of such parts of the proceedings not already on file as the appellant considers necessary, subject to a local rule of the court of appeals and with the following qualifications:<br>(i) the order must be in writing;<br>(ii) if the cost of the transcript is to be paid by the United States under the Criminal Justice Act, the order must so state; and<br>(iii) the appellant must, within the same period, file a copy of the order with the district clerk; or<br>(B) file a certificate stating that no transcript will be ordered. | None | Extend 10-day limit to 14 days. The current 10-day limit has effectively been at least 14 days since 2002, and there seems no strong reason to stick with 10 days. Thus, apply presumption in favor of 7-day multiples |

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| 10 | 10 | (b)(3) | Unless the entire transcript is ordered: (A) the appellant must--within the 10 days provided in Rule 10(b)(1)--file a statement of the issues that the appellant intends to present on the appeal and must serve on the appellee a copy of both the order or certificate and the statement; (B) if the appellee considers it necessary to have a transcript of other parts of the proceedings, the appellee must, within 10 days after the service of the order or certificate and the statement of the issues, file and serve on the appellant a designation of additional parts to be ordered; and (C) unless within 10 days after service of that designation the appellant has ordered all such parts, and has so notified the appellee, the appellee may within the following 10 days either order the parts or move in the district court for an order requiring the appellant to do so. | None | Extend 10-day limit to 14 days. The current 10-day limit has effectively been at least 14 days since 2002, and there seems no strong reason to stick with 10 days. Thus, apply presumption in favor of 7-day multiples |
| 10 | 10 | (c) | If the transcript of a hearing or trial is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement must be served on the appellee, who may serve objections or proposed amendments within 10 days after being served. The statement and any objections or proposed amendments must then be submitted to the district court for settlement and approval. As settled and approved, the statement must be included by the district clerk in the record on appeal. | None | Extend 10-day limit to 14 days. The current 10-day limit has effectively been at least 14 days since 2002, and there seems no strong reason to stick with 10 days. Thus, apply presumption in favor of 7-day multiples |

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| 30 | 11 | (b)(1)(B) | R. 11(b)(1)(B) – If transcript cannot be completed within 30 days of receipt of order, reporter may request extension of time from circuit clerk. | None | None |
| 10 | 12 | (b) | R. 12(b) – Representation statement – Within 10 days after filing notice of appeal unless court of appeals designates another time, attorney who filed notice shall file with the circuit clerk a statement naming each party represented on appeal by that attorney. | None | Extend 10-day limit to 14 days. The current 10-day limit has effectively been at least 14 days since 2002, and there seems no strong reason to stick with 10 days. Thus, apply presumption in favor of 7-day multiples |
| 90 | 13 | (a) | R. 13(a) – Appeal of Tax Court decisions – Review must be obtained by filing a notice of appeal with the Tax Court clerk within 90 days after entry of decision. | None | None |
| 120 | 13 | (a) | R. 13(a) – Appeal of Tax Court decisions – If a timely notice of appeal is filed by one party, any other party may take an appeal by filing a notice of appeal within 120 days after entry of decision by the Tax Court. If timely motion made to vacate or revise decision, time to file notice of appeal runs from entry of order disposing of motion or entry of new decision, whichever is later. | None | None |
| 20 | 15 | (b) | R. 15(b) – Within 20 days after application for enforcement of administrative order is filed, respondent shall serve and file his answer. | None | Extend 20-day period to 21 days. |

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| 30 | 15 | (d) | Unless a statute provides another method, a person who wants to intervene in a proceeding under this rule must file a motion for leave to intervene with the circuit clerk and serve a copy on all parties. The motion - or other notice of intervention authorized by statute--must be filed within 30 days after the petition for review is filed and must contain a concise statement of the interest of the moving party and the grounds for intervention. | None | None |
| 40 | 17 | (a) | R. 17(a) – Filing of record by agency: within 40 days after service upon it of petition for review unless different time provided by statute authorizing review; in enforcement proceedings, within 40 days after filing application for enforcement (unless respondent fails to answer or unless court otherwise orders). Court may shorten or extend time. Notice by clerk to all parties of date of filing. | None | None |
| 7 | 19 | | R. 19 – A party who disagrees with the agency's proposed judgment must within 7 days file with the clerk and serve the agency with a proposed judgment that the party believes conforms to the opinion. | Lengthen from 7 to 10 days. | Lengthen from 7 to 10 days. The multiples-of-seven presumption here seems outweighed by the fact that lengthening to 14 days would extend the period significantly. (Under the current time-counting approach, 7 days usually means either 9 or 11 days, depending on whether one or two weekends intervene.) |
| 14 | 19 | | R. 19 – When the court files an opinion directing entry of judgment enforcing the agency's order in part, the agency must within 14 days file with the clerk and serve on each other party a proposed judgment conforming to the opinion. | None | None |
| 30 | 24 | (a)(5) | R. 24(a)(5) – A party may file a motion to proceed on appeal in forma pauperis in the court of appeals within 30 days after service of the notice. | None | None |

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| 3 | 25 | (a)(2)(B) | R. 25(a)(2)(B) – A brief or appendix is timely filed if on or before the last day for filing it is mailed First-Class or other class at least as expeditious, postage prepaid, or dispatched for delivery within three calendar days by a third-party commercial carrier. | Delete "calendar." | Delete "calendar." |
| 3 | 25 | (c) | Service may be by, inter alia, third-party commercial carrier for delivery within 3 calendar days | Delete "calendar." | Delete "calendar." |
| 3 | 26 | (c) | R. 26(c) – When a party is required or permitted to act within a prescribed period after service of a paper upon that party, three calendar days are added to the period unless the paper is delivered on the date of service stated in the proof of service. A paper served electronically is not treated as delivered on the day of service stated in the proof of service. | Delete "calendar." | Delete "calendar." |
| 8 | 27 | (a)(3)(A) | R. 27(a)(3)(A) – The response to a motion must be filed within 8 days after service of the motion unless the court shortens or extends the time. A motion authorized by App.R. 8, 9, 18, or 41 may be granted before the 8-day period runs only if the court gives reasonable notice to the parties that it intends to act sooner. | Lengthen from 8 to 10 days | Lengthen from 8 to 10 days. Lengthening to 14 would be a fairly big jump, given that 8 days under the current time-counting system generally means either 10 or 12 days. And this period was 10 days prior to 2002's change in time-computation approach. |
| 5 | 27 | (a)(4) | R. 27(a)(4) – Any reply to a response regarding a motion must be filed within 5 days after service of the response. A reply must not present matters that do not relate to the response. | Lengthen from 5 to 7 days | Lengthen from 5 to 7 days |

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| 40 | 28.1 | (f) | [re cross-appeals]: Briefs must be served and filed as follows:<br>(1) the appellant's principal brief, within 40 days after the record is filed;<br>(2) the appellee's principal and response brief, within 30 days after the appellant's principal brief is served;<br>(3) the appellant's response and reply brief, within 30 days after the appellee's principal and response brief is served; and<br>(4) the appellee's reply brief, within 14 days after the appellant's response and reply brief is served, but at least 3 days before argument unless the court, for good cause, allows a later filing. | None | None |
| 30 | 28.1 | (f) | [re cross-appeals]: Briefs must be served and filed as follows:<br>(1) the appellant's principal brief, within 40 days after the record is filed;<br>(2) the appellee's principal and response brief, within 30 days after the appellant's principal brief is served;<br>(3) the appellant's response and reply brief, within 30 days after the appellee's principal and response brief is served; and<br>(4) the appellee's reply brief, within 14 days after the appellant's response and reply brief is served, but at least 3 days before argument unless the court, for good cause, allows a later filing. | None | None |

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| 14 | 28.1 | (f) | [re cross-appeals]: Briefs must be served and filed as follows:<br>(1) the appellant's principal brief, within 40 days after the record is filed;<br>(2) the appellee's principal and response brief, within 30 days after the appellant's principal brief is served;<br>(3) the appellant's response and reply brief, within 30 days after the appellee's principal and response brief is served; and<br>(4) the appellee's reply brief, within 14 days after the appellant's response and reply brief is served, but at least 3 days before argument unless the court, for good cause, allows a later filing. | None | None |
| 3 | 28.1 | (f) | [re cross-appeals]: Briefs must be served and filed as follows:<br>(1) the appellant's principal brief, within 40 days after the record is filed;<br>(2) the appellee's principal and response brief, within 30 days after the appellant's principal brief is served;<br>(3) the appellant's response and reply brief, within 30 days after the appellee's principal and response brief is served; and<br>(4) the appellee's reply brief, within 14 days after the appellant's response and reply brief is served, but at least 3 days before argument unless the court, for good cause, allows a later filing. | Lengthen from 3 to 7 | Lengthen from 3 to 7 |

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| 7 | 29 | (e) | An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's or petitioner's principal brief is filed. A court may grant leave for later filing, specifying the time within which an opposing party may answer. | None. (Cf. Item No. 05-05 re timing of amicus briefs.) | None |
| 10 | 30 | (b)(1) | R. 30(b)(1) – In absence of agreement as to what the appendix should contain, appellant must within 10 days after the record is filed, serve on appellee a designation of parts of the record to be included and a statement of the issues appellant intends to present. Appellee may within 10 days after receiving the designation, serve on the appellant a designation of additional parts. | None | Extend 10-day limits to 14 days. The current 10-day limit has effectively been at least 14 days since 2002, and there seems no strong reason to stick with 10 days. Thus, apply presumption in favor of 7-day multiples |
| 21 | 30 | (c)(1) | R. 30(c)(1) – The court may provide by rule for classes of cases or by order in a particular case that preparation of the appendix may be deferred until after the briefs have been filed and that the appendix may be filed 21 days after the appellee's brief is served. Even though the filing of the appendix may be deferred, Rule 30(b) applies; except that a party must designate the parts of the record it wants included in the appendix when it serves its brief, and need not include a statement of the issues presented. | None | None |

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| 14 | 30 | (c)(2)(B) | A party who wants to refer directly to pages of the appendix may serve and file copies of the brief within the time required by Rule 31(a), containing appropriate references to pertinent pages of the record. In that event, within 14 days after the appendix is filed, the party must serve and file copies of the brief, containing references to the pages of the appendix in place of or in addition to the references to the pertinent pages of the record. | None | None |
| 3 | 31 | (a) | R. 31(a) – Any reply brief must be filed within 14 days after service of appellee's brief and, except for good cause shown, at least 3 days before argument. | Lengthen from 3 to 7 | Lengthen from 3 to 7 |
| 14 | 31 | (a) | R. 31(a) – Any reply brief must be filed within 14 days after service of appellee's brief and, except for good cause shown, at least 3 days before argument. | None | None |
| 30 | 31 | (a) | R. 31(a) – Briefs – Appellee must serve and file a brief within 30 days after service of the appellant's brief. | None | None |
| 40 | 31 | (a) | R. 31(a) – Briefs – Appellant must serve and file a brief within 40 days after the record is filed. | None | None |
| 10 | 39 | (d) | R. 39(d) – Objections must filed within 10 days after service of the bill of costs, unless the court extends the time. | None | Extend 10-day limit to 14 days. The current 10-day limit has effectively been at least 14 days since 2002, and there seems no strong reason to stick with 10 days. Thus, apply presumption in favor of 7-day multiples |
| 14 | 39 | (d) | R. 39(d) – A party who wants costs taxed must, within 14 days after entry of judgment, file with the circuit clerk, with proof of service, an itemized and verified bill of costs. | None | None |
| 14 | 40 | (a) | R. 40(a) – Petitions for panel rehearings may be filed within 14 days after entry of judgment unless the time is shortened or extended by order or local rule. | None | None |

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| 45 | 40 | (a) | R. 40(a) – In all civil cases in which the United States or its agency or officer thereof is a party, the time within which any party may seek a rehearing shall be 45 days after entry of judgment unless the time is shortened or extended by order. | None | None |
| 7 | 41 | (b), 41(d)(1) | R. 41(b), (d)(1) – The mandate of the court must issue 7 calendar days after the time to file a petition for rehearing expires, or 7 calendar 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. The timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise. | Delete "calendar." | Delete "calendar." |
| 90 | 41 | (d)(2) | R. 41(d)(2) – A stay of mandate pending a petition to the Supreme Court for certiorari cannot exceed 90 days unless the period is extended for good cause or unless during the period of stay, the party who obtained the stay files a petition for the writ and notifies the circuit clerk in writing in which case the stay will continue until final disposition by the Supreme Court. The court of appeals must issue the mandate immediately when a copy of the Supreme Court order denying the petition for writ of certiorari is filed. | None | None |

## PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE*

### Rule 4. Appeal as of Right–When Taken

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

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(4) **Effect of a Motion on a Notice of Appeal.**

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

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

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

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than ~~10~~ 30 days after the judgment is entered.

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(5) **Motion for Extension of Time.**

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(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or ~~10~~ 14 days after the date when the order granting the motion is entered, whichever is later.

**(6) Reopening the Time to File an Appeal.** The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

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(B) the motion is filed within 180 days after the judgment or order is entered or within ~~7~~ 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and

* * * * *

**(b) Appeal in a Criminal Case.**

(1) **Time for Filing a Notice of Appeal.**

(A) In a criminal case, a defendant's notice of appeal must be filed in the district court within ~~10~~ 14 days after the later of:

(i) the entry of either the judgment or the order being appealed; or

(ii) the filing of the government's notice of appeal.

* * * * *

(3) **Effect of a Motion on a Notice of Appeal.**

(A) If a defendant timely makes any of the following motions under the Federal Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within ~~10~~ 14 days after the entry of the order disposing of the last such remaining motion, or within ~~10~~ 14 days after the entry of the judgment of conviction, whichever period ends later. This provision applies to a timely motion:

(i) for judgment of acquittal under Rule 29;

(ii) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than ~~10~~ 14 days after the entry of the judgment; or

(iii) for arrest of judgment under Rule 34.

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**Committee Note**

**Subdivision (a)(4)(A)(vi).** Subdivision (a)(4) provides that certain timely post-trial motions extend the time for filing an appeal. Lawyers sometimes move under Civil Rule 60 for relief that is still available under another rule such as Civil Rule 59. Subdivision (a)(4)(A)(vi) provides for such eventualities by extending the time for filing an appeal so long as the Rule 60 motion is filed within a limited time. Formerly, the time limit under subdivision (a)(4)(A)(vi) was 10 days, reflecting the 10-day limits for making motions under Civil Rules 50(b), 52(b), and 59. Subdivision (a)(4)(A)(vi) now contains a 30-day limit to match the revisions to the time limits in the Civil Rules.

**Subdivision (a)(5)(C).** The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 26.

**Subdivision (a)(6)(B).** The time set in the former rule at 7 days has been revised to 14 days. Under the time-computation.

approach set by former Rule 26(a), "7 days" always meant at least 9 days and could mean as many as 11 or even 13 days. Under current Rule 26(a), intermediate weekends and holidays are counted. Changing the period from 7 to 14 days offsets the change in computation approach. See the Note to Rule 26.

**Subdivisions (b)(1)(A) and (b)(3)(A).** The times set in the former rule at 10 days have been revised to 14 days. See the Note to Rule 26.

**Rule 5. Appeal by Permission**

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**(b) Contents of the Petition; Answer or Cross-Petition; Oral Argument.**

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(2) A party may file an answer in opposition or a cross-petition within ~~7~~ 10 days after the petition is served.

* * * * *

**(d) Grant of Permission; Fees; Cost Bond; Filing the Record.**

(1) Within ~~10~~ 14 days after the entry of the order granting permission to appeal, the appellant must:

(A) pay the district clerk all required fees; and

(B) file a cost bond if required under Rule 7.

* * * * *

**Committee Note**

**Subdivision (b)(2).** Subdivision (b)(2) is amended in the light of the change in Rule 26(a)'s time computation rules. Subdivision (b)(2) formerly required that an answer in opposition to a petition for permission to appeal, or a cross-petition for permission to appeal, be filed "within 7 days after the petition is served." Under former Rule 26(a), "7 days" always meant at least 9 days and could mean as many as 11 or even 13 days. Under current Rule 26(a), intermediate weekends and holidays are counted. Changing the period from 7 to 10 days offsets the change in computation approach. See the Note to Rule 26.

**Subdivision (d)(1).** The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 26.

* * * * *

**Rule 6. Appeal in a Bankruptcy Case From a Final Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel**

* * * * *

**(b) Appeal From a Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel Exercising Appellate Jurisdiction in a Bankruptcy Case.**

* * * * *

(2) **Additional Rules.** In addition to the rules made applicable by Rule 6(b)(1), the following rules apply:

* * * * *

(B) **The record on appeal.**

(i) Within ~~10~~ 14 days after filing the notice of appeal, the appellant must file with the clerk possessing the record assembled in accordance with Bankruptcy Rule 8006 — and serve on the appellee — a statement of the issues to be presented on appeal and a

designation of the record to be certified and sent to the circuit clerk.

(ii) An appellee who believes that other parts of the record are necessary must, within ~~10~~ 14 days after being served with the appellant's designation, file with the clerk and serve on the appellant a designation of additional parts to be included.

* * * * *

**Committee Note**

**Subdivision (b)(2)(B).** The times set in the former rule at 10 days have been revised to 14 days. See the Note to Rule 26.

**Rule 10. The Record on Appeal**

* * * * *

**(b) The Transcript of Proceedings.**

(1) **Appellant's Duty to Order.** Within ~~10~~ 14 days after filing the notice of appeal or entry of an order disposing of the last timely remaining motion of a type specified in Rule 4(a)(4)(A), whichever is later, the appellant must do either of the following:

(A) order from the reporter a transcript of such parts of the proceedings not already on file as the appellant considers necessary, subject to a local rule of the court of appeals and with the following qualifications:

(i) the order must be in writing;

(ii) if the cost of the transcript is to be paid by the United States under the Criminal Justice Act, the order must so state; and

(iii) the appellant must, within the same period, file a copy of the order with the district clerk; or

(B) file a certificate stating that no transcript will be ordered.

* * * * *

(3) **Partial Transcript.** Unless the entire transcript is ordered:

(A) the appellant must — within the ~~10~~ 14 days provided in Rule 10(b)(1) — file a statement of the issues that the appellant intends to present on the appeal and must serve on the appellee a copy of both the order or certificate and the statement;

(B) if the appellee considers it necessary to have a transcript of other parts of the proceedings, the appellee must, within ~~10~~ 14 days after the service of the order or certificate and the statement of the issues, file and serve on the

appellant a designation of additional parts to be ordered; and

(C) unless within ~~10~~ 14 days after service of that designation the appellant has ordered all such parts, and has so notified the appellee, the appellee may within the following ~~10~~ 14 days either order the parts or move in the district court for an order requiring the appellant to do so.

* * * * *

**(c) Statement of the Evidence When the Proceedings Were Not Recorded or When a Transcript Is Unavailable.** If the transcript of a hearing or trial is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement must be served on the appellee, who may serve

objections or proposed amendments within ~~10~~ 14 days after being served. The statement and any objections or proposed amendments must then be submitted to the district court for settlement and approval. As settled and approved, the statement must be included by the district clerk in the record on appeal.

* * * * *

**Committee Note**

**Subdivisions (b)(1), (b)(3) and (c).** The times set in the former rule at 10 days have been revised to 14 days. See the Note to Rule 26.

**Rule 12. Docketing the Appeal; Filing a Representation Statement; Filing the Record**

* * * * *

**(b) Filing a Representation Statement.** Unless the court of appeals designates another time, the attorney who filed the notice of appeal must, within ~~10~~ 14 days after filing

the notice, file a statement with the circuit clerk naming the parties that the attorney represents on appeal.

* * * * *

**Committee Note**

**Subdivision (b).** The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 26.

* * * * *

**Rule 15. Review or Enforcement of an Agency Order — How Obtained; Intervention**

* * * * *

**(b) Application or Cross-Application to Enforce an Order; Answer; Default.**

(1) An application to enforce an agency order must be filed with the clerk of a court of appeals authorized to enforce the order. If a petition is filed to review an agency order that the court may enforce, a party opposing the petition may file a cross-application for enforcement.

(2) Within ~~20~~ 21 days after the application for enforcement is filed, the respondent must serve on the applicant an answer to the application and file it with the clerk. If the respondent fails to answer in time, the court will enter judgment for the relief requested.

* * * * *

**Committee Note**

**Subdivision (b)(2).** The time set in the former rule at 20 days has been revised to 21 days. See the Note to Rule 26.

* * * * *

**Rule 19. Settlement of a Judgment Enforcing an Agency Order in Part**

When the court files an opinion directing entry of judgment enforcing the agency's order in part, the agency must within 14 days file with the clerk and serve on each other party a proposed judgment conforming to the opinion. A party who disagrees with the agency's proposed judgment

must within ~~7~~ 10 days file with the clerk and serve the agency with a proposed judgment that the party believes conforms to the opinion. The court will settle the judgment and direct entry without further hearing or argument.

**Committee Note**

Rule 19 formerly required a party who disagreed with the agency's proposed judgment to file a proposed judgment "within 7 days." Under former Rule 26(a), "7 days" always meant at least 9 days and could mean as many as 11 or even 13 days. Under current Rule 26(a), intermediate weekends and holidays are counted. Changing the period from 7 to 10 days offsets the change in computation approach. See the Note to Rule 26.

* * * * *

**Rule 25. Filing and Service**

**(a) Filing.**

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(2) **Filing: Method and Timeliness.**

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(B) **A brief or appendix.** A brief or appendix is timely filed, however, if on or before the last day for filing, it is:

(i) mailed to the clerk by First-Class Mail, or other class of mail that is at least as expeditious, postage prepaid; or

(ii) dispatched to a third-party commercial carrier for delivery to the clerk within 3 ~~calendar~~ days.

* * * * *

**(c) Manner of Service.**

(1) Service may be any of the following:

* * * * *

(C) by third-party commercial carrier for delivery within 3 ~~calendar~~ days; or

* * * * *

**Committee Note**

Under former Rule 26(a), short periods that span weekends or holidays were computed without counting those weekends or holidays. To specify that a period should be calculated by counting all intermediate days, including weekends or holidays, the Rules used the term "calendar days." Rule 26(a) now takes a "days-are-days" approach under which all intermediate days are counted, no matter how short the period. Accordingly, "3 calendar days" in subdivisions (a)(2)(B)(ii) and (c)(1)(C) is amended to read simply "3 days."

**Rule 26. Computing and Extending Time**

* * * * *

**(c) Additional Time after Service.** When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 ~~calendar~~ days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service.

**Committee Note**

**Subdivision (c).** To specify that a period should be calculated by counting all intermediate days, including weekends or holidays, the Rules formerly used the term "calendar days." Because new subdivision (a) takes a "days-are-days" approach under which all intermediate days are counted, no matter how short the period, "3 calendar days" in subdivision (c) is amended to read simply "3 days."

**Rule 27. Motions**

**(a) In General.**

* * * * *

(3) **Response.**

(A) **Time to file.** Any party may file a response to a motion; Rule 27(a)(2) governs its contents. The response must be filed within ~~8~~ 10 days after service of the motion unless the court shortens or extends the time. A motion authorized by Rules 8, 9, 18, or 41 may be granted before the ~~8-day~~ 10-day period runs

only if the court gives reasonable notice to the parties that it intends to act sooner.

* * * * *

(4) **Reply to Response.** Any reply to a response must be filed within ~~5~~ 7 days after service of the response. A reply must not present matters that do not relate to the response.

* * * * *

**Committee Note**

**Subdivision (a)(3)(A).** Subdivision (a)(3)(A) formerly required that a response to a motion be filed "within 8 days after service of the motion unless the court shortens or extends the time." Prior to the 2002 amendments to Rule 27, subdivision (a)(3)(A) set this period at 10 days rather than 8 days. The period was changed in 2002 to reflect the change from a time-computation approach that counted intermediate weekends and holidays to an approach that did not. (Prior to the 2002 amendments, intermediate weekends and holidays were excluded only if the period was less than 7 days; after those amendments, such days were excluded if the period was less than 11 days.) Under current Rule 26(a), intermediate weekends and holidays are counted for all periods. Accordingly, revised subdivision (a)(3)(A) once again sets the period at 10 days.

**Subdivision (a)(4).** Subdivision (a)(4) formerly required that a reply to a response be filed "within 5 days after service of the response." Prior to the 2002 amendments, this period was set at 7 days; in 2002 it was shortened in the light of the 2002 change in time-computation approach (discussed above). Under current Rule 26(a), intermediate weekends and holidays are counted for all periods, and revised subdivision (a)(4) once again sets the period at 7 days.

* * * * *

**Rule 28.1. Cross-Appeals**

* * * * *

**(f) Time to Serve and File a Brief.** Briefs must be served and filed as follows:

(1) the appellant's principal brief, within 40 days after the record is filed;

(2) the appellee's principal and response brief, within 30 days after the appellant's principal brief is served;

(3) the appellant's response and reply brief, within 30 days after the appellee's principal and response brief is served; and

(4) the appellee's reply brief, within 14 days after the appellant's response and reply brief is served, but at least ~~3~~ 7 days before argument unless the court, for good cause, allows a later filing.

**Committee Note**

**Subdivision (f)(4).** Subdivision (f)(4) formerly required that the appellee's reply brief be served "at least 3 days before argument unless the court, for good cause, allows a later filing." Under former Rule 26(a), "3 days" could mean as many as 5 or even 6 days. See the Note to Rule 26. Under revised Rule 26(a), intermediate weekends and holidays are counted. Changing "3 days" to "7 days" alters the period accordingly. Under revised Rule 26(a), when a period ends on a weekend or holiday, one must continue to count in the same direction until the next day that is not a weekend or holiday; the choice of the 7-day period for subdivision (f)(4) will minimize such occurrences.

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**Rule 30. Appendix to the Briefs**

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**(b) All Parties' Responsibilities.**

(1) **Determining the Contents of the Appendix.** The parties are encouraged to agree on the contents of the appendix. In the absence of an agreement, the appellant must, within ~~10~~ 14 days after the record is filed, serve on the appellee a designation of the parts of the record the appellant intends to include in the appendix and a statement of the issues the appellant intends to present for review. The appellee may, within ~~10~~ 14 days after receiving the designation, serve on the appellant a designation of additional parts to which it wishes to direct the court's attention. The appellant must include the designated parts in the appendix. The parties must not engage in unnecessary designation of parts of the record, because the entire record is available to the court. This paragraph applies also to a cross-appellant and a cross-appellee.

* * * * *

**Committee Note**

**Subdivision (b)(1).** The times set in the former rule at 10 days have been revised to 14 days. See the Note to Rule 26.

**Rule 31. Serving and Filing Briefs**

**(a) Time to Serve and File a Brief.**

(1) The appellant must serve and file a brief within 40 days after the record is filed. The appellee must serve and file a brief within 30 days after the appellant's brief is served. The appellant may serve and file a reply brief within 14 days after service of the appellee's brief but a reply brief must be filed at least ~~3~~ 7 days before argument, unless the court, for good cause, allows a later filing.

* * * * *

**Committee Note**

**Subdivision (a)(1).** Subdivision (a)(1) formerly required that the appellant's reply brief be served "at least 3 days before argument, unless the court, for good cause, allows a later filing." Under former Rule 26(a), "3 days" could mean as many as 5 or even 6 days. See the Note to Rule 26. Under revised Rule 26(a), intermediate weekends and holidays are counted. Changing "3 days" to "7 days" alters the period accordingly. Under revised Rule 26(a), when a period ends on a weekend or holiday, one must continue to count in the same direction until the next day that is not a weekend or holiday; the choice of the 7-day period for subdivision (a)(1) will minimize such occurrences.

* * * * *

**Rule 39. Costs**

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**(d) Bill of Costs: Objections; Insertion in Mandate.**

(1) A party who wants costs taxed must — within 14 days after entry of judgment — file with the circuit clerk, with proof of service, an itemized and verified bill of costs.

(2) Objections must be filed within ~~10~~ 14 days after service of the bill of costs, unless the court extends the time.

* * * * *

**Committee Note**

**Subdivision (d)(2).** The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 26.

**Rule 41. Mandate: Contents; Issuance and Effective Date; Stay**

* * * * *

**(b) When Issued.** The court's mandate must issue 7 ~~calendar~~ days after the time to file a petition for rehearing expires, or 7 ~~calendar~~ 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.

* * * * *

**Committee Note**

Under former Rule 26(a), short periods that span weekends or holidays were computed without counting those weekends or holidays. To specify that a period should be calculated by counting all intermediate days, including weekends or holidays, the Rules used the term "calendar days." Rule 26(a) now takes a "days-are-days" approach under which all intermediate days are counted, no matter how short the period. Accordingly, "7 calendar days" in subdivision (b) is amended to read simply "7 days."

**MEMORANDUM**

**DATE:** March 26, 2007

**TO:** Committee Reporters
John K. Rabiej
James N. Ishida

**FROM:** Judge Mark R. Kravitz
Catherine T. Struve

**RE:** Current time-computation template

For your convenience in assembling the agenda book materials for your spring meetings, we enclose the current time-computation template draft in both clean and redlined forms. It is redlined to show changes made since the version we circulated on March 6. The only changes to the text of the rule are those suggested in the March 13 memo, plus a style change to subdivision (a)(3) that we made in response to comments from Professor Kimble. (Also, the wording of the suggested change to subdivision (a)(6)(B) is slightly different from that suggested in our March 13 memo.)

The note shows a number of small changes we have made in response to comments we have received. Though not all those changes have been circulated to the group, we provide the current version in case it is useful for discussion purposes.

The bottom line: If you have already assembled your meeting materials using our March 6 and March 13 memos, that provides a good basis for the committee discussion. If you have not yet assembled the materials, the attached version incorporates the changes suggested in the March 13 memo and may be a useful addition to your meeting materials.

Encl.

**Rule 6. Computing and Extending Time**

**(a) Computing Time.** The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.

**(1)** ***Period Stated in Days or a Longer Unit.*** When the period is stated in days or a longer unit of time:

**(A)** exclude the day of the event that triggers the period;

**(B)** count every day, including intermediate Saturdays, Sundays, and legal holidays; and

**(C)** include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

**(2)** ***Period Stated in Hours.*** When the period is stated in hours:

**(A)** begin counting immediately on the occurrence of the event that triggers the period;

**(B)** count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

**(C)** if the period would end on a Saturday, Sunday, or legal holiday, then continue the period until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

**(3)** ***Inaccessibility of Clerk's Office.*** Unless the court orders otherwise, if the clerk's office is inaccessible:

**(A)** on the last day for filing under Rule 6(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday; or

**(B)** during the last hour for filing under Rule 6(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

**(4)** ***"Last Day" Defined.*** Unless a different time is set by a statute, local rule, or order in the case, the last day ends:

(A) for electronic filing, at midnight in the court's time zone; and

(B) for filing by other means, when the clerk's office is scheduled to close.

**(5)** ***"Next Day" Defined.*** The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

**(6)** ***"Legal Holiday" Defined.*** "Legal holiday" means:

**(A)** the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; and

**(B)** any other day declared a holiday by the President, Congress, or the state where the district court is located. [The word 'state,' as used in this Rule, includes the District of Columbia and any commonwealth, territory, or possession of the United States.]

## Committee Note

**Subdivision (a).** Subdivision (a) has been amended to simplify and clarify the provisions that describe how deadlines are computed. Subdivision (a) governs the computation of any time period found in a Federal Rule of Civil Procedure, a statute, a local rule, or a court order. In accordance with Rule 83(a)(1), a local rule may not direct that a deadline be computed in a manner inconsistent with subdivision (a).

The time-computation provisions of subdivision (a) apply only when a time period must be computed. They do not apply when a fixed time to act is set. The amendments thus carry forward the approach taken in *Violette v. P.A. Days, Inc.*, 427 F.3d 1015, 1016 (6th Cir. 2005) (holding that Civil Rule 6(a) "does not apply to situations where the court has established a specific calendar day as a deadline"), and reject the contrary holding of *In re American Healthcare Management, Inc.*, 900 F.2d 827, 832 (5th Cir. 1990) (holding that Bankruptcy Rule 9006(a) governs treatment of date-certain deadline set by court order). If, for example, the date for filing is "no later than November 1, 2007," subdivision (a) does not govern. But if a filing is required to be made "within 10 days" or "within 72 hours," subdivision (a) describes how that deadline is computed.

Subdivision (a) does not apply when computing a time period set by a statute if the statute specifies a method of computing time. *See, e.g.*, [CITE].

**Subdivision (a)(1).** New subdivision (a)(1) addresses the computation of time periods that are stated in days. It also applies to time periods that are stated in weeks, months, or years. See, e.g., Rule 60(b). Subdivision (a)(1)(B)'s directive to "count every day" is relevant only if the period is stated in days (not weeks, months or years).

Under former Rule 6(a), a period of 11 days or more was computed differently than a period of less than 11 days. Intermediate Saturdays, Sundays, and legal holidays were included in computing the longer periods, but excluded in computing the shorter periods. Former Rule 6(a) thus made computing deadlines unnecessarily complicated and led to counterintuitive results. For example, a 10-day period and a 14-day period that started on the same day usually ended on the same day — and the 10-day period not infrequently ended later than the 14-day period. *See Miltimore Sales, Inc. v. Int'l Rectifier, Inc.*, 412 F.3d 685, 686 (6th Cir. 2005).

Under new subdivision (a)(1), all deadlines stated in days (no matter the length) are computed in the same way. The day of the event that triggers the deadline is not counted. All other days — including intermediate Saturdays, Sundays, and legal holidays — are counted, with only one exception: If the period ends on a Saturday, Sunday, or legal holiday, then the deadline falls on the next day that is not a Saturday, Sunday, or legal holiday. An illustration is provided below in the discussion of subdivision (a)(5). Subdivision (a)(3) addresses filing deadlines that expire on a day when the clerk's office is inaccessible.

Where subdivision (a) formerly referred to the "act, event, or default" that triggers the deadline, new subdivision (a) refers simply to the "event" that triggers the deadline; this change in terminology is adopted for brevity and simplicity, and is not intended to change meaning.

Periods previously expressed as less than 11 days will be shortened as a practical matter by the decision to count intermediate Saturdays, Sundays, and legal holidays in computing all periods. Many of those periods have been lengthened to compensate for the change. See, e.g., [CITE].

Most of the 10-day periods were adjusted to meet the change in computation method by setting 14 days as the new period. A 14-day period corresponds to the most frequent result of a 10-day period under the former computation method — two Saturdays and two Sundays were excluded, giving 14 days in all. A 14-day period has an additional advantage. The final day falls on the same day of the week as the event that triggered the period — the 14th day after a Monday, for example, is a Monday. This advantage of using week-long periods led to adopting 7-day periods to replace some of the periods set at less than 10 days, and 21-day periods to replace 20-day periods. Thirty-day and longer periods, however, were generally retained without change.

**Subdivision (a)(2).** New subdivision (a)(2) addresses the computation of time periods that are stated in hours. No such deadline currently appears in the Federal Rules of Civil Procedure. But some statutes contain deadlines stated in hours, as do some court orders issued in expedited proceedings.

Under subdivision (a)(2), a deadline stated in hours starts to run immediately on the occurrence of the event that triggers the deadline. The deadline generally ends when the time expires. If, however, the time period expires at a specific time (say, 2:17 p.m.) on a Saturday, Sunday, or legal holiday, then the deadline is extended to the same time (2:17 p.m.) on the next day that is not a Saturday, Sunday, or legal holiday. Periods stated in hours are not to be "rounded up" to the next whole hour. Subdivision (a)(3) addresses situations when the clerk's office is inaccessible during the last hour before a filing deadline expires.

Subdivision (a)(2)(B) directs that every hour be counted. Thus, for example, a 72-hour period that commences at 10:23 a.m. on Friday, November 2, 2007, will run until 9:23 a.m. on Monday, November 5; the discrepancy in start and end times in this example results from the intervening shift from daylight saving time to standard time.

**Subdivision (a)(3).** When determining the last day of a filing period stated in days or a longer unit of time, a day on which the clerk's office is not accessible because of the weather or another reason is treated like a Saturday, Sunday, or legal holiday. When determining the end of a filing period stated in hours, if the clerk's office is inaccessible during the last hour of the filing period computed under subdivision (a)(2) then the period is extended to the same time on the next day that is not a weekend, holiday or day when the clerk's office is inaccessible.

Subdivision (a)(3)'s extensions apply "[u]nless the court orders otherwise." In some circumstances, the court might not wish a period of inaccessibility to trigger a full 24-hour extension; in those instances, the court can specify a briefer extension.

The text of the rule no longer refers to "weather or other conditions" as the reason for the inaccessibility of the clerk's office. The reference to "weather" was deleted from the text to underscore that inaccessibility can occur for reasons unrelated to weather, such as an outage of the electronic filing system. Weather can still be a reason for inaccessibility of the clerk's office. The rule does not attempt to define inaccessibility. Rather, the concept will continue to develop through caselaw, *see, e.g.*, William G. Phelps, *When Is Office of Clerk of Court Inaccessible Due to Weather or Other Conditions for Purpose of Computing Time Period for Filing Papers under Rule 6(a) of Federal Rules of Civil Procedure*, 135 A.L.R. Fed. 259 (1996) (collecting cases). In addition, many local provisions address inaccessibility for purposes of electronic filing, *see, e.g.*, D. Kan. Rule 5.4.11 ("A Filing User whose filing is made untimely as the result of a technical failure may seek appropriate relief from the court.").

**Subdivision (a)(4).** New subdivision (a)(4) defines the end of the last day of a period for purposes of subdivision (a)(1). Subdivision (a)(4) does not apply in computing periods stated in hours under subdivision (a)(2), and does not apply if a different time is set by a statute, local rule, or order in the case. A local rule may provide, for example, that papers filed in a drop box after the normal hours of the clerk's office are filed as of the day that is date-stamped on the papers by a device in the drop box.

28 U.S.C. § 452 provides that "[a]ll courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders." A corresponding provision exists in Rule 77(a). Some courts have held that these provisions permit an after-hours filing by handing the papers to an appropriate official. *See, e.g.*, *Casalduc v. Diaz*, 117 F.2d 915, 917 (1st Cir. 1941). Subdivision (a)(4) does not address the effect of the statute on the question of after-hours filing; instead, the rule is designed to deal with filings in the ordinary course without regard to Section 452.

**Subdivision (a)(5).** New subdivision (a)(5) defines the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C). The Federal Rules of Civil Procedure contain both forward-looking time periods and backward-looking time periods. A forward-looking time period requires something to be done within a period of time *after* an event. See, e.g., Rule 59(b) (motion for new trial "shall be filed no later than 10 days after entry of the judgment"). A backward-looking time period requires something to be done within a period of time *before* an event. *See, e.g.*, Rule 26(f) (parties must hold Rule 26(f) conference "as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b)"). In determining what is the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C), one should continue counting in the same direction — that is, forward when computing a forward-looking period and backward when computing a backward-looking period. If, for example, a filing is due within 10 days *after* an event, and the tenth day falls on Saturday,

September 1, 2007, then the filing is due on Tuesday, September 4, 2007 (Monday, September 3, is Labor Day). But if a filing is due 10 days *before* an event, and the tenth day falls on Saturday, September 1, then the filing is due on Friday, August 31.

**Subdivision (a)(6).** New subdivision (a)(6) defines "legal holiday" for purposes of the Federal Rules of Civil Procedure, including the time-computation provisions of subdivision (a).

**Rule 6. Computing and Extending Time**

**(a) Computing Time.** The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute~~[, local rule,]~~ that does not specify a method o~~[r court order]~~f computing time.

**(1)** ***Period Stated in Days or a Longer Unit.*** When the period is stated in days or a longer unit of time:

**(A)** exclude the day of the event that triggers the period;

**(B)** count every day, including intermediate Saturdays, Sundays, and legal holidays; and

**(C)** include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

**(2)** ***Period Stated in Hours.*** When the period is stated in hours:

**(A)** begin counting immediately on the occurrence of the event that triggers the period;

**(B)** count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

**(C)** if the period would end on a Saturday, Sunday, or legal holiday, then continue the period until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

**(3)** ***Inaccessibility of Clerk's Office.*** Unless the court orders otherwise, if the clerk's office is inaccessible:

(A) on the last day for filing under Rule 6(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday; or

([~~A~~]B) [~~on~~]during the last [~~day of a~~]hour for filing[~~ period computed~~] under Rule 6(a)([~~1~~]2), then the time for filing is extended to the [~~first day when~~]same time on the [~~clerk's office is~~]first accessible day that is not a Saturday, Sunday, or legal holiday[~~; or~~].

~~[ (B) d... holiday.~~

~~]~~ (4) ***"Last Day" Defined.*** Unless a different time is set by a statute, local rule, or order in the case, the last day ends:

(A) for electronic filing, at midnight in the court's time zone; and

(B) for filing by other means, when the clerk's office is scheduled to close.

(5) ***"Next Day" Defined.*** The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(6) ***"Legal Holiday" Defined.*** "Legal holiday" means:

**(A)** the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; and

**(B)** any other day declared a holiday by the President, Congress, or the state where the district court is located. [The word 'state,' as used in this Rule,

includes the District of Columbia and any commonwealth, territory, or possession of the United States.]

**Committee Note**

**Subdivision (a).** Subdivision (a) has been amended to simplify and clarify the provisions that describe how deadlines are computed. Subdivision (a) governs the computation of any time period found in a Federal Rule of Civil Procedure, a statute, a local rule, or a court order. In accordance with Rule 83(a)(1), a local rule may not direct that a deadline be computed in a manner inconsistent with subdivision (a).

The time-computation provisions of subdivision (a) apply only when a time period must be computed. They do not apply when a fixed time to act is set. The amendments thus carry forward the approach taken in *Violette v. P.A. Days, Inc.*, 427 F.3d 1015, 1016 (6th Cir. 2005) (holding that Civil Rule 6(a) "does not apply to situations where the court has established a specific calendar day as a deadline"), and reject the contrary holding of *In re American Healthcare Management, Inc.*, 900 F.2d 827, 832 (5th Cir. 1990) (holding that Bankruptcy Rule 9006(a) governs treatment of date-certain deadline set by court order). If, for example, the date for filing is "no later than November 1, 2007," subdivision (a) does not govern. But if a filing is required to be made "within 10 days" or "within 72 hours," subdivision (a) describes how that deadline is computed.

Subdivision (a) does not apply when computing a time period set by a statute if the statute specifies a method of computing time. *See, e.g.*, [CITE].

**Subdivision (a)(1).** New subdivision (a)(1) addresses the computation of time periods that are stated in days. It also applies to time periods that are stated in weeks, months, or years. See, e.g., Rule 60(b). Subdivision (a)(1)(B)'s directive to "count every day" is relevant only if the period is stated in days (not weeks, months or years).

Under former Rule 6(a), a period of 11 days or more was computed differently than a period of less than 11 days. Intermediate Saturdays, Sundays, and legal holidays were included in computing the longer periods, but excluded in computing the shorter periods. Former Rule 6(a) thus made computing deadlines unnecessarily complicated and led to counterintuitive results. For example, a 10-day period and a 14-day period that started on the same day usually ended on the same day — and~~[, not infrequently,]~~ the 10-day period ~~[actually]~~not infrequently ended later than the 14-day period. *See Miltimore Sales, Inc. v. Int'l Rectifier, Inc.*, 412 F.3d 685, 686 (6th Cir. 2005).

Under new subdivision (a)(1), all deadlines stated in days (no matter the length) are computed in the same way. The day of the event that triggers the deadline is not counted. All other days — including intermediate Saturdays, Sundays, and legal holidays — are counted, with

only one exception: If the period ends on a Saturday, Sunday, or legal holiday, then the deadline falls on the next day that is not a Saturday, Sunday, or legal holiday. An illustration is provided below[,] in the discussion of subdivision (a)(5). Subdivision (a)(3) addresses filing deadlines that expire on a day when the clerk's office is inaccessible.

Where subdivision (a) formerly referred to the "act, event, or default" that triggers the deadline, new subdivision (a) refers simply to the "event" that triggers the deadline; this change in terminology is adopted for brevity and simplicity, and is not intended to change meaning.

Periods previously expressed as less than 11 days will be shortened as a practical matter by the decision to count intermediate Saturdays, Sundays, and legal holidays in computing all periods. Many of those periods have been lengthened to compensate for the change. See, e.g., [CITE].

Most of the 10-day periods were adjusted to meet the change in computation method by setting 14 days as the new period. A 14-day period corresponds to the most frequent result of a 10-day period under the former computation method — two Saturdays and two Sundays were excluded, giving 14 days in all. A 14-day period has an additional advantage. The final day falls on the same day of the week as the event that triggered the period — the 14th day after a Monday, for example, is a Monday. This advantage of using week-long periods led to adopting 7-day periods to replace some of the periods set at less than 10 days, and 21-day periods to replace 20-day periods. Thirty-day and longer periods, however, were generally retained without change.

**Subdivision (a)(2).** New subdivision (a)(2) addresses the computation of time periods that are stated in hours. No such deadline currently appears in the Federal Rules of Civil Procedure. But some statutes contain deadlines stated in hours, as do some court orders issued in expedited proceedings.

Under ~~[new ]~~subdivision (a)(2), a deadline stated in hours starts to run immediately on the occurrence of the event that triggers the deadline. The deadline generally ends when the time expires. If, however, the time period expires at a specific time (say, 2:17 p.m.) on a Saturday, Sunday, or legal holiday, then the deadline is extended to the same time (2:17 p.m.) on the next day that is not a Saturday, Sunday, or legal holiday. Periods stated in hours are not to be "rounded up" to the next whole hour. Subdivision (a)(3) addresses situations when the clerk's office is inaccessible during the last hour before a filing deadline expires.

Subdivision (a)(2)(B) directs that every hour be counted. Thus, for example, a 72-hour period that commences at 10:23 a.m. on Friday, November 2, 2007, will run until 9:23 a.m. on Monday, November 5; the discrepancy in start and end times in this example results from the intervening shift from daylight saving time to standard time.

**Subdivision (a)(3).** When determining the last day of a filing period stated in days or a longer unit of time, a day on which the clerk's office is not accessible because of the weather or another reason is treated like a Saturday, Sunday, or legal holiday. When determining the end of a filing period stated in hours, if the clerk's office is inaccessible during the last hour of the filing period computed under subdivision (a)(2) then the period is extended to the same time on the next day that is not a weekend, holiday or day when the clerk's office is inaccessible.

Subdivision (a)(3)'s extensions apply "[u]nless the court orders otherwise." In some circumstances, the court might not wish a period of inaccessibility to trigger a full 24-hour extension; in those instances, the court can specify a briefer extension.

The text of the rule no longer refers to "weather or other conditions" as the reason for the inaccessibility of the clerk's office. The reference to "weather" was deleted from the text to underscore that inaccessibility can occur for reasons unrelated to weather, such as an outage of the electronic filing system. Weather can still be a reason for inaccessibility of the clerk's office. The rule does not attempt to define inaccessibility~~[,]~~. Rather, the concept~~[ of inaccessibility]~~ will continue to develop through caselaw, *see, e.g.*, William G. Phelps, *When Is Office of Clerk of Court Inaccessible Due to Weather or Other Conditions for Purpose of Computing Time Period for Filing Papers under Rule 6(a) of Federal Rules of Civil Procedure*, 135 A.L.R. Fed. 259 (1996) (collecting cases). In addition,~~[ while]~~ many local provisions address inaccessibility for purposes of electronic filing, *see, e.g.*, D. Kan. Rule 5.4.11 ("A Filing User whose filing is made untimely as the result of a technical failure may seek appropriate relief from the court.").

**Subdivision (a)(4).** New subdivision (a)(4) defines the end of the last day of a period for purposes of subdivision (a)(1). Subdivision (a)(4) does not apply ~~[to the computation of]~~in computing periods stated in hours under subdivision (a)(2)~~[. Subdivi...definition]~~, and does not apply if a different time is set by a statute, local rule, or order in the case. A local rule may provide, for example, that papers filed in a drop box after the normal hours of the clerk's office are filed as of the day that is date-stamped on the papers by a device in the drop box.

28 U.S.C. § 452 provides that "[a]ll courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders." A corresponding provision exists in Rule 77(a). Some courts have held that these provisions permit an after-hours filing by handing the papers to an appropriate official. *See, e.g.*, *Casalduc v. Diaz*, 117 F.2d 915, 917 (1st Cir. 1941). Subdivision (a)(4) does not address the ~~[court's au...ling under]~~effect of the statute on the question of after-hours filing; instead, the rule is designed to deal with filings in the ordinary course ~~[of events]~~without regard to Section 452.

**Subdivision (a)(5).** New subdivision (a)(5) defines the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C). The Federal Rules of Civil Procedure contain both forward-looking time periods and backward-looking time periods. A forward-looking time period requires something to be done within a period of time *after* an event. See, e.g., Rule 59(b) (motion for new trial "shall be filed no later than 10 days after entry of the judgment"). A

backward-looking time period requires something to be done within a period of time *before* an event. *See, e.g.*, Rule 26(f) (parties must hold Rule 26(f) conference "as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b)"). In determining what is the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C), one should continue counting in the same direction — that is, forward when computing a forward-looking period and backward when computing a backward-looking period. If, for example, a filing is due within 10 days *after* an event, and the tenth day falls on Saturday, September 1, 2007, then the filing is due on Tuesday, September 4, 2007 (Monday, September 3, is Labor Day). But if a filing is due 10 days *before* an event, and the tenth day falls on Saturday, September 1, then the filing is due on Friday, August 31.

**Subdivision (a)(6).** New subdivision (a)(6) defines "legal holiday" for purposes of the Federal Rules of Civil Procedure, including the time-computation provisions of subdivision~~[s]~~ (a~~[)(1) and (a)(2]~~).

**MEMORANDUM**

**DATE:** March 13, 2007

**TO:** Time Computation Subcommittee
Committee Reporters

**FROM:** Judge Mark R. Kravitz
Catherine T. Struve

**CC:** Judge David F. Levi
John K. Rabiej

**RE:** Two additional template issues

Since circulating the template draft last week, we have become aware of two issues that we would like to bring to your attention in advance of the Advisory Committee meetings this spring. At least one of those issues will require a change to the language of the proposed time-counting Rule.

The first issue concerns the template's effect on statutory provisions that both set a time period for use in litigation and provide explicit instructions on how the period should be computed. The second issue relates to the application of the "legal holidays" definition to litigation that takes place in the Territories, the District of Columbia or Puerto Rico. These issues are addressed in parts I and II below.

## I. Statutory periods expressed in "business days" or similar language

Our subcommittee's master list of short statutory time periods omits periods that explicitly instruct that weekends and holidays not be counted. Those periods were omitted based on the assumption that since the statute specifies the manner of counting, no court would apply a contrary time-counting Rule. But it occurred to us recently that this assumption might have been hasty.

Most statutes that set time periods relating to litigation fail to specify how the periods should be counted. Some other statutes set periods in "calendar days";[1] those provisions are omitted from our master list on the assumption that they will continue to be counted the same way under the Rules' new days-are-days approach. And – of greatest relevance to this memo – a few statutes specify a time-counting method that is different from the one that will apply under the proposed template's approach; those provisions (13 statutes and one regulation) are listed in the enclosed spreadsheet.

As you know, the template states that its "rules apply in computing any time period specified in ... any statute...." And subdivision (a)(1) instructs that "[w]hen the period is stated in days or a longer unit of time" one must "count every day, including intermediate Saturdays, Sundays, and legal holidays." For all sets of Rules other than the Bankruptcy Rules, the supersession authority granted to the rulemakers means that once the template is adopted as part of the Rules, all statutory provisions to the contrary will be of no force and effect. So the question is whether any court would interpret the Rules' days-are-days time-counting directive to supersede an explicit statutory directive to use a non-days-are-days approach. As a policy matter, we believe it would be undesirable for the Rules to trump such directives. Those directives may have arisen, for example, from a legislative desire to set a short period but to avoid imposing hardship in the event that the period includes a weekend or holiday.

It is informative to consider the rationales that courts have used when applying existing or prior versions of the time-counting Rules to compute statutory periods. Some courts have applied those Rules as gap-filling measures in the absence of any contrary indication from Congress.[2] In some instances, courts have applied a time-counting Rule "by analogy," or as a reasonable estimation of congressional intent in enacting the relevant statutory scheme, rather

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[1] See, e.g., 12 U.S.C. § 3410(b) ("All such proceedings shall be completed and the motion or application decided within seven calendar days of the filing of the Government's response.").

[2] For example, the Third Circuit reasoned as follows in a Federal Tort Claims Act case: "Section 2401(b) does not contain a time computation rule. It does not say whether the day of the liability causing event is included or excluded. It says nothing about weekends or holidays at the end of the two year period. Both with its beginning and with its end interpretation is required. Aside from the government's rule of interpretation that the claimant ought always to lose, no more satisfactory rule has been called to our attention than that, approved by Congress, and announced in Rule 6(a)." Frey v. Woodard, 748 F.2d 173, 175 (3d Cir. 1984). See also United Mine Workers of America, Intern. Union v. Dole, 870 F.2d 662, 665 (D.C. Cir. 1989) ("The [Mine Safety and Health Act of 1977] ... makes no separate provision for the computation of time and was enacted subsequent to the adoption of Rule 26(a); we conclude therefore that Congress intended its time periods to be computed in accordance with the federal rule.").

than indicating that the Rule controls of its own force.[3] In other cases, courts have applied a time-counting Rule to compute a statutory period without giving much or any explanation for that application. But courts confronted with a specific statutory counting method have refused to apply a contrary directive in the relevant time-counting Rule.[4]

Clearly, courts applying a time-counting Rule as a gap-filling measure will not apply the Rule when the statute specifies a contrary time-counting method, for in that event there is no gap to be filled. Likewise, courts that look to congressional intent would infer from the statute's specification of a time-counting method that Congress did not intend them to use the time-counting Rule's contrary method. And courts that already reject the time-counting Rule when faced with a statutorily-specified time-counting method would continue to do so.

Nonetheless, a technical argument could be made that says that, as to statutes that predate the adoption of the template in the time-counting Rules, the later-adopted Rule trumps the previously-adopted statutory time-counting provision.[5] It would arguably rise to the level of absurdity to apply a days-are-days time-counting Rule to calculate a period explicitly set in

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[3] *See, e.g.*, Tribue v. U.S., 826 F.2d 633, 635 (7th Cir. 1987) (reasoning in Federal Torts Claims Act case that "if we found § 2401(b) ambiguous regarding whether to exclude the mailing date, we would exclude the mailing date by analogy to Rule 6(a)"); Pearson v. Furnco Const. Co., 563 F.2d 815, 819 (7th Cir. 1977) (holding "that in the light of the purposes intended to be served by Title VII, it is a sound interpretation of congressional intent" to apply Civil Rule 6(a)'s approach to the computation of the limitations period). Likewise, in an early decision interpreting the time limit for petitions for certiorari under 28 U.S.C. § 2101, the Supreme Court drew upon the approach stated in Civil Rule 6(a): "Since [Rule 6(a)] had the concurrence of Congress, and since no contrary policy is expressed in the statute governing this review, we think that the considerations of liberality and leniency which find expression in Rule 6(a) are equally applicable to 28 U.S.C. s 2101(c)." Union Nat. Bank of Wichita, Kan. v. Lamb, 337 U.S. 38, 41 (1949).

[4] See F.D.I.C. v. Enventure V, 77 F.3d 123, 126 (5th Cir. 1996) ("In § 1821(d)(14)(A), Congress provided that the limitations period began 'on the date the claim accrues.' The use of the word 'on' is clear and creates a more specific rule which overrides the application of Rule 6(a)."); Slinger Drainage, Inc. v. E.P.A., 237 F.3d 681, 683 (D.C. Cir. 2001) (refusing to apply Rule 26(a) to determine the period's start date because "the statute currently before us clearly establishes a separate provision for the computation of time: a person may obtain review by filing 'within the 30-day period *beginning on the date the civil penalty issued.*' 33 U.S.C. § 1319(g)(8)(B) (emphasis added)").

[5] This argument assumes that the time-counting Rules' application to the relevant time period is valid under the Rules Enabling Act's scope limitation. That assumption may not always hold true. For example, 18 U.S.C. § 3142(d)'s time limit on detention may implicate substantive rights.

"business days" or "working days." If such applications are absurd, it seems a small step to conclude that it would likewise be absurd to apply the time-counting Rules' days-are-days approach when the statute explicitly directs one to exclude weekends and holidays. But even if this line of reasoning ultimately leads courts to reject the notion that the new time-counting Rules supersede explicit statutory directives concerning the method of computation, it would be best if we could draft the Rules to preempt litigation on this point.

We therefore suggest amending the first sentence in the template Rule as follows:

> The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute[, local ru...urt order.] that does not specify a time-computation method.

We also favor adding a sentence to the Note to observe that state-court interpretations of state statutes count as specifying a statutory method.

## II. Legal holidays in the Territories, the District of Columbia or Puerto Rico

As you know, the Rules apply not only to district court proceedings held within states, but also to district court proceedings held within the District of Columbia and Puerto Rico. Moreover, the Rules apply in proceedings in various territorial courts.[6] The template rule defines "legal holiday" to include the listed holidays plus "any other day declared a holiday by the President, Congress, or the state where the district court is located." This provision may require amendment in order to ensure that the "legal holiday" definition functions appropriately in proceedings within the Territories, the District of Columbia, or Puerto Rico.[7]

The background definitional principles vary. Civil Rule 81(e) provides that "When the word 'state' is used, it includes, if appropriate, the District of Columbia." Our understanding is that the Civil Rules Committee may be considering whether this definition should be expanded

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[6] See, e.g., Criminal Rule 1(a)(1) (subject to certain exceptions, Criminal Rules govern criminal proceedings in district courts in Guam, Northern Mariana Islands, and Virgin Islands); Am. Jur. Federal Courts § 2585 ("[W]hile the District Courts of Guam, the Northern Mariana Islands, and the Virgin Islands are constituted by the respective Organic Acts for such territories, rather than by Chapter 5 of the Judicial Code, it is expressly provided in such acts that the Federal Rules of Civil Procedure apply in such courts.").

[7] Admittedly, courts may decide to interpret the existing language to include more than just states. Cf. Reyes-Cardona v. J. C. Penney Co., Inc., 690 F.2d 1, 1 (1st Cir. 1982) ("But that day was a legal holiday in Puerto Rico honoring Eugenio Maria de Hostos. See 1 L.P.R.A. s 75. As such it is not counted in the computation of time. Rule 6(a) F.R.Civ.P...."). But it seems advisable to clarify the matter in rule text.

to include more than the District of Columbia. Criminal Rule 1(b)(9) could provide a model for such expansion; that Rule provides that "'State' includes the District of Columbia, and any commonwealth, territory, or possession of the United States." The Appellate Rules contain no such definitional provision, and the Bankruptcy Rules appear to contain no relevant definition either.

We therefore would ask the Advisory Committees (other than the Criminal Rules Committee)[8] to consider whether they wish to adopt a general definition such as that in Criminal Rule 1(b)(9). If each set of Rules is amended to contain such a definition, then no change to the template's definition of "legal holiday" would be required. If such a definition is not adopted, however, then seems advisable to add the following at the end of the template's subdivision (a)(6)(B):

> The word 'state,' as used in this Rule, includes the Territories, the District of Columbia and the Commonwealth of Puerto Rico.

* * *

We regret that these changes did not surface before we circulated the official version of the template last week for use in the Advisory Committee meetings this spring. Generally, our plan is to hold any smaller suggestions for change (such as small changes to Note wording) until later, so that the Advisory Committees and Reporters do not have to work with a moving target for purposes of their spring meetings. But these two changes seemed to us to warrant an exception to that policy, and we wanted to place these issues before the Advisory Committees for discussion at the spring meetings.

Thank you for your work on this project.

Encl.

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[8] Obviously, this request is relevant to the Evidence Rules Committee only if it decides to recommend adopting a time-computation provision in the Evidence Rules.

| Title | Section | Subsection | Nature of deadline | Type | App | Bnkr | Civil | Crim | Length - Unit | Length - Number | Comments |
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| 2 | 386 | (c) | (c) Order and time of taking testimony<br>The order in which the parties may take testimony shall be as follows:<br>(1) Contestant may take testimony within thirty days after service of the answer, or, if no answer is served within the time provided in section 383 of this title, within thirty days after the time for answer has expired.<br>(2) Contestee may take testimony within thirty days after contestant's time for taking testimony has expired.<br>(3) If contestee has taken any testimony or has filed testimonial affidavits or stipulations under section 387(c) of this title, contestant may take rebuttal testimony within ten days after contestee's time for taking testimony has expired. | Time for litigant to act | | | Y | | Day | 10 | this provision is included only for completeness, because of its relation to sections 388 and 394. even though this concerns election challenges in House of Representatives under Federal Contested Elections Act, this 10-day period concerns the time for obtaining a subpoena from a federal district court. See 2 USC 388(a). Currently, a time computation method is explicitly provided by 2 USC 394. |
| 2 | 388 | (b) | (a) Issuance<br>Upon application of any party, a subpena for attendance at a deposition shall be issued by:<br>(1) a judge or clerk of the United States district court for the district in which the place of examination is located;<br>...<br>(b) Time, method, and proof of service<br>Service of the subpena shall be made upon the witness no later than three days before the day on which his attendance is directed. A subpena may be served by any person who is not a party to the contested election case and is not less than eighteen years of age. Service of a subpena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering to him the fee for one day's attendance and the mileage allowed by section 389 of this title. Written proof of service shall be made under oath by the person making same and shall be filed with the Clerk. | Notice to litigants or other entities | | | Y | | [Business day] | 3 | Currently, a time computation method is explicitly provided by 2 USC 394. I've omitted 2 USC 387, since that appears to concern procedure when no subpoena is used, and thus when no court is involved. |

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| 2 | 394 | (a) | (a) Method of computing time<br>In computing any period of time prescribed or allowed by this chapter or by the rules or any order of the committee, the day of the act, event, or default after which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period shall run until the end of the next day which is neither a Saturday, a Sunday, nor a legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. For the purposes of this chapter, "legal holiday" shall mean New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States. | Computation method | | | Y | | | | |
| 15 | 78eee | (b)(1) | Upon receipt of an application by SIPC under subsection (a)(3) of this section, the court shall forthwith issue a protective decree if the debtor consents thereto, if the debtor fails to contest such application, or if the court finds that such debtor--<br>[* * *]<br>Unless the debtor consents to the issuance of a protective decree, the application shall be heard three business days after the date on which it is filed, or at such other time as the court shall determine, taking into consideration the urgency which the circumstances require. | Time for court to act | | | Y | | Business day | 3 | |

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| 18 | 2704 | (a) | (a) Backup preservation.--(1) A governmental entity acting under section 2703(b)(2) may include in its subpoena or court order a requirement that the service provider to whom the request is directed create a backup copy of the contents of the electronic communications sought in order to preserve those communications. Without notifying the subscriber or customer of such subpoena or court order, such service provider shall create such backup copy as soon as practicable consistent with its regular business practices and shall confirm to the governmental entity that such backup copy has been made. Such backup copy shall be created within two business days after receipt by the service provider of the subpoena or court order. | Time for third party to act | | | | Y | Business day | 2 | |
| 18 | 3142 | (d) | (d) Temporary detention to permit revocation of conditional release, deportation, or exclusion.--If the judicial officer determines that--<br>(1) such person--<br>(A) is, and was at the time the offense was committed, on--<br>(i) release pending trial for a felony under Federal, State, or local law;<br>(ii) release pending imposition or execution of sentence, appeal of sentence or conviction, or completion of sentence, for any offense under Federal, State, or local law; or<br>(iii) probation or parole for any offense under Federal, State, or local law; or<br>(B) is not a citizen of the United States or lawfully admitted for permanent residence, as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20)); and<br>(2) such person may flee or pose a danger to any other person or the community;<br>such judicial officer shall order the detention of such person, for a period of not more than ten days, excluding Saturdays, Sundays, and holidays, and direct the attorney for the Government to notify the appropriate court, probation or parole official, or State or local law enforcement official, or the | Limit on detention | | | | Y | [Business day] | 10 | |

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| 18 | 3142 | (f) | (f) Detention hearing.--The judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) of this section will reasonably assure the appearance of such person as required and the safety of any other person and the community--<br>* * *<br>The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance. Except for good cause, a continuance on motion of such person may not exceed five days (not including any intermediate Saturday, Sunday, or legal holiday), and a continuance on motion of the attorney for the Government may not exceed three days (not including any intermediate Saturday, Sunday, or legal holiday). During a continuance, such person shall be detained, and the judicial officer, on motion of the attorney for the Government or sua sponte, may order that, while in custody, a person who appears to be a narcotics addict receive a medical examination to determine whether such person is an addict. At the hearing, s | Limit on continuanc e | | | | Y | [Business day] | 3, 5 | ). Pub.L. 104-132, § 729, added "(not including any intermediate Saturday, Sunday, or legal holiday)" following "five days" and following "three days". |
| 18 | 3612 | (d) & (e) | (d) Notification of delinquency.--Within ten working days after a fine or restitution is determined to be delinquent as provided in section 3572(h), the Attorney General shall notify the person whose fine or restitution is delinquent, to inform the person of the delinquency.<br>(e) Notification of default.--Within ten working days after a fine or restitution is determined to be in default as provided in section 3572(i), the Attorney General shall notify the person defaulting to inform the person that the fine or restitution is in default and the entire unpaid balance, including interest and penalties, is due within thirty days. | Time for governme nt to act | | | | Y | Working day | 10 | |

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| 20 | 7711 | (b) | (b) Judicial review of Secretarial action<br>(1) In general<br>A local educational agency or a State aggrieved by the Secretary's final decision following an agency proceeding under subsection (a) of this section may, within 30 working days (as determined by the local educational agency or State) after receiving notice of such decision, file with the United States court of appeals for the circuit in which such agency or State is located a petition for review of that action. The clerk of the court shall promptly transmit a copy of the petition to the Secretary. The Secretary shall then file in the court the record of the proceedings on which the Secretary's action was based, as provided in section 2112 of Title 28. | Time to seek review of agency action | Y | | | | Working day as determined by local agency or state | 30 | |
| 24 | 326 | (a) | (a) Request; determination of right to retain; retention after request<br>If a person who is a patient hospitalized under section 322 or 324 of this title, or his legal guardian, spouse, or adult next of kin, requests the release of such patient, the right of the Secretary, or the head of the hospital, to detain him for care and treatment shall be determined in accordance with such laws governing the detention, for care and treatment, of persons alleged to be mentally ill as may be in force and applicable generally in the State in which such hospital is located, but in no event shall the patient be detained more than forty-eight hours (excluding any period of time falling on a Sunday or legal holiday) after the receipt of such request unless within such time (1) judicial proceedings for such hospitalization are commenced or (2) a judicial extension of such time is obtained, for a period of not more than five days, for the commencement of such proceedings. | Limit on detention | | | Y? | | Hours, excluding Sundays & holidays | 48 | |

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| 29 | 1342 | (b) | (b) Appointment of trustee<br>(1) Whenever the corporation makes a determination under subsection (a) of this section with respect to a plan or is required under subsection (a) of this section to institute proceedings under this section, it may, upon notice to the plan, apply to the appropriate United States district court for the appointment of a trustee to administer the plan with respect to which the determination is made pending the issuance of a decree under subsection (c) of this section ordering the termination of the plan. If within 3 business days after the filing of an application under this subsection, or such other period as the court may order, the administrator of the plan consents to the appointment of a trustee, or fails to show why a trustee should not be appointed, the court may grant the application and appoint a trustee to administer the plan in accordance with its terms until the corporation determines that the plan should be terminated or that termination is unnecessary. The corporation may request that it be appointed as trustee of a plan in any case. | Time for court to act | | | Y | | Business day | 3 | |
| 29 | 1342 | (d) | (d) Powers of trustee<br>(1)(A) A trustee appointed under subsection (b) of this section shall have the power--<br>* * *<br>If the court to which application is made under subsection (c) of this section dismisses the application with prejudice, or if the corporation fails to apply for a decree under subsection (c) of this section, within 30 days after the date on which the trustee is appointed under subsection (b) of this section, the trustee shall transfer all assets and records of the plan held by him to the plan administrator within 3 business days after such dismissal or the expiration of such 30-day period, and shall not be liable to the plan or any other person for his acts as trustee except for willful misconduct, or for conduct in violation of the provisions of part 4 of subtitle B of subchapter I of this chapter (except as provided in subsection (d)(1)(A)(v) of this section). The 30-day period referred to in this subparagraph may be extended as provided by agreement between the plan administrator and the corporation or by court order obtained by the corporation. | Time for trustee to act | | | Y | | Business day | 3 | |

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| 30 | 1734 | | (a) Action for royalty, interest, or civil penalty; limitations; notice of suit * * *<br>(1) A State may commence a civil action under this section against any person to recover any royalty, interest, or civil penalty which the State believes is due, based upon credible evidence, with respect to any oil and gas lease on Federal lands located within the State.<br>(2)(A) No action may be commenced under paragraph (1) prior to 90 days after the State has given notice in writing to the Secretary of the payment required. * * *<br>(B) If, within the 90-day period specified in subparagraph (A), the Secretary issues a demand for the payment concerned, no action may be commenced under paragraph (1) with respect to such payment during a 45-day period after issuance of such demand. * * *<br>(C) If the Secretary refers the case to the Attorney General of the United States within the 45-day period referred to in subparagraph (B) or within 10 business days after the expiration of such 45-day period, no action may be commenced under paragraph (1) if the Attorney General, | Time for governme nt to act | | | Y | | Business day | 10 | |
| 37 | CFR 1.304 | | (a)(1) The time for filing the notice of appeal to the U.S. Court of Appeals for the Federal Circuit (§ 1.302) or for commencing a civil action (§ 1.303) is two months from the date of the decision of the Board of Patent Appeals and Interferences. * * *<br>(b) The times specified in this section in days are calendar days. The times specified herein in months are calendar months except that one day shall be added to any two-month period which includes February 28. If the last day of the time specified for appeal or commencing a civil action falls on a Saturday, Sunday or Federal holiday in the District of Columbia, the time is extended to the next day which is neither a Saturday, Sunday nor a Federal holiday. | Time to seek review of agency action | Y | | | | Calendar months, but extra day if includes February | 2 | |

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| 42 | 16913 | (b) | (b) Initial registration<br>The sex offender shall initially register--<br>(1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or<br>(2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment.<br>(c) Keeping the registration current<br>A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) of this section and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry. That jurisdiction shall immediately provide that information to all other jurisdictions in which the offender is required to register. | Time for litigant to act | | | | Y | Business day | 3 | |
| 42 | 16921 | (c) | (b) Program notification<br>Except as provided in subsection (c) of this section, immediately after a sex offender registers or updates a registration, an appropriate official in the jurisdiction shall provide the information in the registry (other than information exempted from disclosure by the Attorney General) about that offender to the following:<br>* * *<br>(c) Frequency<br>Notwithstanding subsection (b) of this section, an organization or individual described in subsection (b)(6) or (b)(7) of this section may opt to receive the notification described in that subsection no less frequently than once every five business days. | Time for governme nt to act | | | | Y? | Business day | 5 | |

**MEMORANDUM**

**DATE:** March 6, 2007

**TO:** Time-Computation Subcommittee
Committee Reporters

**FROM:** Judge Mark R. Kravitz

**CC:** Judge David F. Levi
John K. Rabiej

**RE:** Newly revised template draft for use in connection with Advisory Committee meetings

Thank you for your input on the template drafts we circulated on January 24 and February 6. Attached are both clean and redlined copies of the draft, showing the changes we have made (since February 6) in response to your feedback. We ask that you use the attached version of the template for the purpose of your spring Advisory Committee meetings.

The major change to the text of the Rule (since the February 6 draft) is that we have moved former subdivision (a)(6) – concerning inaccessibility – earlier in the Rule; it now is subdivision (a)(3). We have also made some minor changes to the Rule's wording and we have made some alterations in the Note.

We welcome your further reactions to these revisions. Thank you.

Encls.

**Rule 6. Computing and Extending Time**

**(a) Computing Time.** The following rules apply in computing any time period specified in these rules or in any statute, local rule, or court order.

**(1)** ***Period Stated in Days or a Longer Unit.*** When the period is stated in days or a longer unit of time:

**(A)** exclude the day of the event that triggers the period;

**(B)** count every day, including intermediate Saturdays, Sundays, and legal holidays; and

**(C)** include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

**(2)** ***Period Stated in Hours.*** When the period is stated in hours:

**(A)** begin counting immediately on the occurrence of the event that triggers the period;

**(B)** count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

**(C)** if the period would end on a Saturday, Sunday, or legal holiday, then continue the period until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

**(3)** ***Inaccessibility of Clerk's Office.*** Unless the court orders otherwise, if the clerk's office is inaccessible:

**(A)** on the last day of a filing period computed under Rule 6(a)(1), then the time for filing is extended to the first day when the clerk's office is accessible that is not a Saturday, Sunday, or legal holiday; or

**(B)** during the last hour of a filing period computed under Rule 6(a)(2), then the time for filing is extended to the same time on the first day when the clerk's office is accessible that is not a Saturday, Sunday, or legal holiday.

**(4)** ***"Last Day" Defined.*** Unless a different time is set by a statute, local rule, or order in the case, the last day ends:

(A) for electronic filing, at midnight in the court's time zone; and

(B) for filing by other means, when the clerk's office is scheduled to close.

**(5)** ***"Next Day" Defined.*** The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

**(6)** ***"Legal Holiday" Defined.*** "Legal holiday" means:

**(A)** the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; and

**(B)** any other day declared a holiday by the President, Congress, or the state where the district court is located.

## Committee Note

**Subdivision (a).** Subdivision (a) has been amended to simplify and clarify the provisions that describe how deadlines are computed. Subdivision (a) governs the computation of any time period found in a Federal Rule of Civil Procedure, a statute, a local rule, or a court order. In accordance with Rule 83(a)(1), a local rule may not direct that a deadline be computed in a manner inconsistent with subdivision (a).

