

Preliminary Draft
of
Proposed Amendments
to the
Federal Rules
of
Practice and Procedure

SUBMITTED FOR PUBLIC COMMENT

Comments Due by February 15, 2008

Administrative Office of the U. S. Courts

James C. Duff, Director

**A SUMMARY FOR BENCH AND BAR
(AUGUST 2007)**

REQUEST FOR COMMENT ON PROPOSED
AMENDMENTS TO THE FEDERAL RULES
OF PRACTICE AND PROCEDURE

The Judicial Conference's Advisory Committees on Appellate Rules, Bankruptcy Rules, Civil Rules, and Criminal Rules have published proposed amendments to various rules and forms and seek public comment on the proposed changes. The Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee) **has not approved these proposals** but submits them for public comment. The proposals have not been presented to the Judicial Conference or the Supreme Court.

The full text of the proposed rules amendments and explanatory Committee Notes is set out in the *Request for Comment* pamphlet, which is posted at <www.uscourts.gov/rules> and available in hard copy on request to the Secretary to the Standing Committee. The following summarizes the major aspects of the proposed Appellate, Bankruptcy, Civil, and Criminal Rule amendments.

The rules committees welcome all comments, whether favorable or adverse. All comments on these proposals will be considered carefully by the respective rules committees, which consist of experienced trial and appellate lawyers, scholars, and judges. All comments submitted are available to the public.

Comments sent electronically or in hard copy must be received by the Secretary to the Standing Committee **no later than February 15, 2008**. Comments may be sent electronically to <Rules_Comments@ao.uscourts.gov> or by mail to the address set out at the end of this brochure.

The public comment period includes public hearings regarding the proposals. Requests to testify at a public hearing must be received by the Secretary to the Standing Committee no later than 30 days before the scheduled hearing date. Information on the dates and places of the public hearings is at the end of this brochure.

Following the public comment period, all amendments require approval by the relevant advisory committee, the Standing Committee, the Judicial Conference, and the Supreme Court. Under the proposed schedule, any approved changes would take effect on December 1, 2009, unless altered by Congress.

I. Time-Computation Rules:

Proposed amendments to Appellate Rule 26, Bankruptcy Rule 9006, Civil Rule 6, and Criminal Rule 45 simplify the time computation methods in each set of rules and make them consistent across the rules. The amendments respond to frequent complaints by practitioners about the effort and uncertainty in calculating time periods, and to comments by judges about the anomalous results of the current computation system. The amended rules' principal simplifying innovation is the adoption of a "days-are-days" approach to computing all periods, including short time periods. Under the current rules,

intermediate Saturdays, Sundays, and legal holidays are omitted when computing short time periods but included when computing longer periods. By contrast, under the amended rules, intermediate Saturdays, Sundays, and legal holidays are always counted. Other changes proposed by the amended rules include how to count forward when the period is measured after an event and the deadline falls on a Saturday, Sunday, or legal holiday, how to tell when the last day of a period ends, how to compute hourly time periods, and how to calculate deadlines when the clerk's office is "inaccessible."

In tandem with the proposed changes to the time calculation method, each rules committee reviewed all time periods in the rules. To further simplify time counting, many rules were changed to adopt multiples of 7 days – 7, 14, 21, and 28-day periods – so that applicable deadlines would usually fall on weekdays. To ensure that the amended time deadlines are reasonable, many short time periods were extended to account for the loss of the additional time now provided by excluding intermediate weekends and holidays. The proposed adjustments to the deadlines are set forth below.

The Standing Committee expects to recommend to Congress that some short statutory deadlines, which may be affected by the change in the time-computation rules, be lengthened to offset the loss of intermediate weekends and holidays. A number of statutory provisions that could be affected are listed in the *Request for Comment* pamphlet, but only a few are likely to warrant recommendations for legislative change as a result of the rule changes. The public is invited to comment on whether attorneys rely on the time-computation rules in general when computing statutory time periods, which of the listed statutory provisions should be recommended for legislative action to offset the changes in the time-computation rules, and whether other statutory periods should be considered.

A. Time periods in the Rules of Appellate Procedure are amended as follows:

Three and five days are extended to seven days in Rules 27, 28.1, and 31.

Seven and eight days are extended to 10 days in Rules 5(b)(2), 19, and 27.

Seven and 10 days are extended to 14 days in Rules 4(a)(5), 4(a)(6), 4(b), 5(d)(1), 6, 10, 12, 30, and 39.

Ten days are extended to 30 days in Rule 4(a)(4)(A)(vi).

Twenty days are extended to 21 days in Rule 15.

