

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

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

FROM: Judge Carl E. Stewart, Chair
Advisory Committee on Appellate Rules

DATE: May 13, 2008 (revised June 20, 2008)

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on April 10 and 11 in Monterey, California. The Committee gave final approval to the package of time-computation amendments, to one new rule, and to three other proposed amendments.

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Part II.A of this report discusses the proposals for which the Committee seeks final approval: the time-computation amendments, proposed new Rule 12.1, and amendments to Rules 26(c), 4(a)(4)(B)(ii) and 22.

* * * * *

II. Action Items

The Committee is seeking final approval of the time-computation amendments and of four other items. The Committee is seeking approval for publication of three items.

A. Items for Final Approval

1. Time-Computation Amendments

a. Introduction

The Committee proposes to amend Rule 26(a) to implement the time-computation project. The project's core innovation is to adopt a days-are-days approach to the computation of all time periods, including short time periods.

To offset the change in the method of computing short time periods, the Committee proposes to amend time periods contained in the Appellate Rules. The changes can be summarized as follows. References to "calendar days" in Rules 25, 26 and 41 become simply references to "days." Three-day periods in Rules 28.1(f) and 31(a) become seven-day periods. The five-day period in Rule 27(a)(4) becomes a seven-day period. The seven-day period in Rule 4(a)(6) lengthens to 14 days. The seven-day periods in Rules 5(b)(2) and 19 become ten days. The eight-day period in Rule 27(a)(3)(A) becomes ten days. The ten-day period in Rule 4(a)(4)(A)(vi) becomes 28 days to correspond with proposed changes in the Civil Rules. The ten-day periods in Rules 4(a)(5)(C), 4(b), 5, 6, 10, 12, 30 and 39 become 14 days. The 20-day period in Rule 15(b) becomes 21 days.

The Committee also compiled a short list of appeal-related statutory time periods that the Committee recommends including among the periods that Congress will be asked to amend. The Committee's recommendations are as follows:

- The 7-day deadline in 28 U.S.C. § 2107(c) should be increased to 14 days.
 - This period, which constitutes one of the time limits on making a motion to reopen the time to appeal in a civil case, should be extended from 7 to 14 days in keeping with the proposed amendment to the corresponding time period in Rule 4(a)(6)(B).
- The "not less than 7" day period in 28 U.S.C. § 1453(c)(1) should be changed to "not more than 10" days.
 - This period limits the time for seeking appellate review, under the Class Action Fairness Act, of a district court's remand order; "not less than" was clearly a

drafting error. Section 1453 should be amended to set the time limit at “not more than 10 days” to correct the drafting error and offset the shift in the time-computation method.

- The four-day deadlines in the Classified Information Procedures Act (“CIPA”) § 7(b) and in the material-support statute, 18 U.S.C. § 2339B(f)(5)(B), should be amended to specify that intermediate weekends and holidays are excluded.
 - CIPA § 7(b) sets a 10-day deadline for pretrial appeals relating to orders concerning disclosure of classified information, and sets 4-day deadlines for the court of appeals to hear argument and render decision with respect to appeals taken during trial. 18 U.S.C. § 2339B(f)(5)(B) sets 10-day and 4-day deadlines (similar to those in CIPA § 7(b)) relating to certain appeals of orders concerning classified information in civil actions brought by the United States concerning the provision of material support to foreign terrorist organizations.
 - Concerning the 10-day deadlines in CIPA and the material-support statute, the Committee voted to defer to the views of the Criminal Rules Committee.
- The 10-day mandamus petition deadline in the Crime Victims’ Rights Act (“CVRA”), 18 U.S.C. § 3771(d)(5), should be extended to 14 days.
 - 18 U.S.C. § 3771(d)(5) sets a 10-day time period for victims to seek mandamus review in the court of appeals for certain purposes. 18 U.S.C. § 3771(d)(3) sets a 72-hour deadline for the court of appeals to decide a victim’s mandamus petition and a 5-day limit on continuances in the district court.
 - The Committee does not recommend any changes to the 72-hour or 5-day periods in the CVRA.

b. Text of Proposed Amendments and Committee Notes (on next page)

**PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF APPELLATE PROCEDURE¹**

Rule 26. Computing and Extending Time

- 1 **(a) Computing Time.** ~~The following rules apply in~~
2 ~~computing any period of time specified in these rules or~~
3 ~~in any local rule, court order, or applicable statute:~~
- 4 ~~— (1) Exclude the day of the act, event, or default that~~
5 ~~begins the period.~~
- 6 ~~— (2) Exclude intermediate Saturdays, Sundays, and legal~~
7 ~~holidays when the period is less than 11 days, unless~~
8 ~~stated in calendar days.~~
- 9 ~~— (3) Include the last day of the period unless it is a~~
10 ~~Saturday, Sunday, legal holiday, or — if the act to be~~
11 ~~done is filing a paper in court — a day on which the~~
12 ~~weather or other conditions make the clerk’s office~~
13 ~~inaccessible.~~

¹New material is underlined; matter to be omitted is lined through.

2 FEDERAL RULES OF APPELLATE PROCEDURE

14 ~~(4) As used in this rule, “legal holiday” means New~~
15 ~~Year’s Day, Martin Luther King, Jr.’s Birthday,~~
16 ~~Washington’s Birthday, Memorial Day, Independence~~
17 ~~Day, Labor Day, Columbus Day, Veterans’ Day,~~
18 ~~Thanksgiving Day, Christmas Day, and any other day~~
19 ~~declared a holiday by the President, Congress, or the~~
20 ~~state in which is located either the district court that~~
21 ~~rendered the challenged judgment or order, or the circuit~~
22 ~~clerk’s principal office. The following rules apply in~~
23 ~~computing any time period specified in these rules, in~~
24 ~~any local rule or court order, or in any statute that does~~
25 ~~not specify a method of computing time.~~

26 **(1) Period Stated in Days or a Longer Unit.** When
27 the period is stated in days or a longer unit of time:
28 **(A) exclude the day of the event that triggers the**
29 **period;**

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

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

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

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

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

45 (C) if the period would end on a Saturday,
46 Sunday, or legal holiday, the period continues

4 FEDERAL RULES OF APPELLATE PROCEDURE

47 to run until the same time on the next day that
48 is not a Saturday, Sunday, or legal holiday.

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

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

56 **(B)** during the last hour for filing under Rule
57 26(a)(2), then the time for filing is extended
58 to the same time on the first accessible day
59 that is not a Saturday, Sunday, or legal
60 holiday.

61 **(4) “Last Day” Defined.** Unless a different time is
62 set by a statute, local rule, or court order, the last
63 day ends:

- 64 (A) for electronic filing in the district court, at
65 midnight in the court’s time zone;
- 66 (B) for electronic filing in the court of appeals, at
67 midnight in the time zone of the circuit
68 clerk’s principal office;
- 69 (C) for filing under Rules 4(c)(1), 25(a)(2)(B),
70 and 25(a)(2)(C) — and filing by mail under
71 Rule 13(b) — at the latest time for the
72 method chosen for delivery to the post office,
73 third-party commercial carrier, or prison
74 mailing system; and
- 75 (D) for filing by other means, when the clerk’s
76 office is scheduled to close.
- 77 (5) **“Next Day” Defined.** The “next day” is
78 determined by continuing to count forward when
79 the period is measured after an event and backward
80 when measured before an event.

6 FEDERAL RULES OF APPELLATE PROCEDURE

81 (6) “Legal Holiday” Defined. “Legal holiday”

82 means:

83 (A) the day set aside by statute for observing New
84 Year’s Day, Martin Luther King Jr.’s
85 Birthday, Washington’s Birthday, Memorial
86 Day, Independence Day, Labor Day,
87 Columbus Day, Veterans’ Day, Thanksgiving
88 Day, or Christmas Day;

89 (B) any day declared a holiday by the President or
90 Congress; and

91 (C) for periods that are measured after an event,
92 any other day declared a holiday by the state
93 where either of the following is located: the
94 district court that rendered the challenged
95 judgment or order, or the circuit clerk’s
96 principal office.