The time-computation provisions of subdivision (a) apply only when a time period must be computed. They do not apply when a fixed time to act is set. The amendments thus carry forward the approach taken in *Violette v. P.A. Days, Inc.*, 427 F.3d 1015, 1016 (6th Cir. 2005) (holding that Civil Rule 6(a) "does not apply to situations where the court has established a specific calendar day as a deadline"), and reject the contrary holding of *In re American Healthcare Management, Inc.*, 900 F.2d 827, 832 (5th Cir. 1990) (holding that Bankruptcy Rule 9006(a) governs treatment of date-certain deadline set by court order). If, for example, the date for filing is "no later than November 1, 2007," subdivision (a) does not govern. But if a filing is required to be made "within 10 days" or "within 72 hours," subdivision (a) describes how that deadline is computed.

**Subdivision (a)(1).** New subdivision (a)(1) addresses the computation of time periods that are stated in days. It also applies to time periods that are stated in weeks, months, or years. See, e.g., Rule 60(b).

Under former Rule 6(a), a period of 11 days or more was computed differently than a period of less than 11 days. Intermediate Saturdays, Sundays, and legal holidays were included in computing the longer periods, but excluded in computing the shorter periods. Former Rule 6(a) thus made computing deadlines unnecessarily complicated and led to counterintuitive results. For example, a 10-day period and a 14-day period that started on the same day usually ended on the same day — and, not infrequently, the 10-day period actually ended later than the 14-day period. *See Miltimore Sales, Inc. v. Int'l Rectifier, Inc.*, 412 F.3d 685, 686 (6th Cir. 2005).

Under new subdivision (a)(1), all deadlines stated in days (no matter the length) are computed in the same way. The day of the event that triggers the deadline is not counted. All other days — including intermediate Saturdays, Sundays, and legal holidays — are counted, with only one exception: If the period ends on a Saturday, Sunday, or legal holiday, then the deadline falls on the next day that is not a Saturday, Sunday, or legal holiday. An illustration is provided below, in the discussion of subdivision (a)(5). Subdivision (a)(3) addresses filing deadlines that expire on a day when the clerk's office is inaccessible.

Where subdivision (a) formerly referred to the "act, event, or default" that triggers the deadline, new subdivision (a) refers simply to the "event" that triggers the deadline; this change in terminology is adopted for brevity and simplicity, and is not intended to change meaning.

Periods previously expressed as less than 11 days will be shortened as a practical matter by the decision to count intermediate Saturdays, Sundays, and legal holidays in computing all periods. Many of those periods have been lengthened to compensate for the change. See, e.g., [CITE].

**Subdivision (a)(2).** New subdivision (a)(2) addresses the computation of time periods that are stated in hours. No such deadline currently appears in the Federal Rules of Civil Procedure. But some statutes contain deadlines stated in hours, as do some court orders issued in expedited proceedings.

Under new subdivision (a)(2), a deadline stated in hours starts to run immediately on the occurrence of the event that triggers the deadline. The deadline generally ends when the time expires. If, however, the time period expires at a specific time (say, 2:17 p.m.) on a Saturday, Sunday, or legal holiday, then the deadline is extended to the same time (2:17 p.m.) on the next day that is not a Saturday, Sunday, or legal holiday. Periods stated in hours are not to be "rounded up" to the next whole hour. Subdivision (a)(3) addresses situations when the clerk's office is inaccessible during the last hour before a filing deadline expires.

Subdivision (a)(2)(B) directs that every hour be counted. Thus, for example, a 72-hour period that commences at 10:23 a.m. on Friday, November 2, 2007, will run until 9:23 a.m. on Monday, November 5; the discrepancy in start and end times in this example results from the intervening shift from daylight saving time to standard time.

**Subdivision (a)(3).** When determining the last day of a filing period stated in days or a longer unit of time, a day on which the clerk's office is not accessible because of the weather or another reason is treated like a Saturday, Sunday, or legal holiday. When determining the end of a filing period stated in hours, if the clerk's office is inaccessible during the last hour of the filing period computed under subdivision (a)(2) then the period is extended to the same time on the next day that is not a weekend, holiday or day when the clerk's office is inaccessible.

Subdivision (a)(3)'s extensions apply "[u]nless the court orders otherwise." In some circumstances, the court might not wish a period of inaccessibility to trigger a full 24-hour extension; in those instances, the court can specify a briefer extension.

The text of the rule no longer refers to "weather or other conditions" as the reason for the inaccessibility of the clerk's office. The reference to "weather" was deleted from the text to underscore that inaccessibility can occur for reasons unrelated to weather, such as an outage of the electronic filing system. Weather can still be a reason for inaccessibility of the clerk's office. The rule does not attempt to define inaccessibility; the concept of inaccessibility will continue to develop through caselaw, *see, e.g.*, William G. Phelps, *When Is Office of Clerk of Court Inaccessible Due to Weather or Other Conditions for Purpose of Computing Time Period for Filing Papers under Rule 6(a) of Federal Rules of Civil Procedure*, 135 A.L.R. Fed. 259 (1996) (collecting cases), while many local provisions address inaccessibility for purposes of electronic

filing, *see, e.g.*, D. Kan. Rule 5.4.11 ("A Filing User whose filing is made untimely as the result of a technical failure may seek appropriate relief from the court.").

**Subdivision (a)(4).** New subdivision (a)(4) defines the end of the last day of a period for purposes of subdivision (a)(1). Subdivision (a)(4) does not apply to the computation of periods stated in hours under subdivision (a)(2). Subdivision (a)(4)'s definition does not apply if a different time is set by a statute, local rule, or order in the case. A local rule may provide, for example, that papers filed in a drop box after the normal hours of the clerk's office are filed as of the day that is date-stamped on the papers by a device in the drop box.

28 U.S.C. § 452 provides that "[a]ll courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders." A corresponding provision exists in Rule 77(a). Some courts have held that these provisions permit an after-hours filing by handing the papers to an appropriate official. *See, e.g.*, *Casalduc v. Diaz*, 117 F.2d 915, 917 (1st Cir. 1941). Subdivision (a)(4) does not address the court's authority to permit such a filing under the statute; instead, the rule is designed to deal with the ordinary course of events.

**Subdivision (a)(5).** New subdivision (a)(5) defines the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C). The Federal Rules of Civil Procedure contain both forward-looking time periods and backward-looking time periods. A forward-looking time period requires something to be done within a period of time *after* an event. See, e.g., Rule 59(b) (motion for new trial "shall be filed no later than 10 days after entry of the judgment"). A backward-looking time period requires something to be done within a period of time *before* an event. *See, e.g.*, Rule 26(f) (parties must hold Rule 26(f) conference "as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b)"). In determining what is the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C), one should continue counting in the same direction — that is, forward when computing a forward-looking period and backward when computing a backward-looking period. If, for example, a filing is due within 10 days *after* an event, and the tenth day falls on Saturday, September 1, 2007, then the filing is due on Tuesday, September 4, 2007 (Monday, September 3, is Labor Day). But if a filing is due 10 days *before* an event, and the tenth day falls on Saturday, September 1, then the filing is due on Friday, August 31.

**Subdivision (a)(6).** New subdivision (a)(6) defines "legal holiday" for purposes of the Federal Rules of Civil Procedure, including the time-computation provisions of subdivisions (a)(1) and (a)(2).

**Rule 6. Computing and Extending Time**

**(a) Computing Time.** The following rules apply in computing any time period specified in these rules or in any statute, local rule, or court order.

**(1)** ***Period Stated in Days or a Longer Unit.*** When the period is stated in days or a longer unit of time:

**(A)** exclude the day of the event that triggers the period;

**(B)** count every day, including intermediate Saturdays, Sundays, and legal holidays; and

**(C)** include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

**(2)** ***Period Stated in Hours.*** When the period is stated in hours:

**(A)** begin counting immediately on the occurrence of the event that triggers the period;

**(B)** count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

**(C)** if the period would end on a Saturday, Sunday, or legal holiday, then continue the period until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(3) ***Inaccessibility of Clerk's Office.*** Unless the court orders otherwise, if the clerk's office is inaccessible:

(A) on the last day of a filing period computed under Rule 6(a)(1), then the time for filing is extended to the first day when the clerk's office is accessible that is not a Saturday, Sunday, or legal holiday; or

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(B) during the last hour of a filing period computed under Rule 6(a)(2), then the time for filing is extended to the same time on the first day when the clerk's office is accessible that is not a Saturday, Sunday, or legal holiday.

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(34) ***"Last Day" Defined.*** Unless a different time is set by a statute, local rule, or order in the case, the last day ends:

(A) for electronic filing, at midnight in the court's time zone; and

(B) for filing by other means, when the clerk's office is scheduled to close.

(45) ***"Next Day" Defined.*** The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(56) ***"Legal Holiday" Defined.*** "Legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; and

**(B)** any other day declared a holiday by the President, Congress, or the state where the district court is located.

~~**(6)** ***Inaccessibility of clerk's office.*** Unless the court otherwise orders, if the clerk's office is inaccessible:~~

~~**(A)** on the last day of a filing period computed under (a)(1), then the time for filing is extended to the first day when the clerk's office is accessible that is not a Saturday, Sunday or legal holiday.~~

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**Committee Note**

**Subdivision (a).** Subdivision (a) has been amended to simplify and clarify the provisions that describe how deadlines are computed. Subdivision (a) governs the computation of any time period found in a Federal Rule of Civil Procedure, a statute, a local rule, or a court order. In accordance with Rule 83(a)(1), a local rule may not direct that a deadline be computed in a manner inconsistent with subdivision (a).

The time-computation provisions of subdivision (a) apply only when a time period must be computed. They do not apply when a fixed time to act is set. The amendments thus carry forward the approach taken in *Violette v. P.A. Days, Inc.*, 427 F.3d 1015, 1016 (6th Cir. 2005) (holding that Civil Rule 6(a) "does not apply to situations where the court has established a specific calendar day as a deadline"), and reject the contrary holding of *In re American Healthcare Management, Inc.*, 900 F.2d 827, 832 (5th Cir. 1990) (holding that Bankruptcy Rule 9006(a) governs treatment of date-certain deadline set by court order). If, for example, athe date for filing is ~~required to be made~~ "no later than November 1, 2007," subdivision (a) does not govern. But if a filing is required to be made "within 10 days" or "within 72 hours," subdivision (a) describes how that deadline is computed.

**Subdivision (a)(1).** New subdivision (a)(1) addresses the computation of time periods that are stated in days. It also applies to time periods that are stated in weeks, months, or years. See, e.g., Rule 60(b).

Under former Rule 6(a), a period of 11 days or more was computed differently than a period of less than 11 days. Intermediate Saturdays, Sundays, and legal holidays were included in computing the longer periods, but excluded in computing the shorter periods. Former Rule 6(a) thus made computing deadlines unnecessarily complicated and led to counterintuitive results. For example, a 10-day period and a 14-day period that started on the same day usually ended on the same day — and, not infrequently, the 10-day period actually ended later than the 14-day period. *See Miltimore Sales, Inc. v. Int'l Rectifier, Inc.*, 412 F.3d 685, 686 (6th Cir. 2005).

Under new subdivision (a)(1), all deadlines stated in days (no matter the length) are computed in the same way. The day of the event that triggers the deadline is not counted. All other days — including intermediate Saturdays, Sundays, and legal holidays — are counted, with only one exception: If the period ends on a Saturday, Sunday, or legal holiday, then the deadline falls on the next day that is not a Saturday, Sunday, or legal holiday. An illustration is provided below, in the discussion of subdivision (a)(~~4~~5). Subdivision (a)(3) addresses filing deadlines that expire on a day when the clerk's office is inaccessible.

Where subdivision (a) formerly referred to the "act, event, or default" that triggers the deadline, new subdivision (a) refers simply to the "event" that triggers the deadline; this change in terminology is adopted for brevity and simplicity, and is not intended to change meaning.

Periods previously expressed as less than 11 days will be shortened as a practical matter by the decision to count intermediate Saturdays, Sundays, and legal holidays in computing all periods. Many of those periods have been lengthened to compensate for the change. See, e.g., [CITE].

~~Subdivision (a)(6) addresses filing deadlines that expire on a day when the clerk's office is inaccessible.~~

**Subdivision (a)(2).** New subdivision (a)(2) addresses the computation of time periods that are stated in hours. No such deadline currently appears in the Federal Rules of Civil Procedure. But some statutes contain deadlines stated in hours, as do some court orders issued in expedited proceedings.

Under new subdivision (a)(2), a deadline stated in hours starts to run immediately on the occurrence of the event that triggers the deadline. The deadline generally ends when the time expires. If, however, the time period expires at a specific time (say, 2:17 p.m.) on a Saturday, Sunday, or legal holiday, then the deadline is extended to the same time (2:17 p.m.) on the next day that is not a Saturday, Sunday, or legal holiday. Periods stated in hours are not to be "rounded up" to the next whole hour. Subdivision (a)(6~~3~~) addresses situations when the clerk's office is inaccessible during the last hour before a filing deadline expires.

Subdivision (a)(2)(B) directs that every hour be counted. Thus, for example, a 72-hour period that commences at 10:23 a.m. on Friday, November 2, 2007, will run until 9:23 a.m. on Monday, November 5; the discrepancy in start and end times in this example results from the intervening shift from ~~D~~daylight ~~S~~saving ~~T~~time to standard time.

~~**Subdivision (a)(3).** New subdivision (a)(3) defines the end of the last day of a period for purposes of subdivision (a)(1). Subdivision (a)(3) does not apply to the computation of periods stated in hours under subdivision (a)(2). Subdivision (a)(3)'s definition does not apply if a different time is set by a statute, local rule, or order in the case.~~

~~28 U.S.C. § 452 provides that "[a]ll courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders." A corresponding provision exists in Rule 77(a). Some courts have held that these provisions permit an after-hours filing to be made by locating an appropriate official and handing the papers to that official. *See, e.g.*, *Casalduc v. Diaz*, 117 F.2d 915, 917 (1st Cir. 1941). Subdivision (a)(3) does not address the court's authority to permit such a filing under the statute; instead, the rule is designed to deal with the ordinary course of events.~~

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~~**Subdivision (a)(5).** New subdivision (a)(5) defines "legal holiday" for purposes of the Federal Rules of Civil Procedure, including the time-computation provisions of subdivisions (a)(1) and (a)(2).~~

**Subdivision (a)(63).** When ~~computing~~determining the last day of a filing period stated in days or a longer unit of time, a day on which the clerk's office is not accessible because of the weather or another reason is treated like a Saturday, Sunday, or legal holiday. When ~~computing~~determining the end of a filing period stated in hours, if the clerk's office is inaccessible during the last hour of the filing period computed under subdivision (a)(2) then the period is extended to the same time on the next day that is not a weekend, holiday or day when the clerk's office is inaccessible.

Subdivision (a)(63)'s extensions apply "[u]nless the court orders otherwise ~~orders~~." In some circumstances, the court might not wish a period of inaccessibility to trigger a full 24-hour extension; in those instances, the court can specify a briefer extension.

The text of the rule no longer refers to "weather or other conditions" as the reason for the inaccessibility of the clerk's office. The reference to "weather" was deleted from the text to underscore that inaccessibility can occur for reasons unrelated to weather, such as an outage of the electronic filing system. Weather can still be a reason for inaccessibility of the clerk's office. The rule does not attempt to define inaccessibility; the concept of inaccessibility will continue to develop through caselaw, *see, e.g.*, William G. Phelps, *When Is Office of Clerk of Court Inaccessible Due to Weather or Other Conditions for Purpose of Computing Time Period for Filing Papers under Rule 6(a) of Federal Rules of Civil Procedure*, 135 A.L.R. Fed. 259 (1996) (collecting cases), while many local provisions address inaccessibility for purposes of electronic filing, *see, e.g.*, D. Kan. Rule 5.4.11 ("A Filing User whose filing is made untimely as the result of a technical failure may seek appropriate relief from the court.").

**Subdivision (a)(4).** New subdivision (a)(4) defines the end of the last day of a period for purposes of subdivision (a)(1). Subdivision (a)(4) does not apply to the computation of periods stated in hours under subdivision (a)(2). Subdivision (a)(4)'s definition does not apply if a different time is set by a statute, local rule, or order in the case. A local rule may provide, for

example, that papers filed in a drop box after the normal hours of the clerk's office are filed as of the day that is date-stamped on the papers by a device in the drop box.

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**Subdivision (a)(45).** New subdivision (a)(45) defines the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C). The Federal Rules of Civil Procedure contain both forward-looking time periods and backward-looking time periods. A forward-looking time period requires something to be done within a period of time *after* an event. See, e.g., Rule 59(b) (motion for new trial "shall be filed no later than 10 days after entry of the judgment"). A backward-looking time period requires something to be done within a period of time *before* an event. *See, e.g.*, Rule 5626(cf) (~~summary judgment motion "shall be served~~parties must hold Rule 26(f) conference "as soon as practicable and in any event at least ~~10~~21 days before ~~the time fixed for the hearing~~"a scheduling conference is held or a scheduling order is due under Rule 16(b)"). In determining what is the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C), one should continue counting in the same direction — that is, forward when computing a forward-looking period and backward when computing a backward-looking period. If, for example, a filing is due within 10 days *after* an event, and the tenth day falls on Saturday, September 1, 2007, then the filing is due on Tuesday, September 4, 2007 (Monday, September 3, is Labor Day). But if a filing is due 10 days *before* an event, and the tenth day falls on Saturday, September 1, then the filing is due on Friday, August 31.

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**Subdivision (a)(6).** New subdivision (a)(6) defines "legal holiday" for purposes of the ~~deletion from~~Federal Rules of Civil Procedure, including the ~~text is not meant to suggest otherwise.~~time-computation provisions of subdivisions (a)(1) and (a)(2).

| Title | Section | Subsection | Nature of deadline | Type | App | Bnkr | Civil | Crim | Evid | Length - Unit | Length - Number | Issues | Comments |
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| 2 | 8 | (b)(4)(B)(i) | (4) Extraordinary circumstances<br>(A) In general<br>In this subsection, "extraordinary circumstances" occur when the Speaker of the House of Representatives announces that vacancies in the representation from the States in the House exceed 100.<br>(B) Judicial review<br>If any action is brought for declaratory or injunctive relief to challenge an announcement made under subparagraph (A), the following rules shall apply:<br>(i) Not later than 2 days after the announcement, the action shall be filed in the United States District Court having jurisdiction in the district of the Member of the House of Representatives whose seat has been announced to be vacant and shall be heard by a 3-judge court convened pursuant to section 2284 of title 28, United States Code.<br>(ii) A copy of the complaint shall be delivered promptly to the Clerk of the House of Representatives.<br>(iii) A final decision in the action shall be made within 3 days of the filing of such action and shall not be reviewable.<br>(iv) The executive authority of the State that contains the district of the Member of the House of Representatives whose seat has been announced to be vacant shall have the right to intervene either in support of or opposition to the position of a party to the case regarding the announcement of such vacancy. | Time to seek judicial review | | | Y | | | Day | 2 | yellow flag on Westlaw | |
| 2 | 8 | (b)(4)(B)(iii) | (4) Extraordinary circumstances<br>(A) In general<br>In this subsection, "extraordinary circumstances" occur when the Speaker of the House of Representatives announces that vacancies in the representation from the States in the House exceed 100.<br>(B) Judicial review<br>If any action is brought for declaratory or injunctive relief to challenge an announcement made under subparagraph (A), the following rules shall apply:<br>(i) Not later than 2 days after the announcement, the action shall be filed in the United States District Court having jurisdiction in the district of the Member of the House of Representatives whose seat has been announced to be vacant and shall be heard by a 3-judge court convened pursuant to section 2284 of title 28, United States Code.<br>(ii) A copy of the complaint shall be delivered promptly to the Clerk of the House of Representatives.<br>(iii) A final decision in the action shall be made within 3 days of the filing of such action and shall not be reviewable.<br>(iv) The executive authority of the State that contains the district of the Member of the House of Representatives whose seat has been announced to be vacant shall have the right to intervene either in support of or opposition to the position of a party to the case regarding the announcement of such vacancy. | Time for court to act | | | Y | | | Day | 3 | yellow flag on Westlaw | |

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| 2 | 386 | (c) | (c) Order and time of taking testimony<br>The order in which the parties may take testimony shall be as follows:<br>(1) Contestant may take testimony within thirty days after service of the answer, or, if no answer is served within the time provided in section 383 of this title, within thirty days after the time for answer has expired.<br>(2) Contestee may take testimony within thirty days after contestant's time for taking testimony has expired.<br>(3) If contestee has taken any testimony or has filed testimonial affidavits or stipulations under section 387(c) of this title, contestant may take rebuttal testimony within ten days after contestee's time for taking testimony has expired. | Time for litigant to act | | | Y | | | Day | 10 | | even though this concerns election challenges in House of Representatives under Federal Contested Elections Act, this 10-day period concerns the time for obtaining a subpoena from a federal district court. See 2 USC 388(a). Currently, a time computation method is explicitly provided by 2 USC 394. |
| 2 | 388 | (b) | (a) Issuance<br>Upon application of any party, a subpena for attendance at a deposition shall be issued by:<br>(1) a judge or clerk of the United States district court for the district in which the place of examination is located;<br>...<br>(b) Time, method, and proof of service<br>Service of the subpena shall be made upon the witness no later than three days before the day on which his attendance is directed. A subpena may be served by any person who is not a party to the contested election case and is not less than eighteen years of age. Service of a subpena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering to him the fee for one day's attendance and the mileage allowed by section 389 of this title. Written proof of service shall be made under oath by the person making same and shall be filed with the Clerk. | Notice to litigants or other entities | | | Y | | | Day | 3 | | Currently, a time computation method is explicitly provided by 2 USC 394. I've omitted 2 USC 387, since that appears to concern procedure when no subpoena is used, and thus when no court is involved. |

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| 2 | 922 | (e) | (b) Appeal to Supreme Court<br>Notwithstanding any other provision of law, any order of the United States District Court for the District of Columbia which is issued pursuant to an action brought under paragraph (1), (2), or (3) of subsection (a) of this section shall be reviewable by appeal directly to the Supreme Court of the United States. Any such appeal shall be taken by a notice of appeal filed within 10 days after such order is entered; and the jurisdictional statement shall be filed within 30 days after such order is entered. No stay of an order issued pursuant to an action brought under paragraph (1), (2), or (3) of subsection (a) of this section shall be issued by a single Justice of the Supreme Court.<br>* * *<br>(e) Timing of relief<br>No order of any court granting declaratory or injunctive relief from the order of the President issued under section 904 of this title, including but not limited to relief permitting or requiring the expenditure of funds sequestered by such order, shall take effect during the pendency of the action before such court, during the time appeal may be taken, or, if appeal is taken, during the period before the court to which such appeal is taken has entered its final order disposing of such action. | Timing of relief | | | Y | | | Day | 10 | Section 922(e) refers to Section 904, which is a part of the Gramm-Rudman-Hollings Act that I thought might have been repealed; RA checked this and reports it has not been repealed. | 922(b), re time limit for filing NOA, is presumably not governed directly by the Civil Rules? |
| 7 | 18 | (f) | (e) Review<br>Any order of the Commission entered hereunder shall be reviewable on petition of any party aggrieved thereby, by the United States Court of Appeals for any circuit in which a hearing was held, or if no hearing was held, any circuit in which the appellee is located * * *<br>(f) Automatic bar from trading and suspension for noncompliance; effect of appeal<br>Unless the party against whom a reparation order has been issued shows to the satisfaction of the Commission within fifteen days from the expiration of the period allowed for compliance with such order that either an appeal as herein authorized has been taken or payment of the full amount of the order (or any agreed settlement thereof) has been made, such party shall be prohibited automatically from trading on all registered entities and, if the party is registered with the Commission, such registration shall be suspended automatically at the expiration of such fifteen-day period until such party shows to the satisfaction of the Commission that payment of such amount with interest thereon to date of payment has been made: Provided, That if on appeal the appellee prevails or if the appeal is dismissed, the automatic prohibition against trading and suspension of registration shall become effective at the expiration of thirty days from the date of judgment on the appeal, but if the judgment is stayed by a court of competent jurisdiction, the suspension shall become effective ten days after the expiration of such stay, unless prior thereto the judgment of the court has been satisfied. | Effective date of consequences after judicial review of agency action | Y | | Y | | | Day | 10 | | |

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| 7 | 2023 | (a)(17) | (13) If the store, concern, or State agency feels aggrieved by such final determination, it may obtain judicial review thereof by filing a complaint against the United States in the United States court for the district in which it resides or is engaged in business, or, in the case of a retail food store or wholesale food concern, in any court of record of the State having competent jurisdiction, within thirty days after the date of delivery or service of the final notice of determination upon it, requesting the court to set aside such determination.<br>* * *<br>(17) During the pendency of such judicial review, or any appeal therefrom, the administrative action under review shall be and remain in full force and effect, unless on application to the court on not less than ten days' notice, and after hearing thereon and a consideration by the court of the applicant's likelihood of prevailing on the merits and of irreparable injury, the court temporarily stays such administrative action pending disposition of such trial or appeal. | Notice to litigants or other entities | | | Y | | | Day | 10 | | |
| 7 | 136h | (d)(3) | (d) Limitations<br>* * *<br>(3) If the Administrator proposes to disclose information described in clause (A), (B), or (C) of paragraph (1) or in paragraph (2) of this subsection, the Administrator shall notify by certified mail the submitter of such information of the intent to release such information. The Administrator may not release such information, without the submitter's consent, until thirty days after the submitter has been furnished such notice. Where the Administrator finds that disclosure of information described in clause (A), (B), or (C) of paragraph (1) of this subsection is necessary to avoid or lessen an imminent and substantial risk of injury to the public health, the Administrator may set such shorter period of notice (but not less than ten days) and such method of notice as the Administrator finds appropriate. During such period the data submitter may institute an action in an appropriate district court to enjoin or limit the proposed disclosure. The court may enjoin disclosure, or limit the disclosure or the parties to whom disclosure shall be made, to the extent that--<br>(A) in the case of information described in clause (A), (B), or (C) of paragraph (1) of this subsection, the proposed disclosure is not required to protect against an unreasonable risk of injury to health or the environment; or<br>(B) in the case of information described in paragraph (2) of this subsection, the public interest in availability of the information in the public proceeding does not outweigh the interests in preserving the confidentiality of the information. | Time to seek review of agency action | | | Y | | | Day | 10 | | |

| Title | Section | Subsection | Nature of deadline | Type | App | Bnkr | Civil | Crim | Evid | Length - Unit | Length - Number | Issues | Comments |
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| 7 | 499g | (d) | (c) Appeal from reparation order; proceedings<br>Either party adversely affected by the entry of a reparation order by the Secretary may, within thirty days from and after the date of such order, appeal therefrom to the district court of the United States for the district in which said hearing was held: Provided, That in cases handled without a hearing in accordance with subsections (c) and (d) of section 499f of this title or in which a hearing has been waived by agreement of the parties, appeal shall be to the district court of the United States for the district in which the party complained against is located. ***<br>(d) Suspension of license for failure to obey reparation order or appeal<br>Unless the licensee against whom a reparation order has been issued shows to the satisfaction of the Secretary within five days from the expiration of the period allowed for compliance with such order that he has either taken an appeal as herein authorized or has made payment in full as required by such order his license shall be suspended automatically at the expiration of such five-day period until he shows to the satisfaction of the Secretary that he has paid the amount therein specified with interest thereon to date of payment: Provided, That if on appeal the appellee prevails or if the appeal is dismissed the automatic suspension of license shall become effective at the expiration of thirty days from the date of the judgment on the appeal, but if the judgment is stayed by a court of competent jurisdiction the suspension shall become effective ten days after the expiration of such stay, unless prior thereto the judgment of the court has been satisfied. | Effective date of consequences after judicial review of agency action | | | Y | | | Day | 10 | | |
| 7 | 499j | | Any order of the Secretary under this chapter other than an order for the payment of money shall take effect within such reasonable time, not less than ten days, as is prescribed in the order, and shall continue in force until his further order, or for a specified period of time, accordingly as it is prescribed in the order, unless such order is suspended, modified, or set aside by the Secretary or is suspended, modified, or set aside by a court of competent jurisdiction. Any such order of the Secretary, if regularly made, shall be final, unless before the date prescribed for its taking effect application is made to a court of competent jurisdiction by the commission merchant, dealer, or broker against whom such order is directed to have such order set aside or its enforcement, operation, or execution suspended or restrained. | Time to seek review of agency action | | | Y | | | Day | 10 | | |

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| 8 | 1226a | (a)(5) | (a) Detention of terrorist aliens<br>(1) Custody<br>The Attorney General shall take into custody any alien who is certified under paragraph (3).<br>* * *<br>(3) Certification<br>The Attorney General may certify an alien under this paragraph if the Attorney General has reasonable grounds to believe that the alien--<br>(A) is described in section 1182(a)(3)(A)(i), 1182(a)(3)(A)(iii), 1182(a)(3)(B), 1227(a)(4)(A)(i), 1227(a)(4)(A)(iii), or 1227(a)(4)(B) of this title; or<br>(B) is engaged in any other activity that endangers the national security of the United States.<br>* * *<br>(5) Commencement of proceedings<br>The Attorney General shall place an alien detained under paragraph (1) in removal proceedings, or shall charge the alien with a criminal offense, not later than 7 days after the commencement of such detention. If the requirement of the preceding sentence is not satisfied, the Attorney General shall release the alien. | Time for government to act | | | | Y | | Day | 7 | | |
| 9 | 4 | | A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there | Notice to litigants or other entities | | | Y | | | Day | 5 | | |

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| | | | is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof. | | | | | | | | | | |
| 10 | 950d | (d) | (a) Interlocutory appeal.--(1) Except as provided in paragraph (2), in a trial by military commission under this chapter, the United States may take an interlocutory appeal to the Court of Military Commission Review of any order or ruling of the military judge that--<br>(A) terminates proceedings of the military commission with respect to a charge or specification;<br>(B) excludes evidence that is substantial proof of a fact material in the proceeding; or<br>(C) relates to a matter under subsection (d), (e), or (f) of section 949d of this title or section 949j(c) of this title.<br>(2) The United States may not appeal under paragraph (1) an order or ruling that is, or amounts to, a finding of not guilty by the military commission with respect to a charge or specification.<br>(b) Notice of appeal.--The United States shall take an appeal of an order or ruling under subsection (a) by filing a notice of appeal with the military judge within five days after the date of such order or ruling.<br>(c) Appeal.--An appeal under this section shall be forwarded, by means specified in regulations prescribed the Secretary of Defense, directly to the Court of Military Commission Review. In ruling on an appeal under this section, the Court may act only with respect to matters of law.<br>(d) Appeal from adverse ruling.--The United States may appeal an adverse ruling on an appeal under subsection (c) to the United States Court of Appeals for the District of Columbia Circuit by filing a petition for review in the Court of Appeals within 10 days after the date of such ruling. Review under this subsection shall be at the discretion of the Court of Appeals. | Time to take appeal from court | Y | | | | | Day | 10 | what rules apply in Court of Military Commission Review? | Enacted by Pub.L. 109-366, § 3(a)(1), Oct. 17, 2006, 120 Stat. 2620. I assume that other provisions in this act which concern practice before the military commission or in the Court of Military Commission Review, because I assume none of the Enabling Act sets of rules applies in those proceedings. See 10 USC 950c(b)(3) (waiver of right of review in CMCR) & 10 USC 950d(b) (appeal by US to CMCR). |

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| 10 | 2663 | (g) | "(f) ADVANCE NOTICE OF USE OF CONDEMNATION.--(1) Before commencing any legal proceeding to acquire any interest in land under subsection (a), including acquisition for temporary use, by condemnation, eminent domain, or seizure, the Secretary of the military department concerned shall--<br>"(A) pursue, to the maximum extent practicable, all other available options for the acquisition or use of the land ...; and<br>"(B) submit to the congressional defense committees a report containing--[details omitted]<br>"(2) The Secretary concerned may have proceedings brought in the name of the United States to acquire the land after the end of the 21-day period beginning on the date on which the report is received by the committees or, if over sooner, the end of the 14-day period beginning on the date on which a copy of the report is provided in an electronic medium pursuant to section 480 of this title.<br>"(g) EXCEPTION TO ADVANCE NOTICE REQUIREMENT.--If the Secretary of a military department determines that the use of condemnation, eminent domain, or seizure to acquire an interest in land is required under subsection (a) to satisfy a requirement vital to national security, and that any delay would be detrimental to national security or the protection of health, safety, or the environment, the Secretary may have proceedings brought in the name of the United States to acquire the land in advance of submitting the report required by subsection (f)(1)(B). However, the Secretary shall submit the report not later than seven days after commencement of the legal proceedings with respect to the land." | Notice to litigants or other entities | | | Y | | | Day | 7 | | Available at 120 Stat 2083, 2474.<br>Not yet available in USC database, presumably b/c PL 109-364 was passed 10/17/06. Seems like a borderline provision b/c the 7-day requirement concerns a report within a framework for congressional oversight of the decision to initiate condemnation proceedings. |
| 10 | 7666 | (a) | (a) If a sale of prize property is ordered by the court, the marshal shall--<br>(1) prepare and circulate full catalogues and schedules of the property to be sold and return a copy of each to the court;<br>(2) advertise the sale fully and conspicuously by posters and in newspapers ordered by the court;<br>(3) give notice to the naval prize commissioner at least five days before the sale; and<br>(4) keep the goods open for inspection for at least three days before the sale. | Notice to litigants or other entities | | | Y | | | Day | 3 | yellow flag on Westlaw -- apparently due to proposed legislation | see also 5-day notice provision |

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| 10 | 7726 | (c) | (a) A claimant or party who considers himself adversely affected by a stay under this chapter may serve a written notice on the Secretary of the Navy at Washington, D.C., requesting him to reconsider the stay previously issued and to issue a new certificate. The notice shall identify the stay by means of an attached copy of the certificate of the Secretary or a sufficient description of the stay. The notice may not contain any recital of the facts or circumstances involved.<br>(b) Within ten days after receiving notice under this section, the Secretary or his designee shall hold a secret meeting at which the claimant or party, or his representative, may present any facts and arguments he thinks material.<br>(c) Within ten days after a hearing under this section, the Secretary shall file with the court that ordered the stay a new certificate stating whether the stay is then to be terminated or for what period the stay is to continue in effect. If the Secretary fails to file a new certificate, the court, upon application by the claimant or party, shall issue an order directing the Secretary to file a new certificate within a specified time. | Time for government to act | | | Y | | | Day | 10 | yellow flag on Westlaw -- apparently due to proposed legislation | 10 USC 7722(a) provides: "Whenever in time of war the Secretary of the Navy certifies to a court, or to a judge of a court, in which a suit described in section 7721 of this title is pending, that the prosecution of the suit would tend to endanger the security of naval operations in the war, or would tend to interfere with those operations, all further proceedings in the suit shall be stayed." |
| 11 | 109 | (h)(3) | (h)(1) Subject to paragraphs (2) and (3), and notwithstanding any other provision of this section, an individual may not be a debtor under this title unless such individual has, during the 180-day period preceding the date of filing of the petition by such individual, received from an approved nonprofit budget and credit counseling agency * * * an individual or group briefing * * * that outlined the opportunities for available credit counseling and assisted such individual in performing a related budget analysis.<br>* * *<br>(3)(A) Subject to subparagraph (B), the requirements of paragraph (1) shall not apply with respect to a debtor who submits to the court a certification that--<br>(i) describes exigent circumstances that merit a waiver of the requirements of paragraph (1);<br>(ii) states that the debtor requested credit counseling services from an approved nonprofit budget and credit counseling agency, but was unable to obtain the services referred to in paragraph (1) during the 5-day period beginning on the date on which the debtor made that request; and<br>(iii) is satisfactory to the court.<br>* * * | Time for bankruptcy participant to act | | Y | | | | | Day | 5 | yellow flag on Westlaw -- apparently due to proposed legislation | |
| 11 | 322 | (a) | (a) Except as provided in subsection (b)(1), a person selected under section 701, 702, 703, 1104, 1163, 1202, or 1302 of this title to serve as trustee in a case under this title qualifies if before five days after such selection, and before beginning official duties, such person has filed with the court a bond in favor of the United States conditioned on the faithful performance of such official duties. | Time for bankruptcy participant to act | | Y | | | | Day | 5 | | |

| Title | Section | Subsection | Nature of deadline | Type | App | Bnkr | Civil | Crim | Evid | Length - Unit | Length - Number | Issues | Comments |
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| 11 | 332 | (a) | (a) If a hearing is required under section 363(b)(1)(B), the court shall order the United States trustee to appoint, not later than 5 days before the commencement of the hearing, 1 disinterested person (other than the United States trustee) to serve as the consumer privacy ombudsman in the case and shall require that notice of such hearing be timely given to such ombudsman. | Time for bankruptcy participant to act | | Y | | | | Day | 5 | | |
| 11 | 342 | (e)(2) | (e)(1) In a case under chapter 7 or 13 of this title of a debtor who is an individual, a creditor at any time may both file with the court and serve on the debtor a notice of address to be used to provide notice in such case to such creditor.<br>(2) Any notice in such case required to be provided to such creditor by the debtor or the court later than 5 days after the court and the debtor receive such creditor's notice of address, shall be provided to such address. | Time for bankruptcy participant to act | | Y | | | | Day | 5 | | |
| 11 | 521 | (e)(2)(A) | (e)(1) If the debtor in a case under chapter 7 or 13 is an individual and if a creditor files with the court at any time a request to receive a copy of the petition, schedules, and statement of financial affairs filed by the debtor, then the court shall make such petition, such schedules, and such statement available to such creditor.<br>(2)(A) The debtor shall provide--<br>(i) not later than 7 days before the date first set for the first meeting of creditors, to the trustee a copy of the Federal income tax return required under applicable law (or at the election of the debtor, a transcript of such return) for the most recent tax year ending immediately before the commencement of the case and for which a Federal income tax return was filed; and<br>(ii) at the same time the debtor complies with clause (i), a copy of such return (or if elected under clause (i), such transcript) to any creditor that timely requests such copy. | Time for bankruptcy participant to act | | Y | | | | Day | 7 | yellow flag on Westlaw -- apparently due to proposed legislation | |
| 11 | 521 | (e)(3) | (3) If a creditor in a case under chapter 13 files with the court at any time a request to receive a copy of the plan filed by the debtor, then the court shall make available to such creditor a copy of the plan--<br>(A) at a reasonable cost; and<br>(B) not later than 5 days after such request is filed. | Time for court to act | | Y | | | | Day | 5 | yellow flag on Westlaw -- apparently due to proposed legislation | |

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| 11 | 521 | (i)(2) | (i)(1) Subject to paragraphs (2) and (4) and notwithstanding section 707(a), if an individual debtor in a voluntary case under chapter 7 or 13 fails to file all of the information required under subsection (a)(1) within 45 days after the date of the filing of the petition, the case shall be automatically dismissed effective on the 46th day after the date of the filing of the petition.<br>(2) Subject to paragraph (4) and with respect to a case described in paragraph (1), any party in interest may request the court to enter an order dismissing the case. If requested, the court shall enter an order of dismissal not later than 5 days after such request.<br>(3) Subject to paragraph (4) and upon request of the debtor made within 45 days after the date of the filing of the petition described in paragraph (1), the court may allow the debtor an additional period of not to exceed 45 days to file the information required under subsection (a)(1) if the court finds justification for extending the period for the filing.<br>(4) Notwithstanding any other provision of this subsection, on the motion of the trustee filed before the expiration of the applicable period of time specified in paragraph (1), (2), or (3), and after notice and a hearing, the court may decline to dismiss the case if the court finds that the debtor attempted in good faith to file all the information required by subsection (a)(1)(B)(iv) and that the best interests of creditors would be served by administration of the case. | Presumptive time for court to act | | Y | | | | Day | 5 | yellow flag on Westlaw -- apparently due to proposed legislation | |
| 11 | 704 | (b)(1) | (b)(1) With respect to a debtor who is an individual in a case under this chapter--<br>(A) the United States trustee (or the bankruptcy administrator, if any) shall review all materials filed by the debtor and, not later than 10 days after the date of the first meeting of creditors, file with the court a statement as to whether the debtor's case would be presumed to be an abuse under section 707(b); and<br>(B) not later than 5 days after receiving a statement under subparagraph (A), the court shall provide a copy of the statement to all creditors. | Time for court to act | | Y | | | | Day | 5 | | |
| 11 | 749 | (b) | (b) Notwithstanding sections 544, 545, 547, 548, and 549 of this title, the trustee may not avoid a transfer made before five days after the order for relief if such transfer is approved by the Commission by rule or order, either before or after such transfer, and if such transfer is--<br>(1) a transfer of a securities contract entered into or carried by or through the debtor on behalf of a customer, and of any cash, security, or other property margining or securing such securities contract; or<br>(2) the liquidation of a securities contract entered into or carried by or through the debtor on behalf of a customer. | Time for bankruptcy participant to act | | Y | | | | Day | 5 | | |

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| 11 | 764 | (b) | (b) Notwithstanding sections 544, 545, 547, 548, 549, and 724(a) of this title, the trustee may not avoid a transfer made before five days after the order for relief, if such transfer is approved by the Commission by rule or order, either before or after such transfer, and if such transfer is--<br>(1) a transfer of a commodity contract entered into or carried by or through the debtor on behalf of a customer, and of any cash, securities, or other property margining or securing such commodity contract; or<br>(2) the liquidation of a commodity contract entered into or carried by or through the debtor on behalf of a customer. | Time for bankruptcy participant to act | | Y | | | | Day | 5 | | |
| 11 | 1113 | (d)(1) | (d)(1) Upon the filing of an application for rejection the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and representative agree. | Presumptive time for court to act | | Y | | | | Day | 7 | yellow flag on Westlaw -- apparently due to proposed legislation | |
| 11 | 1114 | (k)(1) | (k)(1) Upon the filing of an application for modifying retiree benefits, the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and the authorized representative agree. | Presumptive time for court to act | | Y | | | | Day | 7 | yellow flag on Westlaw -- apparently due to proposed legislation | |
| 11 | 1116 | | In a small business case, a trustee or the debtor in possession, in addition to the duties provided in this title and as otherwise required by law, shall--<br>(1) append to the voluntary petition or, in an involuntary case, file not later than 7 days after the date of the order for relief--<br>(A) its most recent balance sheet, statement of operations, cash-flow statement, and Federal income tax return; or<br>(B) a statement made under penalty of perjury that no balance sheet, statement of operations, or cash-flow statement has been prepared and no Federal tax return has been filed; | Time for bankruptcy participant to act | | Y | | | | Day | 7 | | |

| Title | Section | Subsection | Nature of deadline | Type | App | Bnkr | Civil | Crim | Evid | Length - Unit | Length - Number | Issues | Comments |
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| 11 | 1308 | (a) | (a) Not later than the day before the date on which the meeting of the creditors is first scheduled to be held under section 341(a), if the debtor was required to file a tax return under applicable nonbankruptcy law, the debtor shall file with appropriate tax authorities all tax returns for all taxable periods ending during the 4-year period ending on the date of the filing of the petition. | Time for bankruptcy participant to act | | Y | | | | Day | 1 | yellow flag on Westlaw -- apparently due to proposed legislation | |
| 12 | 1708 | (c)(6) | (6) Cease-and-desist orders<br>(A) Whenever the Secretary, upon request of the Mortgagee Review Board, determines that there is reasonable cause to believe that a mortgagee is violating, has violated, or is about to violate, a law, rule or regulation or any condition imposed in writing by the Secretary or the Board, and that such violation could result in significant cost to the Federal Government or the public, the Secretary may issue a temporary order requiring the mortgagee to cease and desist from any such violation * * *<br>(B) Within 10 days after the mortgagee has been served with a temporary cease-and-desist order, the mortgagee may apply to the United States district court for the judicial district in which the home office of the mortgagee is located, or the United States District Court for the District of Columbia, for an injunction setting aside, limiting of suspending the enforcement, operation, or effectiveness of such order pending the completion of the administrative proceedings pursuant to the notice of charges served upon the mortgagee, and such court shall have jurisdiction to issue such injunction. | Time to seek review of agency action | | | Y | | | Day | 10 | yellow flag on Westlaw -- apparently due to proposed legislation | |
| 12 | 1786 | (f)(2) | (f) Temporary cease and desist order; injunctive procedure<br>(1) Whenever the Board shall determine that the violation or threatened violation or the unsafe or unsound practice or practices * * * is likely to cause insolvency or significant dissipation of assets or earnings of the credit union, or is likely to weaken the condition of the credit union or otherwise prejudice the interests of its insured members prior to the completion of the proceedings conducted pursuant to paragraph (1) of subsection (e) of this section, the Board may issue a temporary order requiring the credit union or such party to cease and desist * * *<br>(2) Within ten days after the credit union concerned or any institution-affiliated party has been served with a temporary cease-and-desist order, the credit union or such party may apply to the United States district court for the judicial district in which the home office of the credit union is located, or the United States District Court for the District of Columbia, for an injunction setting aside, limiting, or suspending the enforcement, operation, or effectiveness of such order pending the completion of the administrative proceedings pursuant to the notice of charges served upon the credit union or such party under paragraph (1) of subsection (e) of this section, and such court shall have jurisdiction to issue such injunction. | Time to seek review of agency action | | | Y | | | Day | 10 | yellow flag on Westlaw -- apparently due to proposed legislation | |

| Title | Section | Subsection | Nature of deadline | Type | App | Bnkr | Civil | Crim | Evid | Length - Unit | Length - Number | Issues | Comments |
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| 12 | 1786 | (g)(6) | (6) Within ten days after any director, officer, committee member, or other person has been suspended from office and/or prohibited from participation in the conduct of the affairs of an insured credit union under paragraph (3) of this subsection, such director, officer, committee member, or other person may apply to the United States district court for the judicial district in which the principal office of the credit union is located, or the United States District Court for the District of Columbia, for a stay of such suspension and/or prohibition pending the completion of the administrative proceedings pursuant to the notice served upon such director, officer, committee member, or other person under paragraph (1) or (2) of this subsection, and such court shall have jurisdiction to stay such suspension and/or prohibition. | Time to seek review of agency action | | | Y | | | Day | 10 | yellow flag on Westlaw -- apparently due to proposed legislation | |
| 12 | 1786 | (h)(3) | (3) Not later than ten days after the date on which the Board takes possession and control of the business and assets of an insured credit union pursuant to paragraph (1), such insured credit union may apply to the United States district court for the judicial district in which the principal office of such insured credit union is located or the United States District Court for the District of Columbia, for an order requiring the Board to show cause why it should not be enjoined from continuing such possession and control. Except as provided in this paragraph, no court may take any action, except at the request of the Board by regulation or order, to restrain or affect the exercise of powers or functions of the Board as conservator. | Time to seek review of agency action | | | Y | | | Day | 10 | yellow flag on Westlaw -- apparently due to proposed legislation | |
| 12 | 1787 | (a)(1)(B) | (B) Not later than 10 days after the date on which the Board closes a credit union for liquidation pursuant to paragraph (1), or accepts appointment as liquidating agent pursuant to subsection (b) of this section, such insured credit union may apply to the United States district court for the judicial district in which the principal office of such insured credit union is located or the United States District Court for the District of Columbia, for an order requiring the Board to show cause why it should not be prohibited from continuing such liquidation. Except as otherwise provided in this subparagraph, no court may take any action for or toward the removal of any liquidating agent or, except at the instance of the Board, restrain or affect the exercise of powers or functions of a liquidating agent. | Time to seek review of agency action | | | Y | | | Day | 10 | yellow flag on Westlaw -- apparently due to proposed legislation | |

| Title | Section | Subsection | Nature of deadline | Type | App | Bnkr | Civil | Crim | Evid | Length - Unit | Length - Number | Issues | Comments |
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| 12 | 1817 | (j)(5) | (5) Any person whose proposed acquisition is disapproved after agency hearings under this subsection may obtain review by the United States court of appeals for the circuit in which the home office of the bank [FN2] to be acquired is located, or the United States Court of Appeals for the District of Columbia Circuit, by filing a notice of appeal in such court within ten days from the date of such order, and simultaneously sending a copy of such notice by registered or certified mail to the appropriate Federal banking agency. The appropriate Federal banking agency shall promptly certify and file in such court the record upon which the disapproval was based. The findings of the appropriate Federal banking agency shall be set aside if found to be arbitrary or capricious or if found to violate procedures established by this subsection. | Time to seek review of agency action | Y | | | | | Day | 10 | yellow flag on Westlaw -- apparently due to proposed legislation | |
| 12 | 1818 | (a)(8)(D) | (8) Temporary suspension of insurance<br>(A) In general<br>If the Board of Directors initiates a termination proceeding under paragraph (2), and the Board of Directors, after consultation with the appropriate Federal banking agency, finds that an insured depository institution (other than a savings association to which subparagraph (B) applies) has no tangible capital under the capital guidelines or regulations of the appropriate Federal banking agency, the Corporation may issue a temporary order suspending deposit insurance on all deposits received by the institution.<br>* * *<br>(C) Effective period of temporary order<br>Any order issued under subparagraph (A) shall become effective not earlier than 10 days from the date of service upon the institution and, unless set aside, limited, or suspended by a court in proceedings authorized hereunder, such temporary order shall remain effective and enforceable until an order of the Board under paragraph (3) becomes final or until the Corporation dismisses the proceedings under paragraph (3).<br>(D) Judicial review<br>Before the close of the 10-day period beginning on the date any temporary order has been served upon an insured depository institution under subparagraph (A), such institution may apply to the United States District Court for the District of Columbia, or the United States district court for the judicial district in which the home office of the institution is located, for an injunction setting aside, limiting, or suspending the enforcement, operation, or effectiveness of such order, and such court shall have jurisdiction to issue such injunction. | Time to seek review of agency action | | | Y | | | Day | 10 | yellow flag on Westlaw -- apparently due to proposed legislation | |

| Title | Section | Subsection | Nature of deadline | Type | App | Bnkr | Civil | Crim | Evid | Length - Unit | Length - Number | Issues | Comments |
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| 12 | 1818 | (c)(2) | (2) Within ten days after the depository institution concerned or any institution-affiliated party has been served with a temporary cease-and-desist order, the depository institution or such party may apply to the United States district court for the judicial district in which the home office of the depository institution is located, or the United States District Court for the District of Columbia, for an injunction setting aside, limiting, or suspending the enforcement, operation, or effectiveness of such order pending the completion of the administrative proceedings pursuant to the notice of charges served upon the depository institution or such party under paragraph (1) of subsection (b) of this section, and such court shall have jurisdiction to issue such injunction. | Time to seek review of agency action | | | Y | | | Day | 10 | yellow flag on Westlaw -- apparently due to proposed legislation | |
| 12 | 1818 | (f) | (f) Stay of suspension and/or prohibition of institution-affiliated party Within ten days after any institution-affiliated party has been suspended from office and/or prohibited from participation in the conduct of the affairs of an insured depository institution under subsection (e)(3) of this section, such party may apply to the United States district court for the judicial district in which the home office of the depository institution is located, or the United States District Court for the District of Columbia, for a stay of such suspension and/or prohibition pending the completion of the administrative proceedings pursuant to the notice served upon such party under subsection (e)(1) or (e)(2) of this section, and such court shall have jurisdiction to stay such suspension and/or prohibition. | Time to seek review of agency action | | | Y | | | Day | 10 | yellow flag on Westlaw -- apparently due to proposed legislation | |
| 12 | 2262 | (b) | (b) Within ten days after the institution concerned or any director, officer, employee, agent, or other person participating in the conduct of the affairs of such institution has been served with a temporary cease and desist order, the institution or such director, officer, employee, agent, or other person may apply to the United States district court for the judicial district in which the home office of the institution is located, or the United States district court for the District of Columbia, for an injunction setting aside, limiting, or suspending the enforcement, operation, or effectiveness of such order pending the completion of the administrative proceedings pursuant to the notice of charges served upon the institution or such director, officer, employee, agent, or other person under section 2261 of this title, and such court shall have jurisdiction to issue such injunction. | Time to seek review of agency action | | | Y | | | Day | 10 | | |

| Title | Section | Subsection | Nature of deadline | Type | App | Bnkr | Civil | Crim | Evid | Length - Unit | Length - Number | Issues | Comments |
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| 12 | 2264 | (e) | (e) Stay of suspension or prohibition<br>Within ten days after any director, officer, or other person has been suspended from office or prohibited from participation in the conduct of the affairs of a System institution under subsection (c) of this section, such director, officer, or other person may apply to the United States district court for the judicial district in which the home office of the institution is located, or the United States district court for the District of Columbia, for a stay of either such suspension or prohibition, or both, pending the completion of the administrative proceedings pursuant to the notice served upon such director, officer, or other person under subsection (a) or (b) of this section, and such court shall have jurisdiction to stay either such suspension or prohibition, or both. | Time to seek review of agency action | | | Y | | | Day | 10 | | |
| 12 | 3405 | (2) & (3) | A Government authority may obtain financial records under section 3402(2) of this title pursuant to an administrative subpena or summons otherwise authorized by law only if--<br>(1) there is reason to believe that the records sought are relevant to a legitimate law enforcement inquiry;<br>(2) a copy of the subpena or summons has been served upon the customer or mailed to his last known address on or before the date on which the subpena or summons was served on the financial institution together with the following notice * * *:<br>"Records or information concerning your transactions held by the financial institution named in the attached subpena or summons are being sought by this (agency or department) in accordance with the Right to Financial Privacy Act of 1978 [12 U.S.C.A. § 3401 et seq.] for the following purpose: If you desire that such records or information not be made available, you must:<br>"1. Fill out the accompanying motion paper and sworn statement or write one of your own * * *.<br>"2. File the motion and statement by mailing or delivering them to the clerk of any one of the following United States district courts:<br>"3. Serve the Government authority requesting the records by mailing or delivering a copy of your motion and statement to .<br>"4. Be prepared to come to court and present your position in further detail.<br>"5. You do not need to have a lawyer, although you may wish to employ one to represent you and protect your rights.<br>If you do not follow the above procedures, upon the expiration of ten days from the date of service or fourteen days from the date of mailing of this notice, the records or information requested therein will be made available. These records may be transferred to other Government authorities for legitimate law enforcement inquiries, in which event you will be notified after the transfer."; and<br>(3) ten days have expired from the date of service of the notice or fourteen days have expired from the date of mailing the notice to the customer and within such time period the customer has not filed a sworn statement and motion to quash in an appropriate court, or the customer | Time to make a motion or other filing | | | Y | | | Day | 10 | | |

| Title | Section | Subsection | Nature of deadline | Type | App | Bnkr | Civil | Crim | Evid | Length - Unit | Length - Number | Issues | Comments |
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| | | | challenge provisions of section 3410 of this title have been complied with. | | | | | | | | | | |
| 12 | 3407 | (2) & (3) | A Government authority may obtain financial records under section 3402(4) of this title pursuant to judicial subpena only if--<br>(1) such subpena is authorized by law and there is reason to believe that the records sought are relevant to a legitimate law enforcement inquiry;<br>(2) a copy of the subpena has been served upon the customer or mailed to his last known address on or before the date on which the subpena was served on the financial institution together with the following notice * * * :<br>"Records or information concerning your transactions which are held by the financial institution named in the attached subpena are being sought by this (agency or department or authority) in accordance with the Right to Financial Privacy Act of 1978 [12 U.S.C.A. § 3401 et seq.] for the following purpose:<br>If you desire that such records or information not be made available, you must:<br>"1. Fill out the accompanying motion paper and sworn statement or write one of your own * * *.<br>"2. File the motion and statement by mailing or delivering them to the clerk of the Court.<br>"3. Serve the Government authority requesting the records by mailing or delivering a copy of your motion and statement to .<br>"4. Be prepared to come to court and present your position in further detail.<br>"5. You do not need to have a lawyer, although you may wish to employ one to represent you and protect your rights.<br>If you do not follow the above procedures, upon the expiration of ten days from the date of service or fourteen days from the date of mailing of | Time to make a motion or other filing | | | Y | | | Day | 10 | | |

| Title | Section | Subsection | Nature of deadline | Type | App | Bnkr | Civil | Crim | Evid | Length - Unit | Length - Number | Issues | Comments |
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| | | | this notice, the records or information requested therein will be made available. These records may be transferred to other government authorities for legitimate law enforcement inquiries, in which event you will be notified after the transfer;" and<br>(3) ten days have expired from the date of service or fourteen days from the date of mailing of the notice to the customer and within such time period the customer has not filed a sworn statement and motion to quash in an appropriate court, or the customer challenge provisions of section 3410 of this title have been complied with. | | | | | | | | | | |
| 12 | 3408 | (4)(A) & (B) | A Government authority may request financial records under section 3402(5) of this title pursuant to a formal written request only if--<br>(1) no administrative summons or subpena authority reasonably appears to be available to that Government authority to obtain financial records for the purpose for which such records are sought;<br>(2) the request is authorized by regulations promulgated by the head of the agency or department;<br>(3) there is reason to believe that the records sought are relevant to a legitimate law enforcement inquiry; and<br>(4)(A) a copy of the request has been served upon the customer or mailed to his last known address on or before the date on which the request was made to the financial institution together with the following notice which shall state with reasonable specificity the nature of the law enforcement inquiry:<br>"Records or information concerning your transactions held by the financial institution named in the attached request are being sought by this (agency or department) in accordance with the Right to Financial Privacy Act of 1978 [12 U.S.C.A. § 3401 et seq.] for the following purpose:<br>"If you desire that such records or information not be made available, you must:<br>"1. Fill out the accompanying motion paper and sworn statement or write one of your own * * *.<br>"2. File the motion and statement by mailing or delivering them to the clerk of any one of the following United States District Courts:<br>"3. Serve the Government authority requesting the records by mailing or delivering a copy of your motion and statement to .<br>"4. Be prepared to come to court and present your position in further detail.<br>"5. You do not need to have a lawyer, although you may wish to employ one to represent you and protect your rights. | Time to make a motion or other filing | | | Y | | | Day | 10 | | |

| Title | Section | Subsection | Nature of deadline | Type | App | Bnkr | Civil | Crim | Evid | Length - Unit | Length - Number | Issues | Comments |
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| | | | If you do not follow the above procedures, upon the expiration of ten days from the date of service or fourteen days from the date of mailing of this notice, the records or information requested therein may be made available. These records may be transferred to other Government authorities for legitimate law enforcement inquiries, in which event you will be notified after the transfer;" and<br>(B) ten days have expired from the date of service or fourteen days from the date of mailing of the notice by the customer and within such time period the customer has not filed a sworn statement and an application to enjoin the Government authority in an appropriate court, or the customer challenge provisions of section 3410 of this title have been complied with. | | | | | | | | | | |
| 12 | 3410 | (a) | (a) Filing of motion to quash or application to enjoin; proper court; contents<br>Within ten days of service or within fourteen days of mailing of a subpena, summons, or formal written request, a customer may file a motion to quash an administrative summons or judicial subpena, or an application to enjoin a Government authority from obtaining financial records pursuant to a formal written request, with copies served upon the Government authority. A motion to quash a judicial subpena shall be filed in the court which issued the subpena. A motion to quash an administrative summons or an application to enjoin a Government authority from obtaining records pursuant to a formal written request shall be filed in the appropriate United States district court. * * *<br>Service shall be made under this section upon a Government authority by delivering or mailing by registered or certified mail a copy of the papers to the person, office, or department specified in the notice which the customer has received pursuant to this chapter. For the purposes of this section, "delivery" has the meaning stated in rule 5(b) of the Federal Rules of Civil Procedure.<br>(b) Filing of response; additional proceedings<br>If the court finds that the customer has complied with subsection (a) of this section, it shall order the Government authority to file a sworn response, which may be filed in camera if the Government includes in its response the reasons which make in camera review appropriate. If the court is unable to determine the motion or application on the basis of the parties' initial allegations and response, the court may conduct such additional proceedings as it deems appropriate. All such proceedings shall be completed and the motion or application decided within seven calendar days of the filing of the Government's response. | Time to make a motion or other filing | | | Y | | | Day | 10 | also note "seven calendar days" in (b) | |

| Title | Section | Subsection | Nature of deadline | Type | App | Bnkr | Civil | Crim | Evid | Length - Unit | Length - Number | Issues | Comments |
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| 12 | 3414 | (b)(3) | (b)(1) Nothing in this chapter shall prohibit a Government authority from obtaining financial records from a financial institution if the Government authority determines that delay in obtaining access to such records would create imminent danger of--<br>(A) physical injury to any person;<br>(B) serious property damage; or<br>(C) flight to avoid prosecution.<br>(2) In the instances specified in paragraph (1), the Government shall submit to the financial institution the certificate required in section 3403(b) of this title signed by a supervisory official of a rank designated by the head of the Government authority.<br>(3) Within five days of obtaining access to financial records under this subsection, the Government authority shall file with the appropriate court a signed, sworn statement of a supervisory official of a rank designated by the head of the Government authority setting forth the grounds for the emergency access. The Government authority shall thereafter comply with the notice provisions of section 3409(c) of this title. | Time for government to act | | | | Y | | Day | 5 | yellow flag on Westlaw -- apparently due to proposed legislation | |
| 12 | 4623 | (a) | (a) Jurisdiction<br>(1) Filing of petition<br>An enterprise that is not classified as critically undercapitalized and is the subject of a classification under section 4614 of this title or a discretionary supervisory action taken under this subchapter by the Director (other than action to appoint a conservator under section 4616 or 4617 of this title or action under section 4619 of this title) may obtain review of the classification or action by filing, within 10 days after receiving written notice of the Director's action, a written petition requesting that the classification or action of the Director be modified, terminated, or set aside.<br>(2) Place for filing<br>A petition filed pursuant to this subsection shall be filed in the United States Court of Appeals for the District of Columbia Circuit. | Time to seek review of agency action | Y | | | | | Day | 10 | yellow flag on Westlaw -- apparently due to proposed legislation | |
| 12 | 4632 | (d) | (d) Judicial review<br>An enterprise, executive officer, or director that has been served with a temporary order pursuant to this section may apply to the United States District Court for the District of Columbia within 10 days after such service for an injunction setting aside, limiting, or suspending the enforcement, operation, or effectiveness of the order pending the completion of the administrative proceedings pursuant to the notice of charges served upon the enterprise, executive officer, or director under section 4631(a) or (b) of this title. Such court shall have jurisdiction to issue such injunction. | Time to seek review of agency action | | | Y | | | Day | 10 | yellow flag on Westlaw -- apparently due to proposed legislation | |

| Title | Section | Subsection | Nature of deadline | Type | App | Bnkr | Civil | Crim | Evid | Length - Unit | Length - Number | Issues | Comments |
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| 12 | 1833a | (g)(3) | (a) In general<br>Whoever violates any provision of law to which this section is made applicable by subsection (c) of this section shall be subject to a civil penalty in an amount assessed by the court in a civil action under this section.<br>* * *<br>(g) Administrative subpoenas<br>(1) In general<br>For the purpose of conducting a civil investigation in contemplation of a civil proceeding under this section, the Attorney General may--<br>* * *<br>(C) by subpoena, summon witnesses and require the production of any books, papers, correspondence, memoranda, or other records which the Attorney General deems relevant or material to the inquiry. * * *<br>(2) Procedures applicable<br>The same procedures and limitations as are provided with respect to civil investigative demands in subsections (g), (h), and (j) of section 1968 of Title 18 apply with respect to a subpoena issued under this subsection. * * *. Failure to comply with an order of the court to enforce such subpoena shall be punishable as contempt.<br>(3) Limitation<br>In the case of a subpoena for which the return date is less than 5 days after the date of service, no person shall be found in contempt for failure to comply by the return date if such person files a petition under paragraph (2) not later than 5 days after the date of service. | Time to make a motion or other filing | | | Y | | | Day | 5 | yellow flag on Westlaw -- apparently due to proposed legislation | |
| 15 | 16 | (g) | (g) Filing of written or oral communications with the district court<br>Not later than 10 days following the date of the filing of any proposal for a consent judgment under subsection (b) of this section, each defendant shall file with the district court a description of any and all written or oral communications by or on behalf of such defendant, including any and all written or oral communications on behalf of such defendant by any officer, director, employee, or agent of such defendant, or other person, with any officer or employee of the United States concerning or relevant to such proposal, except that any such communications made by counsel of record alone with the Attorney General or the employees of the Department of Justice alone shall be excluded from the requirements of this subsection. Prior to the entry of any consent judgment pursuant to the antitrust laws, each defendant shall certify to the district court that the requirements of this subsection have been complied with and that such filing is a true and complete description of such communications known to the defendant or which the defendant reasonably should have known. | Time to make a motion or other filing | | | Y | | | Day | 10 | | |

| Title | Section | Subsection | Nature of deadline | Type | App | Bnkr | Civil | Crim | Evid | Length - Unit | Length - Number | Issues | Comments |
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| 15 | 650 | (g)(3)(C) | (C) Judicial review of suspension prior to hearing<br>Not later than 10 days after a management official is suspended or prohibited from participation under subparagraph (A), the management official may apply to an appropriate district court for a stay of the suspension or prohibition pending the completion of the administrative proceedings pursuant to a notice of intent to remove served upon the management official under paragraph (2). | Time to seek review of agency action | | | Y | | | Day | 10 | | |
| 15 | 1116 | (d)(10)(A) | (10)(A) The court shall hold a hearing, unless waived by all the parties, on the date set by the court in the order of seizure. That date shall be not sooner than ten days after the order is issued and not later than fifteen days after the order is issued, unless the applicant for the order shows good cause for another date or unless the party against whom such order is directed consents to another date for such hearing. At such hearing the party obtaining the order shall have the burden to prove that the facts supporting findings of fact and conclusions of law necessary to support such order are still in effect. If that party fails to meet that burden, the seizure order shall be dissolved or modified appropriately. | Presumptive time for court to act | | | Y | | | Day | 10 | | |
| 15 | 1116 | (d)(5)(C) | (5) An order under this subsection shall set forth--<br>* * *<br>(C) the time period, which shall end not later than seven days after the date on which such order is issued, during which the seizure is to be made; | Time for government to act | | | Y | | | Day | 7 | | |
| 15 | 1118 | | In any action arising under this chapter, in which a violation of any right of the registrant of a mark registered in the Patent and Trademark Office, a violation under section 1125(a) of this title, or a willful violation under section 1125(c) of this title, shall have been established, the court may order that all labels, signs, prints, packages, wrappers, receptacles, and advertisements in the possession of the defendant, bearing the registered mark or, in the case of a violation of section 1125(a) of this title or a willful violation under section 1125(c) of this title, the word, term, name, symbol, device, combination thereof, designation, description, or representation that is the subject of the violation, or any reproduction, counterfeit, copy, or colorable imitation thereof, and all plates, molds, matrices, and other means of making the same, shall be delivered up and destroyed. The party seeking an order under this section for destruction of articles seized under section 1116(d) of this title shall give ten days' notice to the United States attorney for the judicial district in which such order is sought (unless good cause is shown for lesser notice) and such United States attorney may, if such destruction may affect evidence of an offense against the United States, seek a hearing on such destruction or participate in any hearing otherwise to be held with respect to such destruction. | Notice to litigants or other entities | | | Y | Y | | Day | 10 | | |

| Title | Section | Subsection | Nature of deadline | Type | App | Bnkr | Civil | Crim | Evid | Length - Unit | Length - Number | Issues | Comments |
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| 15 | 2310 | (c)(1) | (1) The district courts of the United States shall have jurisdiction of any action brought by the Attorney General (in his capacity as such), or by the Commission by any of its attorneys designated by it for such purpose, to restrain (A) any warrantor from making a deceptive warranty with respect to a consumer product, or (B) any person from failing to comply with any requirement imposed on such person by or pursuant to this chapter or from violating any prohibition contained in this chapter. Upon proper showing that, weighing the equities and considering the Commission's or Attorney General's likelihood of ultimate success, such action would be in the public interest and after notice to the defendant, a temporary restraining order or preliminary injunction may be granted without bond. In the case of an action brought by the Commission, if a complaint under section 45 of this title is not filed within such period (not exceeding 10 days) as may be specified by the court after the issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect. * * * | TRO time limit | | | Y | | | Day | 10 | | |
| 15 | 2619 | (b)(2) | (b) Limitation<br>No civil action may be commenced--<br>* * *<br>(2) under subsection (a)(2) of this section before the expiration of 60 days after the plaintiff has given notice to the Administrator of the alleged failure of the Administrator to perform an act or duty which is the basis for such action or, in the case of an action under such subsection for the failure of the Administrator to file an action under section 2606 of this title, before the expiration of ten days after such notification. | Prerequisite for suit | | | Y | | | Day | 10 | yellow flag on Westlaw -- apparently due to proposed legislation | |

| Title | Section | Subsection | Nature of deadline | Type | App | Bnkr | Civil | Crim | Evid | Length - Unit | Length - Number | Issues | Comments |
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| 15 | 6606 | (c)(4) | (a) In general<br>Before commencing a Y2K action, except an action that seeks only injunctive relief, a prospective plaintiff in a Y2K action shall send a written notice by certified mail (with either return receipt requested or other means of verification that the notice was sent) to each prospective defendant in that action. The notice shall provide specific and detailed information about--<br>(1) the manifestations of any material defect alleged to have caused harm or loss;<br>(2) the harm or loss allegedly suffered by the prospective plaintiff;<br>(3) how the prospective plaintiff would like the prospective defendant to remedy the problem;<br>(4) the basis upon which the prospective plaintiff seeks that remedy; and<br>(5) the name, title, address, and telephone number of any individual who has authority to negotiate a resolution of the dispute on behalf of the prospective plaintiff.<br>* * *<br>(c) Response to notice<br>(1) In general<br>Within 30 days after receipt of the notice specified in subsection (a) of this section, each prospective defendant shall send by certified mail with return receipt requested to each prospective plaintiff a written statement acknowledging receipt of the notice, and describing the actions it has taken or will take to address the problem identified by the prospective plaintiff.<br>* * *<br>(4) Presumptive time of receipt<br>For purposes of paragraph (1), a notice under subsection (a) of this section is presumed to be received 7 days after it was sent. | Prerequisite for suit | | | Y | | | Day | 7 | presumably not many of these suits will be brought in the future | |
| 15 | 687e | (c)(3) | (3) Judicial review<br>Not later than 10 days after any management official has been suspended from office or prohibited from participation in the management or conduct of the affairs of a licensee, or both, under paragraph (1), that management official may apply to the United States district court for the judicial district in which the home office of the licensee is located, or the United States District Court for the District of Columbia, for a stay of the suspension or prohibition pending the completion of the administrative proceedings pursuant to a notice of intent to remove served upon the management official under subsection (b) of this section, and such court shall have jurisdiction to stay such action. | Time to seek review of agency action | | | Y | | | Day | 10 | | |

| Title | Section | Subsection | Nature of deadline | Type | App | Bnkr | Civil | Crim | Evid | Length - Unit | Length - Number | Issues | Comments |
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| 15 | 687e | (c)(3) | (3) Judicial review<br>Not later than 10 days after any management official has been suspended from office or prohibited from participation in the management or conduct of the affairs of a licensee, or both, under paragraph (1), that management official may apply to the United States district court for the judicial district in which the home office of the licensee is located, or the United States District Court for the District of Columbia, for a stay of the suspension or prohibition pending the completion of the administrative proceedings pursuant to a notice of intent to remove served upon the management official under subsection (b) of this section, and such court shall have jurisdiction to stay such action. | Time to seek review of agency action | | | Y | | | Day | 10 | | |
| 15 | 77h-1 | (d)(2) | (2) Judicial review<br>Within--<br>(A) 10 days after the date the respondent was served with a temporary cease-and-desist order entered with a prior Commission hearing, or<br>(B) 10 days after the Commission renders a decision on an application and hearing under paragraph (1), with respect to any temporary cease-and-desist order entered without a prior Commission hearing,<br>the respondent may apply to the United States district court for the district in which the respondent resides or has its principal place of business, or for the District of Columbia, for an order setting aside, limiting, or suspending the effectiveness or enforcement of the order, and the court shall have jurisdiction to enter such an order. A respondent served with a temporary cease-and-desist order entered without a prior Commission hearing may not apply to the court except after hearing and decision by the Commission on the respondent's application under paragraph (1) of this subsection. | Time to seek review of agency action | | | Y | | | Day | 10 | | |

| Title | Section | Subsection | Nature of deadline | Type | App | Bnkr | Civil | Crim | Evid | Length - Unit | Length - Number | Issues | Comments |
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| 15 | 78u-3 | (d)(2) | (2) Judicial review<br>Within--<br>(A) 10 days after the date the respondent was served with a temporary cease-and-desist order entered with a prior Commission hearing, or<br>(B) 10 days after the Commission renders a decision on an application and hearing under paragraph (1), with respect to any temporary cease-and-desist order entered without a prior Commission hearing,<br>the respondent may apply to the United States district court for-the district in which the respondent resides or has its principal place of business, or for the District of Columbia, for an order setting aside, limiting, or suspending the effectiveness or enforcement of the order, and the court shall have jurisdiction to enter such an order. A respondent served with a temporary cease-and-desist order entered without a prior Commission hearing may not apply to the court except after hearing and decision by the Commission on the respondent's application under paragraph (1) of this subsection. | Time to seek review of agency action | | | Y | | | Day | 10 | | |
| 15 | 80a-9 | (f)(4)(B) | (B) Judicial review<br>Within--<br>(i) 10 days after the date the respondent was served with a temporary cease-and-desist order entered with a prior Commission hearing, or<br>(ii) 10 days after the Commission renders a decision on an application and hearing under subparagraph (A), with respect to any temporary cease-and-desist order entered without a prior Commission hearing,<br>the respondent may apply to the United States district court for the district in which the respondent resides or has its principal place of business, or for the District of Columbia, for an order setting aside, limiting, or suspending the effectiveness or enforcement of the order, and the court shall have jurisdiction to enter such an order. A respondent served with a temporary cease-and-desist order entered without a prior Commission hearing may not apply to the court except after hearing and decision by the Commission on the respondent's application under subparagraph (A) of this paragraph. | Time to seek review of agency action | | | Y | | | Day | 10 | yellow flag on Westlaw -- apparently due to proposed legislation | |