B. Time periods in the Rules of Bankruptcy Procedure are amended as follows:

Five days are extended to seven days in Rules 2006, 2007, 2008, 2015.3, 6004, 9006, and 9027.

Ten days are extended to 14 days in Rules 1007, 2003, 2015.1, 2015.2, 2016, 3020, 4001, 6004, 6006, 7004, 7012, 8001, 8002, 8003, 8006, 8009, 8015, 8017, 9027, and 9033.

Fifteen days are revised to 14 days in Rules 1007, 1019, 1020, 2015, 2015.1, 2016, 3015, 4001, 4002, 6004, 6007, and 8009.

Twenty days are extended to 21 days in Rules 1011, 2002, 2003, 2007.2, 2015, 2015.3, 3001, 3015, 3019, 6003, 7012, 8002, 9027, and 9033.

Twenty-five days are extended to 28 days in Rules 2002, 3017, and 4004.

C. Time periods in the Rules of Civil Procedure are amended as follows:

The one-day period in Rule 6(c) becomes seven days.
The one-day period in Rule 54(d) becomes 14 days.
The three-day period in Rule 55 becomes seven days.
Five-day periods in Rules 32, 54, and 81 become seven days.

The five-day period in Rule 6(c) becomes 14 days.
Ten-day periods in Rules 12, 14, 15, 23, 38, 59(c), 62, 65, 68, 72, 81, and Supplemental Rule C become 14 days.

Ten-day periods in Rules 50, 52, and 59(b), (d) and (e) become 30-day periods.

The less-than-11-day period in Rule 32 becomes less than 14 days.

Twenty-day periods in Rules 12, 15, 27, 53, 71.1, 81, Forms 3, 4, and 60, and Supplemental Rules B, C and G become 21 days.

Rule 6(b)'s reference to (nonexistent) provisions for extending the times set by enumerated provisions in Rules 50, 52, 59, and 60, and Rule 59(c)'s reference to a 20-day extension, are eliminated.

The timing provisions in Rules 56(a) and (c) are replaced by new provisions that recognize authority to set time requirements by local rule or by court order, and in default of a local rule or court order allow a motion to be made at any time until 30 days after the close of all discovery. The new provisions also establish default times for response and reply.

D. Time periods in the Rules of Criminal Procedure are amended as follows:

Five days are extended to seven days in Rule 47.

Seven and 10 days are extended to 14 days in Rules 5.1, 7, 12.1, 12.3, 29, 33, 34, 35, 41, 58, 59, and Rule 8 of the Rules Governing Proceedings under 28 U.S.C. § 2254 and § 2255.

Twenty days are extended to 21 days in Rules 5.1 and 12.3.

II. Proposed Amendments to the Federal Rules of Appellate Procedure:

Rule 4 would be amended to: (1) eliminate an ambiguity that resulted from the 1998 restyling, whereby Rule 4(a)(4)(B)(ii) might be construed to require an appellant to amend a prior notice of appeal when the district court amends the judgment

after the notice of appeal has been filed, even if the amendment favors the appellant; and (2) make clear that the 60-day appeal period applies when 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.

Rule 22 would be amended to reflect that Rule 11(a) of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 and 2255 will now address the certificate of appealability requirement set by 28 U.S.C. § 2253(c).

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

Rule 40 would be amended to clarify that the 45-day period to file a petition for panel rehearing applies when 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.

New **Rule 12.1** parallels new Civil Rule 62.1 and addresses the procedure to be followed for motions that the district court cannot grant because an appeal is pending. Under the new rule, the court of appeals may remand if the district court states either that the motion would be granted or that the motion raises a substantial issue.

III. Proposed Amendments to the Federal Rules of Bankruptcy Procedure:

New **Rule 1017.1** establishes procedures for the court to consider a debtor’s request to defer prepetition counseling because of exigent circumstances.

Amended **Rule 4008** requires an entity filing a reaffirmation agreement to also file a cover sheet on the applicable Official Form 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** account for the 2002 amendment of Civil Rule 58, which clarifies the time when a judgment that is not set forth on a separate document becomes final for appeal purposes. With some exceptions involving posttrial motions, Civil Rule 58 requires that every judgment be set forth on a separate document and provides a 150-day default appeal period if the requirement is not met. Under the proposed new Rule 7058 and amendments to Rule 7052, the “separate document” requirement and the 150-day default appeal period will apply only to a judgment in an adversary proceeding. They will not apply to a judgment or order in other actions, including contested matters.

Amended **Official Form 8** requires the debtor to provide more information on leased personal property and property subject to security interests.

Amended **Official Form 27** implements the requirements of Rule 4008 and requires certification that the form is a true and correct copy of the reaffirmation agreement and that any difference between income and expenses reported on the form and schedules I and J is explained.