97 * * * * *

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 statute that does not specify a method of computing time, a Federal Rule of Appellate Procedure, a local rule, or a court order. In accordance with Rule 47(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.*, 20 U.S.C. § 7711(b)(1) (requiring certain petitions for review by a local educational agency or a state to be filed “within 30 working days (as determined by the local educational agency or State) after receiving notice of” federal agency decision).

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; 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 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 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.*, Rules 5(b)(2), 5(d)(1), 28.1(f), & 31(a).

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 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 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 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 10:00 a.m. on Friday, November 2, 2007, will run until 9:00 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, local provisions may address inaccessibility for purposes of electronic filing.

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, for example, address the problems that might arise under subdivision (a)(4)(A) if a single district has clerk's offices in different time zones, or provide 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 45(a)(2). 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)(4)(A) addresses electronic filings in the district court. For example, subdivision (a)(4)(A) would apply to an electronically-filed notice of appeal. Subdivision (a)(4)(B) addresses electronic filings in the court of appeals.

Subdivision (a)(4)(C) addresses filings by mail under Rules 25(a)(2)(B)(i) and 13(b), filings by third-party commercial carrier under Rule 25(a)(2)(B)(ii), and inmate filings under Rules 4(c)(1) and 25(a)(2)(C). For such filings, subdivision (a)(4)(C) provides that the “last day” ends at the latest time (prior to midnight in the filer’s time zone) that the filer can properly submit the filing to the post office, third-party commercial carrier, or prison mail system (as applicable) using the filer’s chosen method of submission. For example, if a correctional institution’s legal mail system’s rules of operation provide that items may only be placed in the mail system between 9:00 a.m. and 5:00 p.m., then the “last day” for filings under Rules 4(c)(1) and 25(a)(2)(C) by inmates in that institution ends at 5:00 p.m. As another example, if a filer uses a drop box maintained by a third-party commercial carrier, the “last day” ends at the time of that drop box’s last scheduled pickup. Filings by mail under Rule 13(b) continue to be subject to § 7502 of the Internal Revenue Code, as amended, and the applicable regulations.

Subdivision (a)(4)(D) addresses all other non-electronic filings; for such filings, the last day ends under (a)(4)(D) when the clerk’s office in which the filing is made is scheduled to close.

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 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 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 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. If the clerk’s office is inaccessible on August 31, then subdivision (a)(3) extends the filing deadline forward to the next accessible day that is not a Saturday, Sunday or legal holiday—no earlier than Tuesday, September 4.

Subdivision (a)(6). New subdivision (a)(6) defines “legal holiday” for purposes of the Federal Rules of Appellate Procedure, including the time-computation provisions of subdivision (a). Subdivision (a)(6) continues to include within the definition of “legal holiday” days that are declared a holiday by the President or Congress.

For forward-counted periods — i.e., periods that are measured after an event — subdivision (a)(6)(C) includes certain state holidays within the definition of legal holidays. However, state legal holidays are not recognized in computing backward-counted periods. For both forward- and backward-counted periods, the rule thus protects those who may be unsure of the effect of state holidays. For forward-counted deadlines, treating state holidays the same as federal

7 appeal runs for all parties from the entry of
8 the order disposing of the last such remaining
9 motion:

- 10 (i) for judgment under Rule 50(b);
11 (ii) to amend or make additional factual
12 findings under Rule 52(b), whether or
13 not granting the motion would alter the
14 judgment;
15 (iii) for attorney's fees under Rule 54 if the
16 district court extends the time to appeal
17 under Rule 58;
18 (iv) to alter or amend the judgment under
19 Rule 59;
20 (v) for a new trial under Rule 59; or
21 (vi) for relief under Rule 60 if the motion is
22 filed no later than ~~10~~ 28 days after the
23 judgment is entered.

24

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25

(5) Motion for Extension of Time.

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27

(C) No extension under this Rule 4(a)(5)

28

may exceed 30 days after the prescribed

29

time or ~~10~~ 14 days after the date when

30

the order granting the motion is entered,

31

whichever is later.