| Title | Section | Subsection | Nature of deadline | Type | App | Bnkr | Civil | Crim | Evid | Length - Unit | Length - Number | Issues | Comments |
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| 15 | 80b-3 | (k)(4) | (B) Judicial review<br>Within--<br>(i) 10 days after the date the respondent was served with a temporary cease-and-desist order entered with a prior Commission hearing, or<br>(ii) 10 days after the Commission renders a decision on an application and hearing under subparagraph (A), with respect to any temporary cease-and-desist order entered without a prior Commission hearing,<br>the respondent may apply to the United States district court for the district in which the respondent resides or has its principal place of business, or for the District of Columbia, for an order setting aside, limiting, or suspending the effectiveness or enforcement of the order, and the court shall have jurisdiction to enter such an order. A respondent served with a temporary cease-and-desist order entered without a prior Commission hearing may not apply to the court except after hearing and decision by the Commission on the respondent's application under subparagraph (A) of this paragraph. | Time to seek review of agency action | | | Y | | | Day | 10 | yellow flag on Westlaw -- apparently due to proposed legislation | |
| 16 | 4307 | (c)(2) | (c) Collection<br>If any person fails to pay an assessment of a civil penalty--<br>(1) within 30 days after the order was issued under subsection (a) of this section, or<br>(2) if the order is appealed within such 30-day period, within 10 days after court has entered a final judgment in favor of the Secretary under subsection (b) of this section, the Secretary shall notify the Attorney General and the Attorney General shall bring a civil action in an appropriate United States district court to recover the amount of penalty assessed (plus costs, attorney's fees, and interest at currently prevailing rates from the date the order was issued or the date of such final judgment, as the case may be). In such an action, the validity, amount, and appropriateness of such penalty shall not be subject to review. | Time for government to act | | | Y | | | Day | 10 | | |

| Title | Section | Subsection | Nature of deadline | Type | App | Bnkr | Civil | Crim | Evid | Length - Unit | Length - Number | Issues | Comments |
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| 16 | 539b | (b)(5) | (b) Approved plan for mining operations; requirements; review; modification; suspension of activities<br>Because of the large scale of contemplated mining operations and the proximity of such operations to important fishery resources, with respect to mining operations in the Quartz Hill area of the Tongass National Forest, the regulations of the Secretary shall, pursuant to this subsection, include a requirement that all mining operations involving significant surface disturbance shall be in accordance with an approved plan of operations. * * *<br>* * *<br>(5) upon a finding by the Secretary that a mining activity conducted as a part of a mining operation exists which constitutes a threat of irreparable harm to anadromous fish, or other foodfish populations or their habitat, and that immediate correction is required to prevent such harm, he may require such activity to be suspended for not to exceed seven days, provided the activity may be resumed at the end of said seven-day period unless otherwise required by a United States district court. | Time for government to act | | | Y | | | Day | 7 | | |
| 16 | 539m-5 | (c)(2)(B) | (c) Disputes involving forest service management and Pueblo traditional uses<br>(1) In general<br>In a case in which the management of the Area by the Secretary conflicts with a traditional or cultural use, if the conflict does not pertain to a new use subject to the process specified in subsection (a)(2) of this section, the process for dispute resolution specified in this subsection shall apply.<br>(2) Dispute resolution process<br>(A) In general<br>* * *<br>(B) Disputes requiring immediate resolution<br>In the case of a conflict that requires immediate resolution to avoid imminent, substantial, and irreparable harm--<br>(i) the party identifying the conflict shall notify the other party and seek to resolve the dispute within 3 days of the date of notification; and<br>(ii) if the parties are unable to resolve the dispute within 3 days--<br>(I) either party may bring a civil action for immediate relief in the United States District Court for the District of New Mexico; and<br>(II) the procedural requirements specified in subparagraph (A) shall not apply. | Prerequisite for suit | | | Y | | | Day | 3 | | |

| Title | Section | Subsection | Nature of deadline | Type | App | Bnkr | Civil | Crim | Evid | Length - Unit | Length - Number | Issues | Comments |
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| 17 | 411 | (b) | (b) In the case of a work consisting of sounds, images, or both, the first fixation of which is made simultaneously with its transmission, the copyright owner may, either before or after such fixation takes place, institute an action for infringement under section 501, fully subject to the remedies provided by sections 502 through 506 and sections 509 and 510, if, in accordance with requirements that the Register of Copyrights shall prescribe by regulation, the copyright owner--<br>(1) serves notice upon the infringer, not less than 48 hours before such fixation, identifying the work and the specific time and source of its first transmission, and declaring an intention to secure copyright in the work; and<br>(2) makes registration for the work, if required by subsection (a), within three months after its first transmission. | Notice to litigants or other entities | | | Y | | | Hour | 48 | yellow flag on Westlaw -- apparently due to proposed legislation | See also 37 CFR § 201.22(e)(1), 17 U.S.C.A. foll. § 702 |
| 17 | 1321 | (b)(2)(B) | (b) Review of refusal to register.--(1) Subject to paragraph (2), the owner of a design may seek judicial review of a final refusal of the Administrator to register the design under this chapter by bringing a civil action, and may in the same action, if the court adjudges the design subject to protection under this chapter, enforce the rights in that design under this chapter.<br>(2) The owner of a design may seek judicial review under this section if--<br>(A) the owner has previously duly filed and prosecuted to final refusal an application in proper form for registration of the design;<br>(B) the owner causes a copy of the complaint in the action to be delivered to the Administrator within 10 days after the commencement of the action; and<br>(C) the defendant has committed acts in respect to the design which would constitute infringement with respect to a design protected under this chapter.<br>(c) Administrator as party to action.--The Administrator may, at the Administrator's option, become a party to the action with respect to the issue of registrability of the design claim by entering an appearance within 60 days after being served with the complaint, but the failure of the Administrator to become a party shall not deprive the court of jurisdiction to determine that issue. | Notice to litigants or other entities | | | Y | | | Day | 10 | | |

| Title | Section | Subsection | Nature of deadline | Type | App | Bnkr | Civil | Crim | Evid | Length - Unit | Length - Number | Issues | Comments |
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| 18 | 983 | (i)(3) | (i) Restraining orders; protective orders.--<br>(3) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when a complaint has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought is subject to civil forfeiture and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than 10 days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order. | TRO time limit | | | Y | Y | | Day | 10 | yellow flag on Westlaw -- apparently due to proposed legislation | |
| 18 | 1467 | (c) | (c) Protective orders.-- * * *<br>(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than 10 days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order. | TRO time limit | | | | Y | | Day | 10 | provision deleted by July 27, 2006 amendment to Section 1467 | I'm keeping this in the spreadsheet so as to make clear that the relevant provision no longer exists (it was included in a prior version of the spreadsheet). |

| Title | Section | Subsection | Nature of deadline | Type | App | Bnkr | Civil | Crim | Evid | Length - Unit | Length - Number | Issues | Comments |
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| 18 | 1514 | (a)(2)(C) | (a)(1) A United States district court, upon application of the attorney for the Government, shall issue a temporary restraining order prohibiting harassment of a victim or witness in a Federal criminal case if the court finds, from specific facts shown by affidavit or by verified complaint, that there are reasonable grounds to believe that harassment of an identified victim or witness in a Federal criminal case exists or that such order is necessary to prevent and restrain an offense under section 1512 of this title, other than an offense consisting of misleading conduct, or under section 1513 of this title.<br>(2) * * *<br>(C) A temporary restraining order issued under this section shall expire at such time, not to exceed 10 days from issuance, as the court directs; the court, for good cause shown before expiration of such order, may extend the expiration date of the order for up to 10 days or for such longer period agreed to by the adverse party. | TRO time limit | | | Y | Y | | Day | 10 | | |
| 18 | 1514 | (a)(2)(E) | (a)(1) A United States district court, upon application of the attorney for the Government, shall issue a temporary restraining order prohibiting harassment of a victim or witness in a Federal criminal case if the court finds, from specific facts shown by affidavit or by verified complaint, that there are reasonable grounds to believe that harassment of an identified victim or witness in a Federal criminal case exists or that such order is necessary to prevent and restrain an offense under section 1512 of this title, other than an offense consisting of misleading conduct, or under section 1513 of this title.<br>(2) * * *<br>(E) If on two days notice to the attorney for the Government or on such shorter notice as the court may prescribe, the adverse party appears and moves to dissolve or modify the temporary restraining order, the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require. | Notice to litigants or other entities | | | Y | Y | | Day | 2 | | |

| Title | Section | Subsection | Nature of deadline | Type | App | Bnkr | Civil | Crim | Evid | Length - Unit | Length - Number | Issues | Comments |
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| 18 | 1963 | (d)(2) | (d)(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section--<br>* * *<br>(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time, and prior to the expiration of the temporary order. | TRO time limit | | | | Y | | Day | 10 | | |
| 18 | 2339B | (f)(5)(B)(ii) | (5) Interlocutory appeal.--<br>(A) [authorizes interlocutory appeals regarding District Court orders:]<br>(i) authorizing the disclosure of classified information;<br>(ii) imposing sanctions for nondisclosure of classified information; or<br>(iii) refusing a protective order sought by the United States to prevent the disclosure of classified information.<br>(B) Expedited consideration.--<br>(i) In general.--An appeal taken pursuant to this paragraph, either before or during trial, shall be expedited by the court of appeals.<br>(ii) Appeals prior to trial.--If an appeal is of an order made prior to trial, an appeal shall be taken not later than 10 days after the decision or order appealed from, and the trial shall not commence until the appeal is resolved. | Time to take appeal from court | Y | | | | | Day | 10 | | |

| Title | Section | Subsection | Nature of deadline | Type | App | Bnkr | Civil | Crim | Evid | Length - Unit | Length - Number | Issues | Comments |
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| 18 | 2339B | (f)(5)(B)(ii) | (5) Interlocutory appeal.--<br>(A) [authorizes interlocutory appeals regarding District Court orders:]<br>(i) authorizing the disclosure of classified information;<br>(ii) imposing sanctions for nondisclosure of classified information; or<br>(iii) refusing a protective order sought by the United States to prevent the disclosure of classified information.<br>(B) Expedited consideration.--<br>(i) In general.--An appeal taken pursuant to this paragraph, either before or during trial, shall be expedited by the court of appeals.<br>* * *<br>(iii) Appeals during trial.--If an appeal is taken during trial, the trial court shall adjourn the trial until the appeal is resolved, and the court of appeals--<br>(I) shall hear argument on such appeal not later than 4 days after the adjournment of the trial;<br>* * *<br>(III) shall render its decision not later than 4 days after argument on appeal; and<br>(IV) may dispense with the issuance of a written opinion in rendering its decision. | Time for court to act | Y | | | | | Day | 4 | | |
| 18 | 2518 | | (9) The contents of any wire, oral, or electronic communication intercepted pursuant to this chapter or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information. | Notice to litigants or other entities | | | | Y | | Day | 10 | | |

| Title | Section | Subsection | Nature of deadline | Type | App | Bnkr | Civil | Crim | Evid | Length - Unit | Length - Number | Issues | Comments |
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| 18 | 2518 | | (1) Each application for an order authorizing or approving the interception of a wire, oral, or electronic communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. * * *<br>* * *<br>(5) No order entered under this section may authorize or approve the interception of any wire, oral, or electronic communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Such thirty-day period begins on the earlier of the day on which the investigative or law enforcement officer first begins to conduct an interception under the order or ten days after the order is entered. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days. In the event the intercepted communication is in a code or foreign language, and an expert in that foreign language or code is not reasonably available during the interception period, minimization may be accomplished as soon as practicable after such interception. An interception under this chapter may be conducted in whole or in part by Government personnel, or by an individual operating under a contract with the Government, acting under the supervision of an investigative or law enforcement officer authorized to conduct the interception. | Time for government to act | | | Y | Y | | Day | 10 | | |

| Title | Section | Subsection | Nature of deadline | Type | App | Bnkr | Civil | Crim | Evid | Length - Unit | Length - Number | Issues | Comments |
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| 18 | 2518 | | (7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General, the Deputy Attorney General, the Associate Attorney General, or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that--<br>(a) an emergency situation exists that involves--<br>(i) immediate danger of death or serious physical injury to any person,<br>(ii) conspiratorial activities threatening the national security interest, or<br>(iii) conspiratorial activities characteristic of organized crime,<br>that requires a wire, oral, or electronic communication to be intercepted before an order authorizing such interception can, with due diligence, be obtained, and<br>(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,<br>may intercept such wire, oral, or electronic communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire, oral, or electronic communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application. | Time for government to act | | | Y | Y | | Hour | 48 | | |
| 18 | 2704 | (a) | (a) Backup preservation.--(1) A governmental entity acting under section 2703(b)(2) may include in its subpoena or court order a requirement that the service provider to whom the request is directed create a backup copy of the contents of the electronic communications sought in order to preserve those communications. Without notifying the subscriber or customer of such subpoena or court order, such service provider shall create such backup copy as soon as practicable consistent with its regular business practices and shall confirm to the governmental entity that such backup copy has been made. Such backup copy shall be created within two business days after receipt by the service provider of the subpoena or court order.<br>(2) Notice to the subscriber or customer shall be made by the governmental entity within three days after receipt of such confirmation, unless such notice is delayed pursuant to section 2705(a). | Time for government to act | | | Y | Y | | Day | 3 | also note period of 'two business days' | |

| Title | Section | Subsection | Nature of deadline | Type | App | Bnkr | Civil | Crim | Evid | Length - Unit | Length - Number | Issues | Comments |
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| 18 | 3060 | (b) | (a) Except as otherwise provided by this section, a preliminary examination shall be held within the time set by the judge or magistrate judge pursuant to subsection (b) of this section, to determine whether there is probable cause to believe that an offense has been committed and that the arrested person has committed it.<br>(b) The date for the preliminary examination shall be fixed by the judge or magistrate judge at the initial appearance of the arrested person. Except as provided by subsection (c) of this section, or unless the arrested person waives the preliminary examination, such examination shall be held within a reasonable time following initial appearance, but in any event not later than--<br>(1) the tenth day following the date of the initial appearance of the arrested person before such officer if the arrested person is held in custody without any provision for release, or is held in custody for failure to meet the conditions of release imposed, or is released from custody only during specified hours of the day; or<br>(2) the twentieth day following the date of the initial appearance if the arrested person is released from custody under any condition other than a condition described in paragraph (1) of this subsection. | Time for court to act | | | | Y | | Day | 10 | | |
| 18 | 3125 | | (a) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General, the Deputy Attorney General, the Associate Attorney General, any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General, or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that--<br>(1) an emergency situation exists that involves--<br>(A) immediate danger of death or serious bodily injury to any person;<br>(B) conspiratorial activities characteristic of organized crime;<br>(C) an immediate threat to a national security interest; or<br>(D) an ongoing attack on a protected computer (as defined in section 1030) that constitutes a crime punishable by a term of imprisonment greater than one year;<br>that requires the installation and use of a pen register or a trap and trace device before an order authorizing such installation and use can, with due diligence, be obtained, and<br>(2) there are grounds upon which an order could be entered under this chapter to authorize such installation and use;<br>may have installed and use a pen register or trap and trace device if, within forty-eight hours after the installation has occurred, or begins to occur, an order approving the installation or use is issued in accordance with section 3123 of this title.<br>(b) In the absence of an authorizing order, such use shall immediately terminate when the information sought is obtained, when the application for the order is denied or when forty-eight hours have lapsed since the installation of the pen register or trap and trace device, whichever is earlier.<br>(c) The knowing installation or use by any investigative or law enforcement officer of a pen register or trap and trace device pursuant to subsection (a) without application for the authorizing order within forty- | Time for government to act | | | | Y | | Hour | 48 | | |

| Title | Section | Subsection | Nature of deadline | Type | App | Bnkr | Civil | Crim | Evid | Length - Unit | Length - Number | Issues | Comments |
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| | | | eight hours of the installation shall constitute a violation of this chapter. | | | | | | | | | | |
| 18 | 3161 | (h) | (h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:<br>(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to--<br>* * *<br>(H) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable; | Time for government to act | | | | Y | | Day | 10 | | |
| 18 | 3432 | | A person charged with treason or other capital offense shall at least three entire days before commencement of trial be furnished with a copy of the indictment and a list of the veniremen, and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each venireman and witness, except that such list of the veniremen and witnesses need not be furnished if the court finds by a preponderance of the evidence that providing the list may jeopardize the life or safety of any person. | Notice to litigants or other entities | | | | Y | | Day | 3 | "three entire days" | |

| Title | Section | Subsection | Nature of deadline | Type | App | Bnkr | Civil | Crim | Evid | Length - Unit | Length - Number | Issues | Comments |
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| 18 | 3486 | (a)(9) | (a) Authorization.--(1)(A) In any investigation relating of--<br>(i)(I) a Federal health care offense; or (II) a Federal offense involving the sexual exploitation or abuse of children, the Attorney General; or<br>(ii) an offense under section 871 or 879, or a threat against a person protected by the United States Secret Service under paragraph (5) or (6) of section 3056, [FN1] if the Director of the Secret Service determines that the threat constituting the offense or the threat against the person protected is imminent, the Secretary of the Treasury,<br>may issue in writing and cause to be served a subpoena requiring the production and testimony described in subparagraph (B).<br>* * *<br>(9) A subpoena issued under paragraph (1)(A)(i)(II) or (1)(A)(ii) may require production as soon as possible, but in no event less than 24 hours after service of the subpoena. | Notice to litigants or other entities | | | | Y | | Hour | 24 | yellow flag on Westlaw -- apparently due to proposed legislation | |
| 18 | 3492 | (a) | (a) The testimony of any witness in a foreign country may be taken either on oral or written interrogatories, or on interrogatories partly oral and partly written, pursuant to a commission issued, as hereinafter provided, for the purpose of determining whether any foreign documents sought to be used in any criminal action or proceeding in any court of the United States are genuine, and whether the authentication requirements of the Federal Rules of Evidence are satisfied with respect to any such document (or the original thereof in case such document is a copy). Application for the issuance of a commission for such purpose may be made to the court in which such action or proceeding is pending by the United States or any other party thereto, after five days' notice in writing by the applicant party, or his attorney, to the opposite party, or his attorney of record, which notice shall state the names and addresses of witnesses whose testimony is to be taken and the time when it is desired to take such testimony. In granting such application the court shall issue a commission for the purpose of taking the testimony sought by the applicant addressed to any consular officer of the United States conveniently located for the purpose. In cases of testimony taken on oral or partly oral interrogatories, the court shall make provisions in the commission for the selection as hereinafter provided of foreign counsel to represent each party (except the United States) to the criminal action or proceeding in which the foreign documents in question are to be used, unless such party has, prior to the issuance of the commission, notified the court that he does not desire the selection of foreign counsel to represent him at the time of taking of such testimony. In cases of testimony taken on written interrogatories, such provision shall be made only upon the request of any such party prior to the issuance of such commission. Selection of foreign counsel shall be made by the party whom such foreign counsel is to represent within ten days prior to the taking of testimony or by the court from which the commission issued, upon the request of such party made within such time. | Notice to litigants or other entities | | | | Y | | Day | 5 | see also 10-day limit | |

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| 18 | 3501 | (c) | (c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate judge or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: Provided, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate judge or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate judge or other officer. | Time for government to act | | | | Y | | Hour | 6 | red flag on WL - has this portion been invalidated? RA's answer: No. | 1 Fed. Prac. & Proc. Crim.3d § 72 seems to indicate that Dickerson v. U.S., 530 U.S. 428 (2000), invalidated 3501(b) but not 3501(c). RA agrees: 3501(c) addresses the McNabb-Mallory rule, which is a separate rule from the one involved in the Miranda and Dickerson decisions. 3501(c) appears to be consistent with the Supreme Court holding in Mallory, rather than a legislative attempt to override the decision, and appears to still be valid. |
| 18 | 3509 | (b)(1)(A) | (b) Alternatives to live in-court testimony.--<br>(1) Child's live testimony by 2-way closed circuit television.--<br>(A) In a proceeding involving an alleged offense against a child, the attorney for the Government, the child's attorney, or a guardian ad litem appointed under subsection (h) may apply for an order that the child's testimony be taken in a room outside the courtroom and be televised by 2-way closed circuit television. The person seeking such an order shall apply for such an order at least 5 days before the trial date, unless the court finds on the record that the need for such an order was not reasonably foreseeable. | Time to make a motion or other filing | | | | Y | | Day | 5 | Yellow flag on WL, evidently due to to (1) the holding in US v. Bordeaux, 400 F.3d 548 (8th Cir. 2005), that the statute was unconstitutional as applied in the particular case b/c court failed to apply the Craig test; and/or (2) pending legislation. | RA checked and agrees that Section 3509's framework still applies, modified by the requirements set forth in Maryland v. Craig. Craig permits "denial of [face-to-face] confrontation" only where "necessary to further an important public policy" and "where the reliability of the testimony is otherwise assured." Maryland v. Craig, 497 U.S. at 850. |
| 18 | 3552 | (d) | (d) Disclosure of presentence reports.--The court shall assure that a report filed pursuant to this section is disclosed to the defendant, the counsel for the defendant, and the attorney for the Government at least ten days prior to the date set for sentencing, unless this minimum period is waived by the defendant. The court shall provide a copy of the presentence report to the attorney for the Government to use in collecting an assessment, criminal fine, forfeiture or restitution imposed. | Notice to litigants or other entities | | | | Y | | Day | 10 | | See also USSG, § 6A1.2 ("At least 7 days before sentencing, the probation officer must submit to the court and to the parties the presentence report and an addendum containing any unresolved objections, the grounds for those objections, and the probation officer's comments on them") |

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| 18 | 3612 | (b) | (b) Information to be included in judgment; judgment to be transmitted to Attorney General.--(1) A judgment or order imposing, modifying, or remitting a fine or restitution order of more than $100 shall include--<br>* * *<br>(2) Not later than ten days after entry of the judgment or order, the court shall transmit a certified copy of the judgment or order to the Attorney General. | Notice to litigants or other entities | | | | Y | | Day | 10 | yellow flag on Westlaw -- apparently due to proposed legislation | |
| 18 | 3664 | (d)(5) | (5) If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief. | Time for government to act | | | | Y | | Day | 10 | | |
| 18 | 3771 | (d) | (d) Enforcement and limitations.--<br>* * *<br>(5) Limitation on relief.--In no case shall a failure to afford a right under this chapter provide grounds for a new trial. A victim may make a motion to re-open a plea or sentence only if--<br>(A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied;<br>(B) the victim petitions the court of appeals for a writ of mandamus within 10 days; and<br>(C) in the case of a plea, the accused has not pled to the highest offense charged. | Time to make a motion or other filing | Y | | | Y | | Day | 10 | July 27, 2006 legislation added new subsection (b), which does not appear to directly affect this provision's functioning | RA checked and agrees: Subsection (b) does not affect subsection (d). Subsection (b) only affects (d) in that it states that (d)(1), (2) and (3) apply to Habeas Corpus proceedings. Subsection (b) does not alter or limit (d) in any way. |

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| 18 | 3771 | (d)(3) | (d) Enforcement and limitations.--<br>(1) Rights.--The crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in subsection (a). A person accused of the crime may not obtain any form of relief under this chapter.<br>(2) Multiple crime victims.-- * * *<br>(3) Motion for relief and writ of mandamus.--The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide any motion asserting a victim's right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed. In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion. | Time for court to act | Y | | | | | Hour | 72 | July 27, 2006 legislation added new subsection (b), which does not appear to directly affect this provision's functioning | RA checked and agrees: Subsection (b) does not affect subsection (d). Subsection (b) only affects (d) in that it states that (d)(1), (2) and (3) apply to Habeas Corpus proceedings. Subsection (b) does not alter or limit (d) in any way. |
| 18 | 3771 | (d)(3) | (d) Enforcement and limitations.--<br>(1) Rights.--The crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in subsection (a). A person accused of the crime may not obtain any form of relief under this chapter.<br>(2) Multiple crime victims.-- * * *<br>(3) Motion for relief and writ of mandamus.-- * * * The district court shall take up and decide any motion asserting a victim's right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed. In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion. | TRO time limit | | | | Y | | Day | 5 | July 27, 2006 legislation added new subsection (b), which does not appear to directly affect this provision's functioning | RA checked and agrees: Subsection (b) does not affect subsection (d). Subsection (b) only affects (d) in that it states that (d)(1), (2) and (3) apply to Habeas Corpus proceedings. Subsection (b) does not alter or limit (d) in any way. |

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| 18 | 4114 | (a) | (a) Upon a final decision by the courts of the United States that the transfer of the offender to the United States was not in accordance with the treaty or the laws of the United States and ordering the offender released from serving the sentence in the United States the offender may be returned to the country from which he was transferred to complete the sentence if the country in which the sentence was imposed requests his return. The Attorney General shall notify the appropriate authority of the country which imposed the sentence, within ten days, of a final decision of a court of the United States ordering the offender released. The notification shall specify the time within which the sentencing country must request the return of the offender which shall be no longer than thirty days. | Notice to litigants or other entities | | | | Y | | Day | 10 | | |
| 18 | 4244 | (a) | (a) Motion to determine present mental condition of convicted defendant.--A defendant found guilty of an offense, or the attorney for the Government, may, within ten days after the defendant is found guilty, and prior to the time the defendant is sentenced, file a motion for a hearing on the present mental condition of the defendant if the motion is supported by substantial information indicating that the defendant may presently be suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility. The court shall grant the motion, or at any time prior to the sentencing of the defendant shall order such a hearing on its own motion, if it is of the opinion that there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility. | Time to make a motion or other filing | | | | Y | | Day | 10 | | |
| 18 | 2252A | (c) | (c) It shall be an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) that--<br>(1)(A) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct; and<br>(B) each such person was an adult at the time the material was produced; or<br>(2) the alleged child pornography was not produced using any actual minor or minors.<br>No affirmative defense under subsection (c)(2) shall be available in any prosecution that involves child pornography as described in section 2256(8)(C). A defendant may not assert an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) unless, within the time provided for filing pretrial motions or at such time prior to trial as the judge may direct, but in no event later than 10 days before the commencement of the trial, the defendant provides the court and the United States with notice of the intent to assert such defense and the substance of any expert or other specialized testimony or evidence upon which the defendant intends to rely. If the defendant fails to comply with this subsection, the court shall, absent a finding of extraordinary circumstances that prevented timely compliance, prohibit the defendant from asserting such defense to a charge of violating paragraph (1), (2), | Notice to litigants or other entities | | | | Y | | Day | 10 | red flag on WL - has this portion been invalidated? Apparently not , but need to double-check. July 27, 2006 legislation amended subsection (b) but does not appear to directly affect functioning of (c). RA checked and agrees: July 27, 2006 amendments amended (b) and added subsection (g), but do not appear to have affected (c). | Williams, 444 F.3d 1286, 1309 (11th Cir 2006) found "the PROTECT Act pandering provision, 18 U.S.C. § 2252A(a)(3)(B), both substantially overbroad and vague, and therefore facially unconstitutional". Other negative cases in Keycite do not appear to render subsection c nugatory. RA checked and agrees: I looked through the key cite cases and could not find any cases that invalidate (c). |

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| | | | (3)(A), (4), or (5) of subsection (a) or presenting any evidence for which the defendant has failed to provide proper and timely notice. | | | | | | | | | | |
| 19 | 1516 | (f) | (f) * * *<br>If the cause of action is sustained in whole or in part by a decision of the United States Court of International Trade or of the United States Court of Appeals for the Federal Circuit, merchandise of the character covered by the published decision of the Secretary, which is entered for consumption or withdrawn from warehouse for consumption after the date of publication in the Federal Register by the Secretary or the administering authority of a notice of the court decision, shall be subject to appraisement, classification, and assessment of duty in accordance with the final judicial decision in the action, and the liquidation of entries covering the merchandise so entered or withdrawn shall be suspended until final disposition is made of the action, whereupon the entries shall be liquidated, or if necessary, reliquidated in accordance with the final decision. Such notice of the court decision shall be published within ten days from the date of the issuance of the court decision. | Notice to litigants or other entities | Y | | | | | Day | 10 | | |

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| 19 | 1516a | (c)(1) | (c) Liquidation of entries<br>(1) Liquidation in accordance with determination<br>Unless such liquidation is enjoined by the court under paragraph (2) of this subsection, entries of merchandise of the character covered by a determination of the Secretary, the administering authority, or the Commission contested under subsection (a) of this section shall be liquidated in accordance with the determination of the Secretary, the administering authority, or the Commission, if they are entered, or withdrawn from warehouse, for consumption on or before the date of publication in the Federal Register by the Secretary or the administering authority of a notice of a decision of the United States Court of International Trade, or of the United States Court of Appeals for the Federal Circuit, not in harmony with that determination. Such notice of a decision shall be published within ten days from the date of the issuance of the court decision. | Notice to litigants or other entities | Y | | | | | Day | 10 | | |
| 19 | 1516a | (e) | (e) Liquidation in accordance with final decision<br>If the cause of action is sustained in whole or in part by a decision of the United States Court of International Trade or of the United States Court of Appeals for the Federal Circuit--<br>(1) entries of merchandise of the character covered by the published determination of the Secretary, the administering authority, or the Commission, which is entered, or withdrawn from warehouse, for consumption after the date of publication in the Federal Register by the Secretary or the administering authority of a notice of the court decision, and<br>(2) entries, the liquidation of which was enjoined under subsection (c)(2) of this section,<br>shall be liquidated in accordance with the final court decision in the action. Such notice of the court decision shall be published within ten days from the date of the issuance of the court decision. | Notice to litigants or other entities | Y | | | | | Day | 10 | | See also Section 1516a(g)(4)(H):<br>"Notwithstanding any other provision of law, any final judgment of the United States Court of Appeals for the District of Columbia Circuit which is issued pursuant to an action brought under subparagraph (A) shall be reviewable by appeal directly to the Supreme Court of the United States. Any such appeal shall be taken by a notice of appeal filed within 10 days after such order is entered; and the jurisdictional statement shall be filed within 30 days after such order is entered. No stay of an order issued pursuant to an action brought under subparagraph (A) may be issued by a single Justice of the Supreme Court." |

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| 21 | 853 | (e)(2) | (e) Protective orders<br>(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) of this section for forfeiture under this section--<br>* * *<br>(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order. | TRO time limit | | | Y | Y | | Day | 10 | yellow flag on WL -- probably because of proposed legislation. RA: The proposed legislation does not appear to affect subsection (e). I did not see any decisions in key cite that would negate (e)(2). Because there were so many key cite cases, I also looked at 13 Fed. Proc., L. Ed. § 35:790 to be sure that I had not missed anything, and it does not indicate there are any constitutional problems with (e)(2). | |
| 21 | 880 | (d)(3) | (3) A warrant issued pursuant to this section must be executed and returned within ten days of its date unless, upon a showing by the United States of a need therefor, the judge or magistrate judge allows additional time in the warrant. If property is seized pursuant to a warrant, the person executing the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return of the warrant shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the person executing the warrant and of the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the person making such inventory, and shall be verified by the person executing the warrant. The judge or magistrate judge, upon request, shall deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant. | Time for government to act | | | Y | Y | | Day | 10 | | |

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| 24 | 326 | (a) | (a) Request; determination of right to retain; retention after request<br>If a person who is a patient hospitalized under section 322 or 324 of this title, or his legal guardian, spouse, or adult next of kin, requests the release of such patient, the right of the Secretary, or the head of the hospital, to detain him for care and treatment shall be determined in accordance with such laws governing the detention, for care and treatment, of persons alleged to be mentally ill as may be in force and applicable generally in the State in which such hospital is located, but in no event shall the patient be detained more than forty-eight hours (excluding any period of time falling on a Sunday or legal holiday) after the receipt of such request unless within such time (1) judicial proceedings for such hospitalization are commenced or (2) a judicial extension of such time is obtained, for a period of not more than five days, for the commencement of such proceedings. | Time for government to act | | | Y | | | Hour | 48 | provision explicitly provides for exclusion of Sundays (but not Saturdays) & holidays | |
| 26 | 5311 | | It shall be lawful for any internal revenue officer to detain any container containing, or supposed to contain, distilled spirits, wines, or beer, when he has reason to believe that the tax imposed by law on such distilled spirits, wines, or beer has not been paid or determined as required by law, or that such container is being removed in violation of law; and every such container may be held by him at a safe place until it shall be determined whether the property so detained is liable by law to be proceeded against for forfeiture; but such summary detention shall not continue in any case longer than 72 hours without process of law or intervention of the officer to whom such detention is to be reported. | Time for government to act | | | Y | Y | | Hour | 72 | not clear whether this period would be governed by either the Civil or Criminal Rules | |

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| 26 | 6861 | (g) | (g) Abatement if jeopardy does not exist.--The Secretary may abate the jeopardy assessment if he finds that jeopardy does not exist. Such abatement may not be made after a decision of the Tax Court in respect of the deficiency has been rendered or, if no petition is filed with the Tax Court, after the expiration of the period for filing such petition. The period of limitation on the making of assessments and levy or a proceeding in court for collection, in respect of any deficiency, shall be determined as if the jeopardy assessment so abated had not been made, except that the running of such period shall in any event be suspended for the period from the date of such jeopardy assessment until the expiration of the 10th day after the day on which such jeopardy assessment is abated. | Time for government to act | | | Y | | | | | need to check how this provision works | RA reports, based on 35 Am. Jur. 2d Federal Tax Enforcement § 341, that under (g) "the Secretary may abate a jeopardy assessment if he or she finds that jeopardy does not exist AND either of the following: 1) a decision of the Tax Court with respect to the deficiency has not been rendered OR 2) if no petition is filed with the Tax Court for a re-determination of a deficiency, after the expiration of the period for filing such a petition. In the event that an abatement under (g) occurs, the period of limitation for making of assessments and levy or collecting a deficiency through court proceedings is the same as if no assessment (and then abatement) had been made in the first place, except that the running of the period is suspended between the date of the jeopardy assessment and ten days after the date of the abatement." |
| 26 | 7429 | (b) | (b) Judicial review.--<br>(1) Proceedings permitted.-- * * *<br>the taxpayer may bring a civil action against the United States for a determination under this subsection in the court with jurisdiction determined under paragraph (2).<br>(2) Jurisdiction for determination.--<br>(A) In general.--Except as provided in subparagraph (B), the district courts of the United States shall have exclusive jurisdiction over any civil action for a determination under this subsection.<br>(B) Tax Court.-- * * *<br>(3) Determination by court.-- * * *<br>If the court determines that proper service was not made on the United States or on the Secretary, as may be appropriate, within 5 days after the date of the commencement of the proceeding, then the running of the 20-day period set forth in the preceding sentence shall not begin before the day on which proper service was made on the United States or on the Secretary, as may be appropriate. | Notice to litigants or other entities | | | Y | | | Day | 5 | | |

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| 26 | 7482 | (a)(2)(A) | (2) Interlocutory orders.--<br>(A) In general.--When any judge of the Tax Court includes in an interlocutory order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals may, in its discretion, permit an appeal to be taken from such order, if application is made to it within 10 days after the entry of such order. Neither the application for nor the granting of an appeal under this paragraph shall stay proceedings in the Tax Court, unless a stay is ordered by a judge of the Tax Court or by the United States Court of Appeals which has jurisdiction of the appeal or a judge of that court. | Time to take appeal from court | Y | | | | | Day | 10 | | |
| 26 | 7609 | | (a) Notice.--<br>(1) In general.--If any summons to which this section applies requires the giving of testimony on or relating to, the production of any portion of records made or kept on or relating to, or the production of any computer software source code (as defined in 7612(d)(2)) with respect to, any person (other than the person summoned) who is identified in the summons, then notice of the summons shall be given to any person so identified within 3 days of the day on which such service is made, but no later than the 23rd day before the day fixed in the summons as the day upon which such records are to be examined. Such notice shall be accompanied by a copy of the summons which has been served and shall contain an explanation of the right under subsection (b)(2) to bring a proceeding to quash the summons.<br>(2) Sufficiency of notice.--Such notice shall be sufficient if, on or before such third day, such notice is served in the manner provided in section 7603 (relating to service of summons) upon the person entitled to notice, or is mailed by certified or registered mail to the last known address of such person, or, in the absence of a last known address, is left with the person summoned. If such notice is mailed, it shall be sufficient if mailed to the last known address of the person entitled to notice or, in the case of notice to the Secretary under section 6903 of the existence of a fiduciary relationship, to the last known address of the fiduciary of such person, even if such person or fiduciary is then deceased, under a legal disability, or no longer in existence.<br>* * *<br>(b) Right to intervene; right to proceeding to quash.--<br>* * *<br>(2) Proceeding to quash.--<br>(A) In general.--Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to begin a proceeding to quash such summons not later than the 20th day after the day such notice is given in the manner provided in subsection (a)(2). In any such proceeding, the Secretary may seek to compel compliance with the summons.<br>* * * | Notice to litigants or other entities | | | Y | | | Day | 3 | | |

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| | | | (h) Jurisdiction of district court; etc.--<br>(1) Jurisdiction.--The United States district court for the district within which the person to be summoned resides or is found shall have jurisdiction to hear and determine any proceeding brought under subsection (b)(2), (f), or (g). An order denying the petition shall be deemed a final order which may be appealed. | | | | | | | | | | |
| 27 | 207 | | The District Courts of the United States, and the United States court for any Territory, of the District where the offense is committed or threatened or of which the offender is an inhabitant or has his principal place of business, are vested with jurisdiction of any suit brought by the Attorney General in the name of the United States, to prevent and restrain violations of any of the provisions of this chapter. Any person violating any of the provisions of section 203 or 205 of this title shall be guilty of a misdemeanor and upon conviction thereof be fined not more than $1,000 for each offense. The Secretary of the Treasury is authorized, with respect to any violation of this chapter, to compromise the liability arising with respect to such violation (1) upon payment of a sum not in excess of $500 for each offense, to be collected by the Secretary and to be paid into the Treasury as miscellaneous receipts, and (2) in case of repetitious violations and in order to avoid multiplicity of criminal proceedings, upon agreement to a stipulation, that the United States may, on its own motion upon five days' notice to the violator, cause a consent decree to be entered by any court of competent jurisdiction enjoining the repetition of such violation. | Notice to litigants or other entities | | | Y | Y | | Day | 5 | | |

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| 28 | 144 | | Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.<br>The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith. | Time to make a motion or other filing | | Y | Y | Y | | Day | 10 | | |
| 28 | 158 | note | "(4) Filing of petition with attachment.--A petition requesting permission to appeal, that is based on a certification made under subparagraph (A) or (B) of section 158(d)(2) shall--<br>"(A) be filed with the circuit clerk not later than 10 days after the certification is entered on the docket of the bankruptcy court, the district court, or the bankruptcy appellate panel from which the appeal is taken; and<br>"(B) have attached a copy of such certification." | Time to take appeal from court | Y | | | | | Day | 10 | | temporary provision that will lapse if/when FRAP rule on point takes effect |

| Title | Section | Subsection | Nature of deadline | Type | App | Bnkr | Civil | Crim | Evid | Length - Unit | Length - Number | Issues | Comments |
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| 28 | 636 | (b) | (b)(1) Notwithstanding any provision of law to the contrary--<br>(A) a judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court, except [lists exceptions]. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law.<br>(B) a judge may also designate a magistrate judge to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial [FN1] relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.<br>(C) the magistrate judge shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.<br>Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions. | Time to take appeal from court | | | Y | Y | | Day | 10 | yellow flag on WL -- perhaps due to proposed legislation, or to negative caselaw re (prior version of?) 636(c) | RA states: "The yellow flag is probably due to U.S. v. Johnston, 258 F.3d 361, in which the Fifth Circuit held (c)(1) to be unconstitutional. However, the concerns in Johnston regarding the constitutionality of delegations in (c) do not appear to apply to the delegations in (b).... the delegations in (b) involve only civil trials, do not permit magistrates to review an Art III judge's decisions, and gives authority for Art III judges to review all decisions and recommendations of the magistrate. Subsection (b) only delegates to a magistrate judge the power to make pre-trial decisions and hold evidentiary hearings to make recommendations of findings of fact. Those recommendations of findings of fact are reviewed under a de novo standard." |
| 28 | 754 | | A receiver appointed in any civil action or proceeding involving property, real, personal or mixed, situated in different districts shall, upon giving bond as required by the court, be vested with complete jurisdiction and control of all such property with the right to take possession thereof. He shall have capacity to sue in any district without ancillary appointment, and may be sued with respect thereto as provided in section 959 of this title.<br>Such receiver shall, within ten days after the entry of his order of appointment, file copies of the complaint and such order of appointment in the district court for each district in which property is located. The failure to file such copies in any district shall divest the receiver of jurisdiction and control over all such property in that district. | Time to make a motion or other filing | | | Y | | | Day | 10 | | |

| Title | Section | Subsection | Nature of deadline | Type | App | Bnkr | Civil | Crim | Evid | Length - Unit | Length - Number | Issues | Comments |
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| 28 | 1292 | (b) | (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order. | Time to take appeal from court | Y | | | | | Day | 10 | yellow flag on Westlaw -- apparently due to proposed legislation | see also 1292(d)(1) & (2) re Court of International Trade and Court of Federal Claims |
| 28 | 1292 | (d) | (d)(1) When the chief judge of the Court of International Trade issues an order under the provisions of section 256(b) of this title, or when any judge of the Court of International Trade, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order. | Time to take appeal from court | Y | | | | | Day | 10 | yellow flag on Westlaw -- apparently due to proposed legislation | |
| 28 | 1292 | (d) | (2) When the chief judge of the United States Court of Federal Claims issues an order under section 798(b) of this title, or when any judge of the United States Court of Federal Claims, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order. | Time to take appeal from court | Y | | | | | Day | 10 | yellow flag on Westlaw -- apparently due to proposed legislation | |

| Title | Section | Subsection | Nature of deadline | Type | App | Bnkr | Civil | Crim | Evid | Length - Unit | Length - Number | Issues | Comments |
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| 28 | 1453 | (c)(1) | (c) Review of remand orders.--<br>(1) In general.--Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not less than 7 days after entry of the order.<br>(2) Time period for judgment.--If the court of appeals accepts an appeal under paragraph (1), the court shall complete all action on such appeal, including rendering judgment, not later than 60 days after the date on which such appeal was filed, unless an extension is granted under paragraph (3).<br>(3) Extension of time period.--The court of appeals may grant an extension of the 60-day period described in paragraph (2) if--<br>(A) all parties to the proceeding agree to such extension, for any period of time; or<br>(B) such extension is for good cause shown and in the interests of justice, for a period not to exceed 10 days.<br>(4) Denial of appeal.--If a final judgment on the appeal under paragraph (1) is not issued before the end of the period described in paragraph (2), including any extension under paragraph (3), the appeal shall be denied. | Time to take appeal from court | Y | | | | | Day | 7 | "less" or "more"? See 9th Cir opinion | |
| 28 | 1453 | (c)(3) | (c) Review of remand orders.--<br>(1) In general.--Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not less than 7 days after entry of the order.<br>* * *<br>(3) Extension of time period.--The court of appeals may grant an extension of the 60-day period described in paragraph (2) if--<br>(A) all parties to the proceeding agree to such extension, for any period of time; or<br>(B) such extension is for good cause shown and in the interests of justice, for a period not to exceed 10 days.<br>(4) Denial of appeal.--If a final judgment on the appeal under paragraph (1) is not issued before the end of the period described in paragraph (2), including any extension under paragraph (3), the appeal shall be denied. | Time for court to act | Y | | | | | Day | 10 | | |

| Title | Section | Subsection | Nature of deadline | Type | App | Bnkr | Civil | Crim | Evid | Length - Unit | Length - Number | Issues | Comments |
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| 28 | 1605 | (b)(2) | (b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: Provided, That--<br>(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and<br>(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest. | Notice to litigants or other entities | | | Y | | | Day | 10 | yellow flag on Westlaw -- apparently due to proposed legislation | |
| 28 | 1715 | (b) | (b) In general.--Not later than 10 days after a proposed settlement of a class action is filed in court, each defendant that is participating in the proposed settlement shall serve upon the appropriate State official of each State in which a class member resides and the appropriate Federal official, a notice of the proposed settlement * * * | Notice to litigants or other entities | | | Y | | | Day | 10 | | |
| 28 | 1867 | (a) | (a) In criminal cases, before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the defendant may move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury. | Time to make a motion or other filing | | | | Y | | Day | 7 | | |
| 28 | 1867 | (b) | (b) In criminal cases, before the voir dire examination begins, or within seven days after the Attorney General of the United States discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the Attorney General may move to dismiss the indictment or stay the proceedings on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury. | Time to make a motion or other filing | | | | Y | | Day | 7 | | |

| Title | Section | Subsection | Nature of deadline | Type | App | Bnkr | Civil | Crim | Evid | Length - Unit | Length - Number | Issues | Comments |
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| 28 | 1867 | (c) | (c) In civil cases, before the voir dire examination begins, or within seven days after the party discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, any party may move to stay the proceedings on the ground of substantial failure to comply with the provisions of this title in selecting the petit jury. | Time to make a motion or other filing | | | Y | | | Day | 7 | | |
| 28 | 2001 | (b) | (b) After a hearing, of which notice to all interested parties shall be given by publication or otherwise as the court directs, the court may order the sale of such realty or interest or any part thereof at private sale for cash or other consideration and upon such terms and conditions as the court approves, if it finds that the best interests of the estate will be conserved thereby. Before confirmation of any private sale, the court shall appoint three disinterested persons to appraise such property or different groups of three appraisers each to appraise properties of different classes or situated in different localities. No private sale shall be confirmed at a price less than two-thirds of the appraised value. Before confirmation of any private sale, the terms thereof shall be published in such newspaper or newspapers of general circulation as the court directs at least ten days before confirmation. The private sale shall not be confirmed if a bona fide offer is made, under conditions prescribed by the court, which guarantees at least a 10 per centum increase over the price offered in the private sale. | Notice to litigants or other entities | | | Y | | | Day | 10 | | |
| 28 | 2107 | (c) | (c) * * * In addition, if the district court finds--<br>(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<br>(2) that no party would be prejudiced,<br>the district court may, upon motion filed within 180 days after entry of the judgment or order or within 7 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. | Time to take appeal from court | Y | | Y | | | Day | 7 | | |

| Title | Section | Subsection | Nature of deadline | Type | App | Bnkr | Civil | Crim | Evid | Length - Unit | Length - Number | Issues | Comments |
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| 28 | 2112 | (a) | (a) The rules prescribed under the authority of section 2072 of this title may provide for the time and manner of filing and the contents of the record in all proceedings instituted in the courts of appeals to enjoin, set aside, suspend, modify, or otherwise review or enforce orders of administrative agencies, boards, commissions, and officers. * * * If proceedings are instituted in two or more courts of appeals with respect to the same order, the following shall apply:<br>(1) If within ten days after issuance of the order the agency, board, commission, or officer concerned receives, from the persons instituting the proceedings, the petition for review with respect to proceedings in at least two courts of appeals, the agency, board, commission, or officer shall proceed in accordance with paragraph (3) of this subsection. If within ten days after the issuance of the order the agency, board, commission, or officer concerned receives, from the persons instituting the proceedings, the petition for review with respect to proceedings in only one court of appeals, the agency, board, commission, or officer shall file the record in that court notwithstanding the institution in any other court of appeals of proceedings for review of that order. In all other cases in which proceedings have been instituted in two or more courts of appeals with respect to the same order, the agency, board, commission, or officer concerned shall file the record in the court in which proceedings with respect to the order were first instituted.<br>* * *<br>(3) If an agency, board, commission, or officer receives two or more petitions for review of an order in accordance with the first sentence of paragraph (1) of this subsection, the agency, board, commission, or officer shall, promptly after the expiration of the ten-day period specified in that sentence, so notify the judicial panel on multidistrict litigation authorized by section 1407 of this title, in such form as that panel shall prescribe. The judicial panel on multidistrict litigation shall, by means of random selection, designate one court of appeals, from among the courts of appeals in which petitions for review have been filed and received within the ten-day period specified in the first sentence of paragraph (1), in which the record is to be filed, and shall issue an order consolidating the petitions for review in that court of appeals. The judicial panel on multidistrict litigation shall, after providing notice to the public and an opportunity for the submission of comments, prescribe rules with respect to the consolidation of proceedings under this paragraph. The agency, board, commission, or officer concerned shall file the record in the court of appeals designated pursuant to this paragraph. | Time to seek review of agency action | Y | | | | | Day | 10 | | |

| Title | Section | Subsection | Nature of deadline | Type | App | Bnkr | Civil | Crim | Evid | Length - Unit | Length - Number | Issues | Comments |
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| 28 | 2243 | | A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.<br>The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.<br>The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.<br>When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed. * * * | Presumptive time for court to act | | | Y | | | Day | 5 | what rules apply? | |
| 28 | 2243 | | A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.<br>The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.<br>The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.<br>When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed. * * * | Time for government to act | | | Y | | | Day | 3 | what rules apply? | |
| 28 | 2284 | (b)(2) | (a) A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.<br>(b) In any action required to be heard and determined by a district court of three judges under subsection (a) of this section, the composition and procedure of the court shall be as follows:<br>(1) Upon the filing of a request for three judges, the judge to whom the request is presented shall, unless he determines that three judges are not<br>required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. The judges so designated, and the judge to whom the request was presented, shall serve as members of the court to hear and determine the action or proceeding.<br>(2) If the action is against a State, or officer or agency thereof, at least five days' notice of hearing of the action shall be given by registered or certified mail to the Governor and attorney general of the State. | Notice to litigants or other entities | | | Y | | | Day | 5 | | |

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| 28 | 2349 | (b) | (b) The filing of the petition to review does not of itself stay or suspend the operation of the order of the agency, but the court of appeals in its discretion may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the petition. When the petitioner makes application for an interlocutory injunction restraining or suspending the enforcement, operation, or execution of, or setting aside, in whole or in part, any order reviewable under this chapter, at least 5 days' notice of the hearing thereon shall be given to the agency and to the Attorney General. In a case in which irreparable damage would otherwise result to the petitioner, the court of appeals may, on hearing, after reasonable notice to the agency and to the Attorney General, order a temporary stay or suspension, in whole or in part, of the operation of the order of the agency for not more than 60 days from the date of the order pending the hearing on the application for the interlocutory injunction, in which case the order of the court of appeals shall contain a specific finding, based on evidence submitted to the court of appeals, and identified by reference thereto, that irreparable damage would result to the petitioner and specifying the nature of the damage. The court of appeals, at the time of hearing the application for an interlocutory injunction, on a like finding, may continue the temporary stay or suspension, in whole or in part, until decision on the application. | Notice to litigants or other entities | Y | | | | | Day | 5 | also 60 day period | |
| 28 | 3007 | (b) | (a) Authority to sell.--If at any time during any action or proceeding under this chapter the court determines on its own initiative or upon motion of any party, that any seized or detained personal property is likely to perish, waste, or be destroyed, or otherwise substantially depreciate in value during the pendency of the proceeding, the court shall order a commercially reasonable sale of such property.<br>(b) Deposit of sale proceeds.--Within 5 days after such sale, the proceeds shall be deposited with the clerk of the court, accompanied by a statement in writing and signed by the United States marshal, to be filed in the action or proceeding, stating the time and place of sale, the name of the purchaser, the amount received, and an itemized account of expenses.<br>(c) Presumption.--For purposes of liability on the part of the United States, there shall be a presumption that the price paid at a sale under subsection (a) is the fair market value of the property or portion. | Time for government to act | | | Y | | | Day | 5 | | re federal debt collection procedure |

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| 28 | 3101 | (d)(2) | (a) Application.--(1) The United States may, in a proceeding in conjunction with the complaint or at any time after the filing of a civil action on a claim for a debt, make application under oath to a court to issue any prejudgment remedy.<br>***<br>[(d)](2) By requesting, at any time before judgment on the claim for a debt, the court to hold a hearing, the debtor may move to quash the order granting such remedy. The court shall hold a hearing on such motion as soon as practicable, or, if requested by the debtor, within 5 days after receiving the request for a hearing or as soon thereafter as possible. | Presumptive time for court to act | | | Y | | | Day | 5 | yellow flag on Westlaw -- apparently due to proposed legislation | re federal debt collection procedure |
| 28 | 3102 | (e)(1) | (e) Return of writ; duties of marshal; further return.--(1) A United States marshal executing a writ of attachment shall return the writ with the marshal's action endorsed thereon or attached thereto and signed by the marshal, to the court from which it was issued, within 5 days after the date of the levy. | Time for government to act | | | Y | | | Day | 5 | | re federal debt collection procedure |
| 28 | 3105 | (f)(1) | (f) Return of writ; duties of marshal; further return.--(1) A United States marshal executing a writ of sequestration shall return the writ with the marshal's action endorsed thereon or attached thereto and signed by the marshal, to the court from which it was issued, within 5 days after the date of the execution. | Time for government to act | | | Y | | | Day | 5 | | re federal debt collection procedure |
| 28 | 3202 | (d) | (d) Hearing.--By requesting, within 20 days after receiving the notice described in section 3202(b), the court to hold a hearing, the judgment debtor may move to quash the order granting such remedy. The court that issued such order shall hold a hearing on such motion as soon as practicable, or, if so requested by the judgment debtor, within 5 days after receiving the request or as soon thereafter as possible. The issues at such hearing shall be limited--<br>(1) to the probable validity of any claim of exemption by the judgment debtor;<br>(2) to compliance with any statutory requirement for the issuance of the postjudgment remedy granted; and<br>(3) if the judgment is by default and only to the extent that the Constitution or another law of the United States provides a right to a hearing on the issue, to--<br>(A) the probable validity of the claim for the debt which is merged in the judgment; and<br>(B) the existence of good cause for setting aside such judgment. | Presumptive time for court to act | | | Y | | | Day | 5 | yellow flag on Westlaw -- apparently due to proposed legislation | re federal debt collection procedure. |

| Title | Section | Subsection | Nature of deadline | Type | App | Bnkr | Civil | Crim | Evid | Length - Unit | Length - Number | Issues | Comments |
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| 28 | 3203 | (d) | (d) Levy of execution.--<br>(1) In general.--Levy on property pursuant to a writ of execution issued under this section shall be made in the same manner as levy on property is made pursuant to a writ of attachment issued under section 3102(d).<br>* * *<br>(3) Records of United States marshal.-- * * *<br>(C) The United States marshal shall make a written return to the court on each writ of execution stating concisely what is done pursuant to the writ and shall deliver a copy to counsel for the United States who requests the writ. The writ shall be returned not more than--<br>(i) 90 days after the date of issuance if levy is not made; or<br>(ii) 10 days after the date of sale of property on which levy is made. | Time for government to act | | | Y | | | Day | 10 | also note 90 day period | re federal debt collection procedure |
| 28 | 3203 | (g) | (g) Execution sale.--<br>(1) General procedures.--An execution sale under this section shall be conducted in a commercially reasonable manner--<br>(A) Sale of real property.--<br>(i) In general.--(I) Except as provided in clause (ii), real property, or any interest therein, shall be sold, after the expiration of the 90-day period beginning on the date of levy under subsection (d), for cash at public auction at the courthouse of the county, parish, or city in which the greater part of the property is located or on the premises or some parcel thereof.<br>(II) The court may order the sale of any real property after the expiration of the 30-day period beginning on the date of levy under subsection (d) if the court determines that such property is likely to perish, waste, be destroyed, or otherwise substantially depreciate in value during the 90-day period beginning on the date of levy.<br>(III) The time and place of sale of real property, or any interest therein, under execution shall be advertised by the United States marshal, by publication of notice, once a week for at least 3 weeks prior to the sale, in at least one newspaper of general circulation in the county or parish where the property is located. The first publication shall appear not less than 25 days preceding the day of sale. The notice shall contain a statement of the authority by which the sale is to be made, the time of levy, the time and place of sale, and a brief description of the property to be sold, sufficient to identify the property (such as a street address for urban property and the survey identification and location for rural property), but it shall not be necessary for the notice to contain field notes. Such property shall be open for inspection and appraisal, subject to the judgment debtor's reasonable objections, for a reasonable period before the day of sale.<br>(IV) The United States marshal shall serve written notice of public sale by personal delivery, or certified or registered mail, to each person whom the marshal has reasonable cause to believe, after a title search is conducted by the United States, has an interest in property under execution, including lienholders, co-owners, and tenants, at least 25 days | Notice to litigants or other entities | | | Y | | | Day | 10 | also note other time periods | re federal debt collection procedure |

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| | | | before the day of sale, to the last known address of each such person.<br>* * *<br>(B) Sale of personal property.-- * * *<br>(ii)(I) Except as provided in subclause (II), personal property, or any interest therein, shall be sold after the expiration of the 30-day period beginning on the date of levy under subsection (d).<br>(II) The court may order the sale of any personal property before the expiration of such 30-day period if the court determines that such property is likely to perish, waste, be destroyed, or otherwise substantially depreciate in value during such 30-day period.<br>(iii) Notice of the time and place of the sale of personal property shall be given by the United States marshal by posting notice thereof for not less than 10 days successively immediately before the day of sale at the courthouse of any county, parish, or city, and at the place where the sale is to be made.<br>* * * | | | | | | | | | | |
| 28 | 3205 | (c)(2) | (c) Procedures applicable to writ.--<br>(1) Court determination.--If the court determines that the requirements of this section are satisfied, the court shall issue an appropriate writ of garnishment.<br>(2) Form of writ.--The writ shall state--<br>(A) The nature and amount of the debt, and any cost and interest owed with respect to the debt.<br>(B) The name and address of the garnishee.<br>(C) The name and address of counsel for the United States.<br>(D) The last known address of the judgment debtor.<br>(E) That the garnishee shall answer the writ within 10 days of service of the writ.<br>(F) That the garnishee shall withhold and retain any property in which the debtor has a substantial nonexempt interest and for which the garnishee is or may become indebted to the judgment debtor pending further order of the court. | Time to make a motion or other filing | | | Y | | | Day | 10 | | re federal debt collection procedure |
| 28 | 3205 | (c)(5) | (5) Objections to answer.--Within 20 days after receipt of the answer, the judgment debtor or the United States may file a written objection to the answer and request a hearing. The party objecting shall state the grounds for the objection and bear the burden of proving such grounds. A copy of the objection and request for a hearing shall be served on the garnishee and all other parties. The court shall hold a hearing within 10 days after the date the request is received by the court, or as soon thereafter as is practicable, and give notice of the hearing date to all the parties. | Presumptive time for court to act | | | Y | | | Day | 10 | see also 20 day period | re federal debt collection procedure |

| Title | Section | Subsection | Nature of deadline | Type | App | Bnkr | Civil | Crim | Evid | Length - Unit | Length - Number | Issues | Comments |
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| 28 | 3205 | (c)(7) | (7) Disposition order.--After the garnishee files an answer and if no hearing is requested within the required time period, the court shall promptly enter an order directing the garnishee as to the disposition of the judgment debtor's nonexempt interest in such property. If a hearing is timely requested, the order shall be entered within 5 days after the hearing, or as soon thereafter as is practicable. | Presumptive time for court to act | | | Y | | | Day | 5 | | re federal debt collection procedure |
| 28 | 3205 | (c)(9) | (9) Accounting.--(A) While a writ of garnishment is in effect under this section, the United States shall give an annual accounting on the garnishment to the judgment debtor and the garnishee.<br>(B) Within 10 days after the garnishment terminates, the United States shall give a cumulative written accounting to the judgment debtor and garnishee of all property it receives under a writ of garnishment. Within 10 days after such accounting is received, the judgment debtor or garnishee may file a written objection to the accounting and a request for hearing. The party objecting shall state grounds for the objection. The court shall hold a hearing on the objection within 10 days after the court receives the request for a hearing, or as soon thereafter as is practicable. | Presumptive time for court to act | | | Y | | | Day | 10 | | re federal debt collection procedure |
| 28 | 3205 | (c)(9) | (9) Accounting.--(A) While a writ of garnishment is in effect under this section, the United States shall give an annual accounting on the garnishment to the judgment debtor and the garnishee.<br>(B) Within 10 days after the garnishment terminates, the United States shall give a cumulative written accounting to the judgment debtor and garnishee of all property it receives under a writ of garnishment. Within 10 days after such accounting is received, the judgment debtor or garnishee may file a written objection to the accounting and a request for hearing. The party objecting shall state grounds for the objection. The court shall hold a hearing on the objection within 10 days after the court receives the request for a hearing, or as soon thereafter as is practicable. | Time for government to act | | | Y | | | Day | 10 | | re federal debt collection procedure |

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| 28 | 3205 | (c)(9) | (9) Accounting.--(A) While a writ of garnishment is in effect under this section, the United States shall give an annual accounting on the garnishment to the judgment debtor and the garnishee.<br>(B) Within 10 days after the garnishment terminates, the United States shall give a cumulative written accounting to the judgment debtor and garnishee of all property it receives under a writ of garnishment. Within 10 days after such accounting is received, the judgment debtor or garnishee may file a written objection to the accounting and a request for hearing. The party objecting shall state grounds for the objection. The court shall hold a hearing on the objection within 10 days after the court receives the request for a hearing, or as soon thereafter as is practicable. | Time to make a motion or other filing | | | Y | | | Day | 10 | | re federal debt collection procedure |
| 29 | 107 | | No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this chapter, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect--<br>* * *<br>* * * Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court. * * * | TRO time limit | | | Y | | | Day | 5 | | |

| Title | Section | Subsection | Nature of deadline | Type | App | Bnkr | Civil | Crim | Evid | Length - Unit | Length - Number | Issues | Comments |
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| 29 | 160 | (l) | Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 158(b) of this title, or section 158(e) of this title or section 158(b)(7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: Provided further, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: Provided further, That such officer or regional attorney shall not apply for any restraining order under section 158(b)(7) of this title if a charge against the employer under section 158(a)(2) of this title has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: Provided further, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 158(b)(4)(D) of this title. | TRO time limit | | | Y | | | Day | 5 | yellow flag on Westlaw -- apparently due to proposed legislation | |

| Title | Section | Subsection | Nature of deadline | Type | App | Bnkr | Civil | Crim | Evid | Length - Unit | Length - Number | Issues | Comments |
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| 29 | 662 | (b) | (a) Petition by Secretary to restrain imminent dangers; scope of order<br>The United States district courts shall have jurisdiction, upon petition of the Secretary, to restrain any conditions or practices in any place of employment which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this chapter. Any order issued under this section may require such steps to be taken as may be necessary to avoid, correct, or remove such imminent danger and prohibit the employment or presence of any individual in locations or under conditions where such imminent danger exists, except individuals whose presence is necessary to avoid, correct, or remove such imminent danger or to maintain the capacity of a continuous process operation to resume normal operations without a complete cessation of operations, or where a cessation of operations is necessary, to permit such to be accomplished in a safe and orderly manner.<br>(b) Appropriate injunctive relief or temporary restraining order pending outcome of enforcement proceeding; applicability of Rule 65 of Federal Rules of Civil Procedure<br>Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order pending the outcome of an enforcement proceeding pursuant to this chapter. The proceeding shall be as provided by Rule 65 of the Federal Rules, Civil Procedure, except that no temporary restraining order issued without notice shall be effective for a period longer than five days. | TRO time limit | | | Y | | | Day | 5 | | |
| 29 | 2937 | (a) | (1) Petition<br>With respect to any final order by the Secretary under section 2936 of this title by which the Secretary awards, declines to award, or only conditionally awards, financial assistance under his [FN1] chapter, or any final order of the Secretary under section 2936 of this title with respect to a corrective action or sanction imposed under section 2934 of this title, any party to a proceeding which resulted in such final order may obtain review of such final order in the United States Court of Appeals having jurisdiction over the applicant or recipient of funds involved, by filing a review petition within 30 days after the date of issuance of such final order.<br>(2) Action on petition<br>The clerk of the court shall transmit a copy of the review petition to the Secretary who shall file the record on which the final order was entered as provided in section 2112 of Title 28. The filing of a review petition shall not stay the order of the Secretary, unless the court orders a stay. Petitions filed under this subsection shall be heard expeditiously, if possible within 10 days after the date of filing of a reply to the petition. | Presumptive time for court to act | Y | | | | | Day | 10 | | |

| Title | Section | Subsection | Nature of deadline | Type | App | Bnkr | Civil | Crim | Evid | Length - Unit | Length - Number | Issues | Comments |
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| 30 | 40 | | All affidavits required to be made under sections 21, 22 to 24, 26 to 28, 29, 30, 33 to 48, 50 to 52, 71 to 76 of this title, and section 661 of Title 43 may be verified before any officer authorized to administer oaths within the land district where the claims may be situated, and all testimony and proofs may be taken before any such officer, and, when duly certified by the officer taking the same, shall have the same force and effect as if taken before the register of the land office. In cases of contest as to the mineral or agricultural character of land, the testimony and proofs may be taken as herein provided on personal notice of at least ten days to the opposing party; or if such party cannot be found, then by publication of at least once a week for thirty days in a newspaper, to be designated by the register of the land office as published nearest to the location of such land; and the register shall require proof that such notice has been given. | Notice to litigants or other entities | | | Y | | | Day | 10 | | |
| 30 | 818 | (b) | (b) Jurisdiction; relief; findings of Commission or Secretary<br>In any action brought under subsection (a) of this section, the court shall have jurisdiction to provide such relief as may be appropriate. In the case of an action under subsection (a)(2) of this section, the court shall in its order require such assurance or affirmative steps as it deems necessary to assure itself that the protection afforded to miners under this chapter shall be provided by the operator. Temporary restraining orders shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure, as amended, except that the time limit in such orders, when issued without notice, shall be seven days from the date of entry. Except as otherwise provided herein, any relief granted by the court to enforce any order under paragraph (1) of subsection (a) of this section shall continue in effect until the completion or final termination of all proceedings for review of such order under this subchapter, unless prior thereto, the district court granting such relief sets it aside or modifies it. In any action instituted under this section to enforce an order or decision issued by the Commission or the Secretary after a public hearing in accordance with section 554 of Title 5, the findings of the Commission or the Secretary, as the case may be, if supported by substantial evidence on the record considered as a whole, shall be conclusive. | TRO time limit | | | Y | | | Day | 7 | yellow flag on Westlaw -- apparently due to proposed legislation | |
| 30 | 1734 | (c)(2) | (2) Any rent, royalty, or interest recovered by a State under subsection (a) of this section shall be deposited in the Treasury of the United States in the same manner, and subject to the same requirements, as are applicable in the case of any rent, royalty, or interest collected by an officer or employee of the United States, except that such amounts shall be deposited in the Treasury not later than 10 days after receipt by the State. | Time for government to act | | | Y | | | Day | 10 | | |

| Title | Section | Subsection | Nature of deadline | Type | App | Bnkr | Civil | Crim | Evid | Length - Unit | Length - Number | Issues | Comments |
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| 38 | 7292 | (b)(1) | (b)(1) When a judge or panel of the Court of Appeals for Veterans Claims, in making an order not otherwise appealable under this section, determines that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that there is in fact a disagreement between the appellant and the Secretary with respect to that question of law and that the ultimate termination of the case may be materially advanced by the immediate consideration of that question, the judge or panel shall notify the chief judge of that determination. Upon receiving such a notification, the chief judge shall certify that such a question is presented, and any party to the case may then petition the Court of Appeals for the Federal Circuit to decide the question. That court may permit an interlocutory appeal to be taken on that question if such a petition is filed with it within 10 days after the certification by the chief judge of the Court of Appeals for Veterans Claims. Neither the application for, nor the granting of, an appeal under this paragraph shall stay proceedings in the Court of Appeals for Veterans Claims, unless a stay is ordered by a judge of the Court of Appeals for Veterans Claims or by the Court of Appeals for the Federal Circuit. | Time to take appeal from court | Y | | | | | Day | 10 | | |
| 42 | 1971 | (e) | (d) Jurisdiction; exhaustion of other remedies<br>The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law.<br>(e) Order qualifying person to vote; application; hearing; voting referees; transmittal of report and order; certificate of qualification; definitions<br>* * *<br>An application for an order pursuant to this subsection shall be heard within ten days, and the execution of any order disposing of such application shall not be stayed if the effect of such stay would be to delay the effectiveness of the order beyond the date of any election at which the applicant would otherwise be enabled to vote.<br>* * *<br>The court may appoint one or more persons who are qualified voters in the judicial district, to be known as voting referees, who shall subscribe to the oath of office required by section 3331 of Title 5, to serve for such period as the court shall determine, to receive such applications and to take evidence and report to the court findings * * *.<br>Upon receipt of such report, the court shall cause the Attorney General to transmit a copy thereof to the State attorney general and to each party to such proceeding together with an order to show cause within ten days, or such shorter time as the court may fix, why an order of the court should not be entered in accordance with such report. Upon the expiration of such period, such order shall be entered unless prior to that time there has been filed with the court and served upon all parties a statement of exceptions to such report. Exceptions as to matters of fact shall be considered only if supported by a duly verified copy of a public record or by affidavit of persons having personal knowledge of such facts or by statements or matters contained in such report; those relating to matters of law shall be supported by an appropriate memorandum of law. The | Time for court to act | | | Y | | | Day | 10 | yellow flag in WL apparently relates to proposed legislation and perhaps also to July 27, 2006 legislation that named this provision | RA checked and states that "There does not appear to be any relevant negative treatment of § 1971." |

| Title | Section | Subsection | Nature of deadline | Type | App | Bnkr | Civil | Crim | Evid | Length - Unit | Length - Number | Issues | Comments |
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| | | | issues of fact and law raised by such exceptions shall be determined by the court or, if the due and speedy administration of justice requires, they may be referred to the voting referee to determine in accordance with procedures prescribed by the court. A hearing as to an issue of fact shall be held only in the event that the proof in support of the exception disclose the existence of a genuine issue of material fact. The applicant's literacy and understanding of other subjects shall be determined solely on the basis of answers included in the report of the voting referee. | | | | | | | | | | |
| 42 | 1971 | (e) | (d) Jurisdiction; exhaustion of other remedies<br>The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law.<br>(e) Order qualifying person to vote; application; hearing; voting referees; transmittal of report and order; certificate of qualification; definitions<br>* * *<br>An application for an order pursuant to this subsection shall be heard within ten days, and the execution of any order disposing of such application shall not be stayed if the effect of such stay would be to delay the effectiveness of the order beyond the date of any election at which the applicant would otherwise be enabled to vote.<br>* * *<br>The court may appoint one or more persons who are qualified voters in the judicial district, to be known as voting referees, who shall subscribe to the oath of office required by section 3331 of Title 5, to serve for such period as the court shall determine, to receive such applications and to take evidence and report to the court findings * * *.<br>Upon receipt of such report, the court shall cause the Attorney General to transmit a copy thereof to the State attorney general and to each party to such proceeding together with an order to show cause within ten days, or such shorter time as the court may fix, why an order of the court should not be entered in accordance with such report. Upon the expiration of such period, such order shall be entered unless prior to that time there has been filed with the court and served upon all parties a statement of | Time for government to act | | | Y | | | Day | 10 | yellow flag in WL apparently relates to proposed legislation and perhaps also to July 27, 2006 legislation that named this provision | RA checked and states that "There does not appear to be any relevant negative treatment of § 1971." |

