

December 1, 2008

TO: Honorable John G. Roberts, Jr.
Chief Justice of the United States

RE: Summary of Proposed Amendments to the Federal Rules

The proposed amendments to the Federal Rules of Practice and Procedure transmitted from the Judicial Conference are summarized below.

TIME-COMPUTATION PROJECT

The proposed amendments to Appellate Rule 26, Bankruptcy Rule 9006, Civil Rule 6, and Criminal Rule 45 adopt the same time-computation method for each set of rules and make the application of the method clearer and simpler. The principal simplifying change is a “days are days” approach to computing all time periods in each set of rules, counting intermediate weekend days and holidays. Under the present rules, intermediate weekends and holidays are sometimes counted and sometimes not. To further simplify time counting, most periods shorter than 30 days are changed to multiples of 7 days (7, 14, 21, or 28 days) so that deadlines will usually fall on weekdays. The proposed amendments add clarity by addressing forward and backward counting periods and addressing how concepts such as the “inaccessibility” of the clerk’s office and when a day “ends” apply to electronic filing. These amendments replace the inconsistent and often unclear approach of the existing rules.

Including intermediate weekend days and holidays in calculating deadlines effectively shortens those deadlines. For example, a 10-day period under the present rules is in effect a 14-day period because the weekend days are excluded. The proposed amendments to 14 Appellate Rules, 38 Bankruptcy Rules, 23 Civil Rules, 3 Official Civil Forms, and 13 Criminal Rules extend virtually all short deadlines to offset this effect of including intermediate weekend days and holidays in the calculation. The proposed amendments to Civil Rules 50, 52, and 59 change the period for filing certain postjudgment motions from the current 10-day to 28-day periods.

The proposed amendments to Criminal Rule 45 clarify that its time-computation provisions apply to deadlines in statutes affecting court proceedings if those statutes do not specify how to calculate the time period. This approach is consistent with the other sets of rules and with case law.

The Judicial Conference has approved asking Congress to enact legislation changing a modest number of deadlines in statutes that affect court proceedings and that use the rules time-calculation method to calculate when those deadlines fall. The legislation would make these statutory deadlines consistent with the rules and avoid confusion.

APPELLATE RULES

The proposed amendment to Rule 4 eliminates an ambiguity arising from the 1998 restyling. The current rule might be construed to require an appellant to amend a prior notice of appeal whenever the district court amends the judgment, even if the amendment to the judgment favors the appellant.

The proposed new Rule 12.1 dovetails with proposed new Civil Rule 62.1 to provide for a party to request an “indicative ruling” in the district court on a motion that the district court lacks authority to grant because of a pending appeal. The proposed Appellate Rule facilitates remand to the district court for a ruling on the motion when the district court has indicated that the motion raises a substantial issue or that the district court would grant the motion if the court of appeals remanded for that purpose.

The proposed amendment to Rule 22 conforms to the proposed new Rule 11(a) of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 or 2255 by deleting the requirement that the district judge issue a certificate of appealability or state why a certificate should not issue. That requirement will now be set out in the proposed new Rule 11(a) of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 or 2255.

The proposed amendment to Rule 26 clarifies the operation of the “three-day rule” when a time period ends on a weekend or holiday.

BANKRUPTCY RULES

The proposed amendment to Rule 2016 is a technical change to correct a cross-reference to a subsection of the Bankruptcy Code that was recently changed.

The proposed amendment to Rule 4008 requires an entity filing a reaffirmation agreement to file a cover sheet that includes sufficient information for the court to determine whether the proposed reaffirmation agreement is presumed to be an undue hardship for the debtor.

The proposed amendments to Rules 7052 and 9021 and new Rule 7058 conform the Bankruptcy Rules to the “separate judgment rule” of Civil Rule 58. Under the proposed

amendments and proposed new rule, the separate-document requirement will apply only to a judgment in an adversary proceeding and not to a judgment or order in other actions, including contested matters.

The proposed amendment to Rule 9006 is a technical change to correct the cross-reference to Civil Rule 5(b)(2), which was renumbered as part of the recent restyling of the Civil Rules.

The proposed amendments to Rules 9015 and 9023 would set a 14-day deadline to file certain postjudgment motions, which is different from the proposed 28-day deadline in the Civil Rules that would otherwise apply in a bankruptcy case.

The proposed revision of Exhibit D to Official Form 1 deletes the requirement that a debtor file a separate motion for an order postponing the debtor's mandatory credit-counseling briefing, warning that the court may dismiss the case if it concludes that a postponement is not warranted.

The proposed revision of Official Form 8 requires the debtor to provide additional information indicating the debtor's intentions to use leased personal property and property subject to security interests.

The proposed revisions of Official Forms 9F, 10, and 23 are technical and conforming changes.

The proposed new Official Form 27 implements the proposed amendment to Rule 4008 by requiring the disclosure of financial information necessary for the court to determine whether a reaffirmation agreement creates a presumption of undue hardship for the debtor.

CIVIL RULES

The proposed amendment to Rule 13 deletes subdivision (f), which sets out standards for amending pleadings to add a counterclaim, because it is redundant of Rule 15.

The proposed amendment to Rule 15 limits the time within which a party may amend once – as a matter of course – a pleading to which a responsive pleading is required.

The proposed amendment to Rule 48 requires the court to poll the jury when a party requests it, and permits the court to do so on its own. The proposed amendment makes the Civil Rule on the procedure for polling the jury parallel the existing Criminal Rule.

The proposed new Rule 62.1, in coordination with proposed new Appellate Rule 12.1, provides a procedure for a party to request an “indicative ruling” in the district court on a motion that the district court lacks authority to grant because of a pending appeal. The district court may defer ruling, deny the motion, or indicate either that the motion raises a substantial issue or that the court would be inclined to grant the motion if the case were remanded.

The proposed amendment to Rule 81 clarifies the definition of “state” to include not only the District of Columbia but also any United States commonwealth or territory.

CRIMINAL RULES

The proposed amendment to Rule 7 deletes as unnecessary a forfeiture-related provision that is more appropriately located in Rule 32.2, which consolidates the forfeiture procedures in a single rule.

The proposed amendment to Rule 32 provides that a presentence report should state whether the government is seeking forfeiture, to facilitate timely consideration of forfeiture issues during sentencing.

The proposed amendments to Rule 32.2: (1) state that the government’s notice of forfeiture should not be a count in an indictment or information; (2) provide that the notice of forfeiture need not identify the specific property or money judgment that is subject to forfeiture; (3) require the court to enter a preliminary forfeiture order sufficiently in advance of sentencing to permit the parties to comment; (4) expressly authorize the court to enter a general forfeiture order when it is not possible to identify all of the property subject to forfeiture; and (5) make various clarifying and technical changes.

The proposed amendment to Rule 41 clarifies the application of the rule’s warrant provisions to the search and seizure of electronically stored information. The amendment establishes a two-stage process, authorizing (1) the seizure of electronic storage media or the seizure and copying of electronically stored information and (2) a subsequent review, consistent with the warrant, of the storage media or electronically stored information.

The proposed amendment to Rule 11 of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 or 2255 consolidates and clarifies the requirements for certificates of appealability. The amendment requires the district court to rule on the certificate of appealability when a final order is issued, rather than later after a notice of appeal is filed.