32

(6) Reopening the Time to File an Appeal. The

33

district court may reopen the time to file an

34

appeal for a period of 14 days after the date

35

when its order to reopen is entered, but only

36

if all the following conditions are satisfied:

37

* * * * *

38

(B) the motion is filed within 180 days after

39

the judgment or order is entered or

40

within ~~7~~ 14 days after the moving party

41 receives notice under Federal Rule of
42 Civil Procedure 77(d) of the entry,
43 whichever is earlier; and

44 * * * * *

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

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

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

- 51 (i) the entry of either the judgment or
52 the order being appealed; or
53 (ii) the filing of the government's
54 notice of appeal.

55 * * * * *

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

18 FEDERAL RULES OF APPELLATE PROCEDURE

- 57 (A) If a defendant timely makes any of the
58 following motions under the Federal Rules of
59 Criminal Procedure, the notice of appeal from
60 a judgment of conviction must be filed within
61 ~~10~~ 14 days after the entry of the order
62 disposing of the last such remaining motion,
63 or within ~~10~~ 14 days after the entry of the
64 judgment of conviction, whichever period
65 ends later. This provision applies to a timely
66 motion:
- 67 (i) for judgment of acquittal under Rule 29;
 - 68 (ii) for a new trial under Rule 33, but if
69 based on newly discovered evidence,
70 only if the motion is made no later than
71 ~~10~~ 14 days after the entry of the
72 judgment; or
 - 73 (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 28-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.

20 FEDERAL RULES OF APPELLATE PROCEDURE

Rule 5. Appeal by Permission

1

* * * * *

2

(b) Contents of the Petition; Answer or Cross-Petition;

3

Oral Argument.

4

* * * * *

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(2) A party may file an answer in opposition or a

6

cross-petition within ~~7~~ 10 days after the petition is

7

served.

8

* * * * *

9

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

10

Record.

11

(1) Within ~~10~~ 14 days after the entry of the order

12

granting permission to appeal, the appellant must:

13

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

14

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

15

* * * * *

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

1

* * * * *

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

6

* * * * *

22 FEDERAL RULES OF APPELLATE PROCEDURE

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

10 * * * * *

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

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

21 (ii) An appellee who believes that other
22 parts of the record are necessary must,
23 within ~~10~~ 14 days after being served

24 with the appellant's designation, file
25 with the clerk and serve on the appellant
26 a designation of additional parts to be
27 included.

28 * * * * *

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

1 * * * * *

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

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

8

* * * * *

9

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

10

ordered:

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(A) the appellant must — within the ~~10~~ 14 days

12

provided in Rule 10(b)(1) — file a statement

13

of the issues that the appellant intends to

14

present on the appeal and must serve on the

15

appellee a copy of both the order or

16

certificate and the statement;

17

(B) if the appellee considers it necessary to have

18

a transcript of other parts of the proceedings,

19

the appellee must, within ~~10~~ 14 days after the

20

service of the order or certificate and the

21

statement of the issues, file and serve on the

22

appellant a designation of additional parts to

23

be ordered; and

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

31 * * * * *

32 (c) **Statement of the Evidence When the Proceedings**
33 **Were Not Recorded or When a Transcript Is**
34 **Unavailable.** If the transcript of a hearing or trial is
35 unavailable, the appellant may prepare a statement of the
36 evidence or proceedings from the best available means,
37 including the appellant's recollection. The statement
38 must be served on the appellee, who may serve
39 objections or proposed amendments within ~~10~~ 14 days
40 after being served. The statement and any objections or

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41 proposed amendments must then be submitted to the
42 district court for settlement and approval. As settled and
43 approved, the statement must be included by the district
44 clerk in the record on appeal.

45 * * * * *

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

1 * * * * *

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

7

* * * * *

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**

1

* * * * *

2

(b) Application or Cross-Application to Enforce an

3

Order; Answer; Default.

4

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5

(2) Within ~~20~~ 21 days after the application for

6

enforcement is filed, the respondent must serve on

7

the applicant an answer to the application and file

8

it with the clerk. If the respondent fails to answer

9

in time, the court will enter judgment for the relief

10

requested.