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| | | | exceptions to such report. Exceptions as to matters of fact shall be considered only if supported by a duly verified copy of a public record or by affidavit of persons having personal knowledge of such facts or by statements or matters contained in such report; those relating to matters of law shall be supported by an appropriate memorandum of law. The issues of fact and law raised by such exceptions shall be determined by the court or, if the due and speedy administration of justice requires, they may be referred to the voting referee to determine in accordance with procedures prescribed by the court. A hearing as to an issue of fact shall be held only in the event that the proof in support of the exception disclose the existence of a genuine issue of material fact. The applicant's literacy and understanding of other subjects shall be determined solely on the basis of answers included in the report of the voting referee. | | | | | | | | | | |
| 43 | 1062 | | It shall be the duty of the United States attorney for the proper district, on affidavit filed with him by any citizen of the United States that section 1061 of this title is being violated showing a description of the land inclosed with reasonable certainty, not necessarily by metes and bounds nor by governmental subdivisions of surveyed lands, but only so that the inclosure may be identified, and the persons guilty of the violation as nearly as may be, and by description, if the name cannot on reasonable inquiry be ascertained, to institute a civil suit in the proper United States district court, or territorial district court, in the name of the United States, and against the parties named or described who shall be in charge of or controlling the inclosure complained of as defendants; and jurisdiction is also conferred on any United States district court or territorial district court having jurisdiction over the locality where the land inclosed, or any part thereof, shall be situated, to hear and determine proceedings in equity, by writ of injunction, to restrain violations of the provisions of this chapter; and it shall be sufficient to give the court jurisdiction if service of original process be had in any civil proceeding on any agent or employee having charge or control of the inclosure. In any case if the inclosure shall be found to be unlawful, the court shall make the proper order, judgment, or decree for the destruction of the inclosure, in a summary way, unless the inclosure shall be removed by the defendant within five days after the order of the court. | Time to make a motion or other filing | | | Y | | | Day | 5 | | |

| Title | Section | Subsection | Nature of deadline | Type | App | Bnkr | Civil | Crim | Evid | Length - Unit | Length - Number | Issues | Comments |
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| 45 | 159 | | First. Filing of award<br>The award of a board of arbitration, having been acknowledged as herein provided, shall be filed in the clerk's office of the district court designated in the agreement to arbitrate.<br>Second. Conclusiveness of award; judgment<br>An award acknowledged and filed as herein provided shall be conclusive on the parties as to the merits and facts of the controversy submitted to arbitration, and unless, within ten days after the filing of the award, a petition to impeach the award, on the grounds hereinafter set forth, shall be filed in the clerk's office of the court in which the award has been filed, the court shall enter judgment on the award, which judgment shall be final and conclusive on the parties.<br>* * *<br>Fifth. Appeal; record<br>At the expiration of 10 days from the decision of the district court upon the petition filed as aforesaid, final judgment shall be entered in accordance with said decision, unless during said 10 days either party shall appeal therefrom to the court of appeals. In such case only such portion of the record shall be transmitted to the appellate court as is necessary to the proper understanding and consideration of the questions of law presented by said petition and to be decided. | Time to make a motion or other filing | Y | | Y | | | Day | 10 | | |
| 45 | 159 | | First. Filing of award<br>The award of a board of arbitration, having been acknowledged as herein provided, shall be filed in the clerk's office of the district court designated in the agreement to arbitrate.<br>Second. Conclusiveness of award; judgment<br>An award acknowledged and filed as herein provided shall be conclusive on the parties as to the merits and facts of the controversy submitted to arbitration, and unless, within ten days after the filing of the award, a petition to impeach the award, on the grounds hereinafter set forth, shall be filed in the clerk's office of the court in which the award has been filed, the court shall enter judgment on the award, which judgment shall be final and conclusive on the parties.<br>* * *<br>Fifth. Appeal; record<br>At the expiration of 10 days from the decision of the district court upon the petition filed as aforesaid, final judgment shall be entered in accordance with said decision, unless during said 10 days either party shall appeal therefrom to the court of appeals. In such case only such portion of the record shall be transmitted to the appellate court as is necessary to the proper understanding and consideration of the questions of law presented by said petition and to be decided. | Time to take appeal from court | Y | | Y | | | Day | 10 | | |

| Title | Section | Subsection | Nature of deadline | Type | App | Bnkr | Civil | Crim | Evid | Length - Unit | Length - Number | Issues | Comments |
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| 46 | 10706 | | When a seaman dies in the United States and is entitled at death to claim money, property, or wages from the master or owner of a vessel on which the seaman served, the master or owner shall deliver the money, property, and wages to a district court of the United States within one week of the seaman's death. If the seaman's death occurs at sea, such money, property, or wages shall be delivered to a district court or a consular officer within one week of the vessel's arrival at the first port call after the seaman's death. | | | | Y | | | Week | 1 | | |
| 46 | 41306 | (c) | "§ 41306. Injunctive relief sought by complainants<br>"(a) IN GENERAL.--After filing a complaint with the Federal Maritime Commission under section 41301 of this title, the complainant may bring a civil action in a district court of the United States to enjoin conduct in violation of this part.<br>"(b) VENUE.--The action must be brought in the judicial district in which--<br>"(1) the Commission has brought a civil action against the defendant under section 41307(a) of this title; or<br>"(2) the defendant resides or transacts business, if the Commission has not brought such an action.<br>"(c) REMEDIES BY COURT.--After notice to the defendant, and a showing that the standards for granting injunctive relief by courts of equity are met, the court may grant a temporary restraining order or preliminary injunction for a period not to exceed 10 days after the Commission has issued an order disposing of the complaint. | TRO time limit | | | Y | | | Day | 10 | | Can be found at 120 Stat 1485, 1546. Does not yet appear in Westlaw's USC database -- presumably because the relevant Public Law -- PL 109-304 -- was passed 10/6/06 |
| 46 | 41307 | (a) | "§ 41307. Injunctive relief sought by the Commission<br>"(a) GENERAL VIOLATIONS.--In connection with an investigation under section 41301 or 41302 of this title, the Federal Maritime Commission may bring a civil action to enjoin conduct in violation of this part. The action must be brought in the district court of the United States for any judicial district in which the defendant resides or transacts business. After notice to the defendant, and a showing that the standards for granting injunctive relief by courts of equity are met, the court may grant a temporary restraining order or preliminary injunction for a period not to exceed 10 days after the Commission has issued an order disposing of the issues under investigation. | TRO time limit | | | Y | | | Day | 10 | | can be found at 120 Stat 1485, 1547. Does not yet appear in Westlaw's USC database -- presumably because the relevant Public Law -- PL 109-304 -- was passed 10/6/06 |

| Title | Section | Subsection | Nature of deadline | Type | App | Bnkr | Civil | Crim | Evid | Length - Unit | Length - Number | Issues | Comments |
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| 47 | 402 | (d) | (d) Notice to interested parties; filing of record<br>Upon the filing of any such notice of appeal the appellant shall, not later than five days after the filing of such notice, notify each person shown by the records of the Commission to be interested in said appeal of the filing and pendency of the same. The Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. | Notice to litigants or other entities | Y | | | | | Day | 5 | | |
| 49 | 32707 | (c) | (c) Service and impoundment of property.--(1) A warrant issued under this section must be served and proof of service filed not later than 10 days after its issuance date. The judge or magistrate may allow additional time in the warrant if the Secretary of Transportation demonstrates a need for additional time. Proof of service must be filed promptly with a written inventory of the property impounded under the warrant. The inventory shall be made in the presence of the individual serving the warrant and the individual from whose possession or premises the property was impounded, or if that individual is not present, a credible individual except the individual making the inventory. The individual serving the warrant shall verify the inventory. On request, the judge or magistrate shall send a copy of the inventory to the individual from whose possession or premises the property was impounded and to the applicant for the warrant. | Time for government to act | | | Y | | | Day | 10 | | RA checked and states that "This is definitely not a criminal procedure. It appears to be primarily administrative, but some of the enforcement mechanisms are civil. Under § 32706, the Secretary of Transportation is authorized to "conduct inspections or investigations, impound vehicles, require dealers or distributors of motor vehicles to keep records, and conduct hearings relating to compliance with odometer laws and regulations." (7A Am. Jur. 2d Automobiles and Highway Traffic § 221) An inspection or impoundment may be carried out for the purpose of conducting such inspections, but only after a warrant is obtained through the procedures given in §32707. All of this appears to be administrative in nature. However, under § 32706, the Sec of Transportation can enforce compliance with a court order to obey the Secretary's subpoena or order through civil action (failure to comply can be punished as contempt of court)." |

| Title | Section | Subsection | Nature of deadline | Type | App | Bnkr | Civil | Crim | Evid | Length - Unit | Length - Number | Issues | Comments |
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| 50 | 1801 | (h) | (h) "Minimization procedures", with respect to electronic surveillance, means--<br>* * *<br>(4) notwithstanding paragraphs (1), (2), and (3), with respect to any electronic surveillance approved pursuant to section 1802(a) of this title, procedures that require that no contents of any communication to which a United States person is a party shall be disclosed, disseminated, or used for any purpose or retained for longer than 72 hours unless a court order under section 1805 of this title is obtained or unless the Attorney General determines that the information indicates a threat of death or serious bodily harm to any person. | | | | | Y | | Hour | 72 | yellow flag on Westlaw -- apparently due to proposed legislation | |
| 50 | 1805 | (c)(3) | (3) Special directions for certain orders<br>An order approving an electronic surveillance under this section in circumstances where the nature and location of each of the facilities or places at which the surveillance will be directed is unknown shall direct the applicant to provide notice to the court within ten days after the date on which surveillance begins to be directed at any new facility or place, unless the court finds good cause to justify a longer period of up to 60 days, of--<br>(A) the nature and location of each new facility or place at which the electronic surveillance is directed;<br>(B) the facts and circumstances relied upon by the applicant to justify the applicant's belief that each new facility or place at which the electronic surveillance is directed is or was being used, or is about to be used, by the target of the surveillance;<br>(C) a statement of any proposed minimization procedures that differ from those contained in the original application or order, that may be necessitated by a change in the facility or place at which the electronic surveillance is directed; and<br>(D) the total number of electronic surveillances that have been or are being conducted under the authority of the order. | Time for government to act | | | | Y | | Day | 10 | yellow flag on Westlaw -- apparently due to proposed legislation | |

| Title | Section | Subsection | Nature of deadline | Type | App | Bnkr | Civil | Crim | Evid | Length - Unit | Length - Number | Issues | Comments |
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| 50 | 1805 | (f) | (f) Emergency orders<br>Notwithstanding any other provision of this subchapter, when the Attorney General reasonably determines that--<br>(1) an emergency situation exists with respect to the employment of electronic surveillance to obtain foreign intelligence information before an order authorizing such surveillance can with due diligence be obtained; and<br>(2) the factual basis for issuance of an order under this subchapter to approve such surveillance exists;<br>he may authorize the emergency employment of electronic surveillance if a judge having jurisdiction under section 1803 of this title is informed by the Attorney General or his designee at the time of such authorization that the decision has been made to employ emergency electronic surveillance and if an application in accordance with this subchapter is made to that judge as soon as practicable, but not more than 72 hours after the Attorney General authorizes such surveillance. If the Attorney General authorizes such emergency employment of electronic surveillance, he shall require that the minimization procedures required by this subchapter for the issuance of a judicial order be followed. In the absence of a judicial order approving such electronic surveillance, the surveillance shall terminate when the information sought is obtained, when the application for the order is denied, or after the expiration of 72 hours from the time of authorization by the Attorney General, whichever is earliest. In the event that such application for approval is denied, or in any other case where the electronic surveillance is terminated and no order is issued approving the surveillance, no information obtained or evidence derived from such surveillance shall be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in or before any court, grand jury, department, office, agency, regulatory body, legislative committee, or other authority of the United States, a State, or political subdivision thereof, and no information concerning any United States person acquired from such surveillance shall subsequently be used or disclosed in any other manner by Federal officers or employees without the consent of such person, except with the approval of the Attorney General if the information indicates a threat of death or serious bodily harm to any person. A denial of the application made under this subsection may be reviewed as provided in section 1803 of this title. | Time to make a motion or other filing | | | | Y | | Hour | 72 | yellow flag on Westlaw -- apparently due to proposed legislation | |
| 50 | 1821 | (4)(D) | (4) "Minimization procedures" with respect to physical search, means--<br>* * *<br>(D) notwithstanding subparagraphs (A), (B), and (C), with respect to any physical search approved pursuant to section 1822(a) of this title, procedures that require that no information, material, or property of a United States person shall be disclosed, disseminated, or used for any purpose or retained for longer than 72 hours unless a court order under section 1824 of this title is obtained or unless the Attorney General determines that the information indicates a threat of death or serious bodily harm to any person. | | | | | Y | | Hour | 72 | yellow flag on Westlaw -- apparently due to proposed legislation | |

| Title | Section | Subsection | Nature of deadline | Type | App | Bnkr | Civil | Crim | Evid | Length - Unit | Length - Number | Issues | Comments |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 50 | 1824 | (e) | (e) Emergency orders<br>(1)(A) Notwithstanding any other provision of this subchapter, whenever the Attorney General reasonably makes the determination specified in subparagraph (B), the Attorney General may authorize the execution of an emergency physical search if--<br>(i) a judge having jurisdiction under section 1803 of this title is informed by the Attorney General or the Attorney General's designee at the time of such authorization that the decision has been made to execute an emergency search, and<br>(ii) an application in accordance with this subchapter is made to that judge as soon as practicable but not more than 72 hours after the Attorney General authorizes such search.<br>(B) The determination referred to in subparagraph (A) is a determination that--<br>(i) an emergency situation exists with respect to the execution of a physical search to obtain foreign intelligence information before an order authorizing such search can with due diligence be obtained, and<br>(ii) the factual basis for issuance of an order under this subchapter to approve such a search exists.<br>(2) If the Attorney General authorizes an emergency search under paragraph (1), the Attorney General shall require that the minimization procedures required by this subchapter for the issuance of a judicial order be followed.<br>(3) In the absence of a judicial order approving such a physical search, the search shall terminate the earlier of--<br>(A) the date on which the information sought is obtained;<br>(B) the date on which the application for the order is denied; or<br>(C) the expiration of 72 hours from the time of authorization by the Attorney General. | Time to make a motion or other filing | | | | Y | | Hour | 72 | yellow flag on Westlaw -- apparently due to proposed legislation | |
| 50 | 1843 | (a) | (a) Requirements for authorization<br>Notwithstanding any other provision of this subchapter, when the Attorney General makes a determination described in subsection (b) of this section, the Attorney General may authorize the installation and use of a pen register or trap and trace device on an emergency basis to gather foreign intelligence information not concerning a United States person or information to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution if--<br>(1) a judge referred to in section 1842(b) of this title is informed by the Attorney General or his designee at the time of such authorization that the decision has been made to install and use the pen register or trap and trace device, as the case may be, on an emergency basis; and<br>(2) an application in accordance with section 1842 of this title is made to such judge as soon as practicable, but not more than 48 hours, after the Attorney General authorizes the installation and use of the pen register or trap and trace device, as the case may be, under this section. | Time to make a motion or other filing | | | | Y | | Hour | 48 | | |

| Title | Section | Subsection | Nature of deadline | Type | App | Bnkr | Civil | Crim | Evid | Length - Unit | Length - Number | Issues | Comments |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 50 | 1843 | (c) | (c) Effect of absence of order<br>(1) In the absence of an order applied for under subsection (a)(2) of this section approving the installation and use of a pen register or trap and trace device authorized under this section, the installation and use of the pen register or trap and trace device, as the case may be, shall terminate at the earlier of--<br>(A) when the information sought is obtained;<br>(B) when the application for the order is denied under section 1842 of this title; or<br>(C) 48 hours after the time of the authorization by the Attorney General. | Time for government to act | | | | Y | | Hour | 48 | | |
| 50 | 1861 | (f)(2) | (f)(1) In this subsection--<br>(A) the term "production order" means an order to produce any tangible thing under this section; and<br>(B) the term "nondisclosure order" means an order imposed under subsection (d) of this section.<br>(2)(A)(i) A person receiving a production order may challenge the legality of that order by filing a petition with the pool established by section 1803(e)(1) of this title. Not less than 1 year after the date of the issuance of the production order, the recipient of a production order may challenge the nondisclosure order imposed in connection with such production order by filing a petition to modify or set aside such nondisclosure order, consistent with the requirements of subparagraph (C), with the pool established by section 1803(e)(1) of this title.<br>(ii) The presiding judge shall immediately assign a petition under clause (i) to 1 of the judges serving in the pool established by section 1803(e)(1) of this title. Not later than 72 hours after the assignment of such petition, the assigned judge shall conduct an initial review of the petition. If the assigned judge determines that the petition is frivolous, the assigned judge shall immediately deny the petition and affirm the production order or nondisclosure order. If the assigned judge determines the petition is not frivolous, the assigned judge shall promptly consider the petition in accordance with the procedures established under section 1803(e)(2) of this title.<br>(iii) The assigned judge shall promptly provide a written statement for the record of the reasons for any determination under this subsection. Upon the request of the Government, any order setting aside a nondisclosure order shall be stayed pending review pursuant to paragraph (3). | Time for court to act | | | | | | Hour | 72 | do Criminal Rules apply? See 50 USC 1803(f)(1). Yellow flag on westlaw -- apparently due to proposed legislation | RA states: "According to the Foreign Intelligence Surveillance Court Rules of Procedure (Effective February 17, 2006), Rule 1: "Issues not addressed in these rules may be resolved under the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure." Agree that yellow flag is due to proposed legislation." |

| Title | Section | Subsection | Nature of deadline | Type | App | Bnkr | Civil | Crim | Evid | Length - Unit | Length - Number | Issues | Comments |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 46 App | 1710 | (h) | (h) Injunction<br>(1) In connection with any investigation conducted under this section, the Commission may bring suit in a district court of the United States to enjoin conduct in violation of this chapter. Upon a showing that standards for granting injunctive relief by courts of equity are met and after notice to the defendant, the court may grant a temporary restraining order or preliminary injunction for a period not to exceed 10 days after the Commission has issued an order disposing of the issues under investigation. Any such suit shall be brought in a district in which the defendant resides or transacts business.<br>(2) After filing a complaint with the Commission under subsection (a) of this section, the complainant may file suit in a district court of the United States to enjoin conduct in violation of this chapter. Upon a showing that standards for granting injunctive relief by courts of equity are met and after notice to the defendant, the court may grant a temporary restraining order or preliminary injunction for a period not to exceed 10 days after the Commission has issued an order disposing of the complaint. Any such suit shall be brought in the district in which the defendant has been sued by the Commission under paragraph (1); or, if no suit has been filed, in a district in which the defendant resides or transacts business. A defendant that prevails in a suit under this paragraph shall be allowed reasonable attorney's fees to be assessed and collected as part of the costs of the suit. | TRO time limit | | | Y | | | Day | 10 | yellow flag on Westlaw -- apparently due to proposed legislation | |
| CIPA | 7 | | (a) An interlocutory appeal by the United States taken before or after the defendant has been placed in jeopardy shall lie to a court of appeals from a decision or order of a district court in a criminal case authorizing the disclosure of classified information, imposing sanctions for nondisclosure of classified information, or refusing a protective order sought by the United States to prevent the disclosure of classified information.<br>(b) An appeal taken pursuant to this section either before or during trial shall be expedited by the court of appeals. Prior to trial, an appeal shall be taken within ten days after the decision or order appealed from and the trial shall not commence until the appeal is resolved. If an appeal is taken during trial, the trial court shall adjourn the trial until the appeal is resolved and the court of appeals (1) shall hear argument on such appeal within four days of the adjournment of the trial, (2) may dispense with written briefs other than the supporting materials previously submitted to the trial court, (3) shall render its decision within four days of argument on appeal, and (4) may dispense with the issuance of a written opinion in rendering its decision. Such appeal and decision shall not affect the right of the defendant, in a subsequent appeal from a judgment of conviction, to claim as error reversal by the trial court on remand of a ruling appealed from during trial. | Time for court to act | Y | | | Y | | Day | 4 | see also 10 day limit. | |

| Title | Section | Subsection | Nature of deadline | Type | App | Bnkr | Civil | Crim | Evid | Length - Unit | Length - Number | Issues | Comments |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| CIPA | 7 | | (a) An interlocutory appeal by the United States taken before or after the defendant has been placed in jeopardy shall lie to a court of appeals from a decision or order of a district court in a criminal case authorizing the disclosure of classified information, imposing sanctions for nondisclosure of classified information, or refusing a protective order sought by the United States to prevent the disclosure of classified information.<br>(b) An appeal taken pursuant to this section either before or during trial shall be expedited by the court of appeals. Prior to trial, an appeal shall be taken within ten days after the decision or order appealed from and the trial shall not commence until the appeal is resolved. If an appeal is taken during trial, the trial court shall adjourn the trial until the appeal is resolved and the court of appeals (1) shall hear argument on such appeal within four days of the adjournment of the trial, (2) may dispense with written briefs other than the supporting materials previously submitted to the trial court, (3) shall render its decision within four days of argument on appeal, and (4) may dispense with the issuance of a written opinion in rendering its decision. Such appeal and decision shall not affect the right of the defendant, in a subsequent appeal from a judgment of conviction, to claim as error reversal by the trial court on remand of a ruling appealed from during trial. | Time to take appeal from court | Y | | | Y | | Day | 4 | see also 10 day limit. | |

**MEMORANDUM**

**DATE:** March 27, 2007

**TO:** Advisory Committee on Appellate Rules

**FROM:** Catherine T. Struve, Reporter

**RE:** Item No. 06-04

At the November 2006 meeting, the Committee voted (8 to 1) to amend the FRAP to require that amicus briefs indicate whether counsel for a party authored the brief and to identify persons who contributed monetarily to the preparation or submission of the brief. (A copy of my October 16, 2006 memo on this issue is enclosed.) The Committee did not have before it a draft of the proposed Rule, but the consensus was that the Rule should be modeled upon Supreme Court Rule 37.6, which provides:

> Except for briefs presented on behalf of *amicus curiae* listed in Rule 37.4, a brief filed under this Rule shall indicate whether counsel for a party authored the brief in whole or in part and shall identify every person or entity, other than the amicus curiae, its members, or its counsel, who made a monetary contribution to the preparation or submission of the brief. The disclosure shall be made in the first footnote on the first page of text.

This consensus leaves a few choices still to be made. First, there is the question of placement. Rule 29 (governing amicus briefs) is the obvious choice.[1] Within Rule 29, the question is whether to add the requirement to an existing subdivision or to create a new subdivision (h). Either possibility would be reasonable; the draft that follows adds the provision to Rule 29(c) on the theory that the new provision – like those already in Rule 29(c) – concerns the required contents of the brief. Within Rule 29(c), there is a further choice: whether to list the new requirement within the initial block of text ("Option 1"), or whether to include it as a numbered requirement ("Option 2"). The fact that the other disclosure requirement – set by Rule 26.1 – is mentioned in the text block might weigh in favor of adding the new disclosure requirement to that text block as well. On the other hand, setting the requirement forth as a numbered requirement might make it harder to overlook. Professor Kimble reviewed the language of both options for style; I asked him which option seemed better, and he favors Option 2. To facilitate the Committee's review, both options are displayed below.

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[1] Although Rule 26.1 also imposes a disclosure requirement (concerning certain corporate affiliates), Rule 26.1 would not be as good a place for the new provision. Amici would be more likely to overlook the new provision if it is placed in Rule 26.1.

Second, some translation is needed to adapt the provision to the Appellate Rules. Supreme Court Rule 37.6 provides an exception "for briefs presented on behalf of *amicus curiae* listed in Rule 37.4." Rule 37.4 provides that "[n]o motion for leave to file an *amicus curiae* brief is necessary if the brief is presented on behalf of the United States by the Solicitor General; on behalf of any agency of the United States allowed by law to appear before this Court when submitted by the agency's authorized legal representative; on behalf of a State, Commonwealth, Territory, or Possession when submitted by its Attorney General; or on behalf of a city, county, town, or similar entity when submitted by its authorized law officer." Thus, Rule 37.6's reference to Rule 37.4 exempts the listed entities from Rule 37.6's disclosure requirement. It is not entirely clear whether the cognate exception in the new Appellate Rules provisions should use Rule 37.4's exact list of exempted entities. As noted, what Rule 37.6's exemption does is to exclude entities that, under Rule 37.4, need not move for leave to file their amicus brief. Appellate Rule 29, likewise, has such a provision: Rule 29(a) 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." The drafts that follow create an exception for the government entities listed in Rule 29(a), on the theory that it makes sense to link the Rule 29(a) and Rule 29(c) exemptions – just as the Supreme Court Rule 37.4 and 37.6 exemptions are linked.

If the Committee decides to proceed with Item No. 07-AP-D (concerning the definition of "state") then both Rule 29(a) and the proposed amendment to Rule 29(c) should presumably be revised to refer to "a state" rather than to "a State, Territory, Commonwealth, or the District of Columbia" – because the three latter terms would be redundant if "state" is defined to include them.

**Option 1: Inclusion in the text block:**

**Rule 29. Brief of an Amicus Curiae**

* * * * *

(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. If an amicus curiae is a corporation, the brief must include a disclosure statement like that required of parties by Rule 26.1. Except when filed by the United States, its officer or agency, a State,

Territory, or Commonwealth, or the District of Columbia, the brief must indicate whether a party's counsel authored the brief in whole or in part and must identify every person or entity — other than the amicus curiae, its members, or its counsel — who contributed money toward preparing or submitting the brief; this disclosure must be made in the first footnote on the first page. An amicus brief need not comply with Rule 28, but must include the following:

**(1)** a table of contents, with page references;

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

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

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

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

* * * * *

**Committee Note**

**Subdivision (c).** Subdivision (c) is amended to require amicus briefs to disclose whether counsel for a party authored the brief in whole or in part and to identify every person or entity (other than the amicus, its members, or its counsel) who contributed monetarily to the preparation or submission of the brief. Entities entitled under subdivision (a) to file an amicus brief without the consent of the parties or leave of court are exempt from this disclosure requirement.

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). *Cf.* Robert L. Stern et al., Supreme Court Practice 662 (8th ed. 2002) (Supreme Court Rule 37.6 does not "require disclosure of any coordination and discussion between party counsel and *amici* counsel regarding their respective arguments . . . .").

**Option 2: Inclusion in the numbered list:**

**Rule 29. Brief of an Amicus Curiae**

* * * * *

**(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. If an amicus curiae is a corporation, the brief must include a disclosure statement like that required of parties by Rule 26.1. An amicus brief need not comply with Rule 28, but must include the following:

**(1)** a table of contents, with page references;

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

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

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

(5) a certificate of compliance, if required by Rule 32(a)(7)~~.~~; and

(6) except in briefs filed by the United States, its officer or agency, a State, Territory, or Commonwealth, or the District of Columbia, a statement that, in the first footnote on the first page:

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

(B) identifies every person or entity — other than the amicus curiae, its members, or its counsel — who contributed money toward preparing or submitting the brief.

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**Committee Note**

**Subdivision (c).** Subdivision (c) is amended to require amicus briefs to disclose whether counsel for a party authored the brief in whole or in part and to identify every person or entity (other than the amicus, its members, or its counsel) who contributed monetarily to the preparation or submission of the brief. Entities entitled under subdivision (a) to file an amicus brief without the consent of the parties or leave of court are exempt from this disclosure requirement.

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)(6). *Cf.* Robert L. Stern et al., Supreme Court Practice 662 (8th ed. 2002) (Supreme Court Rule 37.6 does not "require disclosure of any coordination and discussion between party counsel and *amici* counsel regarding their respective arguments . . . .").

**MEMORANDUM**

**DATE:** October 16, 2006

**TO:** Advisory Committee on Appellate Rules

**FROM:** Catherine T. Struve, Reporter

**RE:** Item No. 06-04

As we briefly discussed at our April 2006 meeting, Chief Judge Michel and Judge Dyk of the U.S. Court of Appeals for the Federal Circuit have proposed that the FRAP be amended to require that amicus briefs indicate whether counsel for a party authored the brief and to identify persons who contributed monetarily to the preparation or submission of the brief.

Part I of this memo reviews the model for such a rule – Supreme Court Rule 37.6 – and notes that no circuit currently appears to impose a similar requirement. Part II reviews arguments for adopting the proposed requirement, and for adopting it in the FRAP rather than on a circuit-by-circuit basis. Part III considers possible counter-arguments. Part IV concludes that the proposed rule is well worth considering.

## I. Supreme Court Rule 37.6

The model for the proposed rule is Supreme Court Rule 37.6, which provides:

> Except for briefs presented on behalf of *amicus curiae* listed in Rule 37.4, a brief filed under this Rule shall indicate whether counsel for a party authored the brief in whole or in part and shall identify every person or entity, other than the amicus curiae, its members, or its counsel, who made a monetary contribution to the preparation or submission of the brief. The disclosure shall be made in the first footnote on the first page of text.

Rule 37.6's reference to Rule 37.4 exempts amicus briefs filed by the Solicitor General, by federal agencies permitted by law to appear before the Court, by the Attorney General of a state, commonwealth, territory or possession, and by the authorized representative of a municipal entity. Rule 37.6's disclosure requirement is of relatively recent vintage, but it is not clear what motivated its adoption in 1997:

> The Court provided no rationale for these new disclosure requirements. The changes could mean simply that the Justices want to know if an amicus brief is

> written or financed by one of the parties so that they can more appropriately evaluate the contents of the brief for possible bias. Alternatively, the changes could reflect a perception by the Justices that some parties are funding or ghost-writing amicus briefs to get around the page limits that apply to the parties' briefs on the merits. Or, the amendments could reflect a growing concern on the part of the Justices that amicus filings are being manipulated in order to create an impression of widespread political support for a particular position.

Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. Pa. L. Rev. 743, 766-67 (2000).

A quick search of the local circuit rules, handbook provisions and IOPs available in the "USC" database on Westlaw indicates that no circuit currently has a provision similar to Supreme Court Rule 37.6.[1] I searched the "USC" database for the terms "amicus" or "amici," and reviewed all hits in circuit rules, circuit handbook provisions, or circuit IOPs. I found nothing pertinent[2] in any of these sources.

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[1] Interestingly, some amici nonetheless include a disclosure in their brief. The examples I have seen were disclosures denying any authorship by counsel for the parties or support by outsiders. See, e.g., Brief Amicus Curiae of the Institute for Justice in Support of Appellants (Dec. 29, 2005), Merrifeld v. Melton, No. 05-16613 (9th Cir.), 2005 WL 4678924, at *1 n.1 ("Counsel for the parties in this case did not author this brief in whole or in part. No person or entity, other than *amicus curiae* Institute for Justice, its members, and its counsel made a monetary contribution to the preparation and submission of this brief."); Brief of Amici Curiae Consumer Project on Technology, Electronic Frontier Foundation, and Public Knowledge in Support of Defendant-Appellant (Oct. 17, 2005), Integra Lifesciences I, Ltd. v. Merck KGAA, Nos. 02-1052, 02-1065 (Fed. Cir.), 2005 WL 3569316, at *vi n.1 (similar disclosure); Amicus Curiae Brief of American Bar Association in Support of Appellants and Reversal of Judgment (June 17, 2005), Spargo v. New York State Comm'n on Judicial Conduct, No. 03-7250(L), 03-7289(XAP) (2d Cir.), 2005 WL 1985223, at *i n.1 (similar disclosure).

[2] The D.C. Circuit, Fourth Circuit, Sixth Circuit, Seventh Circuit, Eleventh Circuit and Federal Circuit impose certain disclosure requirements on amici. See D.C. Circuit Rule 26.1; Fourth Circuit Appendix of Forms, Form A; Sixth Circuit Rule 26.1; Seventh Circuit Rule 26.1 (disclosure of true name and of law firms that have appeared or will appear); Eleventh Circuit Rule 26.1-1 (certificate of interested persons and corporate disclosure statement); Federal Circuit Local Rules 29(a) & 47.4 (certificate of interest and corporate disclosure statement). Except as indicated in the parentheticals, these requirements seem to parallel those already imposed on corporate amici by FRAP 29(c) ("If an amicus curiae is a corporation, the brief must include a disclosure statement like that required of parties by Rule 26.1.").

The Federal Circuit requires that "each amicus curiae must appear through an attorney authorized to practice before this court and must designate one attorney as the principal attorney of record," and provides that "[a]ny other attorney assisting the attorney of record must be

## II. Should the FRAP be amended to include a provision like Supreme Court Rule 37.6?

To assess whether the FRAP should be amended to incorporate a rule similar to Supreme Court Rule 37.6, it is necessary to consider both whether such a rule is desirable and whether the rule should be adopted as part of the FRAP.

### A. Is such a rule desirable?

A disclosure rule might be useful in at least four ways. First, requiring disclosure might deter undesirable litigant and amicus behavior. Second, disclosure might assist the court in deciding whether to permit the filing of an amicus brief. Third, assuming that the amicus is permitted to file the brief, the disclosure might help the court assess what weight to give the brief. Fourth, the values of predictability and simplicity are served by conforming practice in the courts of appeals with Supreme Court practice.[3]

As Kearney and Merrill suggest, litigants and their counsel might ghost-write an amicus brief to circumvent page limits on the parties' briefs, or to help create a misleading impression of outside support for their position.[4] Writing for the panel majority in a recent Eleventh Circuit

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designated as 'of counsel.'" Federal Circuit Local Rule 47.3(a). I have seen nothing to indicate, however, whether "assisting" encompasses the sort of work on a brief that would be within the scope of the proposed rule.

Fifth Circuit Rule 29.2 provides in part that an amicus brief "must include a supplemental statement of interested parties, if necessary to fully disclose all those with an interest in the amicus brief." But that Rule, which focuses on unearthing those amici whose financial interests might cause recusals, does not function in the same manner as Supreme Court Rule 37.6.

[3] The fourth rationale suggests that a rule, if adopted, should mirror Supreme Court Rule 37.6's language. Commentators have observed that "[n]ot all questions about required disclosure are answered by the literal language of Rule 37.6." Robert L. Stern et al., Supreme Court Rules: The 1997 Revisions 6 (1997). If the Committee decides to propose the adoption of a disclosure requirement, it will of course need to consider whether to add to (or otherwise depart from) the text of Rule 37.6. The Committee Note might provide a means for addressing some predictable questions about the rule's application.

[4] "In the past it has been in no way unusual for parties to a case to stir up amicus support and to undertake to bear the monetary costs which the amicus would otherwise have to pay for having a brief prepared and filed. Likewise, it has not been unusual for a party to say to the prospective amicus that the party will be glad to have the party's lawyers prepare a draft of an amicus brief which the amicus can then file in its own name." Bennett Boskey & Eugene Gressman, *The 1997 Restatement and Revisions of the Supreme Court 's 1995 Rules*, 170 F.R.D.

decision,[5] Judge Carnes noted the majority's suspicion "that amicus briefs are often used as a means of evading the page limitations on a party's briefs." *Glassroth v. Moore*, 347 F.3d 916, 919 (11th Cir. 2003) (citing *Voices for Choices v. Illinois Bell Telephone Co.*, 339 F.3d 542, 544 (7th Cir. 2003) (Posner, J., chambers op.)).[6] Admittedly, there is nothing wrong, in current practice, with an amicus possessing an interest in the relevant issues. The notion of the amicus as "impartial" became "outdated long ago." *Neonatology Associates, P.A. v. C.I.R.*, 293 F.3d 128, 131 (3d Cir. 2002) (Alito, J., chambers op.). Thus, courts have rejected the "argument that an amicus must be an impartial person not motivated by pecuniary concerns." *Id.* at 132; *see also Funbus Systems, Inc. v. State of Cal. Public Utilities Com'n.*, 801 F.2d 1120, 1125 (9th Cir. 1986) ("[T]here is no rule that amici must be totally disinterested."). However, an amicus ought to add something distinctive to the presentation of the issues, rather than serving as a mere conduit for the views of one of the parties.[7] Moreover, some judges might find it meaningful that

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30, 32 (1997).

[5] The passage quoted in the text forms part of the court's explanation why "[t]he district court ought not allow the plaintiffs any compensation for time their counsel spent in connection with amicus briefs supporting their position." Glassroth v. Moore, 347 F.3d 916, 918 (11th Cir. 2003). In *Glassroth*, plaintiffs' fee application under 42 U.S.C. § 1988 included "a request for reimbursement for work that lead counsel for the plaintiffs . . . did . . . . enlisting various organizations to appear as amici; suggesting potential signatories for the briefs; working on, supervising, and reviewing the amicus briefs; and seeing that they were mailed on time." Id. at 918-19.

[6] *See also* National Organization for Women, Inc. v. Scheidler, 223 F.3d 615, 617 (7th Cir. 2000) ("The lawyer for one of the would-be amici curiae in this case admits that he was paid by one of the appellants for his preparation of the amicus curiae brief. And that appellant comes close to admitting that its support of the requests to file amicus briefs is a response to our having denied the appellant's motion to file an oversized brief."); Ryan v. Commodity Futures Trading Com'n, 125 F.3d 1062, 1063 (7th Cir. 1997) (Posner, J., chambers op.) ("The vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief. Such amicus briefs should not be allowed. They are an abuse.").

[7] 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, coordination – in the sense of sharing drafts of briefs – presumably would not need to be disclosed under a rule such as Supreme Court Rule 37.6. *See* Robert L. Stern et al., Supreme Court Practice 662 (8th ed. 2002) (Rule 37.6 does not "require disclosure of any coordination and discussion between party counsel and *amici* counsel regarding their respective arguments . . . .").

an amicus cared sufficiently about the issue to sustain the cost and effort of filing an amicus brief; to such a judge, one or more amicus filings on the issue might shed light on the range of support, by groups other than the parties, for a particular viewpoint.[8] Though some might dispute the relevance of such considerations, to the extent that a judge might give them weight it would be important for the judge to know whether the amicus contributions were actually funded by a party.[9] In short, a disclosure requirement might deter the inappropriate use of amicus filings, since litigants and counsel would anticipate that the tactics could backfire if the court is made aware of them – and those filings that were not deterred would at least be more amenable to well-informed evaluation.

In a circuit that takes a restrictive approach to amicus briefs, a disclosure requirement might assist the court in assessing whether to grant permission to file an amicus brief. The Seventh Circuit, and in particular Judge Posner, have taken a relatively narrow view of the circumstances under which amicus briefs should be permitted. The decision whether to permit an amicus filing is "with immaterial exceptions, a matter of judicial grace." *National Organization for Women, Inc. v. Scheidler*, 223 F.3d 615, 616 (7th Cir. 2000). "Courts value submissions not to see how the interest groups line up, but to learn about facts and legal perspectives that the litigants have not adequately developed." *Sierra Club, Inc. v. E.P.A.*, 358 F.3d 516, 518 (7th Cir. 2004). "No matter who a would-be amicus curiae is, therefore, the criterion for deciding whether to permit the filing of an amicus brief should be the same: whether the brief will assist the judges by presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties' briefs." *Voices for Choices v. Illinois Bell Telephone Co.*, 339 F.3d 542, 545 (7th Cir. 2003) (Posner, J., chambers op.). The policy of the Seventh Circuit is "to grant permission to file an amicus brief only when (1) a party is not adequately represented (usually, is not represented at all); or (2) when the would-be amicus has a direct interest in another case, and the case in which he seeks permission to file an amicus curiae brief may, by operation of stare decisis or res judicata, materially affect that interest; or (3) when the amicus has a unique perspective, or information, that can assist the court of appeals beyond what the parties are able to do." *Scheidler*, 223 F.3d at 617. Knowing whether an amicus brief was ghost-written by a party's counsel or financed by a party may help the court to assess whether any of those criteria is met.

Most circuits appear to take a significantly less restrictive approach than the Seventh

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[8] *Cf.* Grutter v. Bollinger, 539 U.S. 306, 330-32 (2003) (citing amicus filings as evidence of the importance of diversity in student bodies, businesses, and the military).

[9] See Boskey & Gressman, 170 F.R.D. at 32 (noting that the disclosures required by Rule 37.6 provide "information helpful in assessing the credibility to be attached to the views submitted by the amicus").

Circuit's.[10] In *Neonatology Associates*, then-Judge Alito noted the difficulty of assessing the usefulness of an amicus brief early in the appellate process, and he suggested that the best course was to err on the side of permitting the filing, since the panel hearing the merits can always disregard an unhelpful brief:

> The decision whether to grant leave to file must be made at a relatively early stage of the appeal. It is often difficult at that point to tell with any accuracy if a proposed amicus filing will be helpful. Indeed, it is frequently hard to tell whether an amicus brief adds anything useful to the briefs of the parties without thoroughly studying those briefs and other pertinent materials, and it is often not feasible to do this in connection with the motion for leave to file. Furthermore, such a motion may be assigned to a judge or panel of judges who will not decide the merits of the appeal, and therefore the judge or judges who must rule on the motion must attempt to determine, not whether the proposed amicus brief would be helpful to them, but whether it might be helpful to others who may view the case differently. Under these circumstances, it is preferable to err on the side of granting leave. If an amicus brief that turns out to be unhelpful is filed, the merits panel, after studying the case, will often be able to make that determination without much trouble and can then simply disregard the amicus brief.

*Neonatology Associates*, 293 F.3d at 132-33. Once an amicus brief is accepted, a court assessing the usefulness of the brief's assertions might be aided by the knowledge that the brief was funded or authored by a party or its counsel.

A disclosure rule, then, may serve useful functions – as the Supreme Court has evidently concluded. Interestingly, though, none of the circuits has yet adopted a similar rule. This might be due to the relative novelty of the disclosure rule (as noted above, the Supreme Court adopted Rule 37.6 less than a decade ago), or it might reflect inertia, or it might arise from doubts concerning the usefulness of a disclosure rule.

Several arguments against the proposed rule suggest themselves. One argument might be that the court should give an amicus brief the weight it deserves, based on the merit of its contents; on this view, knowing who funded or drafted the brief does not advance the court's assessment of the quality of the brief's contents. But judges who take that view can simply ignore the disclosure. It might also be argued that there should be a presumption against adding another briefing requirement; adherents to this view might want to see evidence of a need for the proposed rule. Admittedly, the evidence for the practices at which the disclosure requirement

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[10] "There is little evidence . . . that Judge Posner's views are widely shared. Outside of the Seventh Circuit, judges freely permit amicus briefs to be filed." 16A Wright, Miller, Cooper & Schiltz, Federal Practice & Procedure § 3975.

would be aimed tends to be more anecdotal than quantitative.[11] But even without such quantitative evidence, an argument can be made for adopting a disclosure rule, since conforming the requirements applied in the courts of appeals to those imposed by the Supreme Court would arguably simplify appellate practice.[12] Another objection might be that the rule's application to borderline cases might be unclear – as where an amicus is unsure whether a litigant's counsel should be viewed as having "authored" the brief "in part."[13] But here the experience under the Supreme Court's rule should be informative. A final possible concern might be whether the requirement would impinge on First Amendment values by requiring disclosure of the identity of the contributors to an organization that files an amicus brief. But a rule modeled on Supreme Court Rule 37.6 would avoid this problem, because it would exempt the amicus' members from the group of contributors whose monetary contributions must be disclosed.

### B. Should such a rule be incorporated into the FRAP?

As the letters Judge Stewart recently sent to the chief judge of each circuit underscore, undue local variation in briefing requirements carries significant costs. Thus, if a disclosure rule is desirable, incorporating the rule into the FRAP would carry the benefit of uniformity. (And, as noted above, adopting the rule in the FRAP would also benefit uniformity by conforming practice in the courts of appeals to Supreme Court practice.)

It might be argued that some of the purposes served by the disclosure rule carry different

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[11] See, e.g., Stern et al., Supreme Court Practice, at 661 (noting "known instances where counsel for a party not only solicited or inspired the filing of an *amicus* brief but also wrote all or substantial portions of that brief").

[12] The fact that some litigants currently make the disclosure in briefs filed in the courts of appeals suggests that they may assume the requirement exists in those courts already.

[13] As Boskey and Gressman observed when the Supreme Court adopted Rule 37.6:

> Of course, there may be borderline cases, particularly as to "whether counsel for a party authored the brief in whole or in part." Consider, for example, the situation where counsel for the amicus prepares a complete draft of the brief, then shows the draft to counsel for a party, and then accepts a suggestion from the party's counsel that a sentence or two be deleted from the draft or be modified, or that a paragraph be added. Do these come within the intent of the Rule? We would advise that, at least for the time being, even such limited participation–in essence borderline situations–be treated as if within Rule 37.6 and so calling for disclosure.

Boskey & Gressman, 170 F.R.D. at 33.

weight depending on the circuit. For instance, assisting the court in determining whether to permit an amicus filing is likely more important in a circuit, such as the Seventh, which is less willing to grant such permission. However, other goals served by the disclosure rule would seem to have more universal appeal: It seems unlikely, for example, that any circuit would look kindly on the use of an amicus filing as an end-run around the page limits on the parties' briefs; and in all circuits courts must assess the weight to give to the assertions in any amicus briefs that are permitted.

It might also be argued that nationwide adoption of a disclosure rule should not take place until the rule has been tried in one or more circuits. However, there is now almost a decade of experience with Supreme Court Rule 37.6, and the dearth of criticism of that rule in the literature suggests that the rule has not caused difficulties in practice.

## III. Conclusion

Though I was not able to gather empirical data on these issues, it seems likely that some litigants may sometimes attempt to use an amicus' brief to evade page limits, and it seems possible that, at least occasionally, a litigant might drum up amicus briefs (by contributing money or by ghostwriting the briefs) in an attempt to create a misleading appearance of support for the litigant's position. The frequency of these events is not clear, and thus the corresponding benefits of a disclosure rule are uncertain. It does seem likely, though, that adopting for the courts of appeals the same disclosure rule that applies to Supreme Court practice could contribute – modestly – to the simplification of appellate practice. To reap the benefits of such simplification, a nationally applicable rule in the FRAP would be preferable to local circuit-by-circuit adoption. Finally, there do not appear to be significant downsides to the disclosure rule; Supreme Court Rule 37.6 has been in effect for almost a decade, and I was unable to find in the (admittedly sparse) literature any complaints concerning it.

**MEMORANDUM**

**DATE:** March 27, 2007

**TO:** Advisory Committee on Appellate Rules

**FROM:** Catherine T. Struve, Reporter

**RE:** Item No. 06-06

At its November meeting, the Committee discussed the proposal by William Thro, the Virginia State Solicitor General, to amend FRAP 4(a)(1)(B) and 40(a)(1) so as to treat state-government litigants the same as federal-government litigants for purposes of the time to take an appeal or to seek rehearing. Participants observed that the proposal raises a number of questions concerning scope. It was noted that the New York and Illinois solicitors general were not among the thirty-five supporters of Mr. Thro's proposal, and members wondered what their views would be. The consensus was that it would be useful to take additional time to study the proposal. Judge Stewart appointed an informal subcommittee to consider the proposal. The subcommittee is chaired by Steve McAllister and includes Doug Letter and Mark Levy.

This memo summarizes the information gathered by Steve, Doug and Mark, and also discusses possibilities for implementing Mr. Thro's proposal (should the Committee favor doing so). We have asked Bill Thro for his views on some of the questions identified in this memo, and he has passed our inquiry on to Dan Schweitzer at the National Association of Attorneys General, so more information may become available after the agenda book is put together.

## I. Further information concerning the proposal

Steve, Doug and Mark performed considerable investigations and the results of their inquiries are attached. (I also attach Bill Thro's recent response to my follow-up inquiry.) Highlights of the responses include the following:

- We have now heard from three states that did not sign on to Bill Thro's original letter to the Committee:
    - Illinois supports the proposal. Gary Feinerman, the Illinois Solicitor General, views the extension of time to seek rehearing as the more important change, but he supports both changes.
    - New York Solicitor General Barbara Underwood was unable to respond at length,

by the time of this writing, because she was preparing for a March 26 Supreme Court oral argument. She would support a rule change that extended only the state litigants' deadlines. She noted, however, that there might be considerations that weigh against a rule that extends deadlines for other parties as well as for the state litigants. We are hoping to hear more from her before the Committee meets.

- Vermont has a distinctive view. Bridget Asay notes that she works in "what may be the smallest" attorney general office in the country; for them, decisions whether to appeal do not take a lot of time. Thus, in Ms. Asay's view the primary beneficiaries of the proposal would be the State's opponents.

- We have also heard in more detail from three states that did sign on to Bill Thro's original letter to the Committee:

  - Arkansas supports the proposal. Justin Allen, Chief Deputy Attorney General, stresses federalism and comity as reasons to treat states the same as the federal government. He notes the time-consuming consultations that precede a decision to appeal or seek rehearing. He also argues that lengthening the appeal time would provide more opportunity for settlement.

  - New Jersey supports the proposal. Carol Henderson, the AAG who responded to the inquiry, highlights the time-consuming review process necessary for decisions to appeal or seek rehearing.

  - Pennsylvania supports the proposal. Amy Zapp, the Chief Deputy AG who responded, stresses that often it is time-consuming just to become familiar with the case.

- Doug consulted the Deputy Solicitor General at DOJ who handles cases involving Native American tribes; he does not think there is a reason to include tribes within the scope of the proposal. Doug also contacted the DOJ's Office of Tribal Justice, but has not yet heard back from them.

* * *

These findings add to our understanding of the proposal and highlight a couple of questions. As Bridget Asay of Vermont points out, a state with a small office which takes relatively few appeals may not need the additional time that would be provided by these amendments; if that is the case, then the amendments would primarily benefit other parties to the litigation, not the state. Barbara Underwood of New York suggests that she would support an asymmetric provision that lengthens the periods applicable to the states but does not lengthen the periods applicable to other parties to the litigation. Such an asymmetric proposal, however, is unlikely to be adopted. Thus, the question is whether to proceed with a symmetric proposal that

lengthens the time periods for all parties in litigation involving the states. As Fritz Fulbruge has pointed out, because the states win the overwhelming majority of habeas and Section 1983 cases, the great majority of appeals in such cases will be taken by the non-state party. Perhaps the states may feel that it is nonetheless in their interest to obtain the proposed amendment; indeed, Gary Feinerman of Illinois so stated, and the widespread state support for the proposal is also suggestive in this regard. But Asay's response indicates that such a sentiment might not be universal. One might think that if the longer periods are helpful for the federal government, they would likewise benefit the states; but that is only true if the costs and benefits balance out the same way for the states as for the federal government. Relevant questions would include whether the yearly volume of cases that any given state must review approaches the yearly volume of cases that the United States Solicitor General must review; if the number for any given state is appreciably less than for the federal government, perhaps the benefit to the state would not be as great as it is to the United States. Another cost to consider, of course, is the general cost to the system and to litigants when a longer appeal period means a longer period of uncertainty, or when a longer time to seek rehearing delays the issuance of the mandate.

## II. Drafting a proposed amendment

Mr. Thro proposed the following language for Rule 4(a)(1)(B): "When the United States, a State, or ~~its~~ an officer or agency of the United States or a State is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered." He proposed the following language for Rule 40(a)(1): "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, a State, or ~~its~~ an officer or agency of the United States or a State 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."

If the Committee is inclined to adopt Mr. Thro's proposals, it must make some choices concerning implementation. In November 2004, the Advisory Committee approved proposed amendments to Rules 4(a)(1)(B) and 40(a)(1) to clarify the rules' application to individual-capacity suits against federal officers or employees. (A copy of those amendments, as approved in November 2004, is enclosed.) Thus, it is necessary to consider how the two sets of proposed amendments fit together. Moreover, Mr. Thro's proposed amendment intersects with an issue that has arisen in connection with the Time-Computation Project. In that project it has become apparent that the definition of legal holiday, which includes state holidays, should also include holidays in the District of Columbia, Puerto Rico & the Territories. One way to achieve this would be to add a FRAP provision defining "State" to include the Territories, the District of Columbia and the Commonwealth of Puerto Rico. If such a provision were added, it obviously would affect the drafting of the Rule 4 and Rule 40 proposals. The definition of "state" is discussed in a separate memo; in this memo, bracketed alternatives show how a proposal for Rules 4 and 40 might look in the event that a FRAP-wide definition for "state" is or is not adopted.

Here is an illustration of the way in which the two sets of Rule 4 / Rule 40 proposals might be consolidated. This is redlined to show the difference between this version and the version approved by the Committee in November 2004:

**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 the judgment or order appealed from is entered.

(B) ~~When the United States or its officer or agency is a party, t~~[For purposes of this subdivision, "State" includes the Territories, the Commonwealths, and the District of Columbia.] 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~~

(ii) a State;

(iii) a United States or State agency;

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

~~(iv)~~(v) a United States or State officer or employee sued in an individual capacity for an act or omission occurring in connection with duties

performed on behalf of the United States or the State.

* * * * *

**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 in such cases. 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.

Rule 4(a)(1)(B) is also amended to accord state government litigants the same treatment afforded to federal government litigants. States, like the federal government, need time to review the merits prior to deciding whether to appeal. For states, as for the federal government, these decisions may involve complex legal, policy and strategic choices. Multiple decisionmakers within state government will often be involved. Extra time would assist states in conducting those deliberations. Extra time should also reduce or eliminate some states' practice of filing a notice of appeal merely to protect the right to appeal pending a closer review of the case.

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**Rule 40. Petition for Panel Rehearing**

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

(1) **Time.**

(A) ~~U~~Except as provided in Rule 40(a)(1)(B), and 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~~

(B) [For purposes of this subdivision, "State" includes the Territories, the

Commonwealths, and the District of Columbia.] 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~~.~~, a petition for panel rehearing may be filed by any party within 45 days after entry of judgment if one of the parties is:

(~~A~~i) the United States;

(ii) a State;

(~~B~~iii) a United States or State agency;

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

(~~D~~v) a United States or State officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States.

* * * * *

**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.

Rule 40(a)(1) is also amended to accord state government litigants the same treatment afforded to federal government litigants. States, like the federal government, need time to review the merits prior to deciding whether to seek rehearing. For states, as for the federal government, these decisions may involve complex legal, policy and strategic choices. Multiple

decisionmakers within state government will often be involved. Extra time would assist states in conducting those deliberations. Extra time should also reduce or eliminate some states' practice of filing submissions merely in order to preserve the ability to seek rehearing pending a closer review of the case.

* * * * *

Obviously, the considerations above show that opinions may vary concerning the relative costs and benefits of Virginia's proposal. Moreover, integrating the existing proposals for amendments to Rules 4 and 40 with Virginia's proposed amendments is not a straightforward task. A number of drafting and policy determinations remain to be made. The illustration provided above is meant to serve as a basis for the Committee's discussion of those issues.

Encls.

*Proposed amendments approved by the Advisory Committee in November 2004:*

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

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(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

(iv) a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States.

* * * * *

**Committee Note**

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(B) a United States agency;

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

(D) a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States.

* * * * *

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Most recent inquiry from Cathie Struve to Bill Thro, plus Bill Thro's response:

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**From:** Catherine Struve [mailto:cstruve@law.upenn.edu]
**Sent:** Sun 3/25/2007 9:31 AM
**To:** Thro, William E.
**Subject:** Further question concerning your proposal regarding FRAP 4(a)(1)(B) and 40(a)(1)

Dear Bill,

I wanted to let you know that your proposal to amend the time limits for states to file a notice of appeal and rehearing petition is on the agenda for the Appellate Rules Advisory Committee's meeting on April 26. One further question has arisen, and it would be helpful to get your views.

The concern is this. Most of the time, the state will not be either the appellant or the rehearing petitioner. Thus, assuming that the provision applies symmetrically to both parties in a state case (as it does for the federal government under the existing Rules), the consequence of the amendment would be to grant more time to the other side in the vast majority of cases. Furthermore, many, and perhaps most, of these cases, we assume, involve habeas petitions or claims under 42 U.S.C. 1983. In these circumstances, the proposed amendment would usually extend the time in a way that does not really benefit the states and that slows down the judicial process. On the other side is the advantage to the states, which prompted your suggestion in the first place. We can see the upside for a state in cases in which the state is the appellant or rehearing petitioner. But our understanding is that there isn't a large quantity of such cases.

This stands in contrast to the federal government. There, even though in the majority of cases the U.S. is not the appellant or the rehearing petitioner, there are a large number of cases (even though a minority in percentage terms) where the federal government is the initiating party and therefore the usual internal process and approval by the SG are required. In the federal context, the balance was drawn that the tradeoff favored a rule allowing more time because of the volume of cases affected even though there was the effect in most cases of giving the non-government party more time as well.

Any additional thoughts you have would be very informative to the Committee and much appreciated. As you may know, Vermont has raised the issue of delay in the many cases where the state is not the initiating party, and, while not actually opposing the proposal, did express a "dissenting opinion" and would prefer not to have the amendment because it "see[s] more downside than upside" and views "the proposed changes as more of a benefit to opposing parties than to [Vermont]."

Thanks again for all your help.

Best regards,

Cathie

Subject:
RE: Further question concerning your proposal regarding FRAP 4(a)(1)(B) and 40(a)(1)
From:
"Thro, William E." <WThro@oag.state.va.us>
Date:
Sun, 25 Mar 2007 15:33:39 -0400
To:
"Catherine Struve" <cstruve@law.upenn.edu>
CC:
"Thro, William E." <WThro@oag.state.va.us>, "Schweitzer, Dan" <DSchweit@NAAG.ORG>

Cathie,

Thanks for contacting me regarding this concern. I was unaware that Vermont had expressed even a partial "dissent" to the proposal. I am copying Dan Schweitzer at NAAG on this e-mail as he may have additional information or your thoughts.

First, if you were to exclude all habeas cases and/or all cases involving pro se litigants, my sense is you would find that the States initiate a substantial amount, if not the majority, of the appeals and the petitions for rehearing en banc. As SG of Virginia, I have responsibility for everything that involves a constitutional challenge to a statute or a significant public policy isuse or where we are challenging the constitutionality of a federal statute (generally Eleventh Amendment cases). Within that subset of cases, I would say that we are initiator of the appeal or the petition for rehearing en banc a majority of the time or close to a majority of the time. Although I do not have any empirical data to back that up, my sense is that if this rule applied only in counsel filed cases or did not apply in habeas cases, the States' concern could be addressed without causing delay to the judicial process.

Second, as an altertnative, the rule could be made asymmetrical.--the States would have the additional time but not the private litigants. While I think this would be unfair, it would solve the State's concern.

Third, I must admit that I am somewhat confused by Vermont's "dissent." Even assuming that the benefits are greater to private litigants than to the States, there are still substantial benefits to the States. I don't think giving private litigants additonal time is necessarily a detriment to the States. The mere fact that the private litigants benefit does not mean that the States are harmed.

I hope that helps. If you have additional questions or if I can be of further assistance, please do not hesitate to contact me. I will be out of the country from March 30 to April 6.

Bill

William E. Thro
State Solicitor General
Office of the Attorney General
900 East Main Street
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Sent by Remote Access

Request sent to contacts in the Attorney General's offices of all 50 states, D.C., and Puerto Rico by Dan Schweitzer, NAAG Supreme Court Counsel, working with Steve McAllister:

To: State Solicitors General and Appellate Chiefs, and Civil Amicus Contacts

As you may recall, on September 22, 2006, Virginia Solicitor General William Thro sent a letter to the Advisory Committee of the Federal Rules of Appellate Procedure (FRAP) stating that he and his counterparts in 33 States and the Commonwealth of Puerto Rico support amending FRAP "to ensure that the States are treated in the same manner as the National Government for purposes of (1) filing a Notice of Appeal in a civil case; and (2) seeking a panel rehearing or rehearing en banc in a civil case." Specifically, the letter proposed that the time within which a State must file a notice of appeal be extended to 60 days after the judgment is entered, and the time within which a State must file a petition for rehearing be extended to 45 days after the entry of judgment. (A copy of the letter is attached.)

I have recently been informed that a subcommittee of the Advisory Committee on Appellate Rules of the Judicial Conference has been tasked with gathering more information and input regarding these proposed amendments. And I have been asked to assist the subcommittee in obtaining such information and input from State Attorney General offices.

In particular, the subcommittee would appreciate obtaining from each of you:

(1) more detailed feedback regarding the proposed amendments to FRAP, e.g., why you believe they are needed (or not needed, as the case may be); and

(2) your thoughts on whether amending the rules would have the salutary effect of making the States more selective in deciding which cases to actually appeal or seek rehearing (as opposed to merely allowing States to wait longer to file their notices).

I will serve as the intermediary on this effort, so please e-mail responses directly to me. We would appreciate it if you could send the responses by Friday, February 16, 2007.

Thank you for your assistance on this project.

Dan

**********

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Here's the **response from New Jersey**

-----Original Message-----
From: Carol Henderson [mailto:hendersonc@njdcj.org]
Sent: Tuesday, February 20, 2007 9:32 AM
To: Schweitzer, Dan
Subject: Re: Follow-up Inquiry on Proposed FRAP Amendments

Dan,

You requested further information from the States regarding the proposed amendments to FRAP. New Jersey supports the changes which will give the States additional time to file notices of appeal or petitions for rehearing. The additional time would give the States the time to make informed decisions on whether further appeals are necessary.

The decision process in New Jersey to file a federal appeal or petition for rehearing involves the approval of people on several levels of the chain of command. Initially, the attorney who handled the case reviews the decision with his or her supervision and makes a recommendation to the Deputy Chief of the Appellate Section of the Division of Criminal Justice. The Deputy Chief reviews the recommendation and if he approves it, the recommendation is then reviewed by the Section Chief who must concur.

Once the decision is made by the Appellate Section to appeal, the decision must be approved by the Deputy Director of the Bureau. In most cases this level of review will be sufficient. However, there will be cases where approval will be needed from the Director of Criminal Justice, the First Assistant Attorney General, and the Attorney General.

This review process can take some time. The additional time provided by the proposed FRAP would make decisions more selective. If time is running short, the States are more inclined to appeal. If, however, the States are given sufficient time to consider the case and have the recommendation reviewed through all the necessary levels, appeals may actually be reduced. This is because the decision to appeal would be made after consideration of the case as opposed to fear that the deadline would be missed. I do not believe that States would use the additional time simply to wait longer to file their notices of appeal or for rehearing.

I hope this information is helpful to you.

Carol Henderson
Assistant Attorney General
Appellate Section
NJ Division of Criminal Justice

Here's the **response from Pennsylvania**.

Good afternoon, Dan--I don't know if anyone has already mentioned this as a reason for enlarging the appeal period to 60 days and if it has already been brought up I apologize for repeating it. In some of the earlier e-mails I saw that a number of states had pointed out (chiefly in connection with appeals in civil matters) that additional time would be beneficial because they have to work through a bureaucracy of needed approvals within their own offices and/or client agencies in order to file. While the time needed to complete the approval process sometimes affects appeals in *habeas* cases, for us and other states that have similar provisions in their statutes, more often the problem is that extra time is necessary just to become familiar enough with a case so we can assess if an appeal should be taken. In PA, and I believe some other states as well, local/county prosecutors may ask the AG's office to handle appeals and other post-conviction proceedings in cases they have prosecuted. Under our governing statute, we may be asked by a DA to assume representation of the Commonwealth at the time of, or anytime after, direct review. At what point we may become involved in a case can vary greatly. At times, we are asked to take over after a district court has ruled adversely to the Commonwealth on a defendant's *habeas* application. Often in these situations we know nothing or very little about the case as our office has never been previously involved in the litigation. In many instances, especially in capital cases, the litigation has been ongoing for decades and, quite literally, involves dozens of issues. We need time to get our bearings so we can determine if filing an appeal is the proper next step. For any number of reasons, a request that we handle a case may be received after much of the 30 day appeal period has elapsed, affording us even less time for making an assessment. For states like us, there would be a real practical benefit--not just a deferred deadline--in increasing the appeal period to 60 days.

Hope all is well with you,

Amy

**Amy Zapp**
**Chief Deputy Attorney General**
**Appeals & Legal Services Section**
**Criminal Law Division**
**PA OFFICE OF ATTORNEY GENERAL**
**16th Floor - Strawberry Square**
**Harrisburg, PA 17120**
**Phone:** 717-705-4487
**E-mail:** azapp@attorneygeneral.gov

Here's the response from Vermont.

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**From:** Bridget Asay [mailto:BAsay@atg.state.vt.us]
**Sent:** Wednesday, January 24, 2007 3:49 PM
**To:** Schweitzer, Dan
**Subject:** RE: Follow-up Inquiry on Proposed FRAP Amendments

Dan,
I stayed out of this the first time round and am still reluctant to stand in the way if this is truly important to other states. I do have a dissenting opinion, though. I see more downside than upside from the extended appeal period. In the great majority of cases, we are the prevailing party in the district court. Extending the appeals period to 60 days gives opposing parties much more time to file an appeal -- and as a result, I think we will see a small but still significant increase in the number of appeals filed. We do see cases, especially with pro se litigants, where the opposing party files a late notice of appeal.

I have less concern about the 45-day period for moving for rehearing, because those are so rarely granted in our circuit, but it still extends the time for our opponents to seek reargument in the cases we win -- again, the majority of cases. Also, the delay may sometimes be a problem if the issuance of the mandate is relevant for some reason.

In short, I see the proposed changes as more of a benefit to opposing parties than to our office. I am, of course, working in what may be the smallest AGO in the country -- we've not had trouble figuring out whether to appeal in 30 days. We have the same time limit in state court and it's more than enough time to reach a decision. It's hard to write a motion for rehearing in 10 days but we do it when we need to.

I wanted to voice this, because it's not a perspective I've heard yet. Don't feel obliged to pass it on to the Committee if I'm the sole voice in the wilderness. If the larger states have trouble coping with the current deadlines, I understand their desire to make the case to the rules committee. But I do think there's another side.

Thanks --
Bridget

[**Response from Illinois** via Mark Levy who had a phone conversation with Illinois Solicitor General Gary Feinerman]

Steve and I divided up the phone calls, and I spoke today with Gary Feinerman, the Illinois Solicitor General. He very much appreciated the outreach and said that the failure to sign Virginia's original letter did not signify opposition or even reservations about -- more of a bureaucratic snafu. In fact, Gary does support the proposal. As between the two, he thinks the extension of the rehearing time is more important (which can be done by FRAP amendment and would not require, as Cathie discovered, a statutory amendment by Congress), but in the end he would like to have both. He thought it was a good point, and one that had not occurred to him, that the amendments would give more time to opposing parties as well and that the vast majority of times it would be the opposing party that would be filing the notice of appeal or seeking rehearing. Nonetheless, he still support the proposed amendments.

Those are the highlights, and here are some details and background. The Illinois AG/SG represent the State, its officers and officials, and almost all of its agencies in the Seventh Circuit. This covers both civil and criminal, including habeas. As ballpark figures, Gary estimates that he has about 60 civil cases/year that go to merits decision in the Seventh Circuit (that excludes, e.g., denials of Certificates of Appealability in habeas cases); of these, the State is the appellant in fewer than 10/year. On the criminal side, he has about 30-40/year; the State is the appellant in approximately 5/year. With respect to rehearing, Gary estimates that the State files in 5-10 cases/year at most; he doesn't know how many are filed against the State, especially since many of those don't involve a reply to the rehearing petition, but, not surprisingly, he says that the opposing party seeks rehearing almost all the time. All in all, the numbers for the State are not trivial but don't seem especially substantial in the overall work of the Seventh Circuit.

There are a few Illinois agencies that, for historical reasons or outright quirks, the AG/SG does not represent. One example is the University of Illinois. This raises the question of the scope of the proposed amendments. On the one hand, Gary doesn't think that these agencies need to be included, since they are so small a group and don't have to go through the SG's time-consuming process for appeal or rehearing decisions. On the other hand, it might be hard to draft a rule that rests on which lawyer represents the agency, and they might object as a matter of principle if they're carved out of the rule that applies to the rest of the State agencies. And he has no objection to including these agencies if that is the decision of the Advisory Committee. In addition, the Illinois AG/SG also do not represent municipalities. This includes large cities such as Chicago and also small villages of, e.g. Wilmette (for those of you familiar with the North Shore suburbs). Again, Gary isn't sure that most of the municipalities need the longer time, and he isn't even sure about Chicago; on the other hand, it might be hard to draw the line, the municipalities might object, and he has no opposition to including them.
He didn't know whether there would be other sub-units of government that should be considered. As to the list of other possibilities,

e.g., Commonwealths, territories, and Indian tribes, his instinct is that it would be hard to justify including them on the merits but doesn't have a dog in that fight; in particular, there are no federally recognized tribes in Illinois so Gary doesn't have a docket of Indian cases.

In sum, Illinois joins Virginia and the other 33 states that signed the original letter. Please let me know if you have any questions.
Thanks.
Best Mark

[Response from New York via new Solicitor General Barbara Underwood]

Yes I will be arguing for the states in Leegin [v. PSKS, No. 06-480]. Between preparing for that argument and my other responsibilities, I have had no time to give any extended consideration to the proposed amendment to FRAP, nor do I expect to have any time for until after the March 26 argument. I can't imagine any reason not to support extending the time the states have for appeal and for rehearing petition, but if the rule extends the time for everyone (not just states) there might be competing considerations. After March 26 I will be glad to consider the proposal and give you our views.

bdu

[From Doug Letter and DOJ]

Steve:

I checked with the Deputy Solicitor General here at DOJ who handles cases involving Indian tribes. He saw no reason to extend the time for such tribes to appeal or seek rehearing. I have also asked our Office of Tribal Justice, but have not heard back from them. I have not been able to discuss the matter yet with the Solicitor General, and thus cannot yet state any kind of formal position. But at this point there does not seem to be any further information to offer; i.e., we are not aware of any problem caused by the current FRAP deadlines in cases involving Indian tribes.

STATE OF ARKANSAS
THE ATTORNEY GENERAL
DUSTIN MCDANIEL

February 9, 2007

Dan Schweitzer
Supreme Court Counsel
National Association of Attorneys General
2030 M Street, NW, 8th Floor
Washington, DC 20036

***Re: Suggested Amendments to the Federal Rules of Appellate Procedure***

Dear Mr. Schweitzer,

This letter responds to your recent request for information and further comment from interested States regarding proposed amendments to the Federal Rules of Appellate Procedure. Arkansas joined with other states in a letter to the Advisory Committee on Appellate Rules on this subject drafted by the Office of Virginia Solicitor General William Thro in September of 2006. Our additional thoughts are set forth below.

Two amendments of particular concern to the States are under consideration. Those two amendments would amend existing rules to provide "that the States are treated in the same manner as the National Government for purposes of: (1) filing a Notice of Appeal in a civil case; and (2) seeking a panel rehearing en banc in a civil case." Specifically, the proposed amendments would increase the time limit for filing a petition for rehearing under Rule 40(a) for States and their officers and agencies from 14 to 45 days after entry of judgment, and increase the time limit for filing a notice of appeal under Rule 4(a) for States and their officers and agencies from 30 to 60 days after the judgment or order is entered.

As a threshold matter, under principles of federalism and comity, the States should be treated comparably to the federal government. After all, the States existed prior to the formation of the United States, and our federal constitution makers gave the States a primary role in the composition and selection of the central government. Likewise, the founders preserved the States as separate sources of authority and organs of

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independent administration. This notion of necessary equality between the States and the United States suggests that the sovereign governments be treated equally when possible.

**1. Further Comment on the Proposed Amendments.**

Amendments expanding the time limit for States, State officials, and State agencies to decide to file a Notice of Appeal or request a rehearing recognize the fact that individual States, much like the United States, need more time than the rules currently allow to conduct a thorough review of the merits of a case before taking such actions. The rationale for the 45-day time limit for the United States government in Rule 40(a) is that "the Solicitor General needs time to conduct a thorough review of the merits of a case before requesting a rehearing." Committee Note to 1994 Amendment to Fed. R. Civ. P. 40(a). With respect to the 60-day time limit for the United States government in Rule 4(a), the rationale for the rule is that government often needs more time to decide whether to appeal because several departments may be involved in the decision:

> In cases where the United States or an officer or agency thereof is a party, allowance of sixty days to the government, its officers and agents is well justified. For example, in a tax case the Bureau of Internal Revenue must first consider whether it thinks an appeal should be taken. This recommendation goes to the Assistant Attorney General in charge of the Tax Division in the Department of Justice, who must examine the case and make a recommendation. The file then goes to the Solicitor General, who must take the time to go through the papers and reach a conclusion. If these departments are rushed, the result will be that an appeal is taken merely to preserve the right or without adequate consideration, and once taken it is likely to go forward, as it is easier to refrain from an appeal than to dismiss it.

Committee Note of 1948 to the former Fed. R. Civ. P. 73(a) (predecessor to Fed. R. App. P. 4(a)) (emphasis added).

In the State of Arkansas, there are various statutory requirements that must be met before the State can appeal a case or petition for rehearing. The Office of the Arkansas Attorney General must consult with the relevant State agency if an agency is involved (and in many cases this consultation involves multiple exigencies). Of course, additional necessities frequently arise in cases involving political issues or issues of public policy. On occasion, an appeal must be taken "merely to preserve the right or without adequate consideration" because the requirements could not be met within the current time limit.

In addition to the lengthy review processes in place in most States for rendering a decision and approving the decision to appeal or petition for rehearing in *any* given case, there are some types of cases which present unique difficulties for States under the current time limits. For example, in Arkansas, the Attorney General services 144 agencies, commissions and boards. Many of the agencies which become involved in

litigation are relatively small and are governed by a Board instead of by an individual Director or Administrator. The Board members usually reside in scattered locations around the State. In order for the agency to approve or render a decision to appeal or petition for rehearing (or disapprove), the Board must convene for a meeting to discuss the options available to the agency and arrive at a decision. Most of these agency Boards meet only monthly or quarterly, which means they generally have to conduct a special meeting just to decide what course of action to take in a particular individual case without losing options due to the current 14-day and 30-day time limits. As a matter of policy, some larger agencies in Arkansas seek the approval of their Boards as well when deciding whether to appeal or seek rehearing.

Frequently, the State is simply not able to complete the necessary tasks in time to arrive at an informed decision within 14 or 30 days and thus, the Attorney General is forced to file a Notice of Appeal or petition for rehearing simply to avoid losing the right even though the State may ultimately reach a determination that such an appeal or petition is without merit. Of course, the State can dismiss the appeal at that point, but the $455.00 filing fee (Eighth Circuit) is nonrefundable.

Not only do State governments, officials, and agencies need additional time to conduct a thorough review of the merits of a given case, in some cases the non-governmental parties may need additional time to evaluate their options due to the State's involvement. The 60-day appeal period granted to the federal government has been broadly interpreted to apply not only when the United States is a party, but also when the United States intervenes in a case prior to formal entry of judgment being appealed, even if the United States (1) is not a party to appeal, (2) has not asserted any claim against the appellant, and (3) did not intervene until after the district court announced its intention to enter judgment. *See Lonberg v. Sanborn Theaters, Inc.*, No. 99-56221, 2001 U.S. App. LEXIS 21065, at *4-*7 (9th Cir. Sept. 27, 2001). Obviously, if the federal government intervenes in a case at this late stage, it can affect and complicate the analysis of whether a non-prevailing party wishes to appeal the judgment, and the extended time limit enables the party to conduct a more thorough analysis of the merits of appeal. The same would be true if a State government intervened at such a late stage, but under the current rules, intervention by the State does not affect the time limit for appeal.

Finally, the proposed amendments are necessary because of the potential benefits to parties engaged in post-judgment settlement negotiations. When judgment is rendered and a question arises regarding a potential appeal or petition for rehearing, the parties will often engage in settlement negotiations in an attempt to resolve the case and avoid further litigation. This is especially true in close cases, where the question of whether to appeal or petition is complex and the eventual result of such appeal or petition is difficult to predict. Again, when the State (or State agency or official) is a party, there is a multi-level review and approval process regarding settlements of any kind. Frequently, there is simply not enough time to reach agreement among the parties *and* obtain the requisite approvals of the client agencies, fiscal authorities, and the legislature regarding settlement, and the State is forced to file for appeal or rehearing simply to preserve the right in case settlement is not achieved.

**2. Effect of the Proposed Amendments.**

Amending the rules as proposed would certainly have the salutary effect of allowing the State of Arkansas to be more selective in deciding which cases to actually appeal or seek rehearing.

First and foremost, the proposed amendments should reduce, if not eliminate altogether, the number of appeals and petitions which are filed by States as a precautionary measure merely to preserve the right, but where the State ultimately determines that appeal or petition is unwarranted. These amendments should give States sufficient time to conduct their review and approval processes, allowing States to make reasoned decisions after thorough reviews of the merits of the cases by the relevant departments within the States. This salutary effect is two-fold in that it both reduces the total number of appeals and petitions, and it increases the relative percentage of appeals which will be actively pursued rather than dismissed or ignored.

Second, because the proposed amendments give the parties more time to engage in post-judgment settlement negotiations, it logically follows that a greater number of settlement agreements should be reached and finalized during the relevant time periods. For example, while there may not be enough time under the current rules, an expansion of the time periods may allow the parties to reach agreement, eliminating the necessity of an appeal or rehearing petition. The salutary effect of an increase in the occurrence of post-judgment settlements is a corresponding reduction in the number of appeals and petitions for rehearing.

Thank you for serving as the intermediary on this important project. If you have any questions, please feel free to contact me or Colin Jorgensen, the Assistant Attorney General who is the primary author of this letter.