IV. Proposed Amendments to the Federal Rules of Civil Procedure:

Amended **Rule 8** eliminates “discharge in bankruptcy” as an affirmative defense. Under the Bankruptcy Code, a discharge voids any judgment on a discharged debt and acts as an injunction against any creditor seeking to collect the debt, whether or not the debtor invokes the discharge, making it inaccurate to characterize “discharge in bankruptcy” as an affirmative defense.

The proposed amendment to **Rule 13** deletes subdivision (f), addressing amendments to add a counterclaim, as largely redundant of Rule 15, which sets out standards governing pleading amendments in general.

Rule 15 is amended to redefine the circumstances in which a pleading may be amended without leave of court. A pleading to which a responsive pleading is required can be amended once as a matter of course 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier. The amended rule also deletes reference to the trial calendar because many courts no longer keep a central trial calendar.

Rule 48 is amended to require the court to poll jurors individually after a verdict upon a party’s request. The court may also poll jurors on its own motion and may order a new trial or further jury deliberations if the poll reveals a lack of unanimity. The amendment is modeled on Criminal Rule 31(d).

Proposed new **Rule 62.1**, which is integrated with proposed new Appellate Rule 12.1, clarifies the procedures for remand to a trial court to decide a timely motion for postjudgment relief that the court otherwise lacks authority to grant because an appeal has been docketed and is pending. Under the proposed rule, a case could be fully or partially remanded if the district court indicates either that it would grant the motion or that the motion raises a substantial issue. The proposed procedure adopts well-recognized practices in remanding for trial-court action on a motion to vacate under Rule 60(b).

Amended **Rule 81** expands the definition of the term “state” to include, where appropriate, “any commonwealth, territory [, or possession] of the United States.”

V. Proposed Amendments to the Federal Rules of Criminal Procedure:

Amended **Rule 7** deletes as unnecessary subdivision (c)(2), which is more appropriately set forth in Rule 32.2.

Rule 32 is amended to require the government to state in the presentence report whether it seeks forfeiture under Rule 32.2.

The proposed amendments to **Rule 32.2** clarify procedures applicable when the government seeks forfeiture of property as part of a defendant’s sentence. Under the new procedures: (1) the government’s notice of forfeiture should not be designated as a count in the indictment or information and the notice need not identify the specific property or money judgment that is subject

to forfeiture; (2) the court must enter a preliminary forfeiture order sufficiently in advance of sentencing to permit the parties to suggest modifications; (3) the court is authorized to enter a forfeiture order that is general in nature in a case in which it is not possible to identify all of the property subject to forfeiture; (4) the time when a forfeiture order becomes final as to the defendant is clarified; (5) the government must submit a special verdict form; and (6) technical changes are made modifying the notice, publication, and interlocutory sale of property subject to forfeiture.

Amended **Rule 41** clarifies that the warrant provisions apply to the search of electronically stored information. The rule creates a two-step process under which officers may seize or copy electronically stored information and review it later to determine what information falls within the scope of the warrant. Under the amended rule, the inventory describing the electronically stored information may be limited to a description of the physical storage media seized or copied. The amended rule also preserves a judge's discretion to impose a deadline for the return of the storage media.

The proposed amendments to **Rule 11** of the Rules Governing Proceedings under §§ 2254 and 2255 make the requirements concerning certificates of appealability more prominent by adding and consolidating them in the pertinent Rule 11. The amended rules also require the district court to grant or deny the certificate at the time a final order is issued.

Public hearings are scheduled to be held on the amendments to

- Appellate Rules in Pasadena, California, on January 16, 2008, and in New Orleans, Louisiana, on February 1, 2008;
- Bankruptcy Rules in Pasadena, California, on January 16, 2008, and in Washington, D.C., on January 25, 2008;
- Civil Rules in Pasadena, California, on January 16, 2008, and in Washington, D.C., on January 28, 2008; and
- Criminal Rules in Pasadena, California, on January 16, 2008, and in Washington, D.C., on January 18, 2008.

Those wishing to testify should contact the Secretary at the address below in writing at least 30 days before the hearing.

All written comments on the proposed rule amendments should be mailed to:

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

Comments on the proposed rule amendments may also be sent electronically to <Rules_Comments@ao.uscourts.gov>.

In accordance with established procedures all comments submitted on the proposed amendments are available for public inspection.

The text of the proposed rule amendments and the accompanying Committee Notes can be found at the United States Federal Courts' Home Page at <www.uscourts.gov/rules>. For further information, copies of this brochure, the *Request for Comment* pamphlets, and other materials, contact:

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