Very truly yours,

JUSTIN T. ALLEN
Chief Deputy Attorney General

JTA:ds

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL
OFFICE OF THE SOLICITOR GENERAL

October 25, 2006

**BY E-MAIL AND REGULAR MAIL**

Advisory Committee
Federal Rules of Appellate Procedure
c/o Professor Catherine T. Struve
University of Pennsylvania Law School
3400 Chestnut Street
Philadelphia, PA 19104

RE: Proposed additions to suggested amendments to the Federal Rules of Appellate Procedure to include appeals and petitions by the District of Columbia government

Dear Professor Struve and other members of the Committee:

I am the Solicitor General for the Office of the Attorney General for the District of Columbia. In a letter to you dated September 22, 2006, William E. Thro, Solicitor General for the Commonwealth of Virginia, suggested that Federal Rules of Appellate Procedure 4(a)(1)(B) and 40(a)(1) be amended to provide the same filing deadlines for state governments as are presently provided for the United States government for purposes of filing appeals and petitions for rehearing. His proposal would extend the times from 30 to 60 days for appeals and 14 to 45 days for petitions for rehearing.

I support this proposal for the reasons stated in Mr. Thro's letter. I also suggest that, if the proposal is adopted, it be modified to provide similar treatment to appeals and petitions for rehearing by the District of Columbia government. Congress, in enacting the District of Columbia Self-Government and Governmental Reorganization Act, PUB. L. NO. 93-198, 87 Stat. 774 (1993); D.C. Code § 1-201.01 *et seq.* (2001), has created a government for the District of Columbia that has responsibilities like those of a state government, and the reasons stated by Mr. Thro for extending appeal and rehearing times for state governments justify extending those times for the District of Columbia as well. If the committee accepts the proposal to increase the filing times under the Federal Rules

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of Appellate Procedure for states, it would be appropriate and fair to include the District of Columbia as well.

Therefore, building upon Mr. Thro's proposal, I propose that Rules 4(a)(1)(B) and 40(a)(1) be amended by inserting the underscored language:

Rule 4(a)(1)(B):

> When the United States, a State, or the District of Columbia or an officer or agency of the United States, a State, or the District of Columbia is a party, the notice of appeal may be filed within 60 days after the judgment or order appealed from is entered.

Rule 40(a)(1):

> Unless the time is shortened or extended by order or local rule, a petition for rehearing may be filed within 14 days after entry of judgment. But in a civil case, if the United States, a State, or the District of Columbia or an officer or agency of the United States, a State, or the District of Columbia is a party, the time within which any party may seek rehearing is 45 days after the entry of judgment unless an order shortens or extends the time.

Thank you for considering these additions to the amendments proposed by Mr. Thro. If you have any questions, please feel free to contact me at (202) 724-6609 or at todd.kim@dc.gov.

Sincerely yours,

/s/ Todd S. Kim

Todd S. Kim
Solicitor General
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One Judiciary Square
441 4th Street, N.W.
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cc: William E. Thro, Esq.
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*COMMONWEALTH of VIRGINIA*
*Office of the Attorney General*

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October 31, 2006

**Via Electronic Mail as PDF Attachment with Original Via U.S. Mail**

Professor Catherine T. Struve
UNIVERSITY OF PENNSYLVANIA LAW SCHOOL
3400 Chestnut Street
Philadelphia, Pennsylvania 19104

RE: Suggested Amendments to the Federal Rules of Appellate Procedure

Dear Professor Struve:

As you requested, I have asked my colleagues in other States regarding the volume of appeals that might be affected by the States' proposed revisions to the Federal Rules of Appellate Procedure. Although some States do not track this information or only track non-habeas corpus or non-inmate appeals, I was able to gather some information. I write to pass that information on to you and the Committee.

**Arkansas (Eighth Circuit)**—Arkansas has had eight habeas appeals during 2006. There is no data on non-habeas appeals.

**Arizona (Ninth Circuit)**—From July 1, 2005 through June 30, 2006, Arizona had ninety-five non-habeas appeals. There is no data on habeas appeals.

**Connecticut (Second Circuit)**—In the past five years, Connecticut has averaged about eight non-habeas appeals per year. There is no data on habeas appeals.

**Kentucky (Sixth Circuit)**—Kentucky averages about thirty habeas appeals per year. There is no data on non-habeas appeals.

**Illinois (Seventh Circuit)**—Illinois averages about eighty-five non-habeas appeals per year. There is no data on habeas appeals.

**Massachusetts (First Circuit)**-Massachusetts averages twenty-one non-habeas appeals and fourteen habeas appeals.

**New Jersey (Third Circuit)**—New Jersey averages seventy-two non-habeas appeals and twenty-seven habeas appeals.

**Oklahoma (Tenth Circuit)**—Oklahoma currently has seventy-nine habeas appeals pending in the Tenth Circuit. There is no data on non-habeas appeals.

**Pennsylvania (Third Circuit)**—Pennsylvania currently has approximately 125 non-habeas appeals and fifty habeas appeals.

**Puerto Rico (First Circuit)**—Puerto Rico handles approximately ninety civil appeals per year. There is no break down on habeas or non-habeas cases.

**Virginia (Fourth Circuit)**—Virginia averages about 200 habeas appeals per year, seventy-nine non-habeas appeals involving inmates, and about twenty appeals that are neither habeas nor involve inmates.

**Wyoming (Tenth Circuit)**—Wyoming averages about ten non-habeas appeals per year. In the most recent year, Wyoming had seven habeas appeals.

In closing, I want to thank you and the committee for your attention to our proposed amendments. If you have any questions, or if my counterparts and I can provide any additional information, please do not hesitate to contact me at (804) 786-2436 or wthro@oag.state.va.us.

Sincerely,

*/s/ William E. Thro*

William E. Thro
State Solicitor General

**MEMORANDUM**

**DATE:** October 16, 2006

**TO:** Advisory Committee on Appellate Rules

**FROM:** Catherine T. Struve, Reporter

**RE:** Item No. 06-06

William Thro, the State Solicitor General of the Commonwealth of Virginia – writing on his own behalf and on that of his counterparts in thirty-three other states and Puerto Rico – has proposed that FRAP 4(a)(1)(B) and FRAP 40(a)(1) be amended to accord to states the same treatment accorded to the federal government.[1] In brief, Mr. Thro argues that the same considerations that support lengthening the time to file a notice of appeal or to file a petition for panel rehearing or rehearing en banc,[2] when a federal entity is a party, also support such lengthening when a state entity is a party.

Part I of this memo summarizes the history of Rules 4(a)(1)(B) and 40(a)(1), and compares the treatment of federal and state government litigants in the Appellate, Civil and Supreme Court Rules. Part II considers the costs and benefits of the proposed amendments. Part III considers how best to implement the proposal if the Committee considers the proposal worth pursuing. Among other issues, Part III notes the existence of pending amendments to Rules 4(a)(1) and 40(a)(1) to clarify their application to individual-capacity suits. I attach a copy of those amendments, which the Advisory Committee approved in November 2004 but which has not yet been submitted to the Standing Committee.

## I. Federal and state government litigants – overview of treatment in FRAP and elsewhere

This section first summarizes the history of the two provisions to which the proposal is directed. The relevant aspects of the provisions date from a 1948 amendment to Civil Rule 73 (in the case of Rule 4) and a 1994 amendment to the FRAP (in the case of Rule 40). The disparate appeal time for cases involving federal government litigants is also reflected in 28

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[1] Mr. Thro's proposal is attached.

[2] Altering the FRAP 40(a)(1) time period for seeking rehearing will also alter the period for seeking rehearing en banc. See FRAP 35(c) ("A petition for a rehearing en banc must be filed within the time prescribed by Rule 40 for filing a petition for rehearing.").

U.S.C. § 2107, adopted as part of the Judicial Code of 1948.

Next, this section surveys the landscape of provisions in the Appellate Rules, the Civil Rules, and the Supreme Court Rules, and considers the extent to which federal and state litigants are treated differently. This survey discloses a number of instances in which federal and state litigants are treated the same. In a number of other instances, federal litigants are singled out for favorable treatment; some of these instances reflect statutory mandates, and some likely reflect conditions placed by the United States on its submission to suit. A few other instances show differences between the treatment of federal and state litigants, but in ways that do not clearly favor federal litigants.

## A. A brief history of Rules 4(a)(1)(B) and 40(a)

### 1. Rule 4(a)(1)(B)

Rule 4(a)(1)(A) sets a presumptive 30-day time limit for filing a notice of appeal in a civil case. However, "[w]hen the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered." Rule 4(a)(1)(B). The 60-day provision for cases involving U.S. parties has existed in substantially the same form ever since the adoption of the original Appellate Rules in 1968.[3] The 1967 Advisory Committee Note explained that FRAP 4(a) was derived from Civil Rule 73(a) "without any change of substance." The Civil Rule 73(a) to which the 1967 Note referred is no longer extant. The relevant Civil Rule 73(a) provision was adopted in 1948, three months before the enactment of the 1948 Judicial Code, and the Code included a similar provision, 28 U.S.C. § 2107, that exists to this day.

Acting at the suggestion of the Judicial Conference of Senior Circuit Judges, the Civil Rules Advisory Committee took up, in the mid-1940s, the question of appeal time. The Advisory Committee explained the resulting proposal to amend Civil Rule 73(a) as follows:

> Subdivision (a) as amended will fix the time for appeal in all cases, including those from the District of Columbia, at thirty days from the date of the entry of the judgment, unless a shorter period is provided by Act of Congress, but in any case in which the United States, or an officer or agency thereof, is a party, sixty days is allowed from the date of entry of the judgment. The three-months period now allowed by the statute in most cases is too long. . . . The shortened appeal time is in line with developments in state appellate practice; indeed, some states prescribe even shorter periods. . . .

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[3] See Federal Rules of Appellate Procedure with Conforming Amendments to Federal Rules of Civil Procedure and Federal Rules of Criminal Procedure, effective July 1, 1968, 43 F.R.D. 61, 69.

> In cases where the United States or an officer or agency thereof is a party, allowance of sixty days to the government, its officers and agents is well justified. For example, in a tax case the Bureau of Internal Revenue must first consider and decide whether it thinks an appeal should be taken. This recommendation goes to the Assistant Attorney General in charge of the Tax Division in the Department of Justice, who must examine the case and make a recommendation. The file then goes to the Solicitor General, who must take the time to go through the papers and reach a conclusion. If these departments are rushed, the result will be that an appeal is taken merely to preserve the right, or without adequate consideration, and once taken it is likely to go forward, as it is easier to refrain from an appeal than to dismiss it. Since it would be unjust to allow the United States, its officers or agencies extra time and yet deny it to other parties in the case, the rule gives all parties in the case 60 days. The Judicial Conference of Senior Circuit Judges in 1945 recorded itself as in favor of extending the additional time of 60 days to all parties in any case where the United States or its officers or agencies were parties.

Advisory Committee on Rules for Civil Procedure, Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States, 5 F.R.D. 433, 485. The Supreme Court acted favorably upon the amendments in 1946, and the amendments were reported to Congress in 1947. See Amendments to Federal Rules of Civil Procedure, 6 F.R.D. 229. The amendments evidently took effect in March 1948.[4]

Three months later, the Judicial Code of 1948 was enacted. Section 2107 of the newly adopted Code mirrored Civil Rule 73(a)'s treatment of appeal time:

> 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 judgemnt, order or decree.
>
> 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.

Act of June 25, 1948, c. 646, 62 Stat. 869, 963. A review of the provisions cited as precursors of this section of the Judicial Code[5] discloses no precedent for the 1948 Act's distinctive treatment

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[4] Though this is difficult to determine as to Civil Rule 73 because the relevant Civil Rule 73 no longer exists, the effective date of the amendments to other rules amended in the same package is March 19, 1948.

[5] The Revision Notes to the 1948 Act state that Section 2107 was "[b]ased on Title 28, U.S.C., 1940 ed., §§ 227a, 230, and section 1142 of Title 26, U.S.C., 1940 ed., Internal Revenue Code (Mar. 3, 1891, c. 517, § 11, 26 Stat. 829; Mar. 3, 1911, c. 231, § 129, 36 Stat. 1134; Feb.

of U.S. litigants – suggesting that the provision made its way into the Code through the example provided by (or as part of the same process that led to the adoption of) Civil Rule 73(a).

The relevant version of Civil Rule 73(a) no longer exists, but the cognate provisions persist in both FRAP 4(a) and 28 U.S.C. § 2107. The latter currently provides in relevant part:

> (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.

### 2. Rule 40(a)(1)

FRAP 40(a)(1) provides: "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 45-day period for cases involving federal government litigants was added in 1994. The 1994 Advisory Committee Note explained: "This amendment, analogous to the provision in Rule 4(a) extending the time for filing a notice of appeal in cases involving the United States, recognizes that the Solicitor General needs time to conduct a thorough review of the merits of a case before requesting a rehearing." The amendment was modeled on a D.C. Circuit Rule and a Tenth Circuit Rule. See 1994 Advisory Committee Note. The minutes of the Advisory Committee's April 1993 meeting contain a brief discussion of the two comments received after publication of the proposed amendment to Rule 40. As far as can be gleaned from that discussion and from the description in the ensuing Advisory Committee Report, neither commentator raised the question of whether the extended time period should also be available in cases involving state government litigants, and it appears that the Advisory Committee did not discuss that question. See April 1993 Advisory Committee Minutes, at 3-4; May 1993 Advisory Committee Report at 53.

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13, 1925, c. 229, § 8(c), 43 Stat. 940; Feb. 28, 1927, c. 228, 44 Stat. 1261; Jan. 31, 1928, c. 14, § 1, 45 Stat. 54; Feb. 10, 1939, c. 2, § 1142, 53 Stat. 165; Oct. 21, 1942, c. 619, Title V, § 504(a), (c), 56 Stat. 957)."

### B. Treatment of federal and state litigants elsewhere in the Appellate Rules

Apart from Rules 4 and 40, I found only one other instance – Rule 39(b) – in which the Appellate Rules single out federal litigants for treatment different than that accorded to state litigants. In other Appellate Rules – Rules 22(b)(3), 29, and 44 – state and federal litigants share favorable treatment.

#### 1. Rule 39(b)

Rule 39(b) provides that "[c]osts for or against the United States, its agency, or officer will be assessed under Rule 39(a) only if authorized by law." This provision has existed in substantially the same form since the adoption of the FRAP.[6] The 1967 Advisory Committee Notes explained the special treatment of the United States by reference to then-prevailing practice in the courts of appeals and to 28 U.S.C. § 2412:

> The rules of the courts of appeals at present commonly deny costs to the United States except as allowance may be directed by statute. Those rules were promulgated at a time when the United States was generally invulnerable to an award of costs against it, and they appear to be based on the view that if the United States is not subject to costs if it loses, it ought not be entitled to recover costs if it wins.
>
> The number of cases affected by such rules has been greatly reduced by the Act of July 18, 1966 . . . , which amended 28 U.S.C. § 2412, the former general bar to the award of costs against the United States. Section 2412 as amended generally places the United States on the same footing as private parties with respect to the award of costs in civil cases. But the United States continues to enjoy immunity from costs in certain cases. By its terms amended § 2412 authorizes an award of costs against the United States only in civil actions, and it excepts from its general authorization of an award of costs against the United States cases which are "otherwise specifically provided (for) by statute." . . . .

#### 2. Rule 22(b)(3)

Rule 22(b) concerns the requirement that a habeas petitioner obtain a certificate of appealability. Rule 22(b)(3) provides that "[a] certificate of appealability is not required when a state or its representative or the United States or its representative appeals."

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[6] See FRAP 39(b), 43 F.R.D. 61, 102.

### 3. Rule 29(a)

Rule 29(a) requires would-be amici to obtain consent of the parties or leave of court, but exempts from this requirement briefs filed by "[t]he United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia." The exemption for those entities has existed in substantially the same form since the adoption of the FRAP,[7] except that the District of Columbia was added to the list of exempt entities in 1998.

### 4. Rule 44

Rule 44 provides a procedure for notifying government authorities when the constitutionality of a statute is challenged. As initially adopted in 1968, Rule 44 applied only to appeals in which "the constitutionality of any Act of Congress" was questioned and "to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, [was] not a party." 43 F.R.D. 61, 106. The 1967 Advisory Committee Note explained that Rule 44 was adopted "in response to" 28 U.S.C. § 2403, "which requires all courts of the United States to advise the Attorney General of the existence of an action or proceeding of the kind described in the rule."

In 1976, Congress amended Section 2403, adding a new subsection (b) that provides a notification and intervention procedure (for state attorneys general) in cases in which a state statute's constitutionality is questioned. See P.L. 94-381, §§ 5 & 6, August 12, 1976, 90 Stat. 1119, 1120. Roughly a quarter-century later, the rulemakers conformed FRAP 44 to this change by adding FRAP 44(b). See FRAP 44, 2002 Advisory Committee Note.

## C. Treatment of federal and state litigants in the Civil Rules

The Civil Rules, like the Appellate Rules, currently place states and the federal government on the same footing with respect to suits involving challenges to the constitutionality of a statute. New Civil Rule 5.1 (which will take effect December 1 absent congressional action to the contrary) provides for notice to the federal government or to the appropriate state government, and for intervention by that government, in litigation challenging the constitutionality of a federal or state statute.[8]

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[7] As originally adopted in 1968, Rule 29 required would-be amici to obtain written consent of all parties or leave of court, "except that consent or leave shall not be required when the brief is presented by the United States or an officer or agency thereof, or by a State, Territory or Commonwealth." 43 F.R.D. 61, 94.

[8] New Civil Rule 5.1 incorporates and broadens similar provisions that were formerly part of Civil Rule 24(c).

In other instances, however, the Civil Rules accord advantages to federal government litigants but not to state government litigants.[9] In some instances, the provisions were designed to track existing statutory provisions.[10] Though I have not traced the roots of all the provisions, it seems likely that a number of them implemented conditions that the federal government placed upon suits brought against itself.[11] A view of these provisions as reflections of a sovereign's ability to impose conditions on a suit against itself in its own courts may help to explain why they operate only to the advantage of federal government entities. A few other provisions exempt federal government litigants from posting various sorts of security required of other litigants.[12]

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[9] A couple of rules – Civil Rules 4(i) & (j) and Civil Rule 15(c)(3) – single out the U.S. for different treatment but do not appear to confer a particular advantage on the U.S.

[10] Civil Rule 12(a)(1)(A) and 12(a)(2) set 20-day time limits for responding to a complaint or a cross-claim. But for federal government defendants, Civil Rule 12(a)(3) sets a time limit of 60 days. State government defendants do not get the benefit of this extended deadline. The 1937 Advisory Committee Note explains that the 60-day limit for federal government defendants was designed to track similar provisions in certain federal statutes.

[11] Examples in this category include the following:

- Civil Rule 13(d) states that "[t]hese rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the United States or an officer or agency thereof."
- Civil Rule 39(c)'s authorization of the use of juries by consent excepts "actions against the United States when a statute of the United States provides for trial without a jury."
- Civil Rule 54(d)(1) provides in relevant part: "Except when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law."
- Civil Rule 55(e) provides that "[n]o judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes a claim or right to relief by evidence satisfactory to the court."

[12] Examples of this are found in Civil Rules 45, 62 and 65:

- Civil Rule 45(b)(1) provides that "[w]hen [a] subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered."
- Civil Rule 62(e) provides that "[w]hen an appeal is taken by the United States or an officer or agency thereof or by direction of any department of the Government of the United States and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant."
- Civil Rule 65(c) provides in relevant part: "No restraining order or preliminary injunction

### D. Treatment of federal and state litigants in the Supreme Court Rules

Like both the Appellate Rules and the Civil Rules, the Supreme Court Rules include similar provisions concerning challenges to state and federal statutes.[13] And like the Appellate Rules, the Supreme Court Rules equate state and federal litigants by permitting either to file amicus briefs without a motion for leave.[14] Parity is also accorded to state and federal litigants with respect to timing: Supreme Court Rule 13.1 sets a 90-day time limit for certiorari petitions, and does not provide an extended time limit for cases involving the U.S. or other governmental litigants.[15]

## II. Should state and federal litigants be treated the same for purposes of determining appeal time and time to move for panel rehearing or rehearing en banc?

Mr. Thro's letter helpfully sets forth the major arguments in favor of treating states the same as the federal government. States, like the federal government, need time to review the merits prior to deciding whether to appeal, or to request a rehearing. For states, as for the federal government, these decisions may involve complex legal, policy and strategic choices. Multiple decisionmakers within state government will often be involved. Extra time would assist states in conducting those deliberations.

It might also be argued that states should enjoy parity with the federal government, and that this consideration weighs in favor of extending to states the treatment accorded the federal government in Rules 4(a) and 40(a). This argument, however, seems weaker than the practical

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shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof."

[13] See Supreme Court Rules 29.4(b) & (c).

[14] See Supreme Court Rule 37.4. Interestingly, this rule includes not only federal and state governments, and commonwealths, territories or possessions, but also municipal governments.

[15] The one distinction the Supreme Court Rules draw between federal and state litigants can be traced to the question, discussed above, of costs in cases involving the United States: Supreme Court Rule 43.5 provides: "To the extent permitted by 28 U.S.C. § 2412, costs under this Rule are allowed for or against the United States or an officer or agent thereof, unless expressly waived or unless the Court otherwise orders."

arguments pressed by Mr. Thro.[16] Nor does an argument for parallelism with other sets of Rules seem relevant here: The treatment of federal and state litigants in the Civil Rules and the Supreme Court Rules provides room to argue for equal treatment, but also provides examples of differing treatment.

Adoption of the proposal would impose two types of costs. One set of costs concerns implementation. As discussed below, a legislative amendment would be necessary to conform Section 2107 to the amended Rule 4(a). And the bench and bar would incur the usual cost of adjusting to a new amendment. The other cost would be that of the delays imposed by doubling the time for filing a notice of appeal, and more than doubling the time before the court's mandate issues once an appeal is decided. Though I do not have figures with which to illustrate this point, it is clear that the universe of cases to which the amendments would apply is large. It includes all habeas cases concerning state prisoners,[17] all Section 1983 cases involving at least one state official sued in his or her official capacity, and – assuming that the Committee applies the approach taken in the pending amendments discussed in Part III.C. below – all Section 1983 cases involving at least one state official sued in his or her individual capacity for actions taken in connection with official duties.

## III. Crafting the proposed amendments

Assuming that Mr. Thro's similar-treatment proposal is desirable, three issues present themselves. First, because Rule 4(a)(1)'s time periods are intertwined with a statute (Section 2107), it would be advisable to seek a conforming amendment to Section 2107 if the proposed amendment to Rule 4(a)(1) goes forward. Second, there is a question of scope: Should governments other than states be included? If so, which other governments? Third, another scope question concerns the meaning of the term "officer"; there currently exists diversity of opinion in the caselaw as to whether that term encompasses officials sued in their individual capacities, but this question would be settled by proposed amendments that the Advisory

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[16] In considering the proposal that states be treated with parity for the sake of parity, it may be relevant to note that foreign states are often not treated the same as the United States. See, e.g., Dadesho v. Government of Iraq, 139 F.3d 766, 767 (9th Cir. 1998) (noting that the Foreign Sovereign Immunities Act "gives a foreign state sixty days to file an answer to a complaint, in contrast to the twenty days given most civil defendants under Fed. R. Civ. P. 12(a)," but observing that foreign states do not get extra time to file a notice of appeal under Appellate Rule 4(a)).

[17] FRAP 4(a)(1)'s 30-day deadline applies to appeals in habeas cases involving state prisoners. See Houston v. Lack, 487 U.S. 266, 269 (1988). In federal prisoners' Section 2255 proceedings, the 60-day period set in FRAP 4(a)(1)(B) applies. See Rule 11 of the Rules Governing Section 2255 Proceedings for the United States District Courts ("Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules.").

Committee approved in November 2004.

### A. If Rule 4(a)(1) is amended, Section 2107 should be amended as well

As noted above, FRAP 4(a)(1)'s dichotomous treatment of U.S. litigants and other litigants is mirrored in the distinction drawn in 28 U.S.C. § 2107. If the proposed amendment to FRAP 4(a)(1) is adopted, the rulemakers should suggest, at the time that the proposed amendment is forwarded to Congress, that Congress enact conforming changes to Section 2107.

### B. Entities to be covered by the proposed amendments

Mr. Thro writes on behalf of thirty-four states and the Commonwealth of Puerto Rico. He obviously intends Puerto Rico to be included among the entities that would get the benefit of the amendment. He does not discuss, however, whether other entities should also be included. Presumably, the District of Columbia would appropriately be grouped with the states. Though I have not had a chance to research the question, the same might be said of the Northern Mariana Islands, American Samoa, Guam, and the Virgin Islands.[18] Foreign nations, by contrast, might appropriately be excluded from this proposal: They presumably litigate far less frequently in federal court than do the states.

Some Native American tribes may be frequent litigants, and at least a few tribes may face caseloads and decisional challenges that are somewhat similar to those shouldered by a state litigant. But Native American tribes vary widely in their population and resources, and tribal governments vary in their size and complexity. The Navajo Nation, for example, will resemble a state government litigant much more closely than a smaller tribal government would. The great variation among tribal governments might thus lead to the conclusion that tribes should be excluded from the provision. On the other hand, it might be argued that a small tribal government might need the extra time even more, because its lack of resources would render it a less nimble decisionmaker.

Once the Committee reaches a view on the proper scope of the amendments, it will need to decide how to make that scope clear. It seems doubtful that the proposed amendments drafted by Mr. Thro would cover entities other than the fifty states unless a definition is added to make

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[18] It is interesting to note that the members of the National Association of Attorneys General include not only the attorneys general of the fifty states but also "the chief legal officers of the District of Columbia, the Commonwealths of Puerto Rico (Secretary of Justice) and the Northern Mariana Islands, and the territories of American Samoa, Guam, and the Virgin Islands." http://www.naag.org/naag/about_naag.php, last visited September 28, 2006.

that clear.[19] Or – perhaps more straightforwardly – the amendments could be redrafted to refer to all the intended beneficiaries. Thus, for example, FRAP 29(a) refers not merely to a "State" but also to a "Territory, Commonwealth, or the District of Columbia."

### C. Individual-capacity suits

It is currently unclear whether the existing federal-litigant provisions in FRAP 4(a) and 40(a) apply to cases involving federal officials sued in their individual capacities. Cf. 16A Wright, Miller, Cooper & Schiltz, Federal Practice & Procedure § 3950.2, fn. 42 (noting "[t]he problem of the ambiguous role often played by United States officers as defendants").

The Second Circuit has taken a relatively narrow view. As the court explained in a case arising out of a car accident involving a federal employee driving a government-owned vehicle on government business:

> The action was brought against him in his individual capacity and the judgment against him was entered against him as an individual. Although the United States Attorney appeared in his behalf, Smith could have chosen private counsel. Moreover, [i]f Smith had decided to appeal from the judgment against him he would not have needed the approval of any government department. Therefore, the reasons for which the usual 30 day time limit for filing an appeal was extended to 60 days in cases in which the 'United States or an officer or agency thereof' is a party are not applicable to Smith.

Hare v. Hurwitz, 248 F.2d 458, 462 (2d Cir. 1957) (construing Civil Rule 73(a)).

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[19] Some procedural provisions expressly define "State" to include the Commonwealth of Puerto Rico, the District of Columbia, and/or U.S. territories and possessions. See, e.g., 28 U.S.C. § 1332(e) ("The word 'States', as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico."); 28 U.S.C. § 1367(e) ("As used in this section, the term 'State' includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States."); 28 U.S.C. § 1369(c)(5) (definition similar to Section 1367(e)); 28 U.S.C. § 1738A(b)(8) (same); 28 U.S.C. § 3002(14) ("'State' means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Marianas, or any territory or possession of the United States."); 28 U.S.C. § 3701(5) ("[T]he term 'State' means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Palau, or any territory or possession of the United States").

Some procedural provisions define state to encompass, in addition, Native American tribes. See 28 U.S.C. § 1738B(b) ("'State' means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the territories and possessions of the United States, and Indian country (as defined in section 1151 of title 18).").

Some other circuits have given the provisions a broader application. The Ninth Circuit has explained that

> Congress intended the reference to officers of the United States to be read in context with their activities, authority, and duties. A workable rule would be one that looks at who represents the parties and the relationship of the parties to each other and to the government during the course of the conduct that gave rise to the action. Whenever the alleged grievance arises out of a government activity, the 60-day filing period of Rule 4(a) applies if: (a) the defendant officers were acting under color of office, or (b) the defendant officers were acting under color of law or lawful authority, or (c) any party in the case is represented by a government attorney.

Wallace v. Chappell, 637 F.2d 1345, 1347-48 (9th Cir. 1981) (en banc, per curiam decision); Buonocore v. Harris, 65 F.3d 347, 352 (4th Cir. 1995) (applying *Wallace* and concluding that 60-day period applied in case involving *Bivens* claims against officers sued in personal capacities, because officers were acting under color of law, one officer had been represented by government counsel, and the U.S. had been for some period of time a named party to the proceedings below); Williams v. Collins, 728 F.2d 721, 723-24 (5th Cir. 1984) (following *Wallace*).

Provisions setting the time within which to appeal should be clear, and in the case of individual-capacity suits, current Rule 4(a)(1)(B) seems to fall short of that goal. In fact, as you know, the Advisory Committee has already approved proposed amendments to Rules 4(a)(1)(B) and 40(a)(1) to clarify the rules' application to individual-capacity suits. The proposed amendments are attached to this memo.

## IV. Conclusion

As Mr. Thro notes, the decisional challenges faced by state government litigants provide an argument for treating those litigants the same as federal government litigants, with respect to the time for filing the notice of appeal or seeking rehearing. The Committee should weigh that argument against the likely costs of the proposal: the costs of transition to the new rule, and the delays imposed by making the extended deadlines available in a greater range of cases. If the Committee decides to adopt the proposal, it should consider how to incorporate the requisite changes into the currently pending proposals to amend Rules 4(a) and 40(a). It should also consider what entities (e.g. commonwealths, territories, possessions) should be encompassed in addition to states, and it should consider asking Congress to adopt a conforming amendment to 28 U.S.C. § 2107.

Encls.

*Proposed amendments approved by the Advisory Committee in November 2004:*

**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 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:

(a) the United States;

(b) a United States agency;

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

(d) a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States.

* * * * *

**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 in such cases. 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.

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**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~~.~~, a petition for panel rehearing 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 United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States.

* * * * *

**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.

# *COMMONWEALTH of VIRGINIA*

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September 22, 2006

**Via Electronic Mail as PDF Attachment with Original Via U.S. Mail**

Advisory Committee
FEDERAL RULES OF APPELLATE PROCEDURE
c/o Professor Catherine T. Struve
UNIVERSITY OF PENNSYLVANIA LAW SCHOOL
3400 Chestnut Street
Philadelphia, Pennsylvania 19104

RE: Suggested Amendments to the Federal Rules of Appellate Procedure

Ladies and Gentlemen:

I serve as State Solicitor General of the Commonwealth of Virginia. On behalf of my counterparts in Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Idaho, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, New Jersey, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Washington, Wisconsin, and Puerto Rico, I write to propose amendments to the Federal Rules of Appellate Procedure. Our proposed amendments are designed to ensure that the States are treated in the same manner as the National Government for purposes of: (1) filing a Notice of Appeal in a civil case; and (2) seeking a panel rehearing or rehearing en banc in a civil case.

Specifically, we propose that Federal Rule of Appellate Procedure 40(a)(1) be amended by adding the following italicized language:

> Unless the time is shortened or extended by order or local rule, a petition for rehearing may be filed within 14 days after entry of judgment. But in a civil case, if the United States, *a State*, or *an* officer or agency *of the United States or a State* is a party, the time within which any party may seek rehearing is 45 days after the entry of judgment unless an order shortens or extends the time.

Similarly, we propose that Federal Rule of Appellate Procedure 4(a)(1)(B) be amended by adding the following italicized language:

> When the United States, *a State*, or *an* officer or agency *of the United States or a State* is a party, the notice of appeal may be filed within 60 days after the judgment or order appealed from is entered.

The rationale for seeking these changes is to recognize that individual States, like the United States, need time to conduct a thorough review of the merits of a case before filing a Notice of Appeal or requesting a rehearing. This happens to be the exact rationale used by the Advisory Committee when the Rules were amended to give more time to the United States to seek rehearing, and in turn the rationale for Rule 4(a)'s later deadline for a Notice of Appeal. *See Advisory Committee Notes to the 1994 Amendments to Rule 40(a)* ("This amendment, analogous to the provision in Rule 4(a) extending the time for filing a notice of appeal in cases involving the United States, recognizes that the Solicitor General needs time to conduct a thorough review of the merits of a case before requesting a rehearing.").

First, with respect to the suggested amendment to Rule 40(a), like the National Government, the States frequently have lengthy review processes for Petitions for Rehearing. For example, in Indiana, the lawyer handling the appeal would first need to refer the case to the Solicitor General, who would then need to consult the relevant client agencies, and then make a recommendation to the Attorney General. In some cases, depending on the profile of the issue, the Attorney General may arrange a meeting with the relevant public official to discuss alternative strategies before making a decision. Similarly, in Colorado, Petitions for Rehearing in non-habeas cases generally require consultation with the Governor's office, a meeting involving the Attorney General, Chief Deputy Attorney General, or Solicitor General, and, if the decision is to seek rehearing, approval of the draft by the Solicitor General or Attorney General. Because travel schedules and commitments frequently make it difficult for everyone to meet, North Carolina has experienced problems with the time limits regarding Petitions for Rehearing, particularly with respect to habeas corpus matters that entail complex public policy considerations.

In these States and others, this process can be particularly time consuming, but it is important because in most States executive and administrative governmental responsibilities are divided among separately elected officials, including the Governor, Attorney General, Treasurer, Auditor, Secretary of State, and others. Indeed, States frequently will have a situation where the Attorney General is from one party and the Governor or other elected-official client is from another. Consequently, there is often a great need for Attorneys General or their senior deputies to consult with individual agency heads or elected officials before reaching an important decision concerning the appeal. It should not be surprising that this process can be difficult to complete in fourteen days.

Second, with respect to the suggested amendment to Rule 4(a), many of the same difficulties that exist in the rehearing context also arise when States must determine whether to file a Notice of Appeal. While the longer period of time (thirty days instead of fourteen) and the comparative simplicity of preparing a Notice of Appeal alleviate these difficulties to some degree, it is still necessary for multiple deputy Attorneys General to review the district court decision, make a recommendation, and, in many instances, consult with agency heads or other elected state officials before reaching a final decision.

Furthermore, when officials at the United States Department of Justice consider whether to recommend appealing a district court decision, and when the Solicitor General of the United States makes a final determination whether to appeal, these officials are not merely considering the narrow issue whether the government can win the case or whether the potential benefit of winning outweighs

the cost of committing more resources to the case. Rather, these officials are cognizant that they are formulating legal policy for the entire federal government. They must therefore consider whether pursuing the appeal is in the best interests of the United States. This means considering not only the interests of the particular agency whose case is before them, but also the potentially competing interests of other government agencies, and, of course, the cause of justice in general. That is why decisions to prosecute an appeal, but not to defend an appeal, ultimately must be made by the Solicitor General.

The same is true for state Attorneys General and their senior deputies. A decision to appeal represents a decision about legal policy. No less than the Solicitor General of the United States, state government officials often must confront complex and weighty issues of legal policy and legitimate competing agency or public interests, not to mention the need to weigh the likelihood and benefits of winning against the cost of additional resources, when deciding whether to appeal. The current deadline for States to undertake those considerations short-circuits state processes compared with the time afforded the National Government.

The sheer size of the federal bureaucracy does not justify treating state government differently from the National Government for purposes of Rules 40(a) and 4(a) of the Federal Rule of Appellate Procedure. The National Government is allotted more time because its decisions in this regard are important and oftentimes difficult. The same is true for appeal and rehearing decisions by States, and the rules should reflect that and accommodate States as much as the National Government.

In closing, I thank the committee for its attention to our proposed amendments. If you have any questions, or if my counterparts and I can provide any additional information, please do not hesitate to contact me at (804) 786-2436 or wthro@oag.state.va.us.

Sincerely,

*/s/ William E. Thro*

William E. Thro
State Solicitor General

cc: State Solicitors General (or their equivalents) of Participating States

Dan Schweitzer, Esq., Supreme Court Counsel
National Association of Attorneys General

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# MEMORANDUM

**DATE:** March 27, 2007

**TO:** Advisory Committee on Appellate Rules

**CC:** Reporters and Advisory Committee Chairs

**FROM:** Catherine T. Struve

**RE:** Item No. 07-AP-B: Proposed Appellate Rule on indicative rulings

This memo considers possible options for a proposed Appellate Rule 12.1 that would reflect the procedure to be followed when a district court is asked for relief that it lacks authority to grant due to a pending appeal. If the Appellate Rules Committee approves the proposed Rule, the goal would be to seek permission to publish the proposed Rule for comment this summer, along with proposed Civil Rule 62.1.

## I. History of the proposal

In March 2000, the Solicitor General proposed that the Appellate Rules Committee consider adopting a new Appellate Rule 4.1 to address the practice of indicative rulings.[1] The Department of Justice argued that a FRAP rule on this topic would promote awareness of the possibility of indicative rulings; would ensure that the possibility was available in all circuits; and would render the relevant procedures uniform throughout the circuits.[2] The Appellate Rules Committee discussed the proposal at its April 2000 meeting and retained the matter on its study agenda. At the April 2001 meeting, the Committee concluded that the DOJ's proposal should be referred to the Civil Rules Committee, on the ground that any such rule would more appropriately be placed in the Civil Rules.[3]

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[1] *See* Minutes of the Advisory Committee on Appellate Rules, April 13, 2000.

[2] *See id.*

[3] *See* Minutes of the Advisory Committee on Appellate Rules, April 11, 2001.

At its May 2006 meeting, the Civil Rules Committee approved a recommendation to publish for comment a new Civil Rule 62.1 concerning indicative rulings. Though the Committee decided not to request publication in summer 2006, it reported on the proposal at the Standing Committee's June 2006 meeting; at that meeting, there was some discussion of the placement and caption of the proposed Civil Rule. Further discussion of the proposed Civil Rule took place at the Standing Committee's January 2007 meeting, and the Standing Committee has asked the Appellate Rules Committee to consider adopting an Appellate Rules provision that recognizes the Civil Rule 62.1 procedure. The Standing Committee has asked the Civil and Appellate Rules Committees to coordinate so that the provisions concerning indicative rulings will dovetail and will be published for comment simultaneously. A copy of the current draft of proposed Civil Rule 62.1 is enclosed.

In February 2007, we asked Fritz Fulbruge for his input (and that of his fellow circuit clerks) on the indicative-ruling proposal. His memo – which reports his thoughts and those of the D.C. Circuit and Third Circuit clerks – is attached. Fritz reports that overall the clerks do not seem enthusiastic about the proposed rule, in part because "the appellate courts are satisfied with leaving the issue at rest because of locally developed procedures." Mark Langer, the D.C. Circuit clerk, states: "I prefer not to have any rule. We handle things pretty well here without a rule." Despite their doubts about the necessity of a national rule, however, Fritz and the two other clerks who commented on the proposal have provided very helpful insights, which I have attempted to incorporate into this memo and the proposed Rule and Note.

## II. Current circuit practices concerning indicative rulings

Ordinarily, "a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously. The filing of a notice of appeal is an event of jurisdictional significance--it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982).[4] Thus, in civil cases the pendency of an appeal limits the district court's possible dispositions of a motion for relief from the judgment under

[4] *See also In re Jones*, 768 F.2d 923, 931 (7th Cir. 1985) (Posner, J., concurring) ("The purpose of the rule is to keep the district court and the court of appeals out of each other's hair....").

Rule 60(b).[5] The court has three options: (1) deny the motion,[6] (2) defer consideration of the

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[5] By pendency of an appeal, I mean to refer to instances when the notice of appeal has become effective. A Civil Rule 60(b) motion that is filed no later than 10 days after entry of judgment tolls the time for taking an appeal, and a notice of appeal filed before the disposition of such a motion does not "become[] effective" until the entry of the order disposing of the motion. Appellate Rule 4(a)(4)(B)(i).

[6] *See Puerto Rico v. SS Zoe Colocotroni*, 601 F.2d 39, 42 (**1st Cir.** 1979) ("[W]hen an appeal is pending from a final judgment, parties may file Rule 60(b) motions directly in the district court without seeking prior leave from us. The district court is directed to review any such motions expeditiously, within a few days of their filing, and quickly deny those which appear to be without merit...."); *Hyle v. Doctor's Assocs., Inc.*, 198 F.3d 368, 372 n.2 (**2d Cir.** 1999) ("Like most circuits ... , we have recently recognized the power of a district court to *deny* a Rule 60(b) motion after the filing of a notice of appeal from the judgment sought to be modified, *see, e.g., Selletti v. Carey*, 173 F.3d 104, 109 (2d Cir. 1999); *Toliver v. County of Sullivan*, 957 F.2d 47, 49 (2d Cir. 1992), notwithstanding an earlier contrary authority, *see Weiss v. Hunna*, 312 F.2d 711, 713 (2d Cir. 1963), which had previously been cited with apparent approval, *see New York State National Organization for Women*, 886 F.2d 1339, 1349-50 (2d Cir. 1989); *Contemporary Mission, Inc. v. United States Postal Service*, 648 F.2d 97, 107 (2d Cir. 1981)."); *United States v. Contents of Accounts Numbers 3034504504 and 144-07143 at Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 971 F.2d 974, 988 (**3d Cir.** 1992); *Fobian v. Storage Tech. Corp.*, 164 F.3d 887, 891 (**4th Cir.** 1999) ("[W]hen a Rule 60(b) motion is filed while a judgment is on appeal, the district court has jurisdiction to entertain the motion, and should do so promptly. If the district court determines that the motion is meritless, as experience demonstrates is often the case, the court should deny the motion forthwith; any appeal from the denial can be consolidated with the appeal from the underlying order."); *Karaha Bodas Co. v. Perusahaan Perambangan Minyak Dan Gas Bumi Negara*, No. 02-20042, 2003 WL 21027134, at *4 (**5th Cir.** 2003) (unpublished per curiam opinion) ("Under the Fifth Circuit's procedure, the appellate court asks the district court to indicate, in writing, its inclination to grant or deny the Rule 60(b) motion. If the district court determines that the motion is meritless, the appeal from the denial is consolidated with the appeal from the underlying order."); *Kusay v. United States*, 62 F.3d 192, 195 (**7th Cir.** 1995) ("Many cases, including *United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984), say that a district court may deny, but not grant, a post-judgment motion while an appeal is pending. *Cronic* involved a motion for a new trial under Fed.R.Crim.P. 33, but the principle is general."); *Hunter v. Underwood*, 362 F.3d 468, 475 (**8th Cir.** 2004) ("Our case law ... permits the district court to consider a Rule 60(b) motion on the merits and deny it even if an appeal is already pending in this court ...."); *Mahone v. Ray*, 326 F.3d 1176, 1180 (**11th Cir.** 2003) ("[D]istrict courts retain jurisdiction after the filing of a notice of appeal to entertain and deny a Rule 60(b) motion.").

The Supreme Court has stated in passing that "the pendency of an appeal does not affect the district court's power to grant Rule 60 relief." *Stone v. I.N.S.*, 514 U.S. 386, 401 (1995). But

motion,[7] or (3) indicate its inclination to grant the motion and await a remand from the Court of Appeals for that purpose.[8] The district court's options are further limited within the Ninth

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a number of courts "have explicitly recognized that the statement in *Stone* is dicta and thus have not modified their similar Rule 60(b) approach." *Shepherd v. Int'l Paper Co.*, 372 F.3d 326, 331 (5th Cir. 2004) (adopting this view).

[7] *Cf. LSJ Inv. Co. v. O.L.D., Inc.*, 167 F.3d 320, 324 (6th Cir. 1999) (holding that although Sixth Circuit "cases allow the court to entertain a motion for relief even while an appeal is pending, they do not require the court to do so. Once the defendants appealed, it was not erroneous for the district court to let the appeal take its course.").

Some circuits, however, have suggested that deferral is generally inappropriate. *See, e.g.*, *Puerto Rico v. SS Zoe Colocotroni*, 601 F.2d 39, 42 (**1st Cir.** 1979) ("[W]hen an appeal is pending from a final judgment, parties may file Rule 60(b) motions directly in the district court without seeking prior leave from us. The district court is directed to review any such motions expeditiously, within a few days of their filing, and quickly deny those which appear to be without merit....").

[8] *See Fobian v. Storage Tech. Corp.*, 164 F.3d 887, 891 (**4th Cir.** 1999) ("If the district court is inclined to grant the motion, it should issue a short memorandum so stating. The movant can then request a limited remand from this court for that purpose."); *Karaha Bodas Co., L.L.C. v. Perusahaan Perambangan Minyak Dan Gas Bumi Negara*, No. 02-20042, 2003 WL 21027134, at *4 (**5th Cir.** 2003) (unpublished per curiam opinion) ("If the district court is inclined to grant the motion, it should issue a short memorandum so stating. Appellant may then move this court for a limited remand so that the district court can grant the Rule 60(b) relief. After the Rule 60(b) motion is granted and the record reopened, the parties may then appeal to this court from any subsequent final order."); *Bovee v. Coopers & Lybrand C.P.A.*, 272 F.3d 356, 364 (**6th Cir.** 2001) ("Where a party seeks to make a motion under Fed.R.Civ.P. 60(b) to vacate the judgment of a district court, after notice of appeal has been filed, the proper procedure is for that party to file the motion in the district court. . . . If the district judge was inclined to grant the motion, he or she could enter an order so indicating; and, the party could then file a motion in the Court of Appeals to remand."); *Kusay v. United States* , 62 F.3d 192, 195 (**7th Cir.** 1995) ("A district judge disposed to alter the judgment from which an appeal has been taken must alert the court of appeals, which may elect to remand the case for that purpose."); *Pioneer Ins. Co. v. Gelt*, 558 F.2d 1303, 1312 (**8th Cir.** 1977) ("If, on the other hand, the district court decides that the motion should be granted, counsel for the movant should request the court of appeals to remand the case so that a proper order can be entered."); *Mahone v. Ray*, 326 F.3d 1176, 1180 (**11th Cir.** 2003) ("[A] district court presented with a Rule 60(b) motion after a notice of appeal has been filed should consider the motion and assess its merits. It may then deny the motion or indicate its belief that the arguments raised are meritorious. If the district court selects the latter course, the movant may then petition the court of appeals to remand the matter so as to confer jurisdiction on the district court to grant the motion."); *Hoai v. Vo*, 935 F.2d 308, 312 (**D.C. Cir.** 1991)

Circuit, because that circuit takes the view that the district court lacks power to deny a Rule 60(b) motion while an appeal is pending.[9] Though the Ninth Circuit thus diverges from other circuits on the question of whether a district court can deny such a motion without a remand, its indicative-ruling procedure seems fairly similar, in other respects, to that in other circuits.[10]

Local rules or practices addressing the practice of indicative rulings currently exist in the Sixth,[11] Seventh[12] and D.C.[13] Circuits. I was unable to find local rules or handbook provisions

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("[W]hen both a Rule 60(b) motion and an appeal are pending simultaneously . . . . the District Court may consider the 60(b) motion and, if the District Court indicates that it will grant relief, the appellant may move the appellate court for a remand in order that relief may be granted.").

[9] *See Smith v. Lujan*, 588 F.2d 1304, 1307 (**9th Cir.** 1979).

That the Sixth Circuit might take this view is suggested by its statement that the pendency of an appeal deprived the district court of jurisdiction to decide a Rule 60(b) motion. *See S.E.C. v. Johnston*, 143 F.3d 260, 263 (6th Cir. 1998), *abrogated on other grounds by Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1, 16 (2004).

[10] *See, e.g., Williams v. Woodford*, 384 F.3d 567, 586 (9th Cir. 2004).

[11] Sixth Circuit Rule 45 provides in relevant part:

> Duties of Clerks--Procedural Orders
> (a) Orders That May be Entered by Clerk. The clerk may prepare, sign and enter orders or otherwise dispose of the following matters without submission to this Court or a judge, unless otherwise directed:
> ...
> (7) Orders granting remands and limited remands for the purpose of allowing the district court to grant a particular relief requested by a party and to which no other party has objected, or where the parties have moved jointly, where such motion is accompanied by the certification of the district court pursuant to *First National Bank of Salem, Ohio v. Hirsch*, 535 F.2d 343 (6th Cir. 1976).

The procedure set by *First National Bank* is as follows: "[T]he party seeking to file a Rule 60(b) motion ... should ... file[] that motion in the district court. If the district judge is disposed to grant the motion, he may enter an order so indicating and the party may then file a motion to remand in this court." *First Nat'l Bank of Salem, Ohio v. Hirsch*, 535 F.2d 343, 346 (6th Cir. 1976).

[12] Seventh Circuit Rule 57 provides:

> Circuit Rule 57. Remands for Revision of Judgment
> A party who during the pendency of an appeal has filed a motion under

concerning indicative rulings in the other Circuits. The reason may be that, as Fritz reports, the indicative-ruling procedure is not often used; Fritz estimates that in the Fifth Circuit such requests surface only about 30 times per year.

## III. Questions to be addressed

It is fairly straightforward to draft a rule that parallels the proposed Civil Rule 62.1. However, a number of questions suggest themselves. This section considers those questions.

Parts III.A. and III.B. observe that the indicative-ruling procedure is also employed in the criminal context and (at least occasionally) in the bankruptcy context. Accordingly, I have

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Fed. R. Civ. P. 60(a) or 60(b), Fed. R. Crim. P. 35(b), or any other rule that permits the modification of a final judgment, should request the district court to indicate whether it is inclined to grant the motion. If the district court so indicates, this court will remand the case for the purpose of modifying the judgment. Any party dissatisfied with the judgment as modified must file a fresh notice of appeal.

[13] D.C. Circuit Handbook of Practice and Internal Procedures VIII.E. provides:

E. Motions for Remand
(*See* D.C. Cir. Rule 41(b).)

Parties may file a motion to remand either the case or the record for a number of reasons, including to have the district court or agency reconsider a matter, to adduce additional evidence, to clarify a ruling, or to obtain a statement of reasons. The Court also may remand a case or the record on its own motion.

If the *case* is remanded, this Court does not retain jurisdiction, and a new notice of appeal or petition for review will be necessary if a party seeks review of the proceedings conducted upon remand. *See* D.C. Cir. Rule 41(b). In general, a remand of the case occurs where district court or agency reconsideration is necessary. *See, e.g., Raton Gas Transmission Co. v. FERC*, 852 F.2d 612 (D.C. Cir. 1988); *Siegel v. Mazda Motor Co.*, 835 F.2d 1475 (D.C. Cir. 1987). By contrast, if only the record is remanded, such as where additional fact-finding is necessary, this Court retains jurisdiction over the case. *See* D.C. Cir. Rule 41(b).

It is important to note that where an appellant, either in a criminal or a civil case, seeks a new trial on the ground of newly discovered evidence while his or her appeal is pending, or where other relief is sought in the district court, the appellant must file the motion seeking the requested relief in the district court. *See Smith v. Pollin*, 194 F.2d 349, 350 (D.C. Cir. 1952); Fed. R. Crim. P. 33; Fed. R. Civ. P. 60. If that court indicates that it will grant the motion, the appellant should move this Court to remand the case to enable the district court to act. *See Smith v. Pollin*, 194 F.2d at 350.

drafted the proposed Rule to encompass contexts other than those implicated by proposed Civil Rule 62.1.

Part III.C. discusses the dangers that would arise from an unconditional remand; in particular, such a remand creates the risk that the district court will deny the motion for postjudgment relief and the movant will have lost the opportunity to challenge the underlying judgment. For this reason, I have added language to the Note urging that a limited remand will often be the preferable course. Part III.C. also considers the choice between requiring an indication that the district court "might" grant the motion and requiring a statement that it "would" grant the motion in the event of a remand.

Part III.D. notes that it may be useful to alert practitioners to the need for a new notice of appeal to challenge any denial of a motion for postjudgment relief; this observation is included in the draft Note. Part III.E. considers the Rule's reference to an appeal that "has been docketed and is pending," and discusses whether docketing is the appropriate point of demarcation in this context. Part III.F. discusses which events should trigger a duty to notify the court of appeals, and also considers whether the Rule or Note should address the logistics of communications by the parties and the district court to the court of appeals. Part III.G. lists alternative numbering possibilities for the draft Rule.

### A. Should the Appellate Rule encompass remands in criminal cases?

The indicative-ruling process on the criminal side appears to be roughly similar to that envisioned in proposed Civil Rule 62.1. When a new trial motion under Criminal Rule 33[14] is made during the pendency of an appeal, "[t]he District Court ha[s] jurisdiction to entertain the motion and either deny the motion on its merits, or certify its intention to grant the motion to the Court of Appeals, which [can] then entertain a motion to remand the case." *United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984).[15]

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[14] Criminal Rule 33(b)(1) explicitly notes the need for a remand before the district court can grant a motion for a new trial: "If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case."

[15] *See U.S. v. Graciani*, 61 F.3d 70, 77 (**1st Cir.** 1995) (adopting this procedure); *U.S. v. Camacho*, 302 F.3d 35, 36-37 (**2d Cir.** 2002) (citing *Cronic* and stating that "the district court retains jurisdiction to deny a Rule 33 motion during the pendency of an appeal, even though it may not grant such motion unless the Court of Appeals first remands the case to the district court"); *U.S. v. Fuentes-Lozano*, 580 F.2d 724, 726 (**5th Cir.** 1978) (per curiam) ("A motion for a new trial may be presented directly to the district court while the appeal is pending; that court may not grant the motion but may deny it, or it may advise us that it would be disposed to grant the motion if the case were remanded. Alternatively, as here, to avoid delay, the appellant may seek a remand for the purpose of permitting the district court fully to entertain the motion."); *U.S.*

Under the current rules,[16] a pending appeal affects motions under Criminal Rule 35(a) differently than motions under Rule 35(b). It appears that the district court lacks jurisdiction to

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*v. Phillips*, 558 F.2d 363, 363-64 (**6th Cir.** 1977) (per curiam) ("[T]he proper procedure for a party wishing to make a motion for a new trial while appeal is pending is to first file the motion in the district court. If that court is inclined to grant the motion, it may then so certify, and the appellant should then make a motion in the court of appeals for a remand of the case to allow the district court to so act."); *U.S. v. Frame*, 454 F.2d 1136, 1138 (**9th Cir.** 1972) (per curiam) ("By necessary implication, Rule 33 permits a district court to entertain and deny a motion for a new trial based upon newly discovered evidence without the necessity of a remand. Only after the district court has heard the motion and decided to grant it is it necessary to request a remand from the appellate court."); *Garcia v. Regents of Univ. of Ca.*, 737 F.2d 889, 890 (**10th Cir.** 1984) (per curiam) ("It is settled that under Rule 33 of the Federal Rules of Criminal Procedure a district court may entertain a motion for new trial during the pendency of an appeal, although the motion may not be granted until a remand request has been granted by the appellate court.").

[16] The caselaw concerning motions under Criminal Rule 35 is complicated because of courts' readings of a previous version of the Rule. Prior to the enactment of the Sentencing Reform Act of 1984, Rule 35(a) stated that "[t]he court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence." Applying that Rule, the Ninth Circuit held that "the trial court retains jurisdiction to correct [a] sentence under Rule 35(a) while [an] appeal is pending." *Doyle v. U.S.*, 721 F.2d 1195, 1198 (9th Cir. 1983). Congress's amendment to Rule 35(a), however, led the Ninth Circuit to change its approach and hold that the district court lacked jurisdiction to grant Rule 35(a) relief during an appeal, because the amended Rule 35 provided "that district courts are to 'correct a sentence that is determined on appeal ... to have been imposed in violation of law, ... upon remand of the case to the court.'" *U.S. v. Ortega-Lopez*, 988 F.2d 70, 72 (9th Cir. 1993).

modify a final judgment under Rule 35(b)[17] while an appeal from that judgment is pending.[18] Appellate Rule 4(b), however, explicitly provides that the district court may correct a sentence under Rule 35(a) despite the pendency of an appeal.[19]

Two of the three circuits that have provisions addressing indicative rulings address them in the criminal as well as civil context: The Seventh Circuit's rule addresses motions to reduce a sentence under Criminal Rule 35(b), while the D.C. Circuit's Handbook addresses motions for a new trial based on newly discovered evidence under Criminal Rule 33. As noted above, the current draft Rule is drafted so as to encompass the criminal context; and the Note refers to the procedure described in *Cronic*.

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[17] *See, e.g., U.S. v. Campbell*, 40 Fed.Appx. 663, 664 (**3d Cir.** 2002) (nonprecedential opinion) ("After the filing of the original notice of appeal, this Court assumed exclusive jurisdiction over the subject matter of the appeal . . . , and the District Court lost jurisdiction to consider a Rule 35 motion. . . . It was for that reason that the parties . . . sought a summary remand to the District Court to permit disposition of the government's motion."); *U.S. v. Bingham*, 10 F.3d 404, 405 (**7th Cir.** 1993) (per curiam) ("Where a party moves for sentence reduction under Rule 35(b) during the pendency of an appeal, it must request that the district court certify its inclination to grant the motion. If the district court is inclined to resentence the defendant, it shall certify its intention to do so in writing. The government (or the parties jointly) may then request that we remand by way of a motion that includes a copy of the district court's certification order.").

[18] This approach accords with the view expressed by the Supreme Court prior to the adoption of the Criminal Rules. *See Berman v. U.S.*, 302 U.S. 211, 214 (1937) ("As the first sentence was a final judgment and appeal therefrom was properly taken, the District Court was without jurisdiction during the pendency of that appeal to modify its judgment by resentencing the prisoner.").

[19] Rule 35(a) provides that "[w]ithin 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error." Rule 4(b)(5) provides in part: "The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(a), nor does the filing of a motion under 35(a) affect the validity of a notice of appeal filed before entry of the order disposing of the motion." The brevity of Rule 35(a)'s 7-day deadline helps to avoid scenarios in which the district court and court of appeals are both acting with respect to the same judgment. *Cf.* 1991 Advisory Committee Note to Rule 35 ("The Committee believed that the time for correcting such errors should be narrowed within the time for appealing the sentence to reduce the likelihood of jurisdictional questions in the event of an appeal and to provide the parties with an opportunity to address the court's correction of the sentence, or lack thereof, in any appeal of the sentence.").

## B. Should the Appellate Rule encompass remands in bankruptcy cases?

Ordinarily, appeals from bankruptcy court decisions are taken to the district court,[20] or to a bankruptcy appellate panel where such a panel exists.[21] Such appeals are governed by Part VIII of the Bankruptcy Rules.[22] Final decisions on such appeals are appealable, in turn, to the Court of Appeals,[23] and the Appellate Rules apply to the proceedings in the Court of Appeals.[24] The intermediate step may be bypassed – and an appeal taken directly the Court of Appeals from a bankruptcy court decision – if the requirements of 28 U.S.C. § 158(d)(2) are met.[25] Under the temporary procedures that currently govern such direct appeals, the Appellate Rules would

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[20] See 28 U.S.C. § 158(a).

[21] *See* 28 U.S.C. § 158(b).

[22] *See* Bankruptcy Rule 8001 et seq.; *see also* Bankruptcy Rule 8018(a)(1) ("Circuit councils which have authorized bankruptcy appellate panels pursuant to 28 U.S.C. § 158(b) and the district courts may, acting by a majority of the judges of the council or district court, make and amend rules governing practice and procedure for appeals from orders or judgments of bankruptcy judges to the respective bankruptcy appellate panel or district court consistent with--but not duplicative of--Acts of Congress and the rules of this Part VIII.").

[23] *See* 28 U.S.C. § 158(d)(1).

[24] *See* 1983 Advisory Committee Note to Bankruptcy Rule 8001.

[25] Section 158(d)(2) provides in part:

> (2)(A) The appropriate court of appeals shall have jurisdiction of appeals described in the first sentence of subsection (a) if the bankruptcy court, the district court, or the bankruptcy appellate panel involved, acting on its own motion or on the request of a party to the judgment, order, or decree described in such first sentence, or all the appellants and appellees (if any) acting jointly, certify that--
>
> (i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;
>
> (ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or
>
> (iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken;
>
> and if the court of appeals authorizes the direct appeal of the judgment, order, or decree.

generally apply.[26]

At least one Bankruptcy Appellate Panel has indicated that the indicative-ruling process followed in the Civil Rule 60(b) context applies equally when Rule 60(b) relief is sought from a bankruptcy court after an appeal has been taken to the district court from the bankruptcy court's decision. *In re Lafata*, 344 B.R. 715, 722 (B.A.P. 1st Cir. 2006) ("Clearly, under the law of *Zoe Colocotroni*, the bankruptcy court had jurisdiction to consider a Rule 60(b) motion filed during the pendency of an appeal of the December 8th orders."). But in *Lafata*, because the district court had decided the appeal, a request for Rule 60(b) relief in the bankruptcy court was improper. *See id.* at 723 ("Eastern cannot attempt to avoid the decision of the District Court through the use of a Rule 60(b) motion in the bankruptcy court, and a subsequent appeal to the Panel.").

From skimming through the cases on the indicative-ruling procedure, I get the impression that it may not be quite as widely used in the bankruptcy context. None of the three extant circuit provisions addresses its use in bankruptcy litigation. Accordingly, though the draft Rule should be broad enough to encompass such uses, the Note does not specifically refer to them.

### C. "Might" versus "would" and the nature of the remand

As demonstrated by the recent discussions concerning proposed Civil Rule 62.1, arguments can be made for both the position that an indicative ruling must indicate that the district court "would" grant the relevant motion, and the position that the ruling can indicate either that the court "would" grant it or that the court "might" grant it. District courts may prefer the option of saying "might," since it means the district court need not fully analyze the motion unless and until the court of appeals remands; courts of appeals, by contrast, may prefer not to be asked to remand unless the district court has taken the trouble to determine whether it actually would grant the motion.[27] The Civil Rules Committee has discussed the choice between "might"

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[26] *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, Title XII, § 1233(b), Apr. 20, 2005, 119 Stat. 203 (2005).

[27] One case from the Second Circuit suggests that the court is unwilling to remand unless the district court states its *intent to grant* the motion. Thus, writing of Criminal Rule 33 motions, the court explained: "If the district court decides to grant the Rule 33 motion, the district court may then signal its intention to this Court. . . . Only when presented with evidence of the district court's willingness to grant a Rule 33 motion will we remand the case." *U.S. v. Camacho*, 302 F.3d 35, 36-37 (2d Cir. 2002).

Sixth Circuit Rule 45 refers to the *First National Bank* case, which provides for remands after the district judge enters an order indicating that he or she "is disposed to grant the motion." *First National Bank*, 535 F.2d at 346. The D.C. Circuit Handbook refers to remands after the

and "would" at length, and is considering the possibility of using "might or would" in the version of proposed Rule 62.1 that is published for comment, in order to solicit comment on the choice.

The three circuit clerks who reviewed the proposed rule varied in their responses on this question. Marcie Waldron, the Third Circuit clerk, initially suggested: "[I]t is better to say 'might' than 'would.' Sometimes it's just that the 60(b) motion is substantial enough that the judge wants to have briefing." Her later email also seems to come out in favor of "might"; she points out that when a case has been calendared or argued, the appellate judges would rather get earlier notice "that there was a possibility of a change in the district court's decision."[28]

By contrast, Mark Langer, the D.C. Circuit clerk, objects to the choice of "might" because it "would really change the way we do business here. Our district judges, or the parties, only ask for this kind of remand when the district judge 'would' grant the post-judgment relief." Fritz agrees that "would" is preferable to "might," since the latter would increase the burden on the appellate clerks.

Even if one is agnostic on this question, it underscores the need for care in dealing with a related issue: the scope of the remand. In a system where a remand can occur after the district court indicates merely that it "might" grant the requested postjudgment relief, an unconditional remand can be dangerous for the appellant.[29] Since the time to file a notice of appeal from the

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district court "indicates that it will grant the motion." Seventh Circuit Rule 57 concerns remands after the district court indicates that it is "inclined to grant the motion." The Seventh Circuit in *Boyko* suggested that a limited remand (for the purpose of further consideration of the motion) may be appropriate if the district judge thinks there is "some chance that he would grant the Rule 60(b) motion ...." *Boyko*, 185 F.3d at 675.

[28] The latter point might also be a reason for requiring the movant to notify the circuit clerk when the motion is made in the district court, but, as noted in Part III.F. below, Ms. Waldron does not support such a requirement.

[29] *Cf. U.S. v. Siviglia*, 686 F.2d 832, 837-38 (10th Cir. 1982) (en banc) (per curiam) ("We find nothing in Siviglia's motion to remand to indicate that he sought only a partial or limited remand in order to preserve the direct appeal of his conviction should the district court deny his motion for dismissal or new trial. On the contrary, Siviglia advised the Court in his motion to remand that should the district court deny his motion for dismissal or new trial, he intended to appeal "such denial," which he did. Accordingly, the motion for remand, in practical effect, constituted an abandonment of any appeal going to the merits of his conviction. In this connection, our examination of Siviglia's brief addressing the merits of his second conviction indicate quite clearly that his grounds for reversal are unsubstantial. So, the motion for remand indicates, to us, that Siviglia was staking all on his ability to convince the district court that the charges against him should either be dismissed, or that he should be granted a new trial thereon, or, absent that, a reversal on appeal of any such denial order.").

initial judgment will certainly have run by the time the district court (on remand) rules on the motion for postjudgment relief, the movant will have no opportunity to revive the appeal (by filing a new notice of appeal from the underlying judgment) in the event that the district court denies the postjudgment motion. Though the movant can appeal the denial of postjudgment relief, "an appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review." *Browder v. Dir., Dep't of Corr. of Ill.*, 434 U.S. 257, 263 n.7 (1978).[30]

Such considerations may well explain why some circuits provide for a "limited remand" to enable the district court to rule on the motion in question. *See, e.g., Fobian*, 164 F.3d at 892 (discussing Fourth Circuit approach); *Karaha Bodas*, 2003 WL 21027134, at *4 (discussing Fifth Circuit approach); *U.S. v. Work Wear Corp.*, 602 F.2d 110, 114 (6th Cir. 1979) ("This Court granted a limited remand to the district court to allow presentation of the Rule 60(b)(6) motion."); *Chisholm v. Daniel*, No. 89-16430, 1992 WL 102562, at **2 n.1 (9th Cir. 1992) (unpublished opinion) ("This court granted Hwang a limited remand for the district court to decide the Rule 60(b) motion."); *Sierra Pac. Indus. v. Lyng*, 866 F.2d 1099, 1113 n.21 (9th Cir. 1989) ("The proper procedure in such a situation is to ask the district court for an indication that it is willing to entertain a Rule 60(b) motion. If the district court gives such an indication, then the party should make a motion in the Court of Appeals for a limited remand to allow the district court to rule on the motion."); *Rogers v. Fed. Bureau of Prisons*, 105 Fed.Appx. 980, *982 (10th Cir. 2004) (unpublished opinion) ("[W]e issued a limited remand so the District Court could consider the Rule 60(b) motion. We further noted our intention to remand the entire matter if the District Court decided to grant the Rule 60(b) motion ....").

Seventh Circuit Rule 57 purports to require that the court of appeals must remand all proceedings, rather than remanding for a limited purpose. Writing in the context of request for

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[30] Thus, the Seventh Circuit has observed that an "unlimited remand may not be a completely satisfactory solution" for litigants:

> Suppose that the district court, on remand, thinks better of it's inclination to grant the Rule 60(b) motion, and denies it; is the plaintiff remitted to the limited appellate review conventionally accorded rulings on such motions? And what about the defendant in a case in which the Rule 60(b) motion is granted before he has had a chance to argue to the appellate court that the original judgment was correct-- is he, too, remitted to the limited appellate review of such grants? Probably the answer to both questions is "no," the scope of review of Rule 60(b) orders is flexible and can be expanded where necessary to give each party a full review of the district court's original judgment.

*Boyko v. Anderson*, 185 F.3d 672, 674 (7th Cir. 1999). The *Boyko* court's suggestion that the scope of appellate review of the Rule 60(b) order can "probably" be extended to encompass a full review of the original judgment hardly seems like an unequivocal assurance that unconditional remands are safe for the would-be appellant.

relief under Civil Rule 60(b), the court explained that partial remands were inappropriate "because the grant of the Rule 60(b) motion operates to vacate the original judgment, leaving nothing for the appellate court to do with it – in fact mooting the appeal." *Boyko v. Anderson*, 185 F.3d 672, 673-74 (7th Cir. 1999). However, the Seventh Circuit does not actually bar the use of limited remands; in that circuit, a limited remand would be the appropriate device when the district court has indicated that it might (rather than would) grant the relevant motion:

> [I]f the judge thought there was some chance that he would grant the Rule 60(b) motion, but he needed to conduct an evidentiary hearing in order to be able to make a definitive ruling on the question, he should have indicated that this was how he wanted to proceed. Boyko would then have asked us to order a limited remand to enable the judge to conduct the hearing. If after the hearing the judge decided (as we know he would have, since he did) that he did want to grant the Rule 60(b) motion, he should have so indicated on the record and Boyko would then have asked us to remand the case to enable the judge to act on the motion and we would have done so.

*Boyko*, 185 F.3d at 675.

In a similar vein, the Tenth Circuit has observed that the court of appeals has three options when faced with a request to remand so that the district court can consider a request for Rule 60(b) relief:

> [T]his court, confronted with the motion to remand before the trial court has heard the motion for a new trial pursuant to Rule 60(b), has three alternatives: (1) it can remand unconditionally as was done in *Siviglia* but at great risk to the appellant; (2) it can partially remand for consideration of the motion for new trial, retaining jurisdiction over the original appeal and consolidating any subsequent appeal from action on the motion for new trial after the trial court has acted; or (3) it can deny the motion to remand without prejudice, permitting the parties to proceed before the trial court on the motion, and grant a renewed motion to remand after the trial court has indicated its intent to grant the motion for a new trial. If the trial court denies the motion for new trial, it can do so without a remand from this court and appeal may be taken therefrom and consolidated with the original appeal if still pending.

*Garcia v. Regents of Univ. of Ca.*, 737 F.2d 889, 890 (10th Cir. 1984) (per curiam). The court of appeals held that the last of the three options was the appropriate choice "unless the appellant indicates a clear intent to abandon the original appeal." *Id.*

These considerations indicate that the better practice is to exercise caution in setting the terms of the remand. If the district court has stated merely that it "might" grant the relevant motion, then an unconditional remand would be perilous for the appellant; in such cases, the

court of appeals should not grant an unconditional remand unless the appellant has clearly stated its intent to abandon the appeal. By contrast, if the rule requires that the district court state that it "would" grant the motion, one could perhaps, in some cases, follow a simpler procedure: The court of appeals could then remand for the purpose of allowing the district court to grant the motion. Arguably – because the motion is to be granted – the remand could be a full rather than a limited remand. But it still seems prudent for the unlimited nature of the remand to be conditional upon the grant of the motion; otherwise, if the district court were to change its mind and deny the motion, the appellant might be left without an opportunity to revive her appeal from the original judgment. Moreover, in some instances the court of appeals might wish to limit the remand so that it can proceed with the initial appeal even after the district court has granted relief on remand; the Note acknowledges this possibility.

### D. Should the rule address whether a dissatisfied party must file a fresh notice of appeal with respect to action taken by the district court?

It may be worthwhile to include in the Committee Note some observations concerning notices of appeal.[31] In a circuit that shares the majority view that a pending appeal does not prevent a district court from *denying* a Civil Rule 60(b) motion,[32] the movant must make sure to take an appeal from such a denial in order to preserve the right to challenge the denial on appeal.[33] Likewise, "where a 60(b) motion is filed subsequent to the notice of appeal and considered by the district court after a limited remand, an appeal specifically from the ruling on the motion must be taken if the issues raised in that motion are to be considered by the Court of Appeals." *TAAG Linhas Aereas de Angola v. Transamerica Airlines, Inc.*, 915 F.2d 1351, 1354 (9th Cir. 1990).

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[31] Both the Seventh Circuit rule and the D.C. Circuit handbook provision address this issue.

[32] *See, e.g., Fobian v. Storage Tech. Corp.*, 164 F.3d 887, 890 (4th Cir. 1999) ("If a Rule 60(b) motion is frivolous, a district court can promptly deny it without disturbing appellate jurisdiction over the underlying judgment. Swift denial of a Rule 60(b) motion permits an appeal from that denial to be consolidated with the underlying appeal.").

[33] *See Jordan v. Bowen*, 808 F.2d 733, 736-37 (10th Cir. 1987) (viewing district court's response to appellant's motion for indicative ruling as a denial of appellant's request for relief under Rule 60(b), and refusing to review that denial because appellant had failed to take an appeal from the denial).

### E. Is docketing the right demarcation with respect to the transfer of jurisdiction from the district court to the court of appeals?

The draft Rule refers to motions the district court lacks authority to grant "because of an appeal that has been docketed and is pending." One question this suggests is how courts handle requests for postjudgment relief during the period between the filing of the notice of appeal and the docketing of the appeal.

Appeals as of right from the district court[34] are taken by filing a notice of appeal in the district court.[35] The district clerk "must promptly send a copy of the notice of appeal and of the docket entries ... to the clerk of the court of appeals."[36] Upon receiving these items, "the circuit clerk must docket the appeal."[37] Appeals by permission entail a petition for permission to appeal.[38] If permission is granted, no notice of appeal is necessary.[39] Once the district clerk notifies the circuit clerk that the petitioner has paid the required fees, "the circuit clerk must enter the appeal on the docket."[40]

The Fourth Circuit has held that in at least some circumstances the district court can grant relief from the judgment after the filing of the notice of appeal but prior to the docketing of the appeal.[41] Dictum in some other opinions suggests that docketing is the time when jurisdiction

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[34] The procedure appears generally similar, in pertinent respects, for appeals from district courts or bankruptcy appellate panels exercising appellate jurisdiction in bankruptcy cases. *See* Appellate Rule 6(b)(1).

[35] *See* Appellate Rule 3(a).

[36] *See* Appellate Rule 3(d)(1).

[37] *See* Appellate Rule 12(a).

[38] *See* Appellate Rule 5(a).

[39] *See* Appellate Rule 5(d)(2).

[40] *See* Appellate Rule 5(d)(3).

[41] *See Williams v. McKenzie*, 576 F.2d 566, 570 (4th Cir. 1978) ("We hold that on the facts of this particular case, and especially since the appeal was not docketed in this court at the time the district judge reopened the habeas hearing for the taking of additional testimony, that the entertainment of the F.R.C.P. 60(b)(2) motion was appropriate."); *see also Fobian v. Storage Tech. Corp.*, 164 F.3d 887, 891-92 (4th Cir. 1999) (citing *Williams* with approval).

passes to the court of appeals.[42] Additional support for this view might, arguably, be gleaned from the role that docketing of the appeal plays with respect to motions under Rule 60(a). The docketing of the appeal demarcates the time after which the court of appeals' permission is necessary in order for the district court to correct clerical errors under Rule 60(a). To the extent that the choice of docketing as the demarcation point reflects the view that a court of appeals is unlikely to expend effort on an appeal before it is docketed,[43] similar reasoning would support the use of docketing to demarcate the time after which a remand is necessary in order for the district court to grant relief under Rule 60(b).[44] However, a possible counter-argument is that 60(b) relief can have a more significantly disruptive effect on the appeal than 60(a) relief, and therefore that more caution is called for – perhaps weighing in favor of using the filing of the notice of appeal as the cutoff time. Marcie Waldron points out that Appellate Rule 42(a) – which permits the district court to dismiss an appeal before the appeal "has been docketed by the circuit clerk" – provides additional support for the notion that docketing is the relevant demarcation for the shift from district court to appellate court authority.

In contrast to the Fourth Circuit's approach, some other circuits have indicated that it is the filing of the notice of appeal (and thus presumably not the later docketing of the appeal) that demarcates when jurisdiction passes from the trial to the appellate court.[45] Some of these courts echo the *Griggs* Court's statement that "[t]he filing of a notice of appeal is an event of jurisdictional significance--it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs*, 459 U.S. at

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[42] *See Azzeem v. Scott*, No. 98-40347, 1999 WL 301363, at *1 (5th Cir. 1999) (unpublished opinion) ("A district court is divested of jurisdiction upon the docketing in this court of a timely filed notice of appeal.").

[43] *Cf., e.g., In re Modern Textile, Inc.*, 900 F.2d 1184, 1193 (8th Cir. 1990) ("The underlying purpose of this rule, we believe, is to protect the administrative integrity of the appeal, i.e., to ensure that the issues on appeal are not undermined or altered as a result of changes in the district court's judgment, unless such changes are made with the appellate court's knowledge and authorization.").

[44] Some courts have reasoned from this aspect of Rule 60(a) to conclude that the docketing of the appeal marks the passing of jurisdiction from the lower to the appellate court. *See, e.g., Radio Television Espanola S.A. v. New World Entm't, Ltd.*, 183 F.3d 922, 932 (9th Cir. 1999) ("When Television Espanola's appeal of the district court's decision was docketed with the Ninth Circuit on October 22, 1997, the district court lost jurisdiction to review its October 6 entry of judgment.").

[45] *See, e.g., Kusay v. U.S.*, 62 F.3d 192, 194 (7th Cir. 1995) ("Just as the notice of appeal transfers jurisdiction to the court of appeals, so the mandate returns it to the district court.").

58.[46] The view that filing the notice of appeal is the relevant time might also be supported by the fact that an appeal as of right is "taken" by filing the notice of appeal in the district court. Appellate Rule 3(a)(1).

Thus, my quick survey of the caselaw suggests that questions exist regarding the district court's power to grant relief from a judgment after the filing of the notice of appeal but before the docketing of the appeal in the court of appeals. One argument for using docketing as the point when jurisdiction passes from one court to another would presumably be that – at least in the case of appeals as of right – the court of appeals is unlikely to expend any time on an appeal before it is docketed. That may not be the case when it comes to appeals by permission, but there, too, the likelihood that the court of appeals would expend effort on the appeal between the grant of permission and the docketing of the appeal may be low.

The three circuit clerks who have commented on the proposed rule favor the use of docketing as the point of demarcation. Fritz has summarized their reasoning thus:

> Even after all the appellate courts convert to the appellate Case Management/Electronic Case Filing system, incarcerated pro se cases likely still will be processed with a lot of paper, so some of the benefits of electronic filing are lost. Even with electronic notice of the filing of an appeal at the district court there are issues. At present, some district courts require that notices be filed in paper; others merely "lodge" an electronic notice until a review is made and approval given by a district court clerk. When the notice of appeal is filed at the district court in electronic form there will still be delays before the appellate court actually enters the case on the appellate docket.

### F. Issues regarding notification to the Court of Appeals

Proposed Civil Rule 62.1 requires the movant to notify the appellate clerk when the motion is filed and when the district court acts on the motion. The appellate clerks who reviewed the proposal, however, vigorously oppose the notion of requiring notification when requests are made or when the district court denies a request. As Marcie Waldron, the Third Circuit clerk, points out, "I don't want to be notified every time a 60(b) is filed. We only need to know if the district court wants to grant the motion." Fritz points out, moreover, that most indicative-ruling issues in the Fifth Circuit arise in cases involving pro se litigants, who "are not a dependable source of information." Accordingly, draft Rule 12.1(a) includes two bracketed options – one that requires notification when the motion is filed and when it is resolved, and another that

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[46] *See, e.g., Venen v. Sweet*, 758 F.2d 117, 120 (3d Cir. 1985) ("As a general rule, the timely filing of a notice of appeal is an event of jurisdictional significance, immediately conferring jurisdiction on a Court of Appeals and divesting a district court of its control over those aspects of the case involved in the appeal.").

requires notification only when the district court responds favorably to the motion. A parallel provision appears in proposed Civil Rule 62.1, and thus it will be important to coordinate with the Civil Rules Committee on this point.

Marcie Waldron does suggest, however, that notification would be useful, after a remand, when the district court has decided the motion:

> I think the proposed rule should state that the parties must notify the circuit clerk when the district court has decided the motion. Sometimes the district court resolution satisfies everyone and the appeal can go away, but no one bothers to let us know. (Some of our district courts are bad about sending supplemental records.) Or since we retain jurisdiction, if the 60b is denied, they don't always file a new Notice of Appeal and we never know to start the appeal up again.

(She notes, however, that "[t]his problem may evaporate with CM/ECF notifications.") Draft Rule 12.1(b) includes bracketed language that would implement this suggestion.

Another question concerns the mechanics of the procedure by which litigants and the district court communicate the required information to the court of appeals. The current draft Rule 12.1 does not specify the mechanics of those communications. Fritz notes that the circuit practices vary on this point, and suggests that it would be difficult to attain national uniformity with respect to these logistical details. Accordingly, the draft Rule does not specify the procedure for communicating the required information to the court of appeals, but the Note states that "[i]n accordance with Rule 47(a)(1), a local rule may prescribe the format for the notification[s] under subdivision[s] (a) [and (b)] and the district court's statement under subdivision (b)."

### G. Placement and title of the proposed rule

The DOJ's original proposal was that the rule be numbered 4.1; a Rule 4.1 would, of course, fall between the rules governing appeals as of right and appeals by permission. I have tentatively numbered the draft Rule "12.1" because that would place it at the end of the FRAP title concerning appeals from district court judgments or orders. Another possibility in the same title would be 8.1 (following Rule 8, which concerns stays or injunctions pending appeal). Other options would be in Title VII, concerning general provisions: 33.1 (following Rule 33 on appeal conferences); 42.1 (following Rule 42 on voluntary dismissal); or 49 (at the end of the title).

**Rule 12.1 [Remand After an] Indicative Ruling by the District Court [on a Motion for Relief That Is Barred by a Pending Appeal]**

**(a) Notice to the Court of Appeals.** If a timely motion is made in the district court for relief that it lacks authority to grant because an appeal has been docketed and is pending, the movant must notify the circuit clerk [when the motion is filed and when the district court acts on it] [if the district court states that it [might or] would grant the motion].

**(b) Remand After an Indicative Ruling.** If the district court states that it [might or] would grant the motion, the court of appeals may remand for further proceedings [and, if it remands, may retain jurisdiction of the appeal] [but retains jurisdiction [of the appeal] unless it expressly dismisses the appeal]. [If the court of appeals remands but retains jurisdiction, the parties must notify the circuit clerk when the district court has decided the motion on remand.]

**Committee Note**

This new rule corresponds to Federal Rule of Civil Procedure 62.1, which adopts and generalizes the practice that most courts follow when a party moves under Civil Rule 60(b) to vacate a judgment that is pending on appeal. After an appeal has been docketed and while it remains pending, the district court cannot on its own reclaim the case to grant relief under a rule such as Civil Rule 60(b). But it can entertain the motion and deny it, defer consideration, or indicate that it might or would grant the motion if the action is remanded. Experienced appeal lawyers often refer to the suggestion for remand as an "indicative ruling."

Appellate Rule 12.1 is not limited to the Civil Rule 62.1 context; Rule 12.1 may also be used, for example, in connection with motions under Criminal Rule 33. *See United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984). The procedure formalized by Rule 12.1 is helpful whenever relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal.

Rule 12.1 does not attempt to define the circumstances in which an appeal limits or defeats the district court's authority to act in face of a pending appeal. The rules that govern the

relationship between trial courts and appellate courts may be complex, depending in part on the nature of the order and the source of appeal jurisdiction. Appellate Rule 12.1 applies only when those rules, as they are or as they develop, deprive the district court of authority to grant relief without appellate permission.

To ensure proper coordination of proceedings in the district court and in the court of appeals, the movant must notify the circuit clerk [when the motion is filed in the district court and again when the district court rules on the motion] [if the district court states that it [might or] would grant the motion]. If the district court states that it [might or] would grant the motion, the movant may ask the court of appeals to remand the action so that the district court can make its final ruling on the motion. In accordance with Rule 47(a)(1), a local rule may prescribe the format for the notification[s] under subdivision[s] (a) [and (b)] and the district court's statement under subdivision (b).

Remand is in the court of appeals' discretion. The court of appeals may remand all proceedings, terminating the initial appeal. In the context of postjudgment motions, however, that procedure should be followed only when the appellant has stated clearly its intention to abandon the appeal. The danger is that if the initial appeal is terminated and the district court then denies the requested relief, the time for appealing the initial judgment will have run out and a court might rule that the appellant is limited to appealing the denial of the postjudgment motion. The latter appeal may well not provide the appellant with the opportunity to raise all the challenges that could have been raised on appeal from the underlying judgment. *See, e.g.*, *Browder v. Dir., Dep't of Corrections of Ill.*, 434 U.S. 257, 263 n.7 (1978) ("[A]n appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review."). The Committee does not endorse the notion that a court of appeals should decide that the initial appeal was abandoned – despite the absence of any clear statement of intent to abandon the appeal – merely because an unlimited remand occurred, but the possibility that a court might take that troubling view underscores the need for caution in delimiting the scope of the remand.

The court of appeals may instead choose to remand for the sole purpose of ruling on the motion while retaining jurisdiction to proceed with the appeal after the district court rules on the motion (if the appeal is not moot at that point and if any party wishes to proceed). This will often be the preferred course in the light of the concerns expressed above. It is also possible that the court of appeals may wish to proceed to hear the appeal even after the district court has granted relief on remand; thus, even when the district court indicates that it would grant relief, the court of appeals may in appropriate circumstances choose a limited rather than unlimited remand.

[If the court of appeals remands but retains jurisdiction, subdivision (b) requires the parties to notify the circuit clerk when the district court has decided the motion on remand. This is a joint obligation that is discharged when the required notice is given by any litigant involved in the motion in the district court.]

When relief is sought in the district court during the pendency of an appeal, litigants should bear in mind the likelihood that a separate notice of appeal will be necessary in order to challenge the district court's disposition of the motion. *See, e.g.*, *Jordan v. Bowen*, 808 F.2d 733,

736-37 (10th Cir. 1987) (viewing district court's response to appellant's motion for indicative ruling as a denial of appellant's request for relief under Rule 60(b), and refusing to review that denial because appellant had failed to take an appeal from the denial); *TAAG Linhas Aereas de Angola v. Transamerica Airlines, Inc.*, 915 F.2d 1351, 1354 (9th Cir. 1990) ("[W]here a 60(b) motion is filed subsequent to the notice of appeal and considered by the district court after a limited remand, an appeal specifically from the ruling on the motion must be taken if the issues raised in that motion are to be considered by the Court of Appeals.").

UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

# *Memorandum*

TO : Professor Catherine Stuve

FROM : Charles R. Fulbruge III, Clerk, (504) 310-7654

DATE : March 20, 2007

SUBJECT : Proposed Appellate Rule on Indicative Rulings

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The proposed rule generates little comment from the appellate court clerks. I speculate reasons include that the issue does not occur that often; the matter is complex legally, and procedurally difficult as the district and appellate courts try to forecast what the state of electronic filing will be in two to three years when this proposed rule would become effective; and, the appellate courts are satisfied with leaving the issue at rest because of locally developed procedures.

Only two clerks, Mark Langer, of the D.C. Circuit, and Marcia Waldron, of the Third Circuit responded to my inquiry. Mark does not favor a rule at all, but if there is to be a rule, he generally agrees with Marcia's extensive comments. His disagreement is with Marcia's preference for the "might" versus "would" language choice. I agree with Mark's views. In the Fifth Circuit we do not see that many indicative ruling issues, perhaps only 30 per year. The majority of these involve pro se litigants.

Comments of the Third Circuit Clerk

We should keep in mind that Rule 4(a)(4) now provides that the time to appeal is tolled and appeals are stayed if a 60(b) is filed within 10 days of entry of judgment. So district courts certainly have jurisdiction to decide those motions.

Although the attached memo doesn't seem to mention the 3d Cir., we do have procedures for indicative orders (we've never used that term). In Venen v. Sweet, 758 F.2d 117 (3d Cir. 1985), our court held that if a district court got a 60(b) motion while an appeal was pending, it had jurisdiction to enter an order

denying it. It did not have jurisdiction to grant it. So, the district court should notify us that they were inclined to grant and we'd then remand the case. Footnote 7 says the same procedure would apply in Criminal Rule 33 cases.

We've developed some procedures. The parties file a motion to remand; they attach an order or indicate the district court is inclined to grant. We then remand. Our remand order usually states that our court retains jurisdiction (i.e. we don't close the case) and requires the parties to file periodic status reports with our office.

It is usually not a problem getting notified that a motion has been filed. In fact, I don't want to be notified every time a 60(b) is filed. We only need to know if the district court wants to grant the motion. The stickier problem is how the district court judge indicates he/she is willing to grant. The best indication, of course, is an order from the district court judge. Although we've done it on a phone call from the district court judge.

I agree with the proposal that it is better to say "might" than "would." Sometimes it's just that the 60(b) motion is substantial enough that the judge wants to have briefing.

I think the proposed rule should state that the parties must notify the circuit clerk when the district court has decided the motion. Sometimes the district court resolution satisfies everyone and the appeal can go away, but no one bothers to let us know. (Some of our district courts are bad about sending supplemental records.) Or since we retain jurisdiction, if the 60b is denied, they don't always file a new Notice of Appeal and we never know to start the appeal up again. This problem may evaporate with CM/ECF notifications. Including language that a new Notice of Appeal must be filed is also good. But I would phrase it that a party wishing to challenge the district court's ruling must file a Notice of Appeal, not just that a Notice of Appeal must be filed if the motion is denied. If the motion is granted, the loser may want to challenge it.

I think that docketing of the appeal in the court of appeals is the key. Under Rule 42(a) the district court can dismiss an appeal "before an appeal has been docketed by the circuit clerk." We are not able to open all appeals on the day we get them... Some of our district courts are slow about sending them to us too. So if a 60(b) were filed before we opened the case, the district court could dismiss the appeal and it would then have jurisdiction.

I think the draft rule needs work. Section a says that "one who moves in the district court for relief that the district court lacks authority to grant...must notify the circuit clerk when the motion is filed and when the district court acts on the motion." As stated above, the court of appeals doesn't care if the district court denies the motion.... Perhaps only section b is needed.

Also, not all appeals divest the district court of jurisdiction. A district court can go on with a case if the appeal is of an interlocutory order and/or it is clear the court of appeals lacks jurisdiction. Also, the district court has jurisdiction to rule on post-judgment motions that would aid our jurisdiction, e.g. granting i.f.p. It would be nice if the rule or committee note pointed that out.

In a subsequent e-mail Marcie added:

I did have some second thoughts on the might/would question. I think the district court would have jurisdiction to order briefing even if an appeal is pending. If the wording is would, they wouldn't have to notify us until after briefing and the district court judge had determined to grant it. If the wording is might, then they'd have to notify us if they want briefing. The latter might be better because you'd get earlier notice that the motion had some substance to it. I was thinking of the scenario in which a case is calendared or argued. Our judges would want to know that there was a possibility of a change in the district court's decision.

## Comments of the D.C. Circuit Clerk

I prefer not to have any rule. We handle things pretty well here without a rule. If we have to have a rule, I agree with most of what Marcie has to say. My only departure is "might" v. "would." "Might" would really change the way we do business here. Our district judges, or the parties, only ask for this kind of remand when the district judge "would" grant the post-judgment relief. If the district judge wants briefing on a substantial post-judgment motion, he or she goes ahead and orders it and then gives the indication that governs whether the Court of Appeals remands. So, to conform to our practice and case law, "would" is preferable.

## Fifth Circuit Practices

We see these cases in two ways:

Most commonly, the district court judge receives a 60(b) motion and recognizes that we have docketed the appeal. The district court judge wants to grant relief and he or she will send us a letter, e-mail or an order asking us to remand the case.

Alternatively, we get a motion from the parties to:

1. Stay proceedings until the district court denies the motion, or indicates it will grant the motion, or

2. Remand the case. Unlike the Third Circuit we generally do not always get an assertion from the parties, or a document from the district judge indicating a willingness to rule favorably.

If the stay motion gives an indication , preferably from the judge that he or she will grant it, we would take the matter to a three judge panel which likely would grant the remand. If the remand motion does indicate the district judge's inclination to rule favorably, our court would remand. If there is no indication about the judge's inclination, we likely would deny.

Trying to Put It Together

After reviewing the comments and re-reading the proposal I sent another e-mail to Mark and Marcia last week and reviewed their comments yesterday. In sum their thoughts and mine are:

1. We do not want a party to notify us every time a Civil Rule 60(b), etc., motion is filed. For the Fifth Circuit, the majority of our indicative ruling cases seem to involve pro se prisoners. They are not a dependable source of information. Likewise, I do not want a party to tell me that the district court has ruled.

2. The consensus is that we do not want to know if the district court "might" grant a motion. We would prefer to know only if they "would" grant it. Letting the parties advise us that they have filed a motion and then the judges advise us that they would deny the motion creates more work from an appellate clerk's office standpoint.

3. As to the issue of how the district judges should notify the appellate

court of their willingness to grant a motion, we see this in a variety of ways: an e-mail from the judge's law clerk; a phone call, memo or letter from the district court judge, or a formal order. For consistency sake I am sure that DOJ would prefer one method. Given the cultures in the various circuits, I do not know that this is an easily achievable goal.

4. Docketing in the court of appeals is a better measure of when jurisdiction passes than "filing" a notice of appeal in the district court. Even after all the appellate courts convert to the appellate Case Management/Electronic Case Filing system, incarcerated pro se cases, likely still will be processed with a lot of paper, so some of the benefits of electronic filing are lost. Even with electronic notice of the filing of an appeal at the district court there are issues. At present, some district courts require that notices be filed in paper; others merely "lodge" an electronic notice until a review is made and approval given by a district court clerk. When the notice of appeal is filed at the district court in electronic form there will still be delays before the appellate court actually enters the case on the appellate docket. Trying to forecast how all the electronic filing will shake out when this proposed rule would take effect in about 2010 requires forecasting beyond my abilities.

5. Something in the rule or the Committee Note should pertain to the fact that a party wishing to challenge the district court's ruling must file a notice of appeal.

With these thoughts in mind I offer the following language if the Committee believes that a new rule is needed:

> **Rule 12.1 Remand After Indicative Ruling by the District Court on Motion for Relief Barred by Pending Appeal.** If the district court notifies the appellate court that it would grant the motion, in such format as the appellate courts may prescribe by local rule or order, the court of appeals may remand for further proceedings in the district court. Upon remand, the appellate court may retain jurisdiction of the appeal. Any party wishing to challenge the district court's ruling after remand must file a notice of appeal.

This version is designed to avoid the sticky issue of language choices between "an appeal that has been docketed and is pending" and "a pending appeal."

From my perspective, giving the district courts the longest time to be able to grant relief from judgment because the appellate court has not yet docketed the case, see Fed. R. Civ. P. 60(a), is of benefit to all. This version also relieves the appellate court of any number of notifications from the parties as to when a motion is filed and ruled upon. With today's technology, we can easily check the district court docket electronically before our court takes action. What we need is the notice from the district courts that they would grant the motion if our court remands. Lastly, this version allows the various courts to specify what notification from the district courts is best for the individual courts by local rule or order. Other needed information about the process could be added to the Committee Note.

If I have not adequately addressed your questions, please let me know and I'll take another run at it.

Sincerely,

Fritz Fulbruge

cc: Judge Carl E. Stewart

JAMES C. DUFF
Director

JILL C. SAYENGA
Deputy Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief

Rules Committee Support Office

March 26, 2007

MEMORANDUM TO ADVISORY COMMITTEE ON CIVIL RULES

SUBJECT: *Agenda Item on Proposed New Rule 62 on Indicative Rulings*

The text of proposed new Rule 62.1 on Indicative Rulings immediately follows this memorandum. The material behind Tab B includes a report to the Advisory Committee on Appellate Rules on proposed new Appellate Rule 12.1, which conforms to proposed new Civil Rule 62.1. The report provides background information on the origin and purpose of the proposal and the rules committees' actions on it, beginning in 2000 when the Solicitor General first recommended that the Appellate Rules be amended to recognize indicative rulings.

John K. Rabiej

## Indicative Rulings: Civil Rule 62.1

A year ago the Advisory Committee recommended approval for publication of a new Civil Rule 62.1 on "indicative rulings." The recommendation was to defer publication to August 2007 as part of a larger package of Civil Rules proposals. The recommendation was discussed at the June 2006 and January 2007 Standing Committee meetings. The Appellate Rules Committee became convinced that it should consider a parallel provision in the Appellate Rules. The attached Appellate Rules Committee materials and draft Appellate Rule 12.1 provide the background not only for the Appellate Rules Committee's work but also for earlier work on Civil Rule 62.1.

Some changes have been made in the version that was approved last year. They respond both to discussion in the Standing Committee and to the new opportunity to integrate Rule 62.1 with Appellate Rule 12.1. The Rule title was settled. There was rather extensive discussion of the question whether the court of appeals should be asked to consider remand if the district court indicates only that it "might" grant the motion for relief. The discussion is summarized in footnote 1. The outcome is a recommendation to publish with "might or" in brackets. The letter transmitting the proposal for publication will invite comment on the question whether the rule should require that the district court state that it "would" grant relief, or should give the choice to state whether the court "might" grant relief without a firm commitment.

The second footnote flags a question raised by the circuit clerks consulted by the Appellate Rules Advisory Committee. The alternatives indicated in the draft are the same as the alternatives to be presented to the Appellate Rules Committee.

The third footnote indicates the revisions made to seize the new opportunity to integrate with an Appellate Rule. Discussion in the Standing Committee highlighted the difficulties that may arise if the parties and the court of appeals do not think carefully about the terms of a remand. It is better that Rule 62.1 not anticipate these problems so long as there is to be an Appellate Rule addressing this question.

## PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE*

### Rule 62.1 Indicative Ruling on Motion for Relief Barred by Pending Appeal

(a) **Relief Pending Appeal.** If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:

**(1)** defer consideration of the motion;

**(2)** deny the motion; or

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

(3) ~~indicate~~ state that it [might or][1] would grant the motion if

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[1] The drafting choice was discussed at the Standing Committee meeting in January, and has been developed by the Appellate Rules Committee.

The argument that notice should be given only if the district court states that it would grant relief if the appellate court remands includes at least two elements. One looks to disposition by the court of appeals. The court may prefer to remand, disrupting the appeal, only if presented with a fully considered determination that the case for relief has been made and that decision of the appeal on the original judgment and record would be unwise. The other element looks to the burden on the circuit clerks. Charles R. Fulbruge III, the Fifth Circuit Clerk, surveyed the circuit clerks for the Appellate Rules Committee. Two responded. "The consensus is that we do not want to know if the district court 'might' grant a motion. * * * Letting the parties advise us that they have filed a motion and then the judges advise us that they would deny the motion creates more work from an appellate clerk's office standpoint."

The argument for providing notice that the district court "might" grant the motion is familiar. The motion may raise difficult issues that can be resolved only after burdensome proceedings. The district court may have no idea how far the appeal has advanced, particularly if it has been submitted for decision. Nor may the district court have any idea whether the court of appeals thinks it better to resolve the issues presented by the appeal — if the court of appeals has at least an inkling of the likely disposition, it will be better able than the district court to know whether the motion will even remain relevant and whether the questions raised by the motion will be changed by the decision. The district court may believe that the burden of actually deciding the motion is justified only if the appeal

the appellate court should remand for that purpose.

**(b) Notice to Appellate Court.** The movant must notify the circuit clerk ~~of the appellate court~~ under Federal Rule of Appellate Procedure [12.1] [when the motion is filed and when the district court acts on the motion][if the district court ~~indicates~~ states that it {might or} would grant the motion[2]].

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is stayed.

Recognizing the district court's authority to temporize by stating that it "might" grant the motion does not diminish the court of appeals' full control of the decision whether to remand. The court of appeals can consider the district court's statement — which should include the reasons for preferring to defer full consideration of the motion until it knows whether the action will be remanded — and act in its own best discretion. And it can, if it sees fit, decide not to remand without undertaking any lengthy review of the district court's statement.

[2] This alternative reflects the preference of the three circuit clerks in the report described in note 1 above. They prefer not to be afflicted with notice whenever a motion is filed, noting that many of these motions are filed in pro se cases.

No doubt a burden would be imposed by requiring notice of ill-founded motions that will soon be denied by the district court. The extent of the burden, however, may not be great. The Fifth Circuit clerk estimates that the court may encounter 30 of these motions a

year.

A more important question is whether it is important to the court of appeals to know that a motion has been filed so it can decide whether to defer work on the appeal. There are likely to be some cases in which a motion raises issues that obviously are important. The prospect that the judgment may be vacated may appear sufficiently substantial on the face of the motion that the court of appeals would prefer to await the outcome before deciding issues that may be mooted or significantly changed. Experience with post-judgment motions under Rule 60(b), moreover, may not help much in anticipating other motions also covered by the rule. For one example, at least some courts rule that a district court cannot modify a preliminary injunction that is pending on interlocutory appeal. A motion to vacate or modify the injunction may raise issues that are better addressed by the district court. The court of appeals cannot consider the question unless it is told of the motion. (To be sure, this illustration can be seen in a different light. A district court does retain jurisdiction to dismiss the action pending appeal from the interlocutory injunction; the rule does not provide for notice. No one has proposed adoption of a rule that would require notice to the court of appeals of matters that remain in the district court's jurisdiction notwithstanding a pending appeal.)

The second alternative formulation is suitable if the rule applies only when the district court indicates that it "would" grant the motion. Some further drafting may be appropriate if notice is to be given when the district court indicates it "might" grant the motion. A complete provision would address what happens when the district court translates "might" to "denied." It could be: "The movant must notify * * * when the district court indicates that it might or would grant the motion and when the district court grants or denies the

**(c) Remand.** The district court may decide the motion if the court of appeals remands for that purpose.[3] ~~If the district court states that it [might or] would grant the motion, the appellate court may remand for further proceedings in the district court[, and if it remands may retain jurisdiction of the appeal].~~

**Committee Note**

This new rule adopts and generalizes the practice that most courts follow when a party makes a Rule 60(b) motion to vacate a judgment that is pending on appeal. After an appeal has been docketed and while it remains pending, the district court cannot on its own reclaim the case to grant a Rule 60(b) motion. But it can entertain the motion and ~~either~~ deny it, defer consideration, or indicate that it might or would grant the motion if the action is remanded. Experienced appeal lawyers often refer to the suggestion for remand as an "indicative ruling."

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motion."

[3] Work on Appellate Rule 12.1 has progressed to a point that justifies revision of subdivision (c). The new version is underlined. The earlier version, as modified to reflect Standing Committee discussion, is overlined. Earlier drafts spoke to action by the court of appeals on the assumption that no other rule would apply. It is better that the Appellate Rules address the court of appeals decision whether to remand and on what terms. Still, it may be useful to complement the Appellate Rule by confirming the district court's authority on remand.

This clear procedure is helpful whenever relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal. Rule 62.1 does not attempt to define the circumstances in which an appeal limits or defeats the district court's authority to act in face of a pending appeal. The rules that govern the relationship between trial courts and appellate courts may be complex, depending in part on the nature of the order and the source of appeal jurisdiction. Rule 62.1 applies only when those rules, as they are or as they develop, deprive the district court of authority to grant relief without appellate permission. If the district court concludes that it has authority to grant relief without appellate permission, it can act without falling back on the "indicative ruling" procedure.

To ensure proper coordination of proceedings in the district court and in the appellate court, the movant must notify the clerk of the appellate court under Federal Rule of Appellate Procedure [12.1] [when the motion is filed in the district court and again when the district court rules on the motion][when the district court states that it {might or} would grant the motion {and when the district court grants or denies the motion}.][4] Remand is in the appellate court's discretion under Appellate Rule [12.1]. The appellate court may remand all proceedings, terminating the initial appeal. The appellate court may instead choose to ~~or may~~ remand for the sole purpose of ruling on the motion while retaining jurisdiction to proceed with the

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[4] The bracketed alternatives reflect the choice described at note 2 above.

appeal ~~after the district court rules~~ if any party wishes to proceed after the district court rules on the motion.[5]

Often it will be wise for the district court to determine whether it in fact would grant the motion if the case is remanded for that purpose. But a motion may present complex issues that require extensive litigation and that may either be mooted or be presented in a different context by decision of the issues raised on appeal. In such circumstances the district court may prefer to state the reasons why it might grant the motion and why it prefers to decide only if the court of appeals agrees that it would be useful to decide the motion before decision of the pending appeal. The district court is not bound to grant the motion after ~~indicating~~ stating that it might do so; further proceedings on remand may show that the motion ought not be granted.[6]

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[5] The shaded material should be deleted if Appellate Rule 12.1 is recommended for publication.

[6] This final paragraph is appropriate only if the rule allows the district court to state that it "might" grant the motion.

JAMES C. DUFF
Director

JILL C. SAYENGA
Deputy Director

# ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief

Rules Committee Support Office

March 26, 2007

MEMORANDUM TO ADVISORY COMMITTEE ON CIVIL RULES

SUBJECT: *Agenda Item on Proposed New Rule 62 on Indicative Rulings*

The text of proposed new Rule 62.1 on Indicative Rulings immediately follows this memorandum. The material behind Tab B includes a report to the Advisory Committee on Appellate Rules on proposed new Appellate Rule 12.1, which conforms to proposed new Civil Rule 62.1. The report provides background information on the origin and purpose of the proposal and the rules committees' actions on it, beginning in 2000 when the Solicitor General first recommended that the Appellate Rules be amended to recognize indicative rulings.

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Some changes have been made in the version that was approved last year. They respond both to discussion in the Standing Committee and to the new opportunity to integrate Rule 62.1 with Appellate Rule 12.1. The Rule title was settled. There was rather extensive discussion of the question whether the court of appeals should be asked to consider remand if the district court indicates only that it "might" grant the motion for relief. The discussion is summarized in footnote 1. The outcome is a recommendation to publish with "might or" in brackets. The letter transmitting the proposal for publication will invite comment on the question whether the rule should require that the district court state that it "would" grant relief, or should give the choice to state whether the court "might" grant relief without a firm commitment.

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The third footnote indicates the revisions made to seize the new opportunity to integrate with an Appellate Rule. Discussion in the Standing Committee highlighted the difficulties that may arise if the parties and the court of appeals do not think carefully about the terms of a remand. It is better that Rule 62.1 not anticipate these problems so long as there is to be an Appellate Rule addressing this question.

## PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

### Rule 62.1 Indicative Ruling on Motion for Relief That Is Barred by a Pending Appeal

**(a) Relief Pending Appeal.** If a timely motion is made for relief that the court lacks authority to grant because ~~of~~[1] an appeal ~~that~~ has been docketed and is pending, the court may:

**(1)** defer consideration[2] of the motion;

**(2)** deny the motion; or

**(3)** ~~indicate~~ state that it [might or][3] would grant the

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[1] "of" and "that" were removed at the suggestion of the style consultant. Should they be restored to give a more direct statement that we are addressing only the beginning and end of the district court's authority to act on the motion, not any other question that might arise during the limbo between the time a notice of appeal is filed and docketing and remand?

[2] The style consultant prefers "defers considering the motion."

[3] The drafting choice was discussed at the Standing Committee

meeting in January, and has been developed by the Appellate Rules Committee.

The argument that notice should be given only if the district court states that it would grant relief if the appellate court remands includes at least two elements. One looks to disposition by the court of appeals. The court may prefer to remand, disrupting the appeal, only if presented with a fully considered determination that the case for relief has been made and that decision of the appeal on the original judgment and record would be unwise. The other element looks to the burden on the circuit clerks. Charles R. Fulbruge III, the Fifth Circuit Clerk, surveyed the circuit clerks for the Appellate Rules Committee. Two responded. "The consensus is that we do not want to know if the district court 'might' grant a motion. * * * Letting the parties advise us that they have filed a motion and then the judges advise us that they would deny the motion creates more work from an appellate clerk's office standpoint."

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Recognizing the district court's authority to temporize by

motion if the ~~appellate~~ court of appeals ~~should~~ remands for that purpose.

**(b) Notice to ~~Appellate~~ the Court of Appeals.** The movant must notify the circuit clerk ~~of the appellate court~~ under Federal Rule of Appellate Procedure [12.1] [when the motion is filed and when the district court acts on it ~~the motion~~][if the district court ~~indicates~~ states that it {might or} would grant the motion[4]].

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stating that it "might" grant the motion does not diminish the court of appeals' full control of the decision whether to remand. The court of appeals can consider the district court's statement — which should include the reasons for preferring to defer full consideration of the motion until it knows whether the action will be remanded — and act in its own best discretion. And it can, if it sees fit, decide not to remand without undertaking any lengthy review of the district court's statement.

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[5] Work on Appellate Rule 12.1 has progressed to a point that justifies revision of subdivision (c). The new version is underlined. The earlier version, as modified to reflect Standing Committee discussion, is overlined. Earlier drafts spoke to action by the court of appeals on the assumption that no other rule would apply. It is better that the Appellate Rules address the court of appeals decision whether to remand and on what terms. Still, it may be useful to complement the Appellate Rule by confirming the district court's authority on remand.

**Committee Note**

This new rule adopts and generalizes the practice that most courts follow when a party makes a Rule 60(b) motion to vacate a judgment that is pending on appeal. After an appeal has been docketed and while it remains pending, the district court cannot on its own reclaim the case to grant a Rule 60(b) motion. But it can entertain the motion and ~~either~~ deny it, defer consideration, or indicate that it might or would grant the motion if the action is remanded. Experienced appeal lawyers often refer to the suggestion for remand as an "indicative ruling."

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it {might or} would grant the motion {and when the district court grants or denies the motion}.][6] Remand is in the appellate court's discretion under Appellate Rule [12.1]. The appellate court may remand all proceedings, terminating the initial appeal. The appellate court may instead choose to ~~or may~~ remand for the sole purpose of ruling on the motion while retaining jurisdiction to proceed with the appeal after the district court rules if any party wishes to proceed after the district court rules on the motion.[7]

Often it will be wise for the district court to determine whether it in fact would grant the motion if the case is remanded for that purpose. But a motion may present complex issues that require extensive litigation and that may either be mooted or be presented in a different context by decision of the issues raised on appeal. In such circumstances the district court may prefer to state the reasons why it might grant the motion and why it prefers to decide only if the court of appeals agrees that it would be useful to decide the motion before decision of the pending appeal. The district court is not bound to grant the motion after ~~indicating~~ stating that it might do so; further proceedings on remand may show that the motion ought not be

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7 The shaded material should be deleted if Appellate Rule 12.1 is recommended for publication.

granted.[8]

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**MEMORANDUM**

**DATE:** March 27, 2007

**TO:** Advisory Committee on Appellate Rules

**FROM:** Catherine T. Struve, Reporter

**RE:** Item No. 07-AP-C: Proposed amendments relating to Rules 11 of the Rules governing 2254 and 2255 proceedings

The Criminal Rules Committee is currently considering a proposed new Criminal Rule 37, a proposed new Rule 11 of the Rules governing proceedings under 28 U.S.C. § 2254, and an amendment to Rule 11 of the Rules governing proceedings under 28 U.S.C. § 2255. The proposed amendments are explained in the enclosed memo from Professors Beale and King to the Criminal Rules Committee. As that memo notes, the proposed new Criminal Rule 37 has been the subject of extensive debate; that proposal, however, does not directly concern the Appellate Rules Committee. By contrast, the Rule 11 proposals are of direct interest to the Appellate Rules Committee: If adopted, the Rule 11 proposals would render it advisable for the Appellate Rules Committee to consider conforming amendments to the Appellate Rules.

The Criminal Rules Committee tentatively approved the Rule 11 proposals last fall, and the proposals are action items on the agenda for the Criminal Rules Committee's mid-April meeting. If, as expected, the Criminal Rules Committee decides to seek the Standing Committee's permission to publish the proposed Rules for comment this summer, then it would be desirable for the Appellate Rules Committee to seek publication of the conforming amendments at the same time. This memo explains the proposed amendments to FRAP 4(a)(4)(A) and 22.

## I. Proposed amendment to FRAP 4(a)(4)(A)

Professors Beale and King explain that the Rule 11 proposals "are intended to provide, for the first time, a well-defined mechanism by which litigants can seek reconsideration of a district court's ruling on a motion under" the Rules governing proceedings under 28 U.S.C. §§ 2254 and 2255. As they explain, "[t]he efforts by litigants to work around the current procedural gap – particularly by using Federal Rule of Procedure 60(b) – have generated a good deal of confusion."

Under proposed Rule 11(b) in each set of Rules,

> The only procedure for obtaining relief in the district court from a final order is through a motion for reconsideration. The motion must be filed within 30 days after the order is entered. The motion may not raise new claims of error in the [movant's / petitioner's] conviction or sentence, or attack the district court's previous resolution of such a claim on the merits, but may only raise a defect in the integrity of the [§ 2255 / § 2254] proceedings. Federal Rule of Civil Procedure 60(b) may not be used in [§ 2255 / § 2254] proceedings.

The brackets in the above quotation show the wording proposed for the Section 2255 and Section 2254 Rules, respectively. The exact text of each proposed provision is set forth in the enclosed memo.

As can be seen from the above, the proposal would remove the availability of Civil Rule 60(b) motions in Section 2254 and Section 2255 proceedings, and would substitute a motion under Rule 11(b). Presumably, the policy questions raised by this choice are outside the scope of the Appellate Rules.[1]

If the Rule 11 proposals are adopted, then the Appellate Rules Committee should consider revising Appellate Rule 4(a)(4)(A) to state the effect of a timely Rule 11(b) motion on the time to take an appeal. The amendment would read as follows:

**Rule 4. Appeal as of Right--When Taken**

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

* * * * *

**(4) Effect of a Motion on a Notice of Appeal.**

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure — or a motion for reconsideration under Rule 11(b) of the Rules Governing Proceedings

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[1] My earlier memo to Professors Beale and King, which is enclosed in their memo, raises a question concerning the proposed Rule 11(b)'s effect on the availability of postjudgment motions under Civil Rules 52 or 59. The answer to that question, though, does not affect the proposed conforming amendment to Appellate Rule 4.

under 28 U.S.C. §§ 2254 or 2255 —; the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 10 days[2] after the judgment is entered.

* * * * *

**Committee Note**

**Subdivision (a)(4)(A).** New Rule 11(b) of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 or 2255 concerns motions for reconsideration in Section 2254 and 2255 proceedings. Subdivision (a)(4)(A) is revised to provide that a timely motion under Rule 11(b) has the same effect on the time to file an appeal as the other motions listed in subdivision (a)(4)(A).

## II. Proposed amendment to FRAP 22

As the Notes to the proposed Rules 11 explain, the amendments are also designed to make 28 U.S.C. § 2253's certificate-of-appealability requirements more prominent by placing them in the Section 2254 and Section 2255 Rules. In light of this proposed change, the Criminal

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[2] NB: Changes stemming from the Time-Computation Project make it likely that this 10-day limit will be changed to 30 days.

Rules Committee also asks the Appellate Rules Committee to consider a conforming amendment to Appellate Rule 22.

Appellate Rule 22(b)(1) currently provides:

> In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue. The district clerk must send the certificate or statement to the court of appeals with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.

The proposed amendments to 2254/2255 Rules 11 would add a new Rule 11(a) that provides:

> Certificate of Appealability. At the same time the judge enters a final order adverse to the [moving party / applicant / petitioner], the judge must either issue or deny a certificate of appealability. If the judge issues a certificate, the judge must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). [If the judge denies a certificate, the judge must state why a certificate should not issue.]

The brackets in the first sentence of the above quotation show the wording proposed for the Section 2255 and Section 2254 Rules, respectively. The exact text of each proposed provision is set forth in the enclosed memo.

Proposed Rule 11(a) would alter the timing of the district court's certificate-of-appealability decision by requiring the judge to grant or deny the certificate at the time a final order is issued, rather than after a notice of appeal is filed. I am assuming that the policy judgment embodied in that decision is one for the Criminal Rules Committee, rather than the Appellate Rules Committee.

The final bracketed sentence in the proposed Rule 11(a) reflects a suggestion that I made to Professors Beale and King. Aside from the issue of timing, the proposed Rule 11(a) differs from existing Appellate Rule 22(b)(1) in that Rule 11(a) would not require the district court, if it denies the certificate, to "state why."

Rule 22(b)'s requirement of a statement of reasons for the denial is of long standing. The requirement dates as far back as the time – pre-AEDPA -- when the required certificate was a "certificate of probable cause." The pre-AEDPA Rule 22 provided: "If an appeal is taken by the

applicant, the district judge who rendered the judgment shall either issue a certificate of probable cause or state the reasons why such a certificate should not issue." The original 1967 Committee Note to Appellate Rule 22 explained the requirement of an explanation for the denial of the certificate as follows: "In the interest of insuring that the matter of the certificate will not be overlooked and that, if the certificate is denied, the reasons for denial in the first instance will be available on any subsequent application, the proposed rule requires the district judge to issue the certificate or to state reasons for its denial."

When Congress re-wrote Rule 22 as part of AEDPA, it added a requirement that the district court explain *grants* of the certificate, but it did not delete the requirement that the district court also explain *denials*. The rewritten rule read in part: "If an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of appealability or state the reasons why such a certificate should not issue. The certificate or the statement shall be forwarded to the court of appeals with the notice of appeal and the file of the proceedings in the district court." 110 Stat. 1214, 1218. Although the Rule has been amended since then, the substance of this requirement remains.

I therefore suggested to Professors Beale and King that it would be a significant change if Rule 11(a) were to require explanations only for grants and not for denials of the certificate. Failing to require explanation of denials would deprive the Court of Appeals of information relevant to the Court of Appeals' consideration of any request for a certificate of appealability. And deleting the requirement for explanation of denials would delete a requirement that Congress itself retained when it rewrote Appellate Rule 22 as part of AEDPA.

For this reason, I suggested that the following sentence be added to the end of each proposed Rule 11(a): "If the judge denies a certificate, the judge must state why a certificate should not issue." Assuming that the Criminal Rules Committee adopts that suggestion, the conforming amendment to Appellate Rule 22(b)(1) could read as follows:

**Rule 22. Habeas Corpus and Section 2255 Proceedings**

* * * * *

**(b) Certificate of Appealability.**

**(1)** In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). ~~If an applicant files a~~

~~notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue.~~ The district clerk must send the certificate ~~or~~ , if any, and the statement described in Rule 11(a) of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 or 2255 to the court of appeals with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.

* * * * *

**Committee Note**

**Subdivision (b)(1).** The requirement that the district judge who rendered the judgment either issue a certificate of appealability or state why a certificate should not issue has been moved from subdivision (b)(1) to Rule 11(a) of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 or 2255. Subdivision (b)(1) continues to require that the district clerk send the certificate, if any, and the statement of reasons for grant or denial of the certificate to the court of appeals along with the notice of appeal and the file of the district-court proceedings.

Encls.

**MEMO TO:** **Members, Criminal Rules Advisory Committee**

**FROM:** **Professor Sara Sun Beale, Reporter**
**Professor Nancy King**

**RE:** **Proposed Amendments to Rule 11 of the Rules Governing 2254 and 2255 Proceedings; Proposed New Rule 37**

**DATE:** **March 25, 2007**

In January of 2006, the Department of Justice proposed a series of amendments intended abolishing the writs of coram nobis, coram vobis, audita querela, and bill of review and bills in the nature of bills of review, and proposing amendments that take the place of these writs. Judge Bucklew appointed a subcommittee to review the Department's proposals. The committee is chaired by Professor King, and includes Judge Bucklew, Judge Trager, Mr. McNamara, and the Justice Department's representative. The subcommittee reviewed the proposal and draft amendments were discussed at the Committee's October meeting.

**The Rule 11 proposals**

The amendments to Rule 11 of the Rules governing 2254 proceedings, and to Rule 11 of the Rules governing 2255 proceedings were tentatively approved by the Committee at the October meeting. They are intended to provide, for the first time, a well-defined mechanism by which litigants can seek reconsideration of a district court's ruling on a motion under these rules. The efforts by litigants to work around the current procedural gap – particularly by using Federal Rule of Procedure 60(b) – have generated a good deal of confusion.

Outstanding issues for Committee consideration:

On March 15, the Reporter of the Appellate Rules Committee, Professor Struve, submitted to Professors King and Beale a set of comments suggesting changes to the proposed Rules. Her suggestion to add language retaining the judge's duty to state "why a certificate should not issue" is included in brackets. She also inquires how the proposal would affect motions under Rule 52 or 59. Professor Struve's memo is also attached. Because of the timing of her comments, the subcommittee did not have the opportunity to consider her queries.

**Proposed Rule 37**

The original proposal for a new Rule 37 would have (1) subjected coram nobis actions to timing, successive petition, and other limitations similar to those applicable to 2255 actions, and (2) abolished all of the other ancient writs. The Committee discussed this proposal as well as alternative language for Rule 37 proposed by Mr. McNamara at the October meeting. The alternative version would provide no set statute of limitations but allow for dismissal in some circumstances upon a showing of prejudice to the government as a result of delay, and would not have abolished the writs so that they would continue to serve as a kind of insurance policy to provide needed flexibility in the future. The Committee asked the subcommittee to continue working, raising a number of concerns about the proposed new rule.

The subcommittee considered submissions on these questions from both the Department of Justice and Mr. McNamara (see the two memos dated January 5, 2007 to Professor King). The revised version of the proposed Rule 37 approved by a majority of the subcommittee and submitted for Committee consideration here includes one substantive change from the version considered by the Committee in October. Instead of purporting to "abolish" writs, the proposed rule states only that the specified writs "may not be used to seek relief from a criminal judgment." Two non substantive changes made to the language of the rule: (1) the language limiting the use of the writs formerly constituting subdivision (c) of the rule is moved to be part of subsection (a); and (2) the references to statutes and rules in subsection (a) have been reordered and reorganized.

The proposed Committee Note to accompany Rule 37 is a shorter version of the Note that appeared in the October agenda book. In response to the concerns voiced by several members of the Committee in October, it adds references to existing law governing coram nobis actions to make it clear that the proposed rule is not intended to change these aspects of the existing coram nobis remedy. The changes in brackets in paragraph 5 of the Note were added to respond to the concern voiced by members of the subcommittee that the Note did not contain specific examples of loss of employment as "serious adverse consequences." These particular changes in the text of the Note have not been considered by the subcommittee.

Outstanding issues for Committee consideration:

(1) Mr. McNamara opposes the proposed rule and favors tabling the proposal entirely. If the Committee decides to go ahead with a new rule on this topic, he suggests an Alternate Version, which is included here immediately after the Proposed Rule 37 and accompanying Note.

(2) Style changes to the text of the rule have been proposed, but not yet considered by the subcommittee. The style suggestions for the text of the rule are attached at the end of this section.

(3) Professor Cooper has suggested, in particular, that the phrase "or by appeal as authorized by federal statute" be substituted for the enumerated list of appellate provisions in subdivision (a) of the proposed rule, so as not to eliminate either parties' existing ability to employ mandamus and

prohibition, or cut off other existing interlocutory appellate review of orders (bail, wiretaps, forfeiture orders) that might be considered "judgments." This was received after the subcommittee completed its deliberations.

(4) Reporters from other Committees have expressed serious reservations about proposed Rule 37. Input from the other reporters was solicited after the subcommittee had completed its deliberations, so was not considered by the subcommittee.

At the January meeting of the Standing Committee, following Judge Bucklew's description of our work on Rule 37, the reporters expressed serious reservations about the wisdom of going forward with the proposed amendment to Rule 37 at this time. I attempt here to outline these comments. Professor Coquillette may wish to expand upon them at the meeting.

One ground of concern was that any attempt to restrict the ancient writs would be viewed with alarm by Congress and the public, becoming conflated with attempts to restrict judicial review of various kinds of cases, such as the detention of persons as enemy combatants or otherwise who have not been charged with a crime. The subcommittee attempted to address this concern by eliminating the language that "abolished" the ancient writs. The current draft provides, instead, only that the ancient writs "may not be used to seek relief from a criminal judgment." Although this would clearly have no application to cases where terrorists, enemy combatants, or others are held without being charged with a crime, the reporters expressed concern that this distinction would be lost to the public, Congress, and pundits.

Several reporters also expressed, in the strongest terms, an even more fundamental concern. They advised against seeking to codify entirely the ancient writs. It would not matter, in their view, if the text of the rule coincided exactly with the Supreme Court's previous decisions defining the scope of coram nobis. Since the writs are always subject to further judicial development and application to new circumstances, codification thus necessarily loses something – though we might not know exactly what – if it seeks preclude judicial relief that does not fall within the statutory boundary. This is unwise, and possibly beyond the scope of the authority granted by the Rules Enabling Act, since it may modify a substantive right.

There has been some discussion among the reporters about the question whether Civil Rule 60(b) establishes a precedent for the proposed criminal rule. Rule 60(b) was amended in 1948 to abolish the "ancient writs." The Committee Note explains that the writs had continued in use after Rule 60(b) was adopted as part of the original 1938 Rules, "although the precise relief obtained in a particular case by use of these ancillary remedies is shrouded in ancient lore and mystery." The amendment was designed as "a clarification of this situation." After "ascertain[ing] all the remedies and types of relief heretofore available by" the ancient writs, the Committee "endeavored * * * to amend the rules to permit, either by motion or by independent action, the granting of various kinds of relief * * *." If the Committee succeeded in its purpose, "the federal rules will deal with the practice in every sort of case in which relief from final judgments is asked, and prescribe the practice." Rule 60(b) and the ongoing independent action were intended to provide a more modern

procedure to provide for all relief that could be granted under any of the more mysterious ancient writs. At a minimum, anything done in the Criminal Rules should do the same: ensure that the available grounds of relief are not diminished. Some reporters, however, would take the position that in abolishing the ancient writs, Rule 60(b) runs afoul of the advice described above, which would leave open the possibility of further development of the writs, as opposed to the independent statutory actions.

Finally, the reporters noted that it might be wise, before proceeding, to determine if the proposed rule is needed to address a real problem in practice. At the moment, there is no reliable study of the use of the ancient writs. The Federal Judicial Center could undertake such a study.

## PART A. RULE 11 ELEMENTS OF THE PROPOSED AMENDMENTS TO COLLATERAL RELIEF PROCEDURES

**(1) Rule 11 of the Rules Governing Section 2255 Proceedings shall be amended to read as follows:**

**Rule 11. Certificate of Appealability; Motion for Reconsideration; Appeal**

(a) Certificate of Appealabilty. At the same time the judge enters a final order adverse to the [moving party] applicant, the judge must either issue or deny a certificate of appealability. If the judge issues a certificate, the judge must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). [If the judge denies a certificate, the judge must state why a certificate should not issue.]

(b) Motion for Reconsideration. The only procedure for obtaining relief in the district court from a final order is through a motion for reconsideration. The motion must be filed within 30 days after the order is entered. The motion may not raise new claims of error in the movant's conviction or sentence, or attack the district court's previous resolution of such a claim on the merits, but may only raise a defect in the integrity of the § 2255 proceedings. Federal Rule of Civil Procedure 60(b) may not be used in § 2255 proceedings.

(c) Time for Appeal. Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. These rules do not extend the time to appeal the original judgment of conviction.

Advisory Committee Notes

As provided in 28 U.S.C. § 2253(c), an appeal may not be taken to the court of appeals from a final order in a proceeding under § 2255 unless a judge issues a certificate of appealability, which must specify the specific issues for which the applicant has made a substantial showing of a denial of constitutional right. New Rule 11(a) makes the requirements concerning certificates of appealability more prominent by adding and consolidating them in the appropriate rule of the Rules Governing § 2255 Proceedings in the District Courts. Rule 11(a) also requires the district judge to grant or deny the certificate at the time a final order is issued, see 3d Cir. L.A.R. 22.2, 111.3, rather than after a notice of appeal is filed up to 60 days later, see Fed. R. App. P. 4(a)(1)(B). This will ensure prompt decision-making when the issues are fresh. It will also expedite proceedings, avoid unnecessary remands, and inform the moving party's decision whether to file a notice of appeal.

The Rules Governing Section 2255 Proceedings have not previously provided a mechanism by which a litigant can seek reconsideration of the District Court's ruling on a motion under 28 U.S.C. § 2255. Because no procedure was specifically provided by these Rules, some litigants have resorted to Civil Rule 60(b) to provide such relief. Invocation of that civil rule, however, has "has generated confusion among the federal courts." Abdur'Rahman v. Bell, 537 U.S. 88, 89 (2002) (Stevens, J.,

dissenting from the dismissal of certiorari as improvidently granted); In re Abdur'Rahman, 392 F.3d 174 (6th Cir. 2004), *vacated*, 125 S. Ct. 2991 (2005); Pridgen v. Shannon, 380 F.3d 721, 727 (3d Cir. 2004); *see also* Pitchess v. Davis, 421 U.S. 482, 490 (1975). Convicted defendants have invoked Rule 60(b) to evade statutory provisions added by AEDPA in 1996, including a one-year time period for filing, the certificates of appealability requirement, and the limitations on second and successive applications. *See* Gonzalez v. Crosby, 125 S. Ct. 2641, 2646-48 (2005) ("Using Rule 60(b) to present new claims for relief," to present "new evidence in support of a claim already litigated," or to raise "a purported change in the substantive law," "circumvents AEDPA's requirement"). The Supreme Court in Gonzalez attempted a "harmonization" of Rule 60(b) and the AEDPA requirements for state prisoners by holding that Rule 60(b) motions can be treated as successive habeas petitions if they "assert, or reassert, claims of error in the movant's state conviction," but can proceed if they attack "not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." 125 S. Ct. at 2648, 2651.

Rule 11 is amended to end this confusion and abuse by replacing the application of Civil Rule 60(b) in collateral review proceedings with a procedure tailored for such proceedings. Under the amendment, the sole method of seeking reconsideration by the district court of a § 2255 order is the procedure provided by Rule 11 of the Rules Governing § 2255 Proceedings, and not any other provision of law, including Rule 60(b). The amended Rule 11 provides disappointed § 2255 litigants with an appropriate opportunity to seek reconsideration in the district court based on a "defect in the integrity of the federal habeas proceeding," Gonzalez, 125 S. Ct. at 2648-49 & n.5, but within an appropriate and definitive time period, and with an express prohibition on raising new claims that "assert, or reassert, claims of error in the movant's" conviction or sentence, or "attack[] the federal court's previous resolution of a claim *on the merits*," id. at 2648 & nn.4-5, 2651 (emphasis by Court). Defects subject to motion under Rule 11 include purely ministerial or clerical errors in the order of the district court. Rule 11 will thus provide clear and quick relief in the district court, while safeguarding the requirements of § 2255 and the finality of criminal judgments.

**(2) Rule 11 of the Rules Governing Section 2254 Proceedings shall be renumbered Rule 12, and a new Rule 11 shall be enacted to read as follows:**

**Rule 11. Certificate of Appealability; Motion for Reconsideration**

(a) Certificate of Appealabilty. At the same time the judge enters a final order adverse to the [moving party] petitioner, the judge must either issue or deny a certificate of appealability. If the judge issues a certificate, the judge must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). [If the judge denies a certificate, the judge must state why a certificate should not issue.]

(b) Motion for Reconsideration. The only procedure for obtaining relief in the district court from a final order is through a motion for reconsideration. The motion must be filed within 30 days after the order is entered. The motion may not raise new claims of error in the [movant's] petitioner's conviction or sentence, or attack the district court's previous resolution of such a claim on the merits, but may raise only a defect in the integrity of the § 2254 proceedings.Federal Rule of Civil Procedure 60(b) may not be used in § 2254 proceedings.

Advisory Committee Notes

As provided in 28 U.S.C. § 2253(c), an appeal may not be taken to the court of appeals from a final order in a proceeding under § 2255 unless a judge issues a certificate of appealability, which must specify the specific issues for which the applicant has made a substantial showing of a denial of constitutional right. New Rule 11(a) makes the requirements concerning certificates of appealability more prominent by adding and consolidating them in the appropriate rule of the Rules Governing § 2255 Proceedings in the District Courts. Rule 11(a) also requires the district judge to grant or deny the certificate at the time a final order is issued, see 3d Cir. L.A.R. 22.2, 111.3, rather than after a notice of appeal is filed up to 60 days later, see Fed. R. App. P. 4(a)(1)(B). This will ensure prompt decision-making when the issues are fresh. It will also expedite proceedings, avoid unnecessary remands, and inform the moving party's decision whether to file a notice of appeal.

The Rules Governing Section 2254 Proceedings have not previously provided a mechanism by which a litigant can seek reconsideration of the District Court's ruling on a motion under 28 U.S.C. § 2255. Because no procedure was specifically provided by these Rules, some litigants have resorted to Civil Rule 60(b) to provide such relief. Invocation of that civil rule, however, has "has generated confusion among the federal courts." Abdur'Rahman v. Bell, 537 U.S. 88, 89 (2002) (Stevens, J., dissenting from the dismissal of certiorari as improvidently granted); In re Abdur'Rahman, 392 F.3d 174 (6th Cir. 2004), *vacated*, 125 S. Ct. 2991 (2005); Pridgen v. Shannon, 380 F.3d 721, 727 (3d Cir. 2004); *see also* Pitchess v. Davis, 421 U.S. 482, 490 (1975). Convicted defendants have invoked Rule 60(b) to evade statutory provisions added by AEDPA in 1996, including a one-year time period for filing, the certificates of appealability requirement, and the limitations on second and successive

applications. *See* Gonzalez v. Crosby, 125 S. Ct. 2641, 2646-48 (2005) ("Using Rule 60(b) to present new claims for relief," to present "new evidence in support of a claim already litigated," or to raise "a purported change in the substantive law," "circumvents AEDPA's requirement"). The Supreme Court in Gonzalez attempted a "harmonization" of Rule 60(b) and the AEDPA requirements for state prisoners by holding that Rule 60(b) motions can be treated as successive habeas petitions if they "assert, or reassert, claims of error in the movant's state conviction," but can proceed if they attack "not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." 125 S. Ct. at 2648, 2651.

Rule 11 is amended to end this confusion and abuse by replacing the application of Civil Rule 60(b) in collateral review proceedings with a procedure tailored for such proceedings. Under the amendment, the sole method of seeking reconsideration by the district court of a § 2254 order is the procedure provided by Rule 11 of the Rules Governing § 2254 Proceedings, and not any other provision of law, including Rule 60(b). The amended Rule 11 provides disappointed § 2254 litigants with an appropriate opportunity to seek reconsideration in the district court based on a "defect in the integrity of the federal habeas proceeding," Gonzalez, 125 S. Ct. at 2648-49 & n.5, but within an appropriate and definitive time period, and with an express prohibition on raising new claims that "assert, or reassert, claims of error in the movant's" conviction or sentence, or "attack[] the federal court's previous resolution of a claim *on the merits*," id. at 2648 & nn.4-5, 2651 (emphasis by Court). Defects subject to motion under Rule 11 include purely ministerial or clerical errors in the order of the district court. Rule 11 will thus provide clear and quick relief in the district court, while safeguarding the requirements of §§ 2254 and 2255 and the finality of criminal judgments.

## PART B. PROPOSED NEW RULE 37**

**Rule 37. Review of the Judgment.**

**(a) Exclusive Remedies.** The sole procedures for seeking relief from a judgment in a criminal case are by motion as authorized by 18 U.S.C. §§ 3582 and 3600, 28 U.S.C. § 2255, Rules 33, 35, and 37(b), or by appeal as authorized by 18 U.S.C. § 3742, 28 U.S.C. §§ 1291 and 2253, and the Federal Rules of Appellate Procedure. Writs of error coram vobis, audita querela, bills of review, and bills in the nature of a bill of review may not be used to seek relief from a criminal judgment.

**(b) Writ of Error Coram Nobis.**

(1) Requirements. A motion for a writ of error coram nobis to obtain relief from a judgment in a criminal case must meet all the requirements applicable to a motion under 28 U.S.C. § 2255, except that

(A) at the time of filing of the motion, the moving party must not be in custody, within the meaning of 28 U.S.C. § 2255, as a result of the judgment for which relief is being sought; and

(B) the moving party must demonstrate that he is subject to a continuing and serious adverse consequence from the judgment.

(2) Exception to period of limitation. A motion that does not meet the 1-year period of limitation in § 2255 may be considered if it is filed within one year of the date when the continuing and serious adverse consequence from the judgment could have been discovered through the exercise of due diligence. A motion filed under this paragraph must be dismissed if the government has been prejudiced by delay in filing the motion. There is a rebuttable presumption of prejudice if the motion was filed more than five years after date of conviction.

(3) Second or successive motion. If a motion for a writ of error coram nobis to obtain relief from a judgment in a criminal case is filed after the filing of a prior such motion, or a motion under 28 U.S.C. § 2255, seeking relief from that judgment, the motion shall be regarded as a second or successive motion and shall be subject to the requirements for second or successive motions under 28 U.S.C. § 2255.

### Advisory Committee Notes to Rule 37

This Rule is designed to regularize the collateral review of federal criminal judgments. Rule 37(a) recognizes that, with the exception of coram nobis, the common law writs of error subsumed in the All Writs Act of 1791, 28 U.S.C. § 1651, namely coram vobis, audita querela, bills of review, and bills in the nature of a bill of review, have been effectively superseded by

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**The language supported by Mr. McNamara is reprinted following the committee note.

statutes and the Federal Rules of Criminal Procedure. The rule makes clear that it is improper to resort to these writs to challenge a criminal judgment.

Subdivision (a) lists the appropriate avenues of relief from a criminal judgment. Under the current Criminal Rules, defendants can seek post-judgment relief as provided in Rule 33(b)(1) (new trial for newly discovered evidence) and Rule 35(a) (correcting clear error in the sentence). Rule 34, though entitled "Arresting Judgment," requires that the motion be filed within 7 days of the verdict or plea, and thus is not truly a post-judgment remedy. Defendants can also seek post-judgment relief as provided in 18 U.S.C. § 3582(c)(2) (modification of an imposed term of imprisonment based on certain amendments to the sentencing guidelines), 18 U.S.C. § 3600(g) (motion for a new trial or re-sentencing after exculpatory DNA testing), and 28 U.S.C. § 2255. Section 2255 in turn authorizes resort to the writ of habeas corpus under 28 U.S.C. § 2241 if a § 2255 motion is "inadequate or ineffective." Courts have held § 2255 motions inadequate and ineffective when a defendant wishes to file a successive motion on the grounds that his statutory offense has been reinterpreted to render the defendant's conduct non-criminal. See e.g., Christopher v. Miles, 342 F.3d 378, 382 (5th Cir. 2003). The Government can seek post-judgment relief under Rule 35(a) and (b) and under 18 U.S.C. § 3582(c)(2), and by appeal under 18 U.S.C. § 3731. Finally, defendants and the Government can both seek post-judgment relief by appeal where authorized by 18 U.S.C. § 3742, 28 U.S.C. § 1291, 28 U.S.C. § 2253, and the Federal Rules of Appellate Procedure. Subdivision (a) does not alter the requirements of these other rules and statutory sections in any way. It also does not affect the alteration or termination of probation, supervised release, fines, restitution, or criminal forfeiture as elsewhere provided by these Rules or by statute. See, e.g.,18 U.S.C. §§ 3563, 3572, 3583, 3664.

Subdivision (b) recognizes that the writ of coram nobis retains the limited role of providing an avenue for collateral relief to defendants who are not "in custody" within the meaning of § 2255. These include defendants who did not receive a custodial sentence, or whose custodial sentence is insufficiently long to permit a resort to both an appeal and collateral review. Godoski v. United States, 304 F.3d 761, 762 (7th Cir. 2002); United States v. Monreal, 301 F.3d 1127, 1132 (9th Cir. 2002). Under subdivision (b) a motion seeking coram nobis relief must meet all the requirements applicable to a motion under § 2255 other than the "in custody" requirement, which is replaced by a requirement that the defendant demonstrate that he is subject to a continuing and serious adverse consequence from the judgment. The Committee concluded that making the § 2255 requirements equally and uniformly applicable to writs of error coram nobis is most consistent with, and best embodies, congressional intent as it relates to collateral review of criminal convictions.

A defendant's motion in the district court seeking either § 2255 or coram nobis relief must show either a constitutional error or an error "of the most fundamental character, that is, such as rendered the proceeding itself irregular and invalid" and "inherently results in a complete miscarriage of justice." United States v. Addonizio, 442 U.S. 178, 185-87 (1979); Reed v. Farley, 512 U.S. 339, 353 (1994); Morgan, 346 U.S. at 504 (denial of counsel). The decision whether that error may be a factual error "material to the validity and regularity of the legal proceeding itself,"Carlisle, 517 U.S. at 429, or "a fundamental error of law," United States v. Sawyer, 239 F.3d 31, 38 (1st Cir. 2001), is determined under the law applicable to § 2255 motions.

Subdivision (b)(1)(B), which requires that the defendant show that he is subject to a continuing and serious adverse consequence from the judgment, reflects present case law holding that a person seeking coram nobis relief must show a concrete threat of serious harm arising from the judgment. E.g., Morgan, 346 U.S. at 503-04 (conviction used to enhance subsequent sentence); Fleming v. United States, 146 F.3d 88, 90-91 (2d Cir. 1998) [(collecting decisions finding consequences that would support the writ, including deprivation of the right to vote, sentencing enhancement); United States v. Esogbue, 357 F.3d 532, 534 (5th Cir. 2004) (deportation)]; Howard v. United States, 962 F.2d 651, 654 (7th Cir. 1992);[Dean v. United States, 436 F. Supp. 2d 485 (E.D.N.Y. 2006) (employment terminated because of conviction)]. This assures that the defendant is actually being seriously harmed by his conviction; speculative harms, harms to reputation, and harms not directly arising from his conviction are insufficient. Nothing in this Rule is intended to change the scope of "continuing and serious adverse consequences," which the [lower] courts[~~of appeals~~] have found support the issuance of writs of error coram nobis.

Under subdivision (b)(1), a motion for coram nobis relief generally must be filed within one year of the triggering events specified in § 2255 ¶ 6. Although at common law, coram nobis was "allowed without limitation of time," defendants were required to show "sound reasons for failure to seek earlier relief." Morgan, 346 U.S. at 507; Foont v. United States, 93 F.3d 76, 80 (2d Cir. 1996). Similar admonitions against delay were at first applied to motions under § 2255, but Congress ultimately decided that requiring that § 2255 motions be made within one year of specified triggering events was a clearer and better method to prevent abuses and promote the finality of judgments. Just as defendants subject to ongoing imprisonment are required to file within those one-year periods, the Committee believes defendants who are subject to collateral consequences generally should also have to file within those one-year periods.

The only exception, embodied in subdivision (b)(2), is if the defendant demonstrates that the motion was filed within one year of the date when the continuing and serious adverse consequence from the judgment could have been discovered through the exercise of due diligence. This exception is similar to § 2255 ¶ 5(4) and to former Rule 9(a) of the Rules Governing § 2255 proceedings. Elaborating on former Rule 9(a), subdivision (b)(2) provides such a motion must be dismissed if the delay in filing the motion has prejudiced the government, either in responding to the motion, in retrying the case, or otherwise, and provides that prejudice is presumed if the motion is filed more than five years after the date of conviction. The concepts of "due diligence" and "prejudice" are drawn as well from present case law, and nothing in this Rule is intended to change the meaning of these terms as defined by the courts of appeals.

Subdivision (b)(3) provides that if a motion for coram nobis relief is filed after an earlier coram nobis motion or a motion under § 2255 has been filed seeking relief from that judgment, the motion is regarded as a second or successive motion and must meet the requirements of § 2255 ¶ 8. See 28 U.S.C. § 2244(b), United States v. Noske, 235 F.3d 405, 406 (8th Cir. 2000); United States v. Swindall, 107 F.3d 831, 836 n.7 (11th Cir. 1997). Rule 37(b)(3) would allow to

the same extent as § 2255 a successive motion on the basis that the defendant's statutory offense has been reinterpreted to render the his conduct non-criminal.

Under subdivision (b), a defendant may not appeal from the denial of a motion for coram nobis relief unless the district judge or a circuit justice or judge issues a certificate of appealability, as required in § 2255 cases. 28 U.S.C. § 2253(b); Fed. R. App. P. 22(b).

Because a motion for a writ of error coram nobis "is a step in the criminal case and not, like habeas corpus where relief is sought in a separate case and record, the beginning of a separate civil proceeding," Morgan, 346 U.S. at 506 n.4, the motion and all proceedings upon it should be docketed in the criminal case in which the challenged judgment was entered. Nonetheless, because this Rule subjects such motions to the same requirements that are applied to motions under § 2255, the Rules Governing Section 2255 Proceedings for the United States District Courts are equally applicable to motions for writs of error coram nobis.

## ALTERNATIVE VERSION OF PROPOSED RULE 37(b)

**Rule 37.** **Review of the Judgment.**

. . .

**(b) Writ of Error Coram Nobis.**

**(1) Requirements.** A motion for a writ of error coram nobis to obtain relief from a judgment in a criminal case must meet all the requirements applicable to a motion under 28 U.S.C. § 2255, except that

(a) at the time of filing of the motion, the defendant must *not* be in custody within the meaning of 28 U.S.C. § 2255;

(b) the defendant must demonstrate that he is subject to a continuing and serious adverse consequence from the judgment; and

(c) there is no statute of limitations for filing. A motion may be dismissed if the government has been prejudiced by delay in filing the motion, unless the movant shows that the motion is based on grounds he could not have had learned by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred.

**(2) Second or successive motion.** If a motion for a writ of error coram nobis to obtain relief from a judgment in a criminal case is filed after the filing of a prior such motion, or a motion under 28 U.S.C. § 2255, seeking relief from that judgment, the motion shall be regarded as a second or successive motion and shall be subject to the requirements of 28 U.S.C. § 2255, paragraph 8.

## Style suggestions - Rule 37

**Rule 37. Review of the Judgment.**

**(a) Exclusive Remedies.** The sole procedures for seeking relief from a judgment in a criminal case are by motion as authorized by 18 U.S.C. §§ 3582 and 3600, 28 U.S.C. § 2255, ~~Rule~~ **Rules** 33, 35, and 37(b) ~~of these Rules~~, or by appeal as authorized by 18 U.S.C. § 3742, 28 U.S.C. §§ 1291 and 2253, and the Federal Rules of Appellate Procedure. Writs of error coram vobis, audita querela, bills of review, and bills in the nature of a bill of review may not be used to seek relief from a criminal judgment.

**(b) Writ of Error Coram Nobis.**

(1) Requirements. A motion for a writ of error coram nobis to obtain relief from a judgment in a criminal case must meet all the requirements applicable to a motion under 28 U.S.C. § 2255, except that

> (A) at the time of filing of the motion, the moving party must not be in custody, within the meaning of 28 U.S.C. § 2255, as a result of the judgment for which relief is being sought; and
>
> (B) the moving party must demonstrate that ~~he~~ **it** is subject to a continuing and serious adverse consequence from the judgment.

(2) Exception to period of limitation. ~~A~~ **A court may consider a** motion ~~that does not meet~~ **filed after** the 1-year period of limitation in § 2255 ~~may be considered~~ **only** if it is filed within one year of the date when the continuing and serious adverse consequence from the judgment could have been discovered through the exercise of due diligence**, unless** ~~. A motion filed under this paragraph must be dismissed if~~ the government has been prejudiced by delay in filing the motion. There is a rebuttable presumption of prejudice if the motion was filed more than five years after date of conviction.

(3) Second or successive motion. If a motion for a writ of error coram nobis to obtain relief from a judgment in a criminal case is filed after the filing of a prior such motion, or a motion under 28 U.S.C. § 2255, seeking relief from that judgment, the motion ~~shall be regarded as~~ **is** a second or successive motion ~~and shall be~~ subject to the requirements for second or successive motions under 28 U.S.C. § 2255.

**MEMORANDUM**

**DATE:** March 14, 2007

**TO:** Sara Beale
Nancy King

**FROM:** Cathie Struve

**RE:** Amendments relating to Rules 11 of the Rules governing 2254 and 2255 proceedings

Thank you for sharing the proposed amendments to these Rules with me. I have a few questions concerning these amendments – and the conforming amendments to the Appellate Rules – and I wanted to run them by you. I have not yet run these thoughts by anyone from the Appellate Rules Committee, and I haven't yet run the language past Joe Kimble for style review; I hope you don't mind my inflicting my very preliminary ideas on you! I look forward to your guidance on these issues.

## I. Certificates of appealability

Appellate Rule 22(b)(1) currently provides:

> In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue. The district clerk must send the certificate or statement to the court of appeals with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.

The proposed amendments to 2254/2255 Rules 11 would add a new Rule 11(a) that provides:

> At the same time the judge enters a final order adverse to the [moving party] applicant, the judge must either issue or deny a certificate of appealability. If the judge issues a certificate, the judge must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2).

Aside from the issue of timing, the proposed Rule 11(a) differs from existing Appellate Rule 22(b)(1) in that Rule 11(a) would not require the district court, if it denies the certificate, to "state why." Rule 22(b)'s requirement of a statement of reasons for the denial is of long standing. The requirement dates as far back as the time – pre-AEDPA – when the required certificate was a "certificate of probable cause." The pre-AEDPA Rule 22 provided: "If an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of probable cause or state the reasons why such a certificate should not issue." The original 1967 Committee Note to Appellate Rule 22 explained the requirement of an explanation for the denial of the certificate as follows: "In the interest of insuring that the matter of the certificate will not be overlooked and that, if the certificate is denied, the reasons for denial in the first instance will be available on any subsequent application, the proposed rule requires the district judge to issue the certificate or to state reasons for its denial." When Congress re-wrote Rule 22 as part of AEDPA, it added a requirement that the district court explain *grants* of the certificate, but it did not delete the requirement that the district court also explain *denials*. The rewritten rule read in part: "If an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of appealability or state the reasons why such a certificate should not issue. The certificate or the statement shall be forwarded to the court of appeals with the notice of appeal and the file of the proceedings in the district court." 110 Stat. 1214, 1218. Although the Rule has been amended since then, the substance of this requirement remains.

I therefore think it would be a significant change if Rule 11(a) were to require explanations only for grants and not for denials of the certificate. Failing to require explanation of denials would deprive the Court of Appeals of information relevant to the Court of Appeals' consideration of any request for a certificate of appealability. And deleting the requirement for explanation of denials would delete a requirement that Congress itself retained when it rewrote Appellate Rule 22 as part of AEDPA.

For this reason, I would suggest that the following sentence be added to the end of each proposed Rule 11(a): "If the judge denies a certificate, the judge must state why a certificate should not issue."

I would then recommend to the Appellate Rules Committee that it consider the following conforming amendment to Appellate Rule 22(b)(1):

**Rule 22. Habeas Corpus and Section 2255 Proceedings**

* * * * *

**(b) Certificate of Appealability.**

**(1)** In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). ~~If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue.~~ The district clerk must send the certificate ~~or~~ , if any, and the statement described in Rule 11(a) of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 or 2255 to the court of appeals with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.

* * * * *

**Committee Note**

**Subdivision (b)(1).** The requirement that the district judge who rendered the judgment either issue a certificate of appealability or state why a certificate should not issue has been

moved from subdivision (b)(1) to Rule 11(a) of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 or 2255. Subdivision (b)(1) continues to require that the district clerk send the certificate, if any, and the statement of reasons for grant or denial of the certificate to the court of appeals along with the notice of appeal and the file of the district-court proceedings.

## II. Extending the time to file a notice of appeal

The amendment to Appellate Rule 4(a)(4)(A) seems quite straightforward; the way that I would propose to implement it is shown below. I welcome your comments on it.

If you will forgive me for intruding into questions that do not concern appellate procedure, I wanted to ask a question about the way in which proposed new Rule 11(b) will work. The draft states that a motion for reconsideration under Rule 11(b) is the *only* way to obtain relief from a final order, and also states that such a motion may raise *only* a defect in the integrity of the proceedings.

I can see from the Note that the goal here is – following *Gonzalez v. Crosby* – to foreclose the use of Rule 60(b) as an end-run around AEDPA's limitations. My question is what effect Rule 11(b) will have on postjudgment motions under Rules 52(b) or 59(b). Such motions occur after judgment, and thus it seems possible that Rule 11(b) could be read to bar them. Of course, as you know, these motions have long been available in habeas proceedings, *see Browder v. Director, Dept. of Corrections of Illinois*, 434 U.S. 257, 271 (1978). And though I am not sure what the parameters of the *Gonzalez* Court's "integrity of the proceedings" limit are, I would assume that it would exclude a number of grounds that currently can provide a basis for a motion under Rules 52 or 59. The *Gonzalez* Court did not discuss whether its reasoning would apply with equal force to Rule 52 or 59 motions. And since the Committee Note doesn't explicitly discuss Rule 11(b)'s effect on either of those motions, I just wondered about it.

In any event, thank you for your patience with this inquiry; I realize that it's outside the ambit of the Appellate Rules. If Rule 11(b) is adopted, then I would propose that the Appellate Rules Committee consider the following amendment to Appellate Rule 4(a)(4)(A):

**Rule 4. Appeal as of Right--When Taken**

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

* * * * *

**(4) Effect of a Motion on a Notice of Appeal.**

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure or the Rules Governing Proceedings under 28 U.S.C. §§ 2254 or 2255, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b) [of the Federal Rules of Civil Procedure];

(ii) to amend or make additional factual findings under Rule 52(b) [of the Federal Rules of Civil Procedure], whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 [of the Federal Rules of Civil Procedure] if the district court extends the time to appeal under Rule 58 [of the Federal Rules of Civil Procedure];

(iv) to alter or amend the judgment under Rule 59 [of the Federal Rules of Civil Procedure];

(v) for a new trial under Rule 59 [of the Federal Rules of Civil Procedure];~~or~~

(vi) for relief under Rule 60 [of the Federal Rules of Civil Procedure] if the motion is filed no later than 10 days[3] after the judgment is entered; or

(vii) for reconsideration under Rule 11(b) of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 or 2255.

* * * * *

**Committee Note**

**Subdivision (a)(4)(A).** New Rule 11(b) of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 or 2255 concerns motions for reconsideration in Section 2254 and 2255 proceedings. New subdivision (a)(4)(A)(vii) provides that a timely motion under Rule 11(b) has the same effect on the time to file an appeal as the other postjudgment motions listed in subdivision (a)(4)(A).

[3] NB: Changes stemming from the Time-Computation Project make it likely that this 10-day limit will be changed to 30 days.

**U.S. Department of Justice**

Criminal Division

*Office of the Assistant Attorney General* *Washington, D.C. 20530*

January 5, 2007

MEMORANDUM

TO: Professor Nancy J. King
Chair, Subcommittee on
Extraordinary Writs

FROM: Benton J. Campbell
Acting Chief of Staff

SUBJECT: Questions Following the October Meeting of the Full Advisory Committee

This memorandum addresses the questions on extraordinary writs – including questions about the Committee's authority to regulate their use – posed during the relevant discussion at the Committee's October meeting and in your email of November 3, 2006. We look forward to discussing all of this further during our next conference call.

1. Authority of the Committee to Regulate the Use of Extraordinary Writs

Several members of the Committee voiced concern that promulgating the proposed new Rule 37 would go beyond the authority of the Rules Committees. These Committee members expressed concern that the proposed rule would affect substantive rights.

As you know, the Rules Enabling Act explicitly prohibits the promulgation of any rule that would "abridge, enlarge or modify any substantive right." 28 U.S.C. §2072(b). The proposed new Rule 37 does not affect substantive rights, but rather merely attempts to further regularize the procedures by which criminal judgments are collaterally attacked. The best support for this is the consideration and promulgation of Rule 60(b) of the Federal Rules of Civil Procedure, which *abolished* the writ of error *coram nobis* and other extraordinary writs under the Rules Enabling Act process. Rule 60(b) did not impact substantive rights, and the Committees that promulgated the rule so recognized (as did, implicitly, the Judicial Conference and the Supreme Court that approved the rule, and the Congress that passed on it). The Advisory Committee Note that accompanied the rule explicitly and quite clearly lays out that the goal of the rule is to regularize and codify the procedures by which final judgments can be attacked. Fed. R. Civ. P. 60(b), Advisory Committee Note to the 1946 Amendment. The Note states unequivocally that the rule does not "define the substantive law as to the grounds for vacating judgments, but merely prescribes the practice in proceedings to obtain relief." *Id.*

Reviewing courts have also recognized the promulgation of Rule 60(b) as a permissible exercise of the authority granted under the Act to regularize civil procedure. In *Neely v. United States*, 546 F.2d 1059, 1065 (3d Cir. 1976), the Third Circuit found that the abolition of *coram nobis* in Rule 60(b) was part of the usual rules enabling work of regulating the process of civil litigation and did not impact substantive rights. The court stated that "[i]n abolishing *coram nobis*, as well as several other ancient procedural devices, Rule 60(b) did not, and indeed could not, 'abridge, enlarge or modify any substantive right,'" (*quoting* 28 U.S.C. § 2072). The Rules Enabling Act provides "the power to prescribe general rules of practice and procedure," and the *Neely* court, as well as the Committees that promulgated Rule 60(b), found that the writs under consideration were a procedure for raising "substantive rights," not substantive rights in and of themselves. If abolishing these writs was permissible under the Act, than surely limiting *coram nobis* and abolishing those same other writs in Rule 37 would not violate the Act. "'The test must be whether a rule really regulates procedure – the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.'" *Hanna v. Plumer*, 380 U.S. 460, 464 (1965), *quoting Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941). By contrast, a rule that impermissibly alters substantive rights is one that modifies "the rules of decision by which [a] court [resolves disputes]." *Hanna*, 380 U.S. at 464-65.

The proposed Rule 37 does not alter the rules of decision for any claim, but only the procedures for bringing the claim. The writs regulated by the proposed rule are not the exclusive procedures for bringing these substantive claims. The proposed Rule 37 expressly lists other procedures for bringing such claims, just as Rule 60(b) does in the civil context. *See Neely*, 546 F.2d at 1065. The proposed Rule 37 eliminates no substantive right, but at most incidentally affects them. And as the Supreme Court has stated "'[r]ules which incidentally affect litigants' substantive rights do not violate this provision if reasonably necessary to maintain the integrity of

that system of rules.'" *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 552 (1991), *quoting Burlington Northern R. Co. v. Woods*, 480 U.S. 1, 5 (1987).

The procedures by which criminal judgments are attacked collaterally are the province of this Committee. Just as the Advisory Committee to the Civil Rules recognized in 1946 that "[i]t is obvious that the rules should be complete . . . and define the practices with respect to any existing rights or remedies to obtain relief from final judgments," so we believe this Committee has the authority – and ought – to regularize the procedures by which final judgments in criminal cases are challenged. There is considerable and increasing confusion as to availability of these extraordinary writs, and we believe this Committee should provide a clear set of rules for the consideration of collateral attack upon final judgments.

2. Questions from Your Email of November 3, 2006

**A. What is the meaning of "continuing" in the term "continuing and serious adverse consequence" . . . would a one-time problem count (i.e., inability to obtain particular employment)?**

**B. What is the meaning of "serious" adverse consequence? Would job loss count? Reputational injury? Is there settled case law out there defining this term or will this cut back on the present availability of *coram nobis* relief?**

The requirement of continuing and serious adverse consequences is drawn from *Morgan* and the *coram nobis* case law. *E.g.*, *Fleming v. United States*, 146 F.3d 88, 90-91 (2d Cir. 1998); *Hager v. United States*, 993 F.2d 4, 5 (1st Cir. 1993); *United States v. Craig*, 907 F.2d 653, 657-60 (7th Cir. 1990);*United States v. Bruno*, 903 F.2d 393, 396 (5th Cir. 1990); *United States v. Osser*, 864 F.2d 1056, 1059 (3d Cir. 1988). Under this case law, "continuing" means existing in the present day. *Fleming*, 146 F.3d at 90. Legal inability to obtain particular employment would count if it was not speculative. Id.; Howard *v. United States*, 962 F.2d 651, 654 (7th Cir. 1992). Mere reputational loss (which exists for every conviction) would not be sufficient to make a conviction reviewable. *Fleming*, 146 F.3d at 90; *United States v. Keane*, 852 F.2d 199, 202-04 (7th Cir. 1988). This case law will help define the terms, so the proposed rule will not cut back on what would have been available under this case law (although it may in the Ninth and Fourth Circuits, which have not yet adopted that case law, *Fleming*, 146 F.3d at n.3).

**C. Who has the burden of proof on the question of prejudice to the government under the proposed rule? What do existing *coram nobis* cases say about this?**

The burden of proof on prejudice is on the government, except that after five years there is a presumption of prejudice that the defendant could rebut, if he so chose. This presumption was drawn from former Rule 9(a) of the Rules Governing § 2255 and § 2254 Proceedings. *E.g.*, § 2254 Rule 9, 1976 Advisory Committee Notes ("If the delay is more than five years after the judgment of conviction, prejudice is presumed, although this presumption is rebuttable by the petitioner. Otherwise, the state has the burden of showing such prejudice."). All § 2254 and § 2255 petitioners must now meet those statutes' one-year period of limitations (since the prejudice language here appears in subsection (b)(1)(C), which applies only if the defendant cannot meet § 2255's various one-year periods of limitations, it is appropriate and necessary). The *coram nobis* case law on this issue is scant. *See Telink, Inc. v. United States*, 24 F.3d 42, 48 (9th Cir. 1994) (noting that the District Court put the *prima facie* burden on the government).

**D. What counts as prejudice to the government, prejudice in defending *coram nobis* action, prejudice in reprosecuting the petitioner, etc? Is this a change from present law?**

The rule counts both prejudice in responding to the petition and prejudice in reprosecuting the petitioner. Former Rule 9(a) counted the former, and *coram nobis* cases have counted both. *E.g.*, *United States v. Dyer*, 136 F.3d 417, 428 (5th Cir. 1998); *Telink, Inc. v. United States*, 24 F.3d 42, 48 (9th Cir. 1994); *Osser*, 864 F.2d at 1061. Considering the latter type of prejudice is particularly appropriate to petitions under subsection (b)(1)(C), which are brought outside of § 2255's various one-year periods, and indeed after custody is over, when records and evidence often must be destroyed due to storage constraints.

**E. How will prejudice be established, will this mean more evidentiary hearings?**

Prejudice could be shown by proffer by the prosecutor, testimony of a law enforcement agent, or by other evidence. It should not require any more than the single evidentiary hearing that may be necessary for the petitioner to establish the other requirements for *coram nobis*.

**F. What counts as "delay in filing the motion" - is passage of time enough, or must there be some negligence or fault on the part of the petitioner? When is a filing "delayed"?**

The "delay in filing the motion" mean simply the passage of time; no negligence or fault is required. This is because this language appears as part of the prejudice provision in subsection (b)(1)(C), which only applies where the petitions are brought outside of § 2255's various one-year periods, and which generously allows the petitioner to file within one year after the collateral consequences could have been discovered with due diligence. This provision appropriately counterbalances that generosity by considering the prejudice to the government.

**G. Is the five year presumption of prejudice too short? Too long? Why five years?**

See the answer to question C above. Five years is an appropriate period, given the degradation and loss of evidence, memory, witnesses, and prosecutorial personnel that will occur over five years.

**H. How will this proposed rule limit access to DNA testing and potential exonerations? How does it interact with Rule 33 motions for newly discovered evidence?**

18 U.S.C. § 3600 will continue to provide for DNA testing and motions for exoneration. Rule 33 will continue to allow new trial motions for newly discovered evidence. Neither is impeded by the proposal.

**I. Will the proposal change the ability or incentive of a defendant to challenge a prior conviction in a subsequent proceeding (i.e., arguing at sentencing or in a § 2255 application that a prior conviction lacked counsel)?**

Defendants will have the ability to raise such challenges to the extent current law allows them. The proposal would change their incentive only if they have already voided a conviction using *coram nobis*, which removes the need to challenge it again.

**J. Should the list of available remedies surviving the rule include not just § 2241, but also Rules 34 and 59(b)?**

Section 2241 is only available pursuant to § 2255 ¶ 5, and the proposal preserves § 2255 as a remedy, so listing § 2241 is unnecessary, confusing, and likely to generate a lot of improper § 2241 motions by defendants who ought to be filing § 2255 motions. Rule 34 motions have to be filed "within 7 days after the court accepts a verdict or ... plea of guilty," Fed. R. Crim. P. 34(b), and thus are not are not a method of challenging a criminal judgment (despite the rules use of the archaic term "arresting judgment"). Rule 59(b) addresses magistrate's recommendations, which are not final judgments.

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Thomas P. McNamara
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January 5, 2007

**MEMORANDUM**

**TO:** PROFESSOR NANCY J. KING
Chair, Subcommittee on Extraordinary Writs

**FROM:** THOMAS P. McNAMARA
Federal Public Defender

VIDALIA V. PATTERSON
Research and Writing Attorney

**RE:** PROPOSED RULE 37: ADDRESSING QUESTIONS RAISED DURING ADVISORY COMMITTEE MEETING

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Whether Proposed Rule 37 Oversteps the Authority of the Rules Committee

Providing little guidance, the Rules Enabling Act generally states that the "rules shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072. However, the Judicial Conference of the United States (JCUS) has provided further explanation, stating that the basic

charge to the Rules Advisory Committees is "[t]o study the rules of practice and procedure" in each committee's respective field. JCUS- Jurisdiction of committees, Feb. 2006 at 15. We would submit that, although *coram nobis* and other writs may be remedial in nature, by modifying and abolishing existing rights conferred by the writs, proposed Rule 37 affects substantive rights and thus lies outside the authority of the advisory committee as contemplated by both the Rules Enabling Act and the JCUS. Moreover, we were unable to find cases in which the Advisory Rules Committee drafted a rule in which both an act of Congress and Supreme Court precedent were overturned. Such an action appears better left to the legislative branch than by the committee.

The Requirement of Adverse Consequence

Each *coram nobis* case that has examined the requirement of adverse consequences has been factually different.[4] For example, in *United States v. Morgan*, the adverse consequence identified by the Supreme Court involved the possibility of a harsher sentence for the petitioner based on his prior conviction's making him a "second offender." 346 U.S. 502, 504 (1954). Presently, this equates to how the U.S. Sentencing Guidelines accounts for criminal history in the sentence calculation in every case and at times is used to justify an upward departure from that sentence. This is clearly an adverse consequence and was acknowledged as such by the *Morgan* court.

Another example is found in *Hirabayashi v. United States,* 828 F.2d 591, 606-07 (9th Cir. 1987). There, the Ninth Circuit rejected the government's argument that Hirabayashi suffered no continuing adverse consequence from his misdemeanor conviction for failing to comply with a curfew imposed on Japanese aliens and American citizens of Japanese ancestry during WWII. Rather than discussing "continuous and serious" adverse consequences, the court noted that it had "repeatedly reaffirmed the presumption that *collateral consequences* flow from any criminal conviction" and that "[a]ny judgment of misconduct has consequences for which one may be legally or professionally accountable." *Id.* at 606-07 (emphasis added).

The *Hirabayashi* court further referenced two Supreme Court cases, *Sibron v. New York*, 392 U.S. 40 (1968) and *Pollard v. United States*, 352 U.S. 354 (1957). The *Sibron* court held that "a criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction." 392 U.S. at 57. In so holding, the *Sibron* court referred to its previous holding in *Pollard* where the court made a presumption of collateral consequences. *Id.* (Citing *Pollard,* 352 U.S. at 358. ("The possibility of consequences collateral to the imposition of sentence is sufficiently substantial to justify our dealing with the merits.")).

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[1] A thorough search of case law fails to identify opinions that specifically require a *coram nobis* petitioner to demonstrate "continuing and serious" adverse consequences.

It is our position that these collateral consequences include, but are not limited to: affecting the ability to seek employment, damage to reputation, being subject to impeachment on cross-examination, restraint of civil liberties including the right to possess firearms, the prior conviction's serving as a predicate offense for such offenses as felon in possession, characterization as an Armed Career Criminal or Career Offender, and being subject to a higher sentence based on criminal history both at the state and federal levels. All of these are serious and continuing adverse consequences. Moreover, we propose that the term "collateral consequence" more aptly captures what prior courts have found to satisfy the *coram nobis* requirements.

Burden of Proof for Demonstrating Prejudice and Delay Defined in *Coram Nobis*

"It has been held or recognized that the writ of error *coram nobis* is available, without limitation of time, under 28 U.S.C. 1651 as a remedy in order to vacate a judgment of conviction the sentence for which has been served, and that the laches or delay in applying for the writ is not a bar to relief." Romualdo P. Eclavea, Annotation, *Availability, under 28 U.S.C.A. § 1651, of writ of error coram nobis to vacate federal conviction where sentence has been served,* 38 A.L.R. Fed. 617 (2006). As such, we contend that the burden of proof to demonstrate prejudice from delay in applying for the writ would be on the government.

The controlling precedent in this arena is *United States v. Morgan*, 346 U.S. 502 (1954). *Morgan,* which dealt with a denial of counsel, allowed a complainant to bring an action for writ of error *coram nobis* more than twelve years after the date of conviction. In *Morgan*, the Court observed "the writ of *coram nobis* was available at common law to correct errors of fact. It was allowed without limitation of time for facts that affect the 'validity and regularity' of the judgment." *Id.* at 507. The Court found this principle to still be important because, "although the term has been served, the results of the conviction may persist. Subsequent convictions may carry heavier penalties, civil rights may be affected. As the power to remedy an invalid sentence exists, we think, respondent is entitled to an opportunity to attempt to show that this conviction was invalid." *Id.* at 512-513.

The court, however, did place a minimal burden on the party bringing the action if there was a delay. The Court stated in its ruling that "no other remedy being then available and sound reasons existing for failure to seek appropriate earlier relief, this motion in the nature of the extraordinary writ of *coram nobis* must be heard by the federal trial court." *Id.* at 512. Courts have interpreted this to mean that when delay seems to exist, the defendant must show sound reasons for failure to adjudicate the matter in a timely fashion. There has not been a bright line rule established for what is acceptable and what is not.

The general rule—or lack thereof—relating to delay is best summed up by the excerpt below from the American Law Reports: *Delay as affecting right to* coram nobis *attacking criminal conviction*:

> "In most states the questions whether delay, and what delay, will bar relief by *coram nobis* from a conviction of crime cannot be answered wholly independently of the nature of the grounds of the application, nor of the character of the

judgment as being void or merely voidable, assuming the truth of the matters relied upon to set it aside. The most important consideration bearing on the effect of delay is the distinction between a judgment which is void and one which is merely voidable, invalid, erroneous, or affected by some irregularity.

In reason, a void judgment can gain no validity from the passage of time, and to uphold one, particularly in a criminal case, merely because of delay in attacking it, even supposing the guilt of the accused, must amount to an abandonment of the law. A court cannot well say to a defendant: The trial and the supposed judgment against you are utter nullities, but you may be guilty, and you have been for so long a time wrongfully imprisoned without having corrected the error or oversight occurring at your expense, and without having made legally articulate objections, it is now too late to free you or to clear your name but the courts must leave you where you are precisely as though you had been lawfully committed.

So in numerous cases in which the convictions were evidently void, assuming the truth of the allegations made and the affidavits submitted, the view taken was that prolonged delay, even in some cases delay of many years, is not a bar to relief by *coram nobis*. And, in void judgment cases, it has been repeatedly held that delay does not constitute a bar though continued until after the sentence has been fully served. But in other comparable cases the doctrine adhered to was that great delay, or "unreasonable" delay, or lack of "diligence," may in itself justify a denial of the writ or dismissal of the petition.

In cases in which the judgments are not void a variety of considerations may influence the result, according to whether the particular attack is made on grounds of fundamental mistake or oversight resulting in gross injustice or on grounds of error or irregularity concerning matters of a character which when known and dealt with at the trial are ordinarily made grounds of a motion for a new trial or an appeal; and the reasonableness of applying a strict rule of diligence no doubt varies accordingly, and has had an influence on the rulings.

In many cases in which the truth of the matters alleged would presumably not render the judgment void, the proposition laid down in regard to time has in substance been that the applicant for the writ is to be held to a rule of reasonable diligence. In one case, wherein the conviction was not void, the trial court was held to be without authority to set the judgment aside after the great delay that had occurred.

There is very little dissent from the proposition that failure to apply for the writ until after the term at which the conviction was had has expired is not a bar. And, especially when the judgment would be established as void on proof of the matters alleged, the writ need not be applied for within the time allowed for a motion for a

> new trial; but a different rule has been laid down regarding complaints of irregularities occurring at or affecting the trial and which could have been made the ground of a motion for a new trial.
>
> In Florida it has been said that the writ of *coram nobis* must be applied for within such time, if any, as may have been prescribed for the taking out of writs of error generally; but after writs of error were abolished in Florida and review by appeal substituted, it was declared that an application for *coram nobis* must be made within the time prescribed for an appeal, "unless good cause is shown for a longer delay."
>
> An Indiana statute providing that no court shall have jurisdiction to entertain a *coram nobis* proceeding after the lapse of 5 years from the judgment of conviction was applied in certain cases but was later held to contravene the Fourteenth Federal Amendment. Thereafter the Indiana court held that a void judgment may be attacked by *coram nobis* at any time.
>
> A Kansas statute has been construed to remove all objections to delay in applying for *coram nobis* during the time that the "disability" of imprisonment continues.
>
> Not time but a species of failure of the judicial process is of the essence of *coram nobis*. The writ is conceived as an essential safeguard enabling a court in certain extraordinary cases to reach beyond obstructions and intervals in avoidance of insupportable results. It is a sort of birthright not to be exchanged for notions of symmetry or shortsighted convenience; and it must be counted a misfortune when any penchant for rulemaking shall have disabled a court by a proper use of this instrument to deal reasonably and humanely with meritorious cases when and as they are presented. Sufficient unto the day is the decision thereof."

W. W. Allen, Annotation, *Delay as affecting right to* coram nobis *attacking criminal conviction*, 62 A.L.R.2d 432 (2006).

These examples demonstrate that the standard should be "good cause" rather than a bright-line 5 year presumption of prejudice.

Newly Discovered Evidence and *Coram Nobis*

Though never expressly forbidden by the Supreme Court, as a general rule, newly discovered evidence does not on its own furnish a basis for *coram nobis* relief, *Moody v. United States*, 874 F.2d 1575 (11th Cir. 1989); *United States v. Carter*, 319 F. Supp. 702 (M.D. Ga. 1969), judgment aff'd, 437 F.2d 444 (5th Cir. 1971), at least where such evidence is relevant only

to the guilt or innocence of the petitioner. *Moody* at 1577. This rule has been said to apply even in the case of another's confession of guilt. *Clark v. United States*, 370 F. Supp. 92 (W.D. Pa. 1974), aff'd, 506 F.2d 1050 (3d Cir. 1974).

"In some situations, however, newly discovered evidence may be a proper ground for granting relief. For example, if counsel can demonstrate that the newly discovered evidence was of such a nature that the verdict of the trial court would not have been rendered if the evidence had been presented, *coram nobis* relief may be granted. In such a case, however, the attorney advocating for *coram nobis* relief must demonstrate that the new evidence was not known to the defendant or his counsel at the time of the trial and also that it could not have been discovered by either of them in the exercise of reasonable diligence." 18 AM. JUR. *Trials* §1 (2006).

This is likely the rule because of the requirement that *coram nobis* relief may only be secured if no other remedy is available to the applicant. If another remedy is available, such as Rule 33, then that remedy must be utilized. Therefore, the exceptional nature of the writ will allow it to be used in only a few limited circumstances. It is interesting, however, that in *United States v. Morgan, supra* the court states that "the writ of *coram nobis* was available at common law to correct errors of fact." *Morgan* at 507.

Whether the List of Remedies Surviving the Rules Should Include Rules 34 & 59(b)

We see no reason why Fed. R. Crim. P. 34, Arresting Judgment or rule 59(b), Dispositive Matters (before a magistrate judge) should not survive Proposed Rule 37. As the ancient writ of *coram nobis* is a post-sentence, last resort remedy, these should function independently and should not be affected by the new rule.

**MEMORANDUM**

**DATE:** March 27, 2007

**TO:** Advisory Committee on Appellate Rules

**FROM:** Catherine T. Struve, Reporter

**RE:** Item No. 07-AP-D: Defining the term "state"

As explained in the materials concerning the Time-Computation Project, the Chair of the Time-Computation Subcommittee has asked the Advisory Committees (other than the Criminal Rules Committee) to consider whether they wish to adopt a general definition of the term "state" such as that in Criminal Rule 1(b)(9). That Rule provides: "'State' includes the District of Columbia, and any commonwealth, territory, or possession of the United States."

The reason for the request is that the time-computation rules' definition of legal holidays includes state holidays. Because some litigation occurs not within states but rather in D.C. or in a commonwealth or territory, state holidays should include commonwealth and territorial holidays. If each set of Rules is amended to contain a definition like that in Criminal Rule 1(b)(9), then no change to the template's definition of legal holiday would be required. If such a definition is not adopted for the Appellate Rules generally, then it would be necessary to consider adding a definition to proposed Rule 26(a)(6) (concerning legal holidays).

## I. Should the Committee propose to define "state" for purposes of the Appellate Rules?

If the Committee were to adopt a general definition of the term "state," it would affect all Appellate Rules that currently use that term, and would also affect the proposed amendments to Rules 4(a)(1)(B) and 40(a)(1). This Part first considers which entities might be included in the definition. It then reviews each of the relevant Appellate Rules provisions to consider the possible effect of a general definition.

### A. Definitions

The first task is to define the relevant terms. No global statutory definition of territories, possessions or commonwealths appears to exist. The following information from the website of the Department of Interior's Office of Insular Affairs seems helpful in defining the terms (see http://www.doi.gov/oia/Islandpages/political_types.htm):

| | |
|---|---|
| commonwealth | An organized United States insular area, which has established with the Federal Government, a more highly developed relationship, usually embodied in a written mutual agreement. Currently, two United States insular areas are commonwealths, the Northern Mariana Islands and Puerto Rico.... |
| Territory | An incorporated United States insular area, of which only one exists currently, Palmyra Atoll. With an area of 1.56 square miles, Palmyra consists of about fifty small islands and lies approximately one thousand miles south of Honolulu. |
| incorporated territory | Equivalent to *Territory*, a United States insular area, of which only one territory exists currently, Palmyra Atoll, in which the United States Congress has applied the full corpus of the United States Constitution as it applies in the several States. Incorporation is interpreted as a perpetual state. Once incorporated, the Territory can no longer be de-incorporated. |
| territory | An unincorporated United States insular area, of which there are currently thirteen, three in the Caribbean (Navassa Island, Puerto Rico and the United States Virgin Islands) and ten in the Pacific (American Samoa, Baker Island, Guam, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Atoll, the Northern Mariana Islands and Wake Atoll). |
| possession | Equivalent to *territory*. Although it still appears in Federal statutes and regulations, *possession* is no longer current colloquial usage. |
| unincorporated territory | A United States insular area in which the United States Congress has determined that only selected parts of the United States Constitution apply. |
| organized territory | A United States insular area for which the United States Congress has enacted an organic act. |
| unorganized territory | An unincorporated United States insular area for which the United States Congress has not enacted an organic act. |

Assuming that the Office of Insular Affairs' definitions are accurate, a provision that defines states to include any "commonwealth, territory, or possession of the United States"

would include the Northern Mariana Islands,[1] Puerto Rico,[2] American Samoa,[3] Guam,[4] and the

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[1] "In 1976, Congress approved the mutually negotiated Covenant to Establish a Commonwealth of the Northern Mariana Islands (CNMI) in Political Union with the United States. The CNMI Government adopted its own constitution in 1977, and the constitutional government took office in January 1978. The Covenant was fully implemented on November 3, 1986, pursuant to Presidential Proclamation no. 5564, which conferred United States citizenship on legally qualified CNMI residents." U.S. Dep't of Interior, Office of Insular Affairs, Commonwealth of the Northern Mariana Islands, available at http://www.doi.gov/oia/Islandpages/cnmipage.htm (last visited March 24, 2007). *See also* 48 U.S.C. § 1801 (approving "Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America"); *Saipan Stevedore Co. Inc. v. Director, Office of Workers' Compensation Programs*, 133 F.3d 717, 720 (9th Cir. 1998) ("The Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America ... established the Commonwealth as an unincorporated territory of the United States.").

[2] "Puerto Rico, a U.S. possession since 1898, became a commonwealth in 1952. Since then, Puerto Ricans have been considering three significantly different political status options --statehood, enhanced commonwealth, and independence -- as an alternative to the present relationship with the United States. The political status debate continues, in part, because the last plebiscite, held on December 13, 1998, failed to yield a majority vote on any of the five options: 0.29% enhanced commonwealth, 46.4 statehood; 2.5% independence, 0.06% free association, 50.3% none of the above." U.S. Dep't of Interior, Office of Insular Affairs, Puerto Rico, available at http://www.doi.gov/oia/Islandpages/prpage.htm (last visited March 24, 2007). See also 48 U.S.C. § 731 et seq. (provisions relating to Puerto Rico); Puerto Rico Const. Art. I, § 1 (constituting the Commonwealth of Puerto Rico).

[3] "American Samoa, an unincorporated and unorganized territory of the United States, is administered by the U.S. Department of the Interior. It is 'unincorporated' because not all provisions of the U.S. Constitution apply to the territory. The Congress has not provided the territory with an organic act, which organizes the government much like a constitution would. Instead, the Congress gave plenary authority over the territory to the Secretary of the Interior, who in turn allowed American Samoans to draft their own constitution under which their government functions." U.S. Dep't of Interior Office of Insular Affairs, American Samoa, available at http://www.doi.gov/oia/Islandpages/asgpage.htm (last visited March 24, 2007); see also U.S. v. Standard Oil Co., 404 U.S. 558, 558-59 (1972) (per curiam) ("American Samoa is a group of seven small islands in the South Pacific.... By Act of Congress, 45 Stat. 1253, 48 U.S.C. s 1661, pow[e]rs to govern the islands are vested in the President, who has delegated the authority to the Secretary of the Interior ...."); U.S. v. Lee, 472 F.3d 638, 639 (9th Cir. 2006) (terming American Samoa "an unincorporated territory of the United States located in the South Pacific"); 8 U.S.C. § 1101(a)(29) ("As used in this chapter [concerning immigration and nationality] ... [t]he term 'outlying possessions of the United States' means American Samoa and

Virgin Islands.[5]

Technically, such a definition would also include Palmyra Atoll; Navassa Island; Baker Island; Howland Island; Jarvis Island; Johnston Atoll; Kingman Reef; Midway Atoll; and Wake Atoll. But with few or no inhabitants and no local government, these small islands, atolls and reefs seem irrelevant in the contexts covered by the Appellate Rules' references to "states."

### B. Effect on Appellate Rule 22(b)

Appellate Rule 22(b) concerns the certificate-of-appealability requirement imposed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Rule 22(b) currently[6]

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Swains Island.").

[4] "Currently, Guam is an unincorporated, organized territory of the United States. It is 'unincorporated' because not all provisions of the U.S. Constitution apply to the territory. Guam is an 'organized' territory because the Congress provided the territory with an Organic Act in 1950 which organized the government much as a constitution would. The Guam Organic Act currently provides a republican form of government with locally-elected executive and legislative branches and an appointed judicial branch.... Seeking to improve its current political status, the Guam Commission on Self-Determination has drafted a proposed Guam Commonwealth Act, which was approved in two 1987 plebiscites. In February 1988, the document was submitted to the Congress for its consideration and was introduced in four consecutive Congresses--the 100th through the 104th." Dep't of Interior, Office of Insular Affairs, Guam, available at http://www.doi.gov/oia/Islandpages/gumpage.htm (last visited March 24, 2007). *See also* 48 U.S.C. § 1421a ("Guam is declared to be an unincorporated territory of the United States....").

[5] "The U.S. Virgin Islands, an unincorporated territory of the United States, was placed under the administration of the Secretary of the Interior pursuant to Executive Order 5566 in 1931. These islands are under the sovereignty of the United States. The Organic Act of 1936 established local government under the control of the Secretary of Interior. The Revised Organic Act of 1954 is the Virgin Islands analogue of a state constitution, replacing the makeshift Organic Act of 1936. Under the territory's 1954 Revised Organic Act, the Governor of the Virgin Islands was appointed by the President of the United States and reported to the Secretary of the Interior. Under legislation passed in 1968, the Virgin Islands has had a democratically elected form of government since 1970." U.S. Dep't of Interior, Office of Insular Affairs, U.S. Virgin Islands, available at http://www.doi.gov/oia/Islandpages/vipage.htm (last visited March 24, 2007). See also 48 U.S.C. § 1541(a) ("The Virgin Islands as above described are declared an unincorporated territory of the United States of America.").

[6] A separate memo (on Item 07-AP-C) discusses the proposal to amend FRAP 4(a)(4)(A) and 22 in the light of proposed amendments to the Rules governing 2254 and 2255 proceedings.

provides:

> (b) Certificate of Appealability.
>
> (1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue. The district clerk must send the certificate or statement to the court of appeals with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.
>
> (2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals.
>
> (3) A certificate of appealability is not required when a state or its representative or the United States or its representative appeals.

To determine how a FRAP-wide definition of "state" would affect Rule 22(b), it is necessary to determine how courts currently interpret that term as it is used in Rule 22 and in the habeas statutes. Neither the Rule nor the habeas statutes define the term. *See* Rule 22; 28 U.S.C. §§ 2241 - 2254. Caselaw indicates the following:

- District of Columbia: Included
  - The D.C. Circuit Court of Appeals has held that the District of Columbia counts as a state for purposes of 28 U.S.C. § 2253's certificate-of-appealability requirement. *See Madley v. U.S. Parole Com'n*, 278 F.3d 1306, 1309 (D.C. Cir. 2002). The *Madley* court reasoned that it had previously held the pre-AEDPA certificate-of-probable-cause requirement applicable to District of Columbia prisoners, and that Congress had not disapproved that caselaw when it enacted AEDPA. *See id.*
- American Samoa: Unclear
  - Federal caselaw on habeas relief for prisoners convicted in Samoan courts is sparse to nonexistent. In *King v. Morton*, 520 F.2d 1140 (D.C. Cir. 1975), a dissenting opinion referred in passing to the possibility of a habeas claim by King,

who was prosecuted in Samoan court. *See King*, 520 F.2d at 1151 n.6 (Tamm, J., dissenting). But since King's claim (for a declaration that he had a federal constitutional right to a jury trial) was brought against the Secretary of the Interior, Judge Tamm's reference to the possibility of habeas relief says nothing about whether American Samoa would be treated as a state for purposes of the habeas statutes.

- Guam: Included

  - The Ninth Circuit has held that "Guam prisoners may seek federal habeas relief under 28 U.S.C. § 2254 to the same extent as state prisoners." *White v. Klitzkie*, 281 F.3d 920, 923 n.3 (9th Cir. 2002).

- Northern Mariana Islands: Apparently included

  - Section 403(a) of the Covenant To Establish a Commonwealth of the Northern Mariana Islands in Political Union With the United States of America provides: "The relations between the courts established by the Constitution or laws of the United States and the courts of the Northern Mariana Islands with respect to appeals, certiorari, removal of causes, the issuance of writs of habeas corpus and other matters or proceedings will be governed by the laws of the United States pertaining to the relations between the courts of the United States and the courts of the several States in such matters and proceedings, except as otherwise provided in this Article...." Pub. L. No. 94-241, March 24, 1976, 90 Stat. 263.

  - This provision is codified at 48 U.S.C. § 1824: "The relations between the courts established by the Constitution or laws of the United States and the courts of the Northern Mariana Islands with respect to appeals, certiorari, removal of causes, the issuance of writs of habeas corpus, and other matters or proceedings shall be governed by the laws of the United States pertaining to the relations between the courts of the United States including the Supreme Court of the United States, and the courts of the several States in such matters and proceedings, except as otherwise provided in article IV of the covenant...."

  - In one recent case, the Supreme Court of the Northern Mariana Islands relied on the availability of habeas corpus review to support its conclusion that the defendant was not entitled to a new trial. *See Commonwealth of Northern Mariana Islands v. Diaz*, 2003 WL 24270039, at *3 & n.14 (N. Mariana Islands Sept. 4, 2003) (stating that despite AEDPA's one-year statute of limitations "ample time is still available to remedy errors made at trial with a writ of habeas corpus").

- Puerto Rico: Included

    - The First Circuit has applied the habeas statutes to habeas petitions by prisoners convicted in the courts of the Commonwealth of Puerto Rico. *See, e.g., Maldonado-Pagan v. Malave*, 145 Fed.Appx. 375, 376 (1st Cir. 2005) (unpublished opinion) (reviewing district court's denial of habeas petition filed by Puerto Rico prisoner under 28 U.S.C. § 2254).

- Virgin Islands: Included

    - The Third Circuit has held that Section 2254 "applies to the District Court of the Virgin Islands so as to confer jurisdiction upon it to entertain habeas corpus petitions from those in custody pursuant to a judgment of the Territorial Court." *Walker v. Government of Virgin Islands*, 230 F.3d 82, 87 (3d Cir. 2000). The *Walker* court held that Section 2253(c)'s certificate-of-appealability requirement applies to petitioners in custody pursuant to a Virgin Islands judgment. *See id.* at 89.

In sum, courts have held that the District of Columbia, Guam, Puerto Rico and the Virgin Islands count as states for purposes of the habeas statutes. The status of American Samoa and the Northern Mariana Islands is less clear. In any event, defining "state," for FRAP purposes, to include all these entities should not cause a problem in the application of Appellate Rule 22(b): If, for example, American Samoa is not subject to the federal habeas framework, the question of Rule 22(b)'s applicability to American Samoa will simply never arise.

### C. Effect on Appellate Rule 29(a)

Rule 29(a) 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.

I found no caselaw and no local rules explaining the scope of this provision. It explicitly extends to the District of Columbia. It also seems clearly to extend to Puerto Rico and the Northern Mariana Islands, which are commonwealths. If the Rule's reference to "Territory" with a capital "T" were read to invoke the technical definition provided by the Office of Insular Affairs – an "incorporated United States insular area" – that reference would make no current sense, since it would encompass only the unpopulated Palmyra Atoll. It makes more sense, instead, to interpret the Rule's reference to "Territory" to encompass "territories" with a small "t" – in which case the

term would encompass American Samoa, Guam and the Virgin Islands.[7] Such an interpretation technically would also encompass the other U.S. territories, but – since those territories have few or no inhabitants and no local governments – there would be no occasion for Rule 29 to apply to them.

If a FRAP-wide definition of "state" were adopted, FRAP 29(a) could be amended to refer simply to "the United States or its officer or agency or a state."

### D. Effect on Appellate Rule 44(b)

Rule 44(b) provides:

> (b) Constitutional Challenge to State Statute. If a party questions the constitutionality of a statute of a State in a proceeding in which that State or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the attorney general of the State.

This provision was added in 2002. The 2002 committee note does not define "State." The note explains that the amendment is designed to implement 28 U.S.C. § 2403(b).

Section 2403(b) provides:

> In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

There is no statutory definition of "state" for purposes of Section 2403(b). The statute has been

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[7] The National Association of Attorneys General lists among its members not only the attorneys general of the fifty states but also "the chief legal officers of the District of Columbia, the Commonwealths of Puerto Rico (Secretary of Justice) and the Northern Mariana Islands, and the territories of American Samoa, Guam, and the Virgin Islands." http://www.naag.org/naag/about_naag.php, last visited March 24, 2007.

applied to intervention by the Puerto Rico Attorney General, *see Cruz v. Melecio*, 204 F.3d 14, 18 (1st Cir. 2000); *see also In re Casal*, 998 F.2d 28, 30 (1st Cir. 1993), but I found no caselaw applying the statute to intervention by the other entities discussed in this memo.[8]

It thus seems that adopting a general definition of "state" that encompasses the other entities mentioned in this memo would at least clarify and perhaps expand the application of Rule 44(b). One question is whether such an expansion would be appropriate in the light of the fact that Rule 44(b) was designed to implement a statutory provision. There would, at any rate, be no problem with rulemaking power, in that the change would not seem to modify substantive rights. Another question is whether Rule 44(b) would make sense as applied to the other entities. It seems that constitutional challenges could arise with respect to statutes enacted by any of the political entities discussed in this memo; though some of the entities are not subject to all federal constitutional provisions, all the entities are subject to some constitutional constraints. And each entity presumably has a chief legal officer – whether or not termed the "attorney general" – who could receive the Rule 44(b) certification.

### E. Effect on Appellate Rule 46

Rule 46(a)(1) provides:

> (a) Admission to the Bar.
>
> (1) Eligibility. An attorney is eligible for admission to the bar of a court of appeals if that attorney is of good moral and professional character and is admitted to practice before the Supreme Court of the United States, the highest court of a state, another United States court of appeals, or a United States district court (including the district courts for Guam, the Northern Mariana Islands, and the Virgin Islands).

I was unable to find caselaw that addresses whether "state," as used in Rule 46, includes the entities discussed in this memo. The Ninth Circuit held in *In re Rothstein* that

> [t]he Trust Territory of the Pacific Islands is not a territory nor an insular possession of the United States, but was only held under a trusteeship agreement with the Security Council of the United Nations. Admission to the High Court of the Trust Territory of the Pacific Islands does not qualify counsel to practice in the United States District Court for the Northern District of California or in the United States Court of Appeal for the Ninth Circuit.

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[8] We could seek information on this question – and the question, discussed below, concerning Rule 46 – by asking Fritz Fulbruge to make inquiries among the circuit clerks.

*In re Rothstein*, 884 F.2d 490, 492 (9th Cir. 1989). But the *Rothstein* court's mention of territories and possessions is less probative than it might be, because the court was also interpreting a Northern District of California local rule which authorized admission of "attorneys of good moral character who are active members in good standing of the bar and who are eligible to practice before any United States Court or the highest court of any State, Territory or Insular Possession of the United States." *Rothstein*, 884 F.2d at 491.

Thus, as with Rule 44, adopting a general definition of "state" that encompasses the other entities mentioned in this memo would at least clarify and perhaps expand the application of Rule 46. With respect to Rule 46, the policy question for the Committee is whether admission to the highest court of each relevant political entity (Guam, the Northern Mariana Islands, etc.) serves as an appropriate qualification for practice before the federal courts of appeals.

### F. Effect on Item No. 06-06

A pending agenda item – Item No. 06-06 – concerns Virginia's proposal to amend 4(a)(1)(B) and 40(a)(1) so as to treat state-government litigants the same as federal-government litigants for purposes of the time to take an appeal or to seek rehearing. If that proposal is adopted, then those Rules would, of course, be among the Rules that refer to states. If the Committee decides to proceed with Virginia's proposal, and if the Committee feels that the proposal should extend to D.C., the commonwealths, and the territories, then these proposed amendments would mesh comfortably with a FRAP-wide definition of the term "state."

## II. Crafting the proposed amendment

If the Committee is inclined to propose a general definition of the term "state," the next questions concern placement and drafting. Adding a new Rule 49 might be a cumbersome way to accomplish the change. An alternative would be to place the definition in Rule 1; that would parallel the placement of the corresponding definition in Criminal Rule 1.

When drafting the definition, it may make sense to follow the wording employed in the Criminal Rules. The Office of Insular Affairs' commentary suggests that including "possession" may be unnecessary because "possession" is equivalent to "territory" and is no longer commonly used; on the other hand, including the term probably cannot hurt and might help to avoid confusion stemming from the use of the term in older caselaw.

**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)** ~~[Abrogated]~~ **Definition.** In these rules, "state" includes the District of Columbia and any commonwealth, territory, or possession of the United States.

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

**Committee Note**

**Subdivision (b).** New subdivision (b) defines the term "state" to include the District of Columbia and any commonwealth, territory or possession 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.

**MEMORANDUM**

**DATE:** March 26, 2007

**TO:** Advisory Committee on Appellate Rules

**FROM:** Catherine T. Struve, Reporter

**RE:** Item No. 06-07

Howard J. Bashman, an appellate litigator who runs a popular weblog on appellate practice,[1] has suggested that the Advisory Committee on Appellate Rules "should consider proposing a Federal Rule of Appellate Procedure that would require all federal appellate courts to give at least 10 days' advance notice of the identities of the judges assigned to an oral argument panel."[2]

Part I of this memo summarizes the circuits' current approaches to the question. Part II reviews arguments in favor of Bashman's proposed rule. Part III considers potential shortcomings of early notification, while Part IV considers whether a national rule on the subject would be desirable.

## I. Circuits currently vary in their willingness to announce panel composition in advance of oral argument.

If the current practices of the various circuits were depicted graphically by length of time between panel announcement and argument date, they would form a bell curve, with most (i.e., eight) circuits clustered at or near the seven-day mark. The tail on one end of the curve would include two circuits that provide one or two months' (or more) advance notice, and the tail on the other end would include three circuits that do not announce the panel until the day of argument. The following list shows the circuits' current practices. The list is arranged roughly by length of time between panel composition announcement and oral argument (from longest to shortest):[3]

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[1] See http://howappealing.law.com/.

[2] Howard J. Bashman, *Who's on the Argument Panel: Why Ignorance Isn't Bliss*, April 3, 2006, available at http://www.law.com/jsp/article.jsp?id=1143812716056. All cites in this memo to Bashman are to this article.

[3] Precision in ordering the periods is impossible since they are measured in different ways. I assume for purposes of the analysis that the periods set in days are counted without

- DC Circuit, civil appeals: at least 2 months in advance, and generally before the briefs are filed

  - "Ordinarily, the Court discloses merits panels to counsel in the order setting the case for oral argument. In criminal appeals, unlike most civil appeals, the panel usually will not be disclosed until after the parties have filed briefs. This is because the Court does not make the tentative decision to schedule oral argument in most criminal cases until after the appellant's brief has been filed.

    "In addition, the Clerk's Office posts in the Court's public office and on the Court's web site, the calendar for a sitting period approximately 2 months in advance. The panel is subject to unannounced change when regularly scheduled judges recuse themselves or otherwise become unavailable to sit.

    "The timing of disclosure of the merits panel when a case is decided without oral argument pursuant to Circuit Rule 34(j) depends on whether the case had been calendared for argument. If originally scheduled for argument, the panel (subject to substitutions) will be the one announced in the order setting the case for argument. If the case has not been calendared for argument, counsel will learn the identity of the panel from the order stating that the case will be decided without argument." U.S.Ct. of App. D.C.Cir. Handbook II.B.8.

  - "In civil cases, oral argument dates and panels are usually set before the briefs are filed ...." U.S.Ct. of App. D.C.Cir. Handbook IV.A.3.

- Eighth Circuit: One month prior to session

  - "J. Calendaring. .... Printed calendars are mailed (or, in the event the attorney participates in the court's electronic noticing program, are sent electronically) to counsel approximately one month before each court session. Counsel should notify the clerk of potential conflicts well in advance of scheduling. Requests to change the schedule after the calendar has been prepared will be referred to the panel of judges assigned the case and will be granted only for good cause. Counsel's obligation in other courts ordinarily will not be considered good cause...." U.S.Ct. of App. 8th Cir. IOP III.J.

  - "K. Oral Argument. .... 2. Identity of Panel. The printed argument calendar lists the judges on each panel. Panel changes may occur after publication of the

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excluding intermediate weekends and holidays. But see Appellate Rule 26(a) ("The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute .... (2) Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days, unless stated in calendar days.").

argument calendar, and the courtroom deputy confirms the composition of the panel on the day of argument." U.S.Ct. of App. 8th Cir. IOP III.K.2.

- Sixth Circuit: Two weeks before date of argument
  - "Two weeks before the date of oral argument, the names of the judges who will hear the case may be learned by contacting the clerk's office." U.S.Ct. of App. 6th Cir. IOP 34(c)(2).
- Third Circuit: 10 days before first day of sitting
  - "No later than ten (10) days prior to the first day of the panel sitting, the clerk communicates to counsel in each case listed the names of the members of the panel and whether the case is to be orally argued." U.S. Ct. App. 3d Cir. IOP 2.5.
- Eleventh Circuit: One week prior to session (or earlier if ordered by court)
  - "7. Identity of Panel. The clerk's office may disclose the names of the panel members for a particular session one week in advance of the session, or earlier as determined by the court. At the time the clerk issues a calendar assigning an appeal to a specific day of oral argument, the clerk will advise counsel of when the clerk's office may be contacted to learn the identity of the panel members." U.S.Ct. of App. 11th Cir. Rule 34-4
- First Circuit: Seven days prior to session
  - "B. Disclosure of Panel in Advance of Oral Argument. The names of the judges on each panel may be disclosed for a particular session seven (7) days in advance of the session. Once the panel is made public, the Court will not normally grant motions for continuances or for a change in argument date during the same session." U.S.Ct. of App. 1st Cir. IOP VIII
- Fifth Circuit: One week prior to session[4]
  - "Identity of Panel--The clerk may not disclose the names of the panel members for

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[4] The Fifth Circuit appears to have followed a different approach as recently as eleven years ago. A 1996 article explained: "The Fifth Circuit ... notes in its internal operating procedures ... that on the day of argument counsel are required to check in with the clerk 30 minutes before court convenes. 'At that time the names of the judges who will hear the case will be made known.' USCS Court of Appeals Rules, 5th Cir., I.O.P. following local rule 34." Mary L. Jennings, *Should Advocates Be Informed of the Identities of Members of Judicial Panels Prior to Hearings?*, 6 Fed. Circuit B.J. 41, 41 (1996).

a particular session until 1 week in advance of the session." U.S.Ct. of App. 5th Cir. Rule 34.

- Ninth Circuit: Seven days prior to sitting week

  - "The composition of panels shall be made public on the first working day of the week preceding argument. Calendars shall be posted in the San Francisco, Pasadena, and Seattle offices of the Clerk of the Court of Appeals and shall be forwarded to the clerks of the district courts of the circuit with a request that the calendar be posted. Only under exceptional circumstances will the court consider motions for continuances filed within 14 days of the hearing date." Ninth Circuit Court of Appeals General Order 3.5, available at http://www.ca9.uscourts.gov/ca9/Documents.nsf/174376a6245fda7888256ce5007d5470/f769f3ad364d1b6d88256864007a1479?OpenDocument.

- Tenth Circuit: Seven days prior to argument

  - "Attorneys may obtain the identity of the members of the panel hearing a case at any time within seven days of oral argument by viewing the posted calendar on the Tenth Circuit website." Practitioner's Guide to the United States Court of Appeals for the Tenth Circuit VIII.A. (6th revision Dec. 2006), available at http://www.ca10.uscourts.gov/downloads/pracguide_web.pdf.

- Second Circuit: The Thursday prior to sitting week

  - "The names of the judges are not made public until noon on Thursday of the week before the panel sits." U.S. Court of Appeals for the Second Circuit, "How to Appeal Your Civil Case," available at http://www.ca2.uscourts.gov/; see also U.S. Court of Appeals for the Second Circuit, "How to Appeal Your Criminal Case," available at http://www.ca2.uscourts.gov/.

- Fourth Circuit: The morning of the argument

  - "The composition of each panel usually changes daily, and the identity of the argument panel is kept confidential until the morning of oral argument." U.S. Court of Appeals for the Fourth Circuit, "Oral Argument Procedures," available at http://www.ca4.uscourts.gov/pdf/oaproc.pdf.

- Seventh Circuit: The day of argument (except in some cases that were previously argued)

  - "The identity of the three judges on any panel is not made public until the day the cases are argued. An exception to this procedure occurs when a previously argued case is on the docket for a subsequent hearing. In this situation the original panel

may be reconstituted to hear the second appeal." Practitioner's Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit III (2003 ed.), available at http://www.ca7.uscourts.gov/rules/handbook.pdf.

- Federal Circuit: The day of argument

  - See Samuel P. Jordan, *Early Panel Announcement, Settlement and Adjudication*, at 7, forthcoming Brigham Young University Law Review, 2007 (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=929487&high=%20early%20panel%20announcement).

  - See below for a discussion of the Federal Circuit's recent experiment with earlier announcement.

## II. Arguments for earlier disclosure of panel composition

The strongest arguments in favor of Bashman's proposal are that it would help lawyers to prepare for argument, that it could provide particular benefit to lawyers who lack experience arguing before the relevant court, and that it might make recusal requests somewhat less awkward. Some have also suggested that very early disclosure (such as that provided in the D.C. Circuit) could encourage settlement; but the evidence for this effect is weak.

### A. Facilitating advocates' preparation for argument

Bashman observes that advocates would like to know the identity of the panel so that they can "attempt to craft their oral presentations to attract the support" of panel members. As another commentator has noted, "[l]awyers are taught beginning in law school that it is essential to effective advocacy to know how particular courts and judges have ruled in the past." Mary L. Jennings, *Should Advocates Be Informed of the Identities of Members of Judicial Panels Prior to Hearings?*, 6 Fed. Circuit B.J. 41, 43 (1996).

### B. Fairness to advocates with less experience arguing in the relevant circuit

Bashman notes that "advance disclosure helps to level the playing field for those who do not appear often before a given federal appellate court. Someone who regularly appears before the 4th Circuit might not need more than a moment's notice to tailor her arguments to a given three-judge panel, while someone who knows nothing about that court's judges would need a bit more advance notice in order to acquire the same information already possessed by the repeat player."

### C. Facilitating recusal requests

Bashman argues that earlier panel disclosure "allows the attorneys and their clients, before oral argument occurs, to examine whether any grounds for recusal exist that the judges assigned to the case may have overlooked." Although lawyers may request recusal after argument, Bashman asserts that "the strategic considerations at that juncture are different":

> A party may be reluctant to seek recusal of a judge who appeared to favor that party's position at oral argument, even if the ground for recusal is mandatory. And if a party seeks to recuse a judge who did not appear to favor that party's position at oral argument, the recusal motion may be viewed by the court or the judge in question with more skepticism. Finally, a post-oral argument recusal threatens to inconvenience the other two judges on the panel in a way that a pre-oral argument recusal might not. Adding a replacement judge to the panel after oral argument, rather than before, presents the possibility that the appeal will need to be reargued.

### D. Encouraging settlement

The D.C. Circuit discloses the panel members' identity earlier than any other circuit; in civil cases, the panel disclosure occurs before the parties' briefs are filed. This practice dates from 1986. Speaking in 1992, then-Judge Ruth Bader Ginsburg stated that she didn't "remember why we adopted the policy, apart from the thought that it might encourage people to settle."[5] Judge Harry Edwards elaborated on this explanation:

> There is no significant statistical support for the premise that judges' politics routinely determine the outcomes of cases. Nonetheless, this false reality provides a basis to encourage litigants and lawyers with weak cases on the merits to withdraw before argument.... Upon learning the names of the judges assigned to hear a case, some attorneys abandon an appeal on the assumption that the judges on the panel will be unreceptive to their arguments. In blaming the withdrawal (or settlement) of their cases on the composition of judicial panels, rather than on an absence of merit in their cases, attorneys and litigants are able to save face while simultaneously freeing the court system of unnecessary burdens.

140 F.R.D. at 580.[6]

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[5] Proceedings of the Fifty-second Judicial Conference of the District of Columbia Circuit 140 F.R.D. 481, 579 (1992).

[6] Advance knowledge of panel composition could affect parties' expectations concerning the outcome of the appeal even if the parties do not base those expectations on assumptions concerning the judges' political views. For example, Polk Wagner and Lee Petherbridge have

Writing eight years later, Richard Revesz questioned both Judge Edwards' view that the decisional process is non-ideological[7] and his assertion that early announcement of the panel members' identity facilitates settlement. Revesz modeled the effects of early panel disclosure on settlement, and concluded that "the claim adduced by proponents of the D.C. Circuit's rule is misplaced":

> In asserting that this rule would reduce the number of litigated cases, they appear to have focused only on the fact that certain cases would be abandoned if the composition of the panel was unfavorable. But there is another category of cases for which the D.C. Circuit's rule induces litigation. By making it possible to shed cases in stage 2 *[i.e., after panel announcement but before filing briefs]* if the composition of the panel is unfavorable, the D.C. Circuit's rule turns cases that would otherwise have a negative net expected return for the appellant into ones that have a positive net expected return.

Richard L. Revesz, *Litigation and Settlement in the Federal Appellate Courts: Impact of Panel Selection Procedures on Ideologically Divided Courts*, 29 J. Legal Stud. 685, 698 (2000). Revesz argues that by raising the expected value of an appeal under certain circumstances,[8] the D.C. Circuit's early panel disclosure might actually lead some litigants to appeal when they would not have done so absent early disclosure. After considering various possible settlement dynamics, Revesz concludes that "no categorical claim can be made about whether [the D.C. Circuit practice] has the desired effect" on settlement." Id. at 708.

More recently, an empirical study compared voluntary dismissal rates "in civil non-administrative cases filed in the Second, Seventh and D.C. Circuits, and [found] no significant

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argued "that Federal Circuit claim construction analysis is related in a statistically significant way to the composition of the panel of judges that hears and decides the case" due to differences in the judges' interpretive methodologies. R. Polk Wagner & Lee Petherbridge, Is the Federal Circuit Succeeding? An Empirical Assessment of Judicial Performance, 152 U. Pa. L. Rev. 1105, 1169 (2004).

[7] See Richard L. Revesz, Litigation and Settlement in the Federal Appellate Courts: Impact of Panel Selection Procedures on Ideologically Divided Courts, 29 J. Legal Stud. 685, 685 & n.1 (2000) (citing Richard L. Revesz, Environmental Regulation, Ideology, and the D.C. Circuit, 83 Va. L. Rev. 1717 (1997)).

[8] In addition to the example noted in the block quote in the text, Revesz also argues that in some instances the appeal's expected value to the appellant could rise because, if the members of the assigned panel turn out to be ideologically homogenous and favorable to the appellant, the appellant might seek to persuade the panel to adopt a more extreme position than the appellant would advocate if the panel's identity were unknown at the time of briefing. See Revesz, *Impact of Panel Selection Procedures*, 29 J. Legal Stud. at 701.

difference between the circuits. If anything, the rate of voluntary dismissal appears lower in the D.C. Circuit than in the other circuits studied, even when controlling for subject matter and governmental involvement." Samuel P. Jordan, *Early Panel Announcement, Settlement and Adjudication*, at 8. Mindful that comparisons across circuits can be tricky, Jordan also looked "at voluntary dismissal activity within the D.C. Circuit alone." Id. Jordan found that "[o]f 63 cases in which a panel was assigned, 13 were dismissed voluntarily prior to oral argument," and he characterizes this as providing "weak support that the announcement rule affects behavior in some cases." Id.

## III. Arguments against earlier panel disclosure

Some of the arguments against early panel disclosure are simply the flip side of the arguments *for* it: Some judges prefer not to encourage lawyers to tailor their presentation to particular panel members. Some observers have also suggested that early disclosure of panel members may lead litigants to attempt to defer the argument date or even to moot the appeal. And a few commentators have suggested that such strategic behavior could negatively affect the development of circuit law.

### A. Undue focus on panel judges' prior opinions

Bashman suggests that courts which do not announce panel composition prior to the argument date "are concerned that advance disclosure invites lawyers to attempt to pander to the judges at oral argument." But he considers this a relatively slight problem and one which, in any event, cannot be eliminated by avoiding early disclosure of the panel members' identity.

Some judges would disagree with Bashman's dismissal of this problem. In 1983, then-Chief Judge Markey stated that he found it "a little demeaning because of the implications when lawyers go running around psychoanalyzing judges by reading the tea leaves in their opinions ahead of time." The First Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit, 100 F.R.D. 499, 511-512 (1983). Judge J. Harvie Wilkinson, III, speaking in 1992, discussed his own views and those of others on the Fourth Circuit:

> Although we are divided on it, we recognize that every lawyer in the room or 90 percent of the lawyers in the room would rather know the names of the panel. I think it has an insidious effect on the conception of law. It seems to me that the law of the Circuit is a corporate whole which is greater than the individual men and women who may serve on a particular panel. I guess I am interested in having someone approach a case with the law of the Circuit in its entirety in mind and not the identity of the members of the panel.

Proceedings of the Fifty-second Judicial Conference of the District of Columbia Circuit, 140

F.R.D. 481, 579 (1992).

Then-Judge Breyer agreed with Judge Wilkinson:

> I have always thought that one of the reasons we wear black robes is that justice should be anonymous. The rule of law should be independent of the personality of the judge that happens to be hearing the case. Although this does not always happen, nonetheless it is the ideal. Let me add I see particular value in oral argument in its giving me an opportunity to hear how the lawyer who has lived with the case will characterize it, and what that lawyer thinks is most important. I realize that my first reaction from the briefs may have been wrong. Given my objectives, I must hope that the lawyer's characterization does not take a certain form because he finds me sitting there instead of one of my colleagues. The presentation ideally in that respect will be neutral.

140 F.R.D. at 579-80.

### B. Strategic maneuvers to postpone argument or to moot the appeal

Bashman notes that "appellate courts that do not provide advance disclosure of oral argument panel composition may also be concerned that lawyers who learned in advance of oral argument that the panel consisted of judges not viewed as favorable to their client's position would try to postpone oral argument in the hope, if successful, of drawing a different, more favorable panel." But Bashman points out that strategic behavior can be discouraged if the court requires the attorneys to report any days when they will be unavailable *before* the court announces the panel composition for a given date.

It is also possible, though, that a party might simply seek to moot the appeal rather than attempting to defer the date of the argument. As I discuss in Part IV below, some have suggested that this occurred in one case argued before the Federal Circuit during that circuit's experiment with advance panel announcement. Stephen Vladeck has argued that the possibility of strategically mooting an appeal can disproportionately benefit repeat player litigants: "For litigants in a position where individual cases are less important than systematic legal rules, e.g., the government, groups like the Sierra Club in environmental cases, etc., there is an obvious advantage in preventing 'bad' panels on the courts of appeals from reaching the merits when another case might allow a 'better' panel to decide the same legal question."[9]

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[9] Stephen I. Vladeck, Panel Shopping and Voluntary Mooting: A Problem Worth a Solution?, posted at http://prawfsblawg.blogs.com/prawfsblawg/2006/06/panelshopping_a.html.

### C. Possible effects on the development of the law

A related concern is that litigants' strategic behavior – as to the content of briefs or as to settlement – could affect the development of circuit law.

Richard Revesz has argued that if a party knows the panel's identity before it files its brief, and if the panel members all fall at one extreme of the court's ideological spectrum, then the party may try to persuade the court to adopt a more extreme position in deciding the case. See Revesz, *Impact of Panel Selection Procedures*, 29 J. Legal Stud. at 701; see also id. at 709 (arguing that an early disclosure practice like that followed in the D.C. Circuit "is likely to reduce the coherence of a circuit's case law"). Such an effect, if it were to exist at all, presumably would manifest itself in the D.C. Circuit, which discloses the panels in civil appeals before the briefs are filed.

Other commentators have focused on the choice between disclosing panels prior to the argument and disclosing panels only on the day of argument. To the extent that early disclosure alters settlement rates based on the identity of the panel members, that differential in settlement rates might affect the development of circuit law. Assuming that such an effect might occur, commentators are divided as to its desirability. One commentator has suggested that early-announcement policies are more likely to facilitate settlement in cases where a given panel's decision is predictable than in cases where the panel's decision is not predictable, and that the resulting case-selection effect would be salutary:

> Because the announcement of less predictable panels is less likely to lead to settlement, and because those less predictable panels are more likely to be ideologically diverse, the [early-announcement] procedure should encourage ideological diversity on panels that ultimately decide cases and write opinions.

Jordan, *Early Panel Announcement, Settlement and Adjudication*, at 44.

However, Polk Wagner and Lee Petherbridge take the opposite view, arguing that the variation among Federal Circuit judges' claim construction approaches means that

> some panels will be more predictable than others--for example, those with a majority of "swing" judges or a combination of all three [methodological] types. Given this understanding, one can predict that settlement rates when panel composition is known will be unequally distributed, with less settlement of panels that are relatively less predictable. This, then, has the potential of affecting the jurisprudence, with a larger proportion of opinions being decided by panels (and written by judges) that are less predictable. This, obviously, could have long-term negative effects on the overall performance of the court.

Wagner & Petherbridge, *Is the Federal Circuit Succeeding?*, 152 U. Pa. L. Rev. at 1175.

## IV. Would a national rule be desirable?

Bashman's proposed 10-day-minimum disclosure rule would alter practice in nine circuits, though it would constitute a significant change in only three. The question before the Committee is whether a national rule would be desirable at this point in time. The most significant advantages of early disclosure are likely to exist in all circuits, but to differing degrees. The downsides of the practice may vary in significance from circuit to circuit.

Practitioners are likely to support the early disclosure of panels' identity regardless of which circuit they practice in. The significance of the hardship to practitioners when early disclosure does not occur, though, may vary with the size of the circuit. There are 16 judges on the Federal Circuit; 13 on the Fourth Circuit; and 14 on the Seventh Circuit. Bashman concedes that "the number of judges serving on each of the non-disclosure circuits is small enough that it is possible to undertake the additional work (and attendant expense to the client) necessary to prepare for the possibility that any of those courts' active and senior judges might be on the oral argument panel." He notes, however, that "[i]t would be next to impossible to anticipate in advance ... whether a visiting judge or district judge might be on the panel and, if so, who it might be."

Judges' preferences concerning early disclosure seem to vary across circuits, as evidenced by the range of circuit approaches to the question. It may be that judges in some circuits are especially troubled by the notion that advocates would prepare for argument with particular panel members in mind. The circuits may have had different experiences with respect to litigant behavior; it is possible, for example, that a circuit's negative experience with strategic responses to panel disclosure could lead a circuit to reject early disclosure. Though the evidence is limited, it may be that the Federal Circuit's recent experience fits this pattern. The likelihood of strategic behavior may vary with the mix of case types and the culture of the relevant bar; if so, that might create variation across circuits in terms of the salience of the disadvantages identified in Part III.

There is some evidence that the general trend in recent years has been toward the adoption of early disclosure. Speaking in 1983, then-Chief Judge Howard T. Markey of the Federal Circuit remarked that "[t]here is only one circuit in the country" that "notif[ies] counsel regarding who will be sitting." The First Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit, 100 F.R.D. 499, 511 (1983). The summary listed in Part I clearly shows that this is no longer the case.

The Federal Circuit's late-2004-to-early-2006 experiment with early disclosure might be seen as a continuation of this trend – but it also suggests that the remaining non-disclosing circuits may resist adoption of early disclosure. Bashman notes that "[t]he Federal Circuit recently experimented with advance disclosure, but that court's experience was so negative that the experiment promptly terminated with a reaffirmation of that court's refusal to provide advance disclosure of panel composition." Bashman suggests that the Federal Circuit's decision

to revert to its prior practice of disclosing the panels only on the day of argument was "based on that court's negative reaction to an increased amount of attorney pandering at oral argument." It is unclear, however, whether "pandering" was the only problem. As Samuel Jordan has noted,

> [t]here were early signs that the new procedure was indeed affecting litigant behavior. Most notably, the parties informed the court during oral argument in *Apotex v. Pfizer* that Pfizer had executed a covenant not to sue for patent infringement. The covenant not to sue rendered the appeal moot, and the court promptly issued a short opinion dismissing the case for lack of jurisdiction.... [O]ne member of the panel ... remark[ed] during argument that "maybe posting paneling is a very, very bad thing." And it would appear that Judge Mayer was not alone in that sentiment; as of February 6, 2006, the court has reverted to its original procedure of announcing panels on the day of a scheduled argument.

Jordan, *Early Panel Announcement, Settlement and Adjudication*, at 6-7.

## V. Conclusion

It seems likely that Bashman's proposal would enjoy the support of many members of the bar – but that the proposal would garner opposition from judges on at least one, and probably all three, of the circuits that currently reject early disclosure. It seems possible that varying judicial preferences, and perhaps varying local conditions, account for the differences among circuits' approaches to this question. The need for nationwide uniformity may be somewhat less then in other matters such as briefing requirements; no litigant's brief will be rejected as a result of circuit variations in the disclosure of panel identity. (Admittedly, some of the circuits make it quite difficult to find a description of their disclosure practice, but presumably an interested practitioner can easily find the answer by calling the clerk's office.)

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## Who's on the Argument Panel: Why Ignorance Isn't Bliss

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The federal appellate courts are divided over an issue that rarely receives any attention: Whether lawyers who will orally argue an appeal should receive advance notice of which three judges have been assigned to the oral argument panel.

The overwhelming majority of federal appellate courts -- the D.C., 1st, 2nd, 3rd, 5th, 6th, 8th, 9th, 10th and 11th Circuits -- inform lawyers at least several days in advance of oral argument of the identities of the three judges who will be on the panel that will decide the case.



In the remaining three federal appellate courts -- the 4th, 7th and Federal Circuits -- attorneys who will be arguing an appeal do not learn which judges are on the oral argument panel until the attorneys arrive at the courthouse on the day of argument. The Federal Circuit recently experimented with advance disclosure, but that court's experience was so negative that the experiment promptly terminated with a reaffirmation of that court's refusal to provide advance disclosure of panel composition.

Attorneys who are preparing to argue an appeal would, of course, prefer to know which judges will be hearing argument and deciding the appeal. To use the more familiar example of the U.S. Supreme Court, where it takes five justices to form a majority, advocates in closely contested cases will affirmatively attempt to craft their oral presentations to attract the support of at least five members of the Court.

There is nothing subversive about an advocate's effort to attract support at oral argument from five justices. Indeed, an advocate who was indifferent concerning whether his oral argument was likely to garner support from at least five

justices could be accused of failing to provide competent representation to his client.

Yet, notwithstanding the seemingly universal preference among lawyers to learn, in advance of oral argument, the identities of the judges who have been assigned to the three-judge panel that will hear and decide a given federal court appeal, in three of this nation's 13 federal appellate courts the judges have been able to enforce their preference against advance disclosure.

In light of this profound split among the circuits on this matter of appellate oral argument procedure, it is useful to weigh the benefits of advance disclosure against its drawbacks. And it is also helpful to consider whether this is an area where a uniform rule should be adopted, requiring all federal appellate courts to provide a least 10 days' advance notice of oral argument panel composition.

There are three main reasons in favor of advance disclosure of oral argument panel composition, and the first two reasons are closely related. To begin with, advance disclosure allows the advocate to prepare for oral argument mindful of the decision-makers' likes, dislikes, backgrounds and previously expressed positions.

Second, advance disclosure helps to level the playing field for those who do not appear often before a given federal appellate court. Someone who regularly appears before the 4th Circuit might not need more than a moment's notice to tailor her arguments to a given three-judge panel, while someone who knows nothing about that court's judges would need a bit more advance notice in order to acquire the same information already possessed by the repeat player.

And third, advance disclosure of which three judges are assigned to hear oral argument and decide the merits of an appeal allows the attorneys and their clients, before oral argument occurs, to examine whether any grounds for recusal exist that the judges assigned to the case may have overlooked. At present, the annual financial disclosure forms of most federal judges are available online, and on occasion federal appellate judges have overlooked the need to recuse in cases involving litigants in which they hold stock or have other financial interests. In addition, other reasons for recusal are often more easily brought to the attention of a judge before oral argument rather than after.

To be sure, the number of judges serving on each of the non-disclosure circuits is small enough that it is possible to undertake the additional work (and attendant expense to the client) necessary to prepare for the possibility that any of those courts' active and senior judges might be on the oral argument panel. Yet the 4th Circuit sometimes pairs two of its judges with a district judge from within the circuit or a visiting judge from elsewhere. It would be next to impossible to anticipate in advance of a 4th Circuit oral argument whether a visiting judge or district judge might be on the panel and, if so, who it might be.

Similarly, a party could move for recusal of a judge after oral argument has occurred, but the strategic considerations at that juncture are different. A party may be reluctant to seek recusal of a judge who appeared to favor that party's position at oral argument, even if the ground for recusal is mandatory. And if a party seeks to recuse a judge who did not appear to favor that party's position at oral argument, the recusal motion may be viewed by the court or the judge in question with more skepticism. Finally, a post-oral argument recusal threatens to inconvenience the other two judges on the panel in a way that a pre-oral argument recusal might not. Adding a replacement judge to the panel after oral argument, rather than before, presents the possibility that the appeal will need to be reargued.

There are two main reasons why three federal appellate courts still refuse to provide counsel with advance disclosure of the composition of oral argument panels. First, and most importantly, those courts are concerned that advance disclosure invites lawyers to attempt to pander to the judges at oral argument. Many appellate judges find it annoying when lawyers at oral argument identify one of the judges on the panel as the author of a key earlier precedent, as though the earlier opinion's author possesses some unique insight into the matter or holds views to which his colleagues on the current panel should defer. And there are federal appellate judges who believe that the content of an advocate's appellate oral argument should remain the same regardless of which judges are on the panel.

Second, the appellate courts that do not provide advance disclosure of oral argument panel composition may also be concerned that lawyers who learned in advance of oral argument that the panel consisted of judges not viewed as favorable to their client's position would try to postpone oral argument in the hope, if successful, of drawing a different, more favorable panel. Turning first to the pandering issue, it is worth noting at the outset that not all federal appellate judges react negatively to being identified at oral argument as the author of an earlier relevant ruling. Moreover, keeping the panel's identity secret until the morning of oral argument does not eliminate the ability of lawyers to engage in the ingratiating behavior that many appellate judges find annoying.

A much more successful way to avoid the behavior would be for the judges to appear behind opaque screens at oral

argument, with their voices artificially distorted, so that the advocates would have no idea even at oral argument which judges were on the case. Or, judges could decide only to issue per curiam, as opposed to individually signed, opinions so that advocates would never know which particular judge was the author of an earlier ruling.

Judges who are annoyed by pandering at oral argument could attempt to educate the bar that such an oral argument style is not appreciated. In my experience as an observer of the appellate courts, the issue of pandering at oral argument pales in seriousness when compared to the overall poor quality of appellate briefs and oral argument judged on content alone. And one hopes that federal appellate judges are sufficiently neutral and focused on the merits of a case to not allow any offense that pandering might create to influence the judge's views of the merits of the appeal.

On the issue of strategic attempts at postponing oral argument after the names of the judges are revealed, the appellate court possesses the ability to ensure that this never happens. In the 3rd U.S. Circuit Court of Appeals, the federal appellate court before which I practice most often, the court gives plenty of advance notice of the weeks in which an oral argument may occur and asks the attorneys to report any days during those weeks when they will be unavailable. Next, the court supplies counsel with a specific date on which oral argument will occur. That date, provided over a month ahead of time, gives the lawyers one more chance to advise the court of any new reason for unavailability. Thus, when the names of the judges on the panel are revealed 10 days to two weeks before the oral argument date, the advocates are hard-pressed to claim sudden unavailability.

To me, the most interesting issue lurking in the background involves the manner in which federal appellate judges actually go about making decisions. To be sure, in many appeals -- those controlled by U.S. Supreme Court precedent, or rulings of the en banc appellate court or an earlier three-judge panel -- the identities of the judges on the panel makes no difference whatsoever. But there are other cases -- cases involving questions of first impression -- where appellate judges operate unconstrained by anything other than the need to get a second vote to be in the majority.

In those cases of first impression, federal appellate judges can vote for the result they prefer, free of any obligation to reflect the views of colleagues on their court who are not on the given three-judge panel. It is in this very type of case, where the identities of the judges on the panel may in fact determine the outcome, that advance disclosure of the panel's composition is especially useful to counsel.

The Federal Circuit's recent failed experiment with advance disclosure of panel composition, based on that court's negative reaction to an increased amount of attorney pandering at oral argument, suggests that a uniform approach to advance disclosure of three-judge panel composition is not likely to occur voluntarily anytime soon. Because, as demonstrated above, the benefits of advance disclosure sufficiently outweigh the detriments for the lawyers, the litigants and the appellate courts themselves, the U.S. Courts Advisory Committee on Appellate Rules should consider proposing a Federal Rule of Appellate Procedure that would require all federal appellate courts to give at least 10 days' advance notice of the identities of the judges assigned to an oral argument panel.

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**MEMORANDUM**

**DATE:** March 27, 2007

**TO:** Advisory Committee on Appellate Rules

**FROM:** Catherine T. Struve, Reporter

**RE:** Item No. 07-AP-A: Comments concerning new Appellate Rule 32.1

The Committee has received comments on new Appellate Rule 32.1 from Robert Kantowitz, Esq., a tax practitioner from New York. The email containing Mr. Kantowitz's comments is enclosed. This memo reviews his comments and suggests that none of them warrants action by the Committee. Because I thought it might be of interest to the Committee to see how local circuit rules have developed in the wake of Rule 32.1's adoption, I also enclose a table showing each circuit's current rules concerning unpublished opinions.

As you know, Rule 32.1 took effect on December 1, 2006. It provides:

> (a) Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been:
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> > (i) designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like; and
> >
> > (ii) issued on or after January 1, 2007.
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> (b) Copies Required. If a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited.

Mr. Kantowitz's first suggestion is that "[t]he text of the rule should make it clearer that the prohibition applies both to the issuing court's attaching to its opinion a statement that it may not be cited and to any other court's giving effect to such a statement." This suggestion seems unpersuasive. If a court of appeals were to attach to a 2007 or later opinion any statement

restricting the opinion's citation, such a statement would contravene Rule 32.1(a). Likewise, if a court of appeals were to penalize a litigant for citing such an opinion, it would violate Rule 32.1(a).

Mr. Kantowitz's second suggestion is that Rule 32.1 be amended to require the courts of appeals to permit citation of pre-2007 unpublished opinions under certain circumstances. It is interesting to note that a fair number of circuits would permit the citation of their pre-2007 unpublished opinions in the circumstances that Mr. Kantowitz outlines in his second suggestion. But Mr. Kantowitz's proposals would directly contravene the approach currently taken by at least the Second, Seventh and Ninth Circuits. The question of retroactivity was undoubtedly fully aired during the debates over Rule 32.1, and it seems unlikely that the Committee would wish to revisit the question at this time.

Mr. Kantowitz's third suggestion is that state courts might inappropriately permit the citation of pre-2007 federal appellate decisions or might inappropriately disfavor the citation of post-2006 federal appellate decisions. Because Rule 32.1 has only been in effect for a few months, there are of course no examples of the type of problem that Mr. Kantowitz describes. Nor is it clear that such issues would often arise. In any event, the premise for Mr. Kantowitz's third suggestion seems unpersuasive. He argues that state-court divergence concerning the citability of unpublished federal appellate decisions is undesirable because "[a] question of federal ... law ... should come out the same whether the court is a federal court or a state court." But questions of federal law on which there is no definitive Supreme Court precedent can come out differently in state court than they would if they were litigated in a federal court in the same circuit: A state court is not bound by lower federal court precedents. *See, e.g.*, *Strong v. Omaha Const. Industry Pension Plan*, 270 Neb. 1, 10, 701 N.W.2d 320, 328 (Neb. 2005) ("[W]hile Nebraska courts must treat U.S. Supreme Court decisions as binding authority, lower federal court decisions are only persuasive authority.") (citing *Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., dissenting)).

Mr. Kantowitz's fourth suggestion is that it might be useful to expand Rule 32.1's scope so as to permit the citation of foreign judicial opinions "regardless of the issuing court's having prohibited this." Mr. Kantowitz provides no examples of instances in which this has become an issue.

Finally, Mr. Kantowitz asks whether a panel or circuit could "suspend Rule 32.1(a) in a particular case or in general on the authority of F.R.A.P. 2." Rule 2 provides: "On its own or a party's motion, a court of appeals may--to expedite its decision or for other good cause--suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b)." It is clear that Rule 2 does not empower a circuit to suspend Rule 32.1(a)'s operation "in general": "By its terms, Rule 2 does not authorize any general suspension of any rules as applied to all cases or any class of cases. The power of suspension is restricted to 'a particular case' in which a party has made application for a particularized suspension or in which the court has ordered such a suspension on its own motion." 16A Federal

Practice & Procedure § 3948. As to the use of Rule 2 to justify a suspension of Rule 32.1(a) in a particular case, it seems somewhat difficult to imagine how that scenario might arise.

Encls.

---- Forwarded by James Ishida/DCA/AO/USCOURTS on 02/06/2007 08:37 AM -----
Rikz@aol.com

02/06/2007 07:09 AM

To Rules_Comments@ao.uscourts.gov
cc
Subject Attention Peter McCabe - from Robert Kantowitz

I have a few suggestions regarding F.R.A.P. 32.1. (Please excuse the lateness of my comments; I am neither a litigator nor an appellate advocate, and the last time that I had need to refer to courtroom procedures was when I clerked for Judge Garth in the Third Circuit in 1979-1980.)

1. The text of the rule should make it clearer that the prohibition applies both to the issuing court's attaching to its opinion a statement that it may not be cited and to any other court's giving effect to such a statement. See also the end of point 3 below.

2. In limited circumstances, F.R.A.P. 32.1 should permit citation of covered decisions that were issued before 2007.

a. Certainly this should be allowed where necessary to correct a factual error, e.g., where a litigant asserts that, or a judge asks whether, the issue has or has not been addressed by a particular court and in fact it has been addressed by that court in one or more unpublished decisions that are not made superfluous by published decisions of the same court to the same effect.

b. My own inclination is also to allow citation of a pre-2007 decision X where another party or the court itself has cited a contrary pre-2007 unpublished decision (Y) of a court that did not prohibit the citation of Y. Of course, the issue of whether the author(s) of X put in the same care that they would have had they not had the expedient of prohibiting citation is still a concern, but one is inclined to believe that if the court presently is being asked to consider at least one such decision, then to level the playing field and in the interest of justice, other parties should have the benefit of such decisions as well. (In suggesting this, I am assuming that courts' standards for "unpublished" opinions are roughly similar regardless of whether citation had been prohibited or discouraged, i.e., that the "dividing line," if there is one, is between unpublished and published, as opposed to between "not for citation" and "unpublished but permitted to be cited.")

c. To the extent that courts continue to produce unpublished decisions from 2007 onward that differ in scope etc. from published decisions, the dividing line I have delineated in "b" above will still hold true, and then the suggestion that the introduction of unpublished

decision X should, as a matter of fairness, then allow unfettered citation of any other unpublished decision Y applies even if X is post-2006 and Y is pre-2007.

3. The reference to "court" in F.R.A.P. 32.1 would appear to be to the federal courts; after all, the rules do not purport to regulate procedure in state courts, and it is not clear as a matter of federalism that they could (other than in the broadest sense of fundamental notions of justice that rise to constitutional levels). It therefore would appear that state courts remain free to adopt a rule like F.R.A.P. 32.1 with no restriction as to the date of the issuing court's opinion. Less likely, perhaps, a state court might adopt a rule to prohibit citation of opinions even from 2007 an onward that an issuing court, including a federal court, indicates in some way may not be cited.

In case (a), one would hardly expect the issuing federal court to hold a lawyer in contempt for citing in a state court a pre-2007 decision whose citation the issuing federal court had prohibited. (Indeed, what should a lawyer do if the state court explicitly asks him to address such an opinion or whether one exists?!) That question, of course, could have arisen before F.R.A.P. 32.1, but once a rule has been promulgated that is in favor of citation (at least for post-2006 opinions), I suspect that some state courts may more readily venture into this thicket for pre-2007 opinions as well.

The possibility of case (b) -- I have not examined policies or trends in the various states -- means that federal courts might still continue to indicate in some way that they prefer that unpublished opinion not be cited, with the result that this approach will be overruled as to other federal courts but not as to state courts.

A question of federal and state law that is before a court should come out the same whether the court is a federal court or a state court, and the potential for case (a) or case (b) undermines this. (Though I am quite aware of forum shopping in my field, which is tax law, I hope that it is less of an issue in more general areas.) I am not sure that much can be done about case (a), other than relying on state courts to continue to respect the wishes of issuing federal courts with respect to pre-2007 opinions, though state courts might well adopt modifications such as I have suggested in 1 above. As to case (b), however, F.R.A.P. 32.1 could be amended to prohibit federal courts from discouraging or prohibiting in any way the citation of any post-2006 opinion; perhaps even going so far as to say in the rule that no inference may be drawn to that effect from any language in the opinion or elsewhere.

(The same concerns arise, though with far less frequency, as to non-US courts, but there is less that can be done about it and less mischief if they do not respect our rules.)

4. On the subject of foreign courts, given the paucity of materials that may be available, would it make sense to amend the rule to allow unrestricted citation of their opinions in a federal court regardless of the issuing court's having prohibited this? One would think that less comity is due in that regard than with respect to state courts, though for some multinational litigants contempt issues might loom larger.

5. Could a panel or circuit suspend F.R.A.P. 32.1(a) in a particular case or in general on the authority of F.R.A.P. 2? If so, what has been accomplished?

Respectfully,

Robert Kantowitz
Lawrence, New York
516-356-7558

***Table of local appellate rules concerning citation of unpublished opinions:***

| Cite | Provision |
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| D.C. Circuit Rule 32.1(b) | (b) Citation to Unpublished Dispositions.<br><br>(1) Unpublished Dispositions of this Court.<br><br>(A) Unpublished dispositions entered before January 1, 2002. Unpublished orders or judgments of this court, including explanatory memoranda and sealed dispositions, entered before January 1, 2002, are not to be cited as precedent. Counsel may refer to an unpublished disposition, however, when the binding (i.e., the res judicata or law of the case) or preclusive effect of the disposition, rather than its quality as precedent, is relevant.<br><br>(B) Unpublished dispositions entered on or after January 1, 2002. All unpublished orders or judgments of this court, including explanatory memoranda (but not including sealed dispositions), entered on or after January 1, 2002, may be cited as precedent. Counsel should review the criteria governing published and unpublished opinions in Circuit Rule 36, in connection with reliance upon unpublished dispositions of this court.<br><br>(2) Unpublished Opinions of Other Courts. Unpublished dispositions of other courts of appeals and district courts entered before January 1, 2007, may be cited when the binding (i.e., the res judicata or law of the case) or preclusive effect of the disposition is relevant. Otherwise, unpublished dispositions of other courts of appeals entered before January 1, 2007, may be cited only under the circumstances and for the purposes permitted by the court issuing the disposition, and unpublished dispositions of district courts entered before that date may not be cited. Unpublished dispositions of other federal courts entered on or after January 1, 2007, may be cited in accordance with FRAP 32.1.<br><br>(3) Procedures Governing Citation to Unpublished Dispositions. A copy of each unpublished disposition cited in a brief that is not available in a publicly accessible electronic database must be included in an appropriately labeled addendum to the brief. The addendum may be bound together with the brief, but separated from the body of the brief (and from any other addendum) by a distinctly colored separation page. If the addendum is bound separately, it must be filed and served concurrently with, and in the same number of copies as, the brief itself.<br><br>(Adopted Nov. 1, 2006, eff. Dec. 1, 2006.) |

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| D.C. Circuit Rule 36(c)(2) | (c) Unpublished Opinions.<br><br>(1) An opinion, memorandum, or other statement explaining the basis for this court's action in issuing an order or judgment under subsection (b) above, which does not satisfy any of the criteria for publication set out in subsection (a) above, will nonetheless be circulated to all judges on the court prior to issuance. A copy of each such unpublished opinion, memorandum, or statement will be retained as part of the case file in the clerk's office and be publicly available there on the same basis as any published opinion.<br><br>(2) While unpublished dispositions may be cited to the court in accordance with FRAP 32.1 and Circuit Rule 32.1(b)(1), a panel's decision to issue an unpublished disposition means that the panel sees no precedential value in that disposition. |
| 1st Cir. Rule 32.1.0 | (a) Disposition of this court. An unpublished judicial opinion, order, judgment or other written disposition of this court may be cited regardless of the date of issuance. The court will consider such dispositions for their persuasive value but not as binding precedent. A party must note in its brief or other filing that the disposition is unpublished. The term "unpublished" as used in this subsection and Local Rule 36.0(c) refers to a disposition that has not been selected for publication in the West Federal Reporter series, e.g., F., F.2d, and F.3d.<br><br>(b) Dispositions of other courts. The citation of dispositions of other courts is governed by Fed. R. App. P. 32.1 and the local rules of the issuing court. Notwithstanding the above, unpublished or non-precedential dispositions of other courts may always be cited to establish a fact about the case before the court (for example, its procedural history) or when the binding or preclusive effect of the opinion, rather than its quality as precedent, is relevant to support a claim of res judicata, collateral estoppel, law of the case, double jeopardy, abuse of the writ, or other similar doctrine. |
| 1st Cir. Rule 32.0(c) | (c) Precedential Value of Unpublished Opinions. While an unpublished opinion of this court may be cited to this court in accordance with Fed. R. App. P. 32.1 and Local Rule 32.1.0, a panel's decision to issue an unpublished opinion means that the panel sees no precedential value in that opinion. |

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| 2d Cir. Interim Rule 0.23 | (b) ... Rulings by summary order do not have precedential effect.<br><br>(c) Citation of Summary Orders<br><br>(1) Citation to summary orders filed after January 1, 2007, is permitted.<br><br>(A) In a brief or other paper in which a litigant cites a summary order, in each paragraph in which a citation appears, at least one citation must either be to the Federal Appendix or be accompanied by the notation: "(summary order)."<br><br>(B) Unless the summary order is available in an electronic database which is publicly accessible without payment of fee (such as the database available at http://www.ca2.uscourts.gov/), the party citing the summary order must file and serve a copy of that summary order together with the paper in which the summary order is cited. If no copy is served by reason of the availability of the order on such a database, the citation must include reference to that database and the docket number of the case in which the order was entered.<br><br>(2) Citation to summary orders filed prior to January 1, 2007, is not permitted in this or any other court, except in a subsequent stage of a case in which the summary order has been entered, in a related case, or in any case for purposes of estoppel or res judicata.<br><br>(d) Legend<br>Summary orders filed after January 1, 2007, shall bear the following legend:<br><br>SUMMARY ORDER<br><br>Rulings by summary order do not have precedential effect. Citation to summary orders filed after January 1, 2007, is permitted and is governed by this court's Local Rule 0.23 and Federal Rule of Appellate Procedure 32.1. In a brief or other paper in which a litigant cites a summary order, in each paragraph in which a citation appears, at least one citation must either be to the Federal Appendix or be accompanied by the notation: "(summary order)." Unless the summary order is available in an electronic database which is publicly accessible without payment of fee (such as the database available at http://www.ca2.uscourts.gov/), the party citing the summary order must file and serve a copy of that summary order together with the paper in which the summary order is cited. If no copy is served by reason of the availability of the order on such a database, the citation must include reference to that database and the docket number of the case in which the order was entered. |

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| 3d Cir. IOP 5.7 | The court by tradition does not cite to its not precedential opinions as authority. Such opinions are not regarded as precedents that bind the court because they do not circulate to the full court before filing. |
| 4th Cir. Rule 32.1 | Citation of this Court's unpublished dispositions issued prior to January 1, 2007, in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case.<br><br>If a party believes, nevertheless, that an unpublished disposition of this Court issued prior to January 1, 2007, has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited if the requirements of FRAP 32.1(b) are met. |
| 5th Cir. Rule 47.5 | 47.5.3 Unpublished Opinions Issued Before January 1, 1996. [FN*] Unpublished opinions issued before January 1, 1996 [FN*], are precedent. Although every opinion believed to have precedential value is published, an unpublished opinion may be cited pursuant to Fed. R. App. P. 32.1(a). The party citing to an unpublished judicial disposition must provide a citation to the disposition in a publicly accessible electronic database. If the disposition is not available in an electronic database, a copy of any unpublished opinion cited in any document being submitted to the court, must be attached to each copy of the document, as required by Fed. R. App. P. 32.1(b).<br><br>47.5.4 Unpublished Opinions Issued on or After January 1, 1996. [FN*] Unpublished opinions issued on or after January 1, 1996 [FN*], are not precedent, except under the doctrine of res judicata, collateral estoppel or law of the case (or similarly to show double jeopardy, notice, sanctionable conduct, entitlement to attorney's fees, or the like). An unpublished opinion may be cited pursuant to Fed. R. App. P. 32.1(a). The party citing to an unpublished judicial disposition should provide a citation to the disposition in a publicly accessible electronic database. If the disposition is not available in an electronic database, a copy of any unpublished opinion cited in any document being submitted to the court must be attached to each copy of the document, as required by Fed. R. App. P. 32.1(b). The first page of each unpublished opinion bears the following legend:<br><br>Pursuant to 5th Circuit Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Circuit Rule 47.5.4.<br><br>[FN*] Effective date of amended Rule. |

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| 6th Cir. Rule 28(g) | Citation of Unpublished Decisions. Citation of unpublished opinions is permitted. FRAP 32.1(b) applies to all such citations. |
| 6th Cir. R. 206(c) | (c) Published Opinions Binding. Reported panel opinions are binding on subsequent panels. Thus, no subsequent panel overrules a published opinion of a previous panel. Court en banc consideration is required to overrule a published opinion of the court. |
| 7th Cir. Rule 32.1 | (a) Policy. It is the policy of the circuit to avoid issuing unnecessary opinions.<br><br>(b) Publication. The court may dispose of an appeal by an opinion or an order. Opinions, which may be signed or per curiam, are released in printed form, are published in the Federal Reporter, and constitute the law of the circuit. Orders, which are unsigned, are released in photocopied form, are not published in the Federal Reporter, and are not treated as precedents. Every order bears the legend: "Nonprecedential disposition. To be cited only in accordance with Fed. R. App. P. 32.1."<br><br>(c) Motion to change status. Any person may request by motion that an order be reissued as an opinion. The motion should state why this change would be appropriate.<br><br>(d) Citation of older orders. No order of this court issued before January 1, 2007, may be cited except to support a claim of preclusion (res judicata or collateral estoppel) or to establish the law of the case from an earlier appeal in the same proceeding. |
| 8th Cir. Rule 32.1A | Unpublished opinions are decisions which a court designates for unpublished status. They are not precedent. Unpublished opinions issued on or after January 1, 2007, may be cited in accordance with FRAP 32.1. Unpublished opinions issued before January 1, 2007, generally should not be cited. When relevant to establishing the doctrines of res judicata, collateral estoppel, or the law of the case, however, the parties may cite any unpublished opinion. Parties may also cite an unpublished opinion of this court if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well. A party citing an unpublished opinion in a document or for the first time at oral argument which is not available in a publically accessible electronic database must attach a copy thereof to the document or to the supplemental authority letter required by FRAP 28(j). When citing an unpublished opinion, a party must indicate the opinion's unpublished status. |

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| 9th Cir. Rule 36-3 | (a) Not Precedent. Unpublished dispositions and orders of this Court are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion.<br><br>(b) Citation of Unpublished Dispositions and Orders Issued on or after January 1, 2007. Unpublished dispositions and orders of this Court issued on or after January 1, 2007 may be cited to the courts of this circuit in accordance with Fed. R. App. P. 32.1.<br><br>(c) Citation of Unpublished Dispositions and Orders Issued before January 1, 2007. Unpublished dispositions and orders of this Court issued before January 1, 2007 may not be cited to the courts of this circuit, except in the following circumstances.<br><br>(i) They may be cited to this Court or to or by any other court in this circuit when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion.<br><br>(ii) They may be cited to this Court or by any other court in this circuit for factual purposes, such as to show double jeopardy, sanctionable conduct, notice, entitlement to attorneys' fees, or the existence of a related case.<br><br>(iii) They may be cited to this Court in a request to publish a disposition or order made pursuant to Circuit Rule 36-4, or in a petition for panel rehearing or rehearing en banc, in order to demonstrate the existence of a conflict among opinions, dispositions, or orders. |

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| 10th Cir. Rule 32.1 | (A) Precedential value. The citation of unpublished decisions is permitted to the full extent of the authority found in Fed. R. App. P. 32.1. Unpublished decisions are not precedential, but may be cited for their persuasive value. They may also be cited under the doctrines of law of the case, claim preclusion and issue preclusion. Citation to unpublished opinions must include an appropriate parenthetical notation. E.g., United States v. Wilson, No. 06- 2047, 2006 WL 3072766 (10th Cir. Oct. 31, 2006)(unpublished); United States v. Keeble, No. 05-5190, 184 Fed. Appx. 756, 2006 U.S. App. LEXIS 14871, (10th Cir. June 15, 2006)(unpublished).<br><br>(B) Reference. If an unpublished decision cited in a brief or other pleading is not available in a publicly accessible electronic database, a copy must be attached to the document when it is filed and must be provided to all other counsel and pro se parties. Where possible, references to unpublished dispositions should include the appropriate electronic citation.<br><br>(C) Retroactive effect. Parties may cite unpublished decisions issued prior to January 1, 2007, in the same manner and under the same circumstances as are allowed by Fed. R. App. P. 32.1(a)(i) and part (A) of this local rule. |
| 11th Cir. Rule 36-2 | An opinion shall be unpublished unless a majority of the panel decides to publish it. Unpublished opinions are not considered binding precedent, but they may be cited as persuasive authority. If the text of an unpublished opinion is not available on the internet, a copy of the unpublished opinion must be attached to or incorporated within the brief, petition, motion or response in which such citation is made. But see I.O.P. 7, Citation to Unpublished Opinions by the Court, following this rule. |
| 11th Cir. IOP 7 | Citation to Unpublished Opinions by the Court. The court generally does not cite to its "unpublished" opinions because they are not binding precedent. The court may cite to them where they are specifically relevant to determine whether the predicates for res judicata, collateral estoppel, or double jeopardy exist in the case, to ascertain the law of the case, or to establish the procedural history or facts of the case. |

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| Fed. Cir. Local Rule 32.1 | Local Rule 32.1. Citing Judicial Dispositions<br><br>(a) Disposition of Appeal, Motion, or Petition. Disposition of an appeal may be announced in an opinion; disposition of a motion or petition may be announced in an order. An appeal may also be disposed of in a judgment of affirmance without opinion pursuant to Federal Circuit Rule 36. A nonprecedential disposition shall bear a legend designating it as nonprecedential. A precedential disposition shall bear no legend.<br><br>(b) Nonprecedential Opinion or Order. An opinion or order which is designated as nonprecedential is one determined by the panel issuing it as not adding significantly to the body of law.<br><br>(c) Parties' Citation of Nonprecedential Dispositions. Parties are not prohibited or restricted from citing nonprecedential dispositions issued after January 1, 2007. This rule does not preclude assertion of claim preclusion, issue preclusion, judicial estoppel, law of the case, and the like based on a nonprecedential disposition issued before that date.<br><br>(d) Court's Consideration of Nonprecedential Dispositions. The court may refer to a nonprecedential disposition in an opinion or order and may look to a nonprecedential disposition for guidance or persuasive reasoning, but will not give one of its own nonprecedential dispositions the effect of binding precedent. The court will not consider nonprecedential dispositions of another court as binding precedent of that court unless the rules of that court so provide.<br><br>(e) Request to Make an Opinion or Order Precedential; Time for Filing. Within 60 days after any nonprecedential opinion or order is issued, any person may request, with accompanying reasons, that the opinion or order be reissued as precedential. An original and 6 copies of the request must be filed with the court. The request will be considered by the panel that rendered the disposition. The requester must notify the court and the parties of any case that person knows to be pending that would be determined or affected by reissuance as precedential. Parties to pending cases who have a stake in the outcome of a decision to make precedential must be given an opportunity to respond. If the request is granted, the opinion or order may be revised as appropriate.<br><br>(f) Public Records. All dispositions by the court in any form will be in writing and are public records. |

**MEMORANDUM**

**DATE:** March 27, 2007

**TO:** Advisory Committee on Appellate Rules

**FROM:** Catherine T. Struve, Reporter

**RE:** Pending agenda items

Pursuant to the directive of the Standing Committee, the Advisory Committee does not forward proposed amendments in piecemeal fashion, but instead holds them until a sufficient number of proposals exist so that they can be presented as a package. As a result of this policy, we have been holding a number of proposals — including three approved in 2003 and 2004 — for submission to the Standing Committee at a later date. Because it now appears likely that a number of pending items will be forwarded to the Standing Committee with a request that they be published for comment in August 2007, it seems advisable to review the older agenda items to consider whether they should be forwarded at the same time. Prior memos relating to these items are enclosed.

## I. Item 01-03: Proposed amendment concerning the application of the three-day rule

Item 01-03 is a proposed amendment to Appellate Rule 26(c); it is intended to clarify the way in which the three-day rule interacts with Rule 26(a)'s time-computation provisions. Appellate Rule 26(c) currently provides in relevant part: "When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service." The proposed amendment, as approved in November 2003, would make the following change: "When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added ~~to~~ after the prescribed period would otherwise expire under Rule 26(a) unless the paper is delivered on the date of service stated in the proof of service."

The proposed amendment was designed to clarify two points. First, it makes clear that one should ignore the three-day rule when determining whether a time period qualifies as a period of "less than 11 days" for which intermediate weekends and holidays are excluded under

current Rule 26(a)(2). If the Time-Computation Project's shift to a days-are-days approach is adopted, then this issue will be moot. However, Item 01-03's proposed amendment also clarifies a second point, and this second point will survive the adoption of the new time-computation approach. The second issue is what happens when a period that would end on a weekend or holiday is subject to the three-day rule. Suppose that a ten-day period commences on a Wednesday. Wednesday – the day of the event that triggers the period – is excluded. The ten-day period ends on a Saturday. Should one (a) count forward to Monday under current Rule 26(a)(3) before adding the three days, and then count forward three days to Thursday, or (b) add the three days first – thus bringing one to Tuesday – and then stop there because you're on a day that's not a weekend or holiday? Under current Rule 26(c) the answer is unclear. Under the amendment proposed in Item 01-03, the answer would clearly be (a). So the Time-Computation Project, even if it goes forward, will not render Item 01-03 moot. A reason to proceed with Item 01-03 is that it would conform Appellate Rule 26(c) to Civil Rule 6(e); the latter currently provides: "Whenever a party must or may act within a prescribed period after service and service is made under Rule 5(b)(2)(B), (C), or (D), 3 days are added after the prescribed period would otherwise expire under subdivision (a)."

If the Committee decides to request that Item 01-03 be published for comment this summer, I suggest the following changes to the text – to conform to style conventions – and to the note – because the Time-Computation Project moots one of the reasons for the change. The draft below is redlined to show changes from the version this Committee approved in November 2003. For ease of review, I also include a "clean" copy of the version that I suggest the Committee adopt, showing the changes that version would make from the current Rule.

The pending time-computation proposals will affect Item 01-03 in another way as well. If the new days-are-days approach is adopted, Rule 26(c)'s reference to "3 calendar days" should become simply "3 days." The latter change is shown in the suggested amendments compiled by the Appellate Rules Deadlines Subcommittee; I have not indicated it in the proposed draft of Item 01-03, because I thought that combining the two changes could be a bit confusing.

*Redline showing changes that I suggest making to the amendment approved in November 2003:*

**Rule 26. Computing and Extending Time**

* * * * *

**(c) Additional Time after Service.** When a party ~~is required or permitted to act within a prescribed period after a paper is served on that party~~may or must act within a specified time after service, 3 calendar days are added ~~to~~ after the prescribed period would

otherwise expire under Rule 26(a) unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service.

**Committee Note**

**Subdivision (c).** Rule 26(c) has been amended to eliminate uncertainty about application of the 3-day extension. Civil Rule 6(e) was amended in 2004 to eliminate similar uncertainty in the Civil Rules, uncertainty that was described at length in 4B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1171, at 595-601 (2002).

Under the amendment, a party that is required or permitted to act within a prescribed period should first calculate that period, without reference to the 3-day extension provided by Rule 26(c), but with reference to the other time computation provisions of the Appellate Rules. ~~(For example, if the prescribed period is less than 11 days, the party should exclude intermediate Saturdays, Sundays, and legal holidays, as instructed by Rule 26(a)(2).)~~ After the party has identified the date on which the prescribed period would expire but for the operation of Rule 26(c), the party should add 3 calendar days. The party must act by the third day of the extension, unless that day is a Saturday, Sunday, or legal holiday, in which case the party must act by the next day that is not a Saturday, Sunday, or legal holiday.

~~To illustrate: A paper is served by mail on Wednesday, June 1, 2005. The prescribed time to respond is 10 days. Assuming there are no intervening legal holidays, the prescribed period ends on Wednesday, June 15, 2005. (See Rules 26(a)(1) and (2).) Under Rule 26(c), three calendar days are added — Thursday, Friday, and Saturday. Because the last day is a Saturday, the time to act extends to the next day that is not a Saturday, Sunday, or legal holiday. Thus, the response is due on Monday, June 20, 2005.~~

To illustrate ~~further~~: A paper is served by mail on Thursday, ~~August 11~~November 1, 2005~~7~~. The prescribed time to respond is 30 days. ~~Whether or not there are intervening legal holidays, t~~The prescribed period ends on Monday, ~~September 12~~December 3 (because the 30th day falls on a Saturday, the prescribed period extends to the following Monday). Under Rule 26(c), three calendar days are added — Tuesday, Wednesday, and Thursday — and thus the response is due on Thursday, ~~September 15, 2005~~December 6.

*Clean version showing the version of the amendment that I propose the Committee adopt if it decides to forward the amendment to the Standing Committee at this time:*

**Rule 26. Computing and Extending Time**

* * * * *

**(c) Additional Time after Service.** When a party ~~is required or permitted to act within a prescribed period after a paper is served on that party~~ may or must act within a specified time after service, 3 calendar days are added ~~to~~ after the prescribed period would otherwise expire under Rule 26(a) unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service.

**Committee Note**

**Subdivision (c).** Rule 26(c) has been amended to eliminate uncertainty about application of the 3-day extension. Civil Rule 6(e) was amended in 2004 to eliminate similar uncertainty in the Civil Rules, uncertainty that was described at length in 4B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1171, at 595-601 (2002).

Under the amendment, a party that is required or permitted to act within a prescribed period should first calculate that period, without reference to the 3-day extension provided by Rule 26(c), but with reference to the other time computation provisions of the Appellate Rules. After the party has identified the date on which the prescribed period would expire but for the operation of Rule 26(c), the party should add 3 calendar days. The party must act by the third day of the extension, unless that day is a Saturday, Sunday, or legal holiday, in which case the party must act by the next day that is not a Saturday, Sunday, or legal holiday.

To illustrate: A paper is served by mail on Thursday, November 1, 2007. The prescribed time to respond is 30 days. The prescribed period ends on Monday, December 3 (because the 30th day falls on a Saturday, the prescribed period extends to the following Monday). Under Rule 26(c), three calendar days are added — Tuesday, Wednesday, and Thursday — and thus the response is due on Thursday, December 6.

**MEMORANDUM**

**DATE:** March 27, 2002

**TO:** Advisory Committee on Appellate Rules

**FROM:** Patrick J. Schiltz, Reporter

**RE:** Item No. 01-03

Attorney Roy H. Wepner has called the Committee's attention to an ambiguity in the way that Rule 26(a)(2) interacts with Rule 26(c). (A copy of Mr. Wepner's letter is attached.)

Rule 26(c) provides that "[w]hen a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service." For example, under Rule 31(a)(1), the appellee must serve and file a brief within 30 days after the appellant's brief is served. If the appellant serves its brief by mail, the appellee's brief must be served and filed within 33 days — the 30 days prescribed in Rule 31(a)(1) plus the 3 days added to that prescribed period by Rule 26(c).

Rule 26(a)(2) currently provides that, in computing any period of time, intermediate Saturdays, Sundays, and legal holidays are excluded when the period of time is less than 7 days, and included when the period of time is 7 days or more. This Committee has proposed amending Rule 26(a)(2) so that the demarcation line is changed from 7 days to 11 days. The purpose of the proposed amendment is to make time calculation under the Appellate Rules consistent with time calculation under the Civil Rules and Criminal Rules.

The ambiguity is this: In deciding whether a deadline is less than 7 days or 11 days, should the court "count" the 3 days that are added to the deadline under Rule 26(c)? Suppose, for example, that a party has 5 days to respond to a paper that has been served upon her by mail. Is she facing a 5-day deadline — that is, a deadline "less than 7 days" for purposes of current Rule 26(a)(2) — and therefore a deadline that should be calculated by excluding intermediate Saturdays, Sundays, and legal holidays? Or is she facing an 8-day deadline — that is, a deadline that is *not* "less than 7 days" for purposes of current Rule 26(a)(2) — and therefore a deadline that should be calculated by including intermediate Saturdays, Sundays, and legal holidays?

This question never arises under the current version of Rule 26(a)(2). The question would arise only with respect to 4-, 5-, or 6-day deadlines, as only then would including the 3 extra days provided by Rule 26(c) change the deadline from one that is less than 7 days to one that is 7 days or more. But there are no 4-, 5-, or 6-day deadlines in the Appellate Rules.

This question will arise under the *amended* version of Rule 26(a)(2). (The amendment will take effect on December 1, 2002, barring Supreme Court or Congressional action.) Under amended Rule 26(a)(2), the question will arise with respect to 8-, 9-, and 10-day deadlines. There are no 8- or 9-day deadlines in the Appellate Rules, but there are several 10-day deadlines.

A lot turns on this question. Suppose that a party has 10 days to respond to a paper that has been served by mail. If the 3 days *are* added to the deadline before asking whether the deadline is "less than 11 days" for purposes of amended Rule 26(a)(2), then the deadline is *not* "less than 11 days," intermediate Saturdays, Sundays, and legal holidays do count, and the party would have at least 13 calendar days to respond. If the 3 days are *not* added to the deadline before asking whether the deadline is "less than 11 days" for purposes of amended Rule 26(a)(2),

then the deadline *is* "less than 11 days" for purposes of Rule 26(a)(2), intermediate Saturdays, Sundays, and legal holidays do *not* count, and the party would have at least 17 calendar days to respond.

Mr. Wepner is correct that this problem should be fixed. But it is difficult to know exactly how the problem should be fixed or by whom.

The district courts have wrestled with this problem under the Civil Rules for 17 years, yet they have failed to agree on a solution. Professor Arthur Miller devotes 7 pages to this problem in the new edition of Volume 4B of *Federal Practice & Procedure*.[1] Professor Miller's discussion outlines three possible ways of solving the problem (actually four, as the second option has two "sub-options"), but cites disadvantages to each. The problem is a complicated one.

The problem is also one that should not be addressed only by the Appellate Rules Committee. After December 1, the identical issue will arise under the Appellate Rules, the Civil Rules, and the Criminal Rules. If time is to be calculated the same under all three sets of rules, the issue will have to be resolved at the same time and in the same manner by the three advisory committees. One of those committees will have to take the lead.

Judge Alito and I believe — and the Reporter to the Civil Rules Committee agrees — that the Civil Rules Committee should take the lead on this matter. The Civil Rules Committee is, if you will, the "biological parent" of this issue; this Committee is only the "adoptive parent." The Civil Rules Committee has 17 years' experience with this issue; this Committee has none. And this issue is a bigger problem for the Civil Rules than for the (amended) Appellate Rules. The

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[1]*See* 4B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1171, at 595-601 (2002). A copy of this section is attached.

problem does not arise unless a party is required to act within a prescribed period of 8, 9, or 10 days after a paper is *served* on that party. The Appellate Rules contain no 8- or 9-day deadlines and only a handful of 10-day deadlines that are triggered by *service* (as opposed to by the filing of a paper or the entry of an order). Only one of these 10-day deadlines is of any real consequence — the deadline in Rule 27(a)(3)(A) regarding responding to motions.[2] By contrast, the Civil Rules appear to contain at least a dozen 10-day deadlines that are triggered by service.

I recommend that the Committee refer Mr. Wepner's letter to the Civil Rules Committee.

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[2]This Committee has proposed amending Rule 27(a)(3)(A) so that it provides 8 days to respond to a motion, rather than 10. But the change will not eliminate the problem cited by Mr. Wepner.

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November 27, 2000

00-AP-006

00-CV-H

Mr. Peter G. McCabe
Secretary of The Committee on
Rules of Practice and Procedure
Administrative Office of the U.S. Courts
Washington, DC 20544

Re: Proposed Amendments to the Federal Rules
Of Appellate Procedure

Dear Mr. McCabe:

In accordance with the request for comments published in the November 1, 2000 advance sheet of West's Supreme Court Reporter, I am writing to comment on the proposed amendments to Rule 26 of the Federal Rules of Appellate Procedure.

I heartily concur with the notion of amending Fed. R. App. P. 26 so that it is congruent with Fed. R. Civ. P. 6. However, it is unfortunate that the Committee has not seen fit to take this opportunity to remove an ambiguity in these rules which has spawned extensive and needless litigation and which has still left the issue without a definitive resolution. *See generally* WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1171 at 516-21 (Supp. 2000).

The problem is this: when in the calculation process does one add the three calendar days where service has been made by mail? The answer to that question can and does impact on the ultimate calculation, as a simple example will illustrate.

Suppose an adversary serves a paper by mail, and the recipient is obligated to respond within ten days. If you add the three days for service by mail first, we are now above the 11-day threshold, which would suggest that we do not exclude intermediate Saturdays, Sundays and holidays. The final tally, then, is 13 calendar days.

Alternatively, one can first look at the original 10-day deadline, conclude that it is less than the 11-day threshold, and thereby first determine that intermediate Saturdays, Sundays and holidays do not count. This will provide a tentative time period which would typically be 10 business days or 14 calendar days. If we *now* add the three extra days for mailing, we are up to a

total of 17 calendar days. This four-day discrepancy is significant, and can become even more so if the 17th day is a Saturday, Sunday or holiday, which could then result in a final tally of 19 calendar days or even more.

I take no position on which interpretation leads to the proper result. But I do believe that the rule should be clear so that everyone can readily calculate the correct amount of time. To that end, here are two alternative suggested rewrites of the existing first sentence of Fed. R. App. P. 26(c):

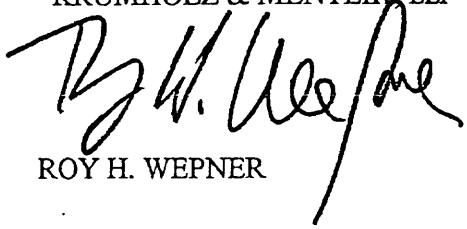
> [1] When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period before making of the determination set forth in Rule 26(a)(2) as to whether the period is less than 11 days, unless the paper is delivered on the date of service stated in the proof of service.
>
> [2] When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period after the deadline has been determined pursuant to Rule 26(a)(2),unless the paper is delivered on the date of service stated in the proof of service.

Should the Committee believe that one of these proposed changes to Fed. R. App. P. 26(c) is desirable, it would obviously make sense to make a similar change in Fed. R. Civ. P. 6, since failing to do so would defeat one object of the present amendment, which was to conform the two rules. If it is too late in the amendment process to make a similar change in Fed. R. Civ. P. 6, perhaps the foregoing proposal could be considered for a separate set of rule changes in the future.

The Committee's consideration of these comments is very much appreciated.

Respectfully submitted,

LERNER, DAVID, LITTENBERG,
KRUMHOLZ & MENTLIK, LLP



ROY H. WEPNER

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When the original period is eleven days or more, the three additional days allowed when service has been made by mail should be added to the original period, rather than treated as a separate period, and the total treated as a single period for purposes of computation.[9] This simplifies computation and accomplishes adequately the purpose of Rule 6(e), which is to protect parties served by mail from suffering a systematic diminution of their time to respond.[10] Thus, suppose that thirty days normally are given to perform a particular act following service of a notice, and the thirtieth day would fall on a Sunday if the party were served personally. It has been argued under state provisions similar to Rule 6(e) that if service is made by mail, the original thirty-day period is then extended to Monday and the three-day addition then makes Thursday the final day for taking action. The better view,

**7. Rule 5(b)**

See the discussion in § 1147.

**8. Advisory Committee**

The Advisory Committee Note to the 2001 amendment to Rule 6(e) is reprinted in vol. 12A, App.C.

**9. Method of computation**

Pagan v. Bowen, D.C.Fla.1987, 113 F.R.D. 667, 668, citing Wright & Miller.

**10. Purpose of Rule 6(e)**

See the discussion in the text at notes 1–5, above.

however, is that there is simply one thirty-three day period and that the thirty-third day, Wednesday, is the final day of the extended period.[11]

When the original period is less than eleven days, however, the issue of whether or not to add the three days into the original period becomes more problematic. This particularly is true in the frequent situation of a governing ten-day period.[12] The problem is caused by the 1985 amendment to Rule 6(a), which provides that intermediate Saturdays, Sundays, and legal holidays are excluded from the computation of periods of less than eleven days.[13] As a result of the amendment, when a notice triggering a ten-day period is served personally, Saturdays, Sundays, and legal holidays are excluded from the period under Rule 6(a). But when the same notice is served by mail, these days arguably should not be excluded since the relevant time frame has become a single time period of thirteen days under Rule 6(e). Unfortunately, the 1985 amendment of the rule does not address the proper integration of Rules 6(a) and 6(e) in this context. A choice therefore has to be made among three possible methods of interpreting these two provisions.

**11. Three days added to original period**

Wheat State Tel. Co. v. State Corp. Comm'n, 1965, 403 P.2d 1019, 195 Kan. 268.

In re Iofredo's Estate, 1954, 63 N.W.2d 19, 241 Minn. 335.

**See also**

EEOC v. TruGreen Ltd. Partnership, D.C.Wis.1998, 185 F.R.D. 552, **quoting Wright & Miller.**

Wallace v. Warehouse Employees Union No. 730, D.C.App.1984, 482 A.2d 801, 809, **citing Wright & Miller.**

**But compare**

Kessler Institute for Rehabilitation v. NLRB, C.A.3d, 1982, 669 F.2d 138, 141 (computing three additional days granted under 29 C.F.R. § 102.114, which is virtually identical to Rule 6(e), as separate period in order to protect number of working days party being served had to respond when response period was only 10 days and court took judicial notice of delays in postal system).

**No additional time**

When no notice of any kind was served upon indemnitors by mail and the indemnitors were not required to await notification by the district court clerk that the amended answer had been approved for filing before they could make the jury demand, the indemnitors' time in which to demand jury trial was not extended by Rule 6(e). Engbrock v. Federal Ins. Co., C.A.5th, 1967, 370 F.2d 784, 787–788.

**12. Ten-day periods**

See, e.g., Rule 12(a)(4)(A), (B) (responsive pleading after grant or denial of motion for more definite statement); Rule 38(b) (demand for jury trial); Rule 56(c) (summary judgment motion); Rule 59(c) (affidavit opposing motion for new trial); Rule 68 (offer of judgment); Rule 72(b) (objection to magistrate's findings).

**13. 1985 amendment**

See the discussion in § 1162.

First, the additional three days allowed under Rule 6(e) when service has been made by mail simply can be added to the original period. This method is consistent with the application of Rule 6(e) to periods of more than eleven days, discussed above, and is easy to apply. However, it probably should be rejected as inconsistent with the intent of the 1985 amendment to Rule 6(a), as well as with the underlying purpose of Rule 6(e).[14] The Advisory Committee Note accompanying the 1985 amendment refers specifically to protecting the number of working days parties will have in which to act under rules with ten-day periods.[15] The amendment assures that when service is made personally at least four additional days (from the two intervening weekends) are added to virtually all ten-day periods[16] (along with any legal holidays that fall within the period). If,

**14. Purpose of Rule 6(e)**

See the discussion in the text at notes 1–5, above.

**15. Advisory Committee Note**

The Advisory Committee Note accompanying the 1985 amendment to Rule 6(a) is set out in vol. 12A, App. C, and is reprinted at 98 F.R.D. 337, 356–357.

See the discussion in § 1162.

**See also**

Peabody Coal Co. v. NLRB, C.A.9th, 1983, 709 F.2d 567, 569–570, **citing Wright & Miller** (29 C.F.R. § 102.114, virtually identical to Rule 6(e), interpreted to call for separate 10-day and three-day periods).

Kessler Institute for Rehabilitation v. NLRB, C.A.3d, 1982, 669 F.2d 138, 141 (29 C.F.R. § 102.114, virtually identical to Rule 6(e), interpreted to call for separate periods in order not to eliminate too many working days from 10–day period in which to file exceptions to report of hearings officer).

Coles Express v. New England Teamsters & Trucking Indus. Pension Fund, D.C.Me.1988, 702 F.Supp. 355.

Nalty v. Nalty Tree Farm, D.C.Ala.1987, 654 F.Supp. 1315.

**Pre–1985 practice**

A previous edition of this Treatise recommended the first method of integration under the pre-1985 version of Rule 6(a), which excluded "dies non" only from periods of less than seven days. This position probably was correct at that time given the fact that the exclusion under former Rule 6(a) never would add up to more than the three days allowed under Rule 6(e). As a result of the 1985 amendment, however, Rule 6(a) routinely adds four days to ten-day periods when service is made personally. Thus the first method of integration no longer clearly is the proper choice.

The 1985 amendment to Rule 6(a) renders the old practice of adding the three mailing days before deciding whether to except intermediate holidays inapplicable. National Savs. Bank of Albany v. Jefferson Bank, D.C.Fla. 1989, 127 F.R.D. 218, **citing Wright & Miller.**

**16. Virtually all**

In the unusual situation when a notice triggering a ten-day period is served personally on a weekend, the period commences on Monday, and only one complete weekend is excluded under Rule 6(a). In the vast majority of cases, however, personal service is made on working days, and Rule 6(a) assures that two weekends are excluded from the computation of the period.

however, service is made by mail and Rule 6(e) is applied to create a single time span, intervening Saturdays, Sundays and legal holidays are not excluded and the time in which to act is reduced effectively from fourteen calendar days to thirteen. Such a reduction runs counter to the purpose of Rule 6(e), which is to leave a party served by mail in no worse position than a party served personally.[17]

The unfairness of the first method of integration is underscored further by the fact that the longer fourteen-day period following personal service does not begin until actual receipt of the notice, but the shorter thirteen-day period following service by mail begins on the date of mailing.[18] Viewed in this light, computation of the three days granted under Rule 6(e) as part of a single time span, rather than as a separate period, results in precisely the situation Rule 6(e) is supposed to prevent—a systematic diminution of the number of working days available to a party to respond when notice is served by mail.[19] Although the diminution is not great, and despite the fact that enlargements of time are available liberally under Rule 6(b)(1),[20] the first method of integration should be rejected for the reasons stated.

The second method of integrating Rules 6(a) and 6(e) is to compute two separate time spans of ten and three days, and exclude weekends and holidays from each. This method solves the diminution of time problem caused by the first method discussed above. It also is relatively easy to implement. In addition, it applies

**17. Purpose of Rule 6(e)**

See the discussion in the text at notes 1–5, above.

**See also**

"It would be queer if service by mail, which delays actual knowledge of the decision, would reduce the time to object." Lerro v. Quaker Oats Co., C.A.7th, 1996, 84 F.3d 239, 242 (Easterbrook, J.), **citing Wright & Miller.**

National Savs. Bank of Albany v. Jefferson Bank, D.C.Fla.1989, 127 F.R.D. 218, **citing Wright & Miller** (agreeing with the text at note 21 of the Second Edition of this Treatise and explicitly disapproving of Pagan v. Bowen, cited below).

**But see**

Pagan v. Bowen, D.C.Fla.1987, 113 F.R.D. 667 (construing Rules 6(a) and 6(e) to create single 13-day period). The court cited a previous edition of this Treatise to support its decision. As a result of the 1985 amendment to Rule 6(a), the position taken in that edition no longer seems to be optimum. See the text at note 13, above.

**18. Service complete on mailing**

Rule 5(b) provides that service of a notice is complete upon mailing. See the discussion in § 1148.

**19. Purpose of Rule 6(e)**

See the discussion in the text at notes 1–5, above.

**20. Enlargements available**

See the discussion in § 1165.

the literal terms of Rule 6(a) to the computation of both time periods in a consistent manner, thereby producing a seemingly desirable result.[21]

On the other hand, the second method can lead to an unjustified lengthening of the permitted time. For example, assume a ten-day period with service by mail occurring on Friday. By eliminating weekends and holidays from both periods, the aggregated period ends on the Wednesday nineteen days later (or Thursday if a holiday intervenes). Even granting that a party served personally would have had fourteen calendar days, and that three additional days should be allowed because service is made by mail, the aggregated period should add up only to seventeen days, not the nineteen (or twenty) permitted by the second method. Of course it should be noted that the unjustified lengthening amounts at most to three days, and this arguably is not grounds for serious concern. It also should be remembered that if the calculation of separate periods results in excessive delay in urgent cases, one of the parties always can request the court to shorten the response time under Rule 6(d).[22] Despite these important ameliorating elements, any discrepancy in the computation of time caused by the method of service of court papers, regardless of how slight it may be, should be eliminated, if possible, in order to avoid giving parties improper incentives to choose a particular method of service (in this case personal service) in the hope of shortening another party's response time.[23]

The third method of integration attempts to eliminate any unjustified discrepancies based on the type of service employed. Under this method, the ten-day period is computed under Rule 6(a), excluding weekends and holidays, and three calendar days are added to the resulting period pursuant to Rule 6(e). To assure consistent application, and to reflect accurately the presumption that the three days allowed under Rule 6(e) represent transmission time in the mail, the three days always should be counted first,

**21. Desirable result**

The desirability of applying Rule 6 consistently to the computation of all time periods is discussed in § 1163 at notes 21–24.

**22. Shorten time**

See the discussion in § 1162 at notes 12–13.

**23. Improper incentives**

Incentives always will exist for parties to choose particular days of the week to serve notices. The point being made in the text is that no additional incentives should be provided to influence a party to choose one method of service over another in hopes of minimizing the response time available to another party.

followed by a counting of the ten-day period.[24] Thus, in the example given of service by mail on a Friday, the three days are Saturday, Sunday, and Monday, and the ten-day period runs from Tuesday through the Monday seventeen days after service. Regardless when the three days end, the ten-day period should begin on the next business day. The ten-day period should not begin on a Saturday, Sunday, or holiday, inasmuch as these days are excluded from the computation period.[25]

Because the third method of integration most closely achieves the apparent purposes of Rule 6(e) and the 1985 amendment to

**24. Three days first**

In some cases, computation of the three days after the ten-day period, rather than before, will cause the aggregated period to end on a weekend when it otherwise would not have. To avoid confusion under the third method of integration, it thus is necessary to adopt a convention of always counting the three days either first or last. Counting them first appears more consistent with the purpose of allowing three additional days to account for the transmission time of papers in the mail. The purpose of Rule 6(e) is discussed in the text above, at notes 1–5.

Kruger v. Apfel, D.C.Wis.1998, 25 F.Supp.2d 937, **quoting Wright & Miller**, vacated on other grounds C.A.7th, 2000, 214 F.3d 784.

EEOC v. TruGreen Ltd. Partnership, D.C.Wis.1998, 185 F.R.D. 552.

Littrell v. Shalala, D.C.Ohio 1995, 898 F.Supp. 582.

Epperly v. Lehmann Co., D.C.Ind.1994, 161 F.R.D. 72, **citing Wright & Miller.**

**Compare**

CNPq–Conselho Nacional de Desenvolvimento Cientifico e Technologico v. Inter-Trade, Inc., C.A.D.C.1995, 50 F.3d 56, 311 U.S.App.D.C. 85.

Vaquillas Ranch v. Texaco Exploration & Production, Inc., D.C.Tex.1994, 844 F.Supp. 1156.

In Nalty v. Nalty Tree Farm, D.C.Ala. 1987, 654 F.Supp. 1315, the district judge, without addressing the question of whether the three days should come first or last, applied a modified version of the third method of integration proposed in text, and put the three days after the ten-day period.

**But see**

The only way to carry out the Rule 6(e) function of adding time to compensate for delays in mail delivery is to employ Rule 6(a) first. Treanor v. MCI Telecommunications Corp., C.A.8th, 1998, 150 F.3d 916.

Consistency with prior cases and ease of computation suggest that the three-day period be computed after the originally prescribed period. National Savs. Bank of Albany v. Jefferson Bank, D.C.Fla.1989, 127 F.R.D. 218, 221, **quoting Wright & Miller.**

**25. Excluded**

Although Rule 6(a) excludes "intermediate" Saturdays, Sundays, and legal holidays, a liberal construction of "intermediate," which seems called for in view of the brevity of the time period involved, excludes from the computation any Saturday, Sunday, and legal holiday falling between the day of the event from which the period begins to run and the final day of the period. See the discussion in § 1162 at notes 12–13.

Rule 6(a), it probably should be preferred. It should be noted, however, that the third method suffers from three drawbacks when compared to the second method. First, it is more complicated; second, it requires the use of a convention (always counting the three-day period first) that is not provided for on the face of either federal rule; and, third, it arguably violates a literal reading of Rule 6(a) by failing to exclude weekends and holidays from the separate three-day transmission period, which, after all, is a period "less than eleven days." These points are well taken, and may lead some courts to adopt the second method of computing time. Nevertheless, the third method still seems preferable, because of its fidelity to the purposes of Rules 6(a) and 6(e), and because it avoids creating undesirable incentives for parties to choose one form of service over another.[26]

## II. Item No. 03-02: Proposed amendment concerning bond for costs on appeal

In November 2003, the Advisory Committee voted to approve the following proposed amendment to Appellate Rule 7. The grounds for the amendment are set forth in the accompanying Committee Note. The version below is redlined to show the changes that I would suggest making in order to update the Note:

**Rule 7. Bond for Costs on Appeal in a Civil Case**

In a civil case, the district court may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal. As used in this rule, "costs on appeal" means the costs that may be taxed under 28 U.S.C. § 1920 and the cost of premiums paid for a supersedeas bond or other bond to preserve rights pending appeal. Rule 8(b) applies to a surety on a bond given under this rule.

**Committee Note**

Rule 7 has been amended to resolve a circuit split over whether attorney's fees are included among the "costs on appeal" that may be secured by a Rule 7 bond when those fees are defined as "costs" under a fee-shifting statute. The Second, Sixth and Eleventh Circuits hold that a Rule 7 bond can secure such attorney's fees; the D.C. and Third Circuits hold that it cannot. *Compare In re Cardizem CD Antitrust Litigation*, 391 F.3d 812, 817 (6th Cir. 2004), *Pedraza v. United Guar. Corp.*, 313 F.3d 1323, 1328-33 (11th Cir. 2002), *and Adsani v. Miller*, 139 F.3d 67, 71-76 (2d Cir. 1998), *with Hirschensohn v. Lawyers Title Ins. Corp.*, No. 96-7312, 1997 WL 307777, at *1 (3d Cir. Apr. 7, 1997), *and In re American President Lines, Inc.*, 779 F.2d 714, 716 (D.C. Cir. 1985).

The amendment adopts the views of the D.C. and Third Circuits. To require parties to secure attorney's fees with a Rule 7 bond would "expand[] Rule 7 beyond its traditional scope, create[] administrative difficulties for district court judges, burden[] the right to appeal for litigants of limited means, and attach[] significant consequences to minor and quite possibly unintentional differences in the wording of fee-shifting statutes." 16A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & ~~PATRICK J~~CATHERINE T. ~~SCHILTZ~~STRUVE, FEDERAL PRACTICE AND PROCEDURE § 3953 (3d ed. Supp. 2004~~7~~). Moreover, it seems likely that in many, if not most, of the cases in which a fee-shifting statute requires an appellant to pay the attorney's fees incurred on appeal by its opponent, the appellant is a governmental or corporate entity whose ability to pay is not seriously in question.

Under amended Rule 7, an appellant may be required to post a bond to secure only two types of costs. First, a Rule 7 bond may ensure payment of the costs that may be taxed under 28 U.S.C. § 1920; attorney's fees are not among those costs. *See Roadway Express, Inc. v. Piper*, 447 U.S. 752, 757-58 (1980). Second, a Rule 7 bond may ensure payment of the cost of premiums paid for a supersedeas bond or other bond to preserve rights pending appeal. Although this cost is not mentioned by § 1920, it has long been recoverable under the common law and the local rules of district courts, and it is explicitly mentioned in Rule 39(e).

**MEMORANDUM**

**DATE:** October 13, 2003

**TO:** Advisory Committee on Appellate Rules

**FROM:** Patrick J. Schiltz, Reporter

**RE:** Item No. 03-02

Rule 7 authorizes a district court to require an appellant to post a bond "to ensure payment of costs on appeal."[1] The courts of appeals have divided over the meaning of "costs." At least two circuits — the D.C.[2] and the Third[3] — hold that a Rule 7 bond can secure only the

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[1]The cost bond that is authorized by Rule 7 should not be confused with the supersedeas bond that is authorized by Rule 8. A Rule 7 bond ensures that the appellant will pay any costs that are incurred on appeal by the appellee and that are eventually taxed against the appellant. A Rule 8 bond is posted by an appellant who seeks a stay of the district court's judgment; it ensures that the appellant will pay that judgment if he or she loses the appeal. *See* 16A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3953, at 291 (3d ed. 1999); *see also* Adsani v. Miller, 139 F.3d 67, 70 n.2 (2d Cir. 1998) ("It appears that a 'supersedeas bond' is retrospective covering sums related to the merits of the underlying judgment (and stay of its execution), whereas a 'cost bond' is prospective relating to the potential expenses of litigating an appeal.").

[2]*See* In re American President Lines, Inc., 779 F.2d 714, 716 (D.C. Cir. 1985) ("The costs referred to [in Rule 7] . . . are simply those that may be taxed against an unsuccessful litigant under Federal Appellate Rule 39, and do not include attorneys' fees that may be assessed on appeal." (footnote omitted)); *but see* Montgomery & Assocs., Inc. v. Commodity Futures Trading Comm'n, 816 F.2d 783, 784 (D.C. Cir. 1987) ("Nothing in the language of Fed.R.App.P. 39(d), and no language elsewhere in Rule 39, enumerates what items are included in 'costs' or suggests an exception for attorneys' fees deemed to be costs by statute.").

[3]*See* Hirschensohn v. Lawyers Title Ins. Corp., No. 96-7312, 1997 WL 307777, at *1 (3d Cir. Apr. 7, 1997) ("'Costs' referred to in Rule 7 are those that may be taxed against an unsuccessful litigant under Federal Rule of Appellate Procedure 39.").

costs that are identified in Rule 39. At least two other circuits — the Second[4] and the Eleventh[5] — hold that Rule 7 bonds can also secure attorney's fees when such fees are defined as "costs" under a fee-shifting statute.

At its May 2003 meeting, the Committee tentatively agreed to resolve this circuit split by amending Rule 7 to adopt the narrow interpretation of "costs" favored by the D.C. and Third Circuits. The Committee asked me to draft an implementing amendment and to take a closer look at this issue. In particular, the Committee was unclear about exactly which costs may be recovered on appeal and under what authority.

I looked at this issue over the summer. To my knowledge, 28 U.S.C. § 1920 is the only statute that *generally* authorizes the recovery of costs incurred in federal litigation. (There are, of course, statutes that authorize recovery of costs as a sanction and fee-shifting statutes that authorize recovery of a particular type of "cost" (e.g., attorney's fees) in a particular type of action (e.g., patent or civil rights).) Section 1920 is a comprehensive statute; it traces its roots to 1853 and "embodies Congress' considered choice as to the kinds of expenses that a federal court may tax as costs against the losing party."[6] The Supreme Court has rejected the argument that

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[4]*See* Adsani, 139 F.3d at 71-76 (upholding a district court's order that appellant post a Rule 7 bond to secure the attorney's fees that appellees might be entitled to "as part of the costs" under 17 U.S.C. § 505).

[5]*See* Pedraza v. United Guar. Corp., 313 F.3d 1323, 1328-33 (11th Cir. 2002) (agreeing with *Adsani* that attorney's fees can be secured by a Rule 7 bond when they are defined as "costs" under a fee-shifting statute, but holding that attorney's fees were not defined as "costs" by 12 U.S.C. § 2607(d)(5) (which authorizes the award of "costs of the action together with reasonable attorneys fees")).

[6]Crawford Fitting Co. v. J. T. Gibbons, Inc., 482 U.S. 437, 440 (1987).

"§ 1920 does not preclude taxation of costs above and beyond the items listed."[7] A litigant seeking to recover costs not listed in § 1920 may do so only when § 1920 has been "overridden by contract or explicit statutory authority."[8]

Section 1920 provides:

> A judge or clerk of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshal;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> (5) Docket fees under section 1923 of this title; [and]
>
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

Appellate Rule 39 is entitled "Costs," but the rule does not itself seem to authorize the taxation of any costs. Rather, Rule 39 provides procedures for the taxing of the costs that may be

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[7] *Id.* at 441.

[8] *Id.* at 444.

recovered pursuant to some other authority — usually, § 1920.[9] Rule 39(e) provides that the following costs are taxable in the district court:

(1) the preparation and transmission of the record;

(2) the reporter's transcript, if needed to determine the appeal;

(3) premiums paid for a supersedeas bond or other bond to preserve rights pending appeal; and

(4) the fee for filing the notice of appeal.

Rule 39(d) provides that all other costs are taxable in the court of appeals. By definition, these are the costs (1) that can be recovered under § 1920 (or another statute), but (2) that are not taxable in the district court under Rule 39(e). As a practical matter, this means the costs of duplicating and binding the briefs and appendices (or record excerpts). All other costs mentioned in § 1920 are either taxable in the district court under Rule 39(e) or almost never incurred on appeal.[10]

There is one anomaly, an anomaly that I have ignored to this point: Rule 39(e) provides that the costs of "premiums paid for a supersedeas bond or other bond to preserve rights pending appeal" should be taxed in the district court. The problem is that I cannot find any statute that

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[9]*See* Pedraza, 313 F.3d at 1329 ("Rule 39 contains no definition of 'costs' at all, and instead . . . sets forth procedural requirements for the obtainment of costs . . . and finally lists some costs that are taxable in the district court. . . . Notably, the rule never sets forth an exhaustive list or a general definition of 'costs.'"); Adsani, 139 F.3d at 74 ("None of these provisions [of Rule 39] purports to define costs: each concerns procedures for taxing them. Specific costs are mentioned only in the context of how that cost should be taxed, procedurally speaking.").

[10]Marcie Waldron confirms my impression that taxation of costs in the appellate court is generally limited to duplication and binding costs and is generally a routine matter handled by deputy clerks.

authorizes the taxation of these costs. As best as I can tell, taxation of these costs was permitted by the common law (at least in some jurisdictions) and by the local rules of some district courts at the time that Rule 39 was enacted, and for that reason these costs were included in Rule 39(e).[11]

This anomaly has made it somewhat difficult to draft an amendment to Rule 7 that implements the Committee's decision that Rule 7 bonds should not extend to attorney's fees. Rule 7 cannot simply cross-reference § 1920, as that statute does not include premiums for supersedeas bonds (which presumably should be included in the costs bonded under Rule 7). Rule 7 also cannot simply cross-reference Rule 39, as Rule 39 neither authorizes the recovery of any costs itself nor provides a complete list of costs recoverable under § 1920. Rather, Rule 39 merely directs that certain (specified) costs be taxed in the district court, and other (unspecified) costs be taxed in the court of appeals.

It seems to me that this leaves the Committee with two options. First, it could amend Rule 7 to identify those costs that *can* be bonded — specifically, the costs authorized by § 1920 plus the costs of premiums paid for supersedeas bonds. Second, it could amend Rule 7 to identify those costs that *cannot* be bonded — specifically, attorney's fees. (I suppose a third option is to amend Rule 7 to do both, but that would be redundant.)

I have followed the first approach in drafting the attached amendment. Identifying what "costs" does *not* include may open the door for future litigation over what it *does* include. It

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[11] *See* Advisory Committee Note to 1967 Adoption of Rule 39 ("Provision for taxation of the cost of premiums paid for supersedeas bonds is common in the local rules of district courts and the practice is established in the Second, Seventh, and Ninth Circuits.").

seems to me better to specify the "costs" that are encompassed within Rule 7 and require anyone who seeks to expand the scope of Rule 7 to amend either the rule or § 1920.

**Rule 7. Bond for Costs on Appeal in a Civil Case**

In a civil case, the district court may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal. As used in this rule, "costs on appeal" means the costs that may be taxed under 28 U.S.C. § 1920 and the cost of premiums paid for a supersedeas bond or other bond to preserve rights pending appeal. Rule 8(b) applies to a surety on a bond given under this rule.

**Committee Note**

Rule 7 has been amended to resolve a circuit split over whether attorney's fees are included among the "costs on appeal" that may be secured by a Rule 7 bond when those fees are defined as "costs" under a fee-shifting statute. The Second and Eleventh Circuits hold that a Rule 7 bond can secure such attorney's fees; the D.C. and Third Circuits hold that it cannot. *Compare Pedraza v. United Guar. Corp.*, 313 F.3d 1323, 1328-33 (11th Cir. 2002), *and Adsani v. Miller*, 139 F.3d 67, 71-76 (2d Cir. 1998), *with Hirschensohn v. Lawyers Title Ins. Corp.*, No. 96-7312, 1997 WL 307777, at *1 (3d Cir. Apr. 7, 1997), *and In re American President Lines, Inc.*, 779 F.2d 714, 716 (D.C. Cir. 1985).

The amendment adopts the views of the D.C. and Third Circuits. To require parties to secure attorney's fees with a Rule 7 bond would "expand[] Rule 7 beyond its traditional scope, create[] administrative difficulties for district court judges, burden[] the right to appeal for litigants of limited means, and attach[] significant consequences to minor and quite possibly unintentional differences in the wording of fee-shifting statutes." 16A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & PATRICK J. SCHILTZ, FEDERAL PRACTICE AND PROCEDURE § 3953 (3d ed. Supp. 2004). Moreover, it seems likely that in many, if not most, of the cases in which a fee-shifting statute requires an appellant to pay the attorney's fees incurred on appeal by its opponent, the appellant is a governmental or corporate entity whose ability to pay is not seriously in question.

Under amended Rule 7, an appellant may be required to post a bond to secure only two types of costs. First, a Rule 7 bond may ensure payment of the costs that may be taxed under 28 U.S.C. § 1920; attorney's fees are not among those costs. *See Roadway Express, Inc. v. Piper*, 447 U.S. 752, 757-58 (1980). Second, a Rule 7 bond may ensure payment of the cost of premiums paid for a supersedeas bond or other bond to preserve rights pending appeal. Although this cost is not mentioned by § 1920, it has long been recoverable under the common law and the local rules of district courts, and it is explicitly mentioned in Rule 39(e).

## III. Item 03-09: Proposed amendments to Rules 4(a)(1)(B) and 40(a)(1) concerning federal officers and employees

In November 2004, the Advisory Committee voted to approve amendments to Rule 4(a)(1)(B) and 40(a)(1). The goal of the amendments is to clarify the application of the extended time periods for United States litigants in cases where an officer or employee of the United States is sued in his or her individual capacity. The text and notes, as approved by the Committee in November 2004, are provided as an attachment to the memo concerning Item 06-06 (concerning the proposal to treat state-government litigants the same as federal-government litigants for purposes of the time limits set in Rules 4(a)(1)(B) and 40(a)(1)).

As noted in that memo, Items 03-09 and 06-06 concern the same Rules. If the Committee decides that it may wish to proceed with Item 06-06, then it may wish to hold off on publishing Item 03-09 for comment until Item 06-06 is ready for publication as well. The memo concerning Item 06-06 attempts to illustrate how the two proposals might be combined into one set of proposed amendments to the relevant Rules.

Encls.

**MEMORANDUM**

**DATE:** October 12, 2004

**TO:** Advisory Committee on Appellate Rules

**FROM:** Patrick J. Schiltz, Reporter

**RE:** Item No. 03-09

At its April 2004 meeting, the Advisory Committee tentatively approved the Department of Justice's proposal that Rules 4(a)(1)(B) and 40(a)(1) be amended to make clear that the extended time periods apply in cases in which an officer or employee of the United States is sued in an individual capacity for acts or omissions that occurred in connection with duties that he or she performed on behalf of the United States. The Committee asked me to take a close look at the amendments and Committee Notes proposed by the Department, make appropriate stylistic changes, and present a final version at the November 2004 meeting.

Attached are revised versions of the amendments and Committee Notes. I have rewritten the amendments to comply with the style conventions and to ensure that the text of these amendments will better match up with the text of restyled Civil Rule 12(a)(2) and (3). I have also shortened the Committee Notes, both because the Standing Committee prefers short Notes, and because these amendments do not require a lot of explanation or justification.

**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 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

(iv) a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States.

* * * * *

**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 extended the 60-day period to respond to complaints to such cases. 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 decide whether to file an appeal.

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**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, a petition for panel rehearing 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 United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States.

* * * * *

**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.