11

* * * * *

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

1 When the court files an opinion directing entry of
2 judgment enforcing the agency’s order in part, the agency
3 must within 14 days file with the clerk and serve on each
4 other party a proposed judgment conforming to the opinion.
5 A party who disagrees with the agency’s proposed judgment
6 must within ~~7~~ 10 days file with the clerk and serve the agency
7 with a proposed judgment that the party believes conforms to
8 the opinion. The court will settle the judgment and direct
9 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

14 * * * * *

15 **(c) Manner of Service.**

16 (1) Service may be any of the following:

17 * * * * *

18 (C) by third-party commercial carrier for delivery

19 within 3 calendar days; or

20 * * * * *

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

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* * * * *

(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

1 **(a) In General.**

2 * * * * *

3 **(3) Response.**

4 **(A) Time to file.** Any party may file a response
5 to a motion; Rule 27(a)(2) governs its
6 contents. The response must be filed within 8
7 10 days after service of the motion unless the
8 court shortens or extends the time. A motion
9 authorized by Rules 8, 9, 18, or 41 may be
10 granted before the ~~8-day~~ 10-day period runs
11 only if the court gives reasonable notice to
12 the parties that it intends to act sooner.

13 * * * * *

14 **(4) Reply to Response.** Any reply to a response must
15 be filed within 5 7 days after service of the

Rule 28.1. Cross-Appeals

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* * * * *

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

4

* * * * *

5 (4) the appellee’s reply brief, within 14 days after the
6 appellant’s response and reply brief is served, but
7 at least ~~3~~ 7 days before argument unless the court,
8 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.

17 the record, because the entire record is available to
18 the court. This paragraph applies also to a
19 cross-appellant and a cross-appellee.

20 * * * * *

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

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

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

10

* * * * *

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

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

7

* * * * *

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

1

* * * * *

2

(b) When Issued. The court's mandate must issue 7

3

~~calendar~~ days after the time to file a petition for

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rehearing expires, or 7 ~~calendar~~ days after entry of an

5

order denying a timely petition for panel rehearing,

6

petition for rehearing en banc, or motion for stay of

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mandate, whichever is later. The court may shorten or

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extend the time.

9

* * * * *

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.”

c. Changes Made After Publication and Comment

The Appellate Rules Committee made only one change to Rule 26(a) after publication and comment: Because the Committee is seeking permission to publish for comment a proposed new Rule 1(b) that would adopt a FRAP-wide definition of the term “state,” the Committee decided to delete from Rule 26(a)(6)(B) the following parenthetical sentence: “(In this rule, ‘state’ includes the District of Columbia and any United States commonwealth, territory, or possession.)” That change required the corresponding deletion — from the Note to Rule 26(a)(6) — of part of the final sentence (the deleted portion read “, and defines the term ‘state’ — for purposes of subdivision (a)(6) — to include the District of Columbia and any commonwealth, territory or possession of the United States. Thus, for purposes of subdivision (a)(6)’s definition of ‘legal holiday,’ ‘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.”)

The Appellate Rules Committee made one change to its proposed amendments concerning Appellate Rules deadlines. Based on comments received with respect to the timing for motions that toll the time for taking a civil appeal, the Committee changed the cutoff time in Rule 4(a)(4)(A)(vi) to 28 days (rather than to 30 days as in the published proposal). The published proposal’s choice of 30 days had been designed to accord with the proposed amendments published by the Civil Rules Committee, which would have extended the deadline

for tolling motions to 30 days. Because 30 days is also the time period set by Appellate Rule 4 and by 28 U.S.C. § 2107 for taking a civil appeal (when the United States and its officers or agencies are not parties), commentators pointed out that adopting 30 days as the cutoff for filing tolling motions would sometimes place would-be appellants in an awkward position: If the deadline for making a tolling motion falls on the same day as the deadline for filing a notice of appeal, then in a case involving multiple parties on one side, a litigant who wishes to appeal may not know, when filing the notice of appeal, whether a tolling motion will be filed; such a timing system can be expected to produce instances when appeals are filed, only to go into abeyance while the tolling motion is resolved.

By the time of the Appellate Rules Committee's April 2008 meeting, the Civil Rules Committee had discussed this issue and had determined that the best resolution would be to extend the deadline for tolling motions to 28 days rather than 30 days. The choice of a 28-day deadline responds to the concerns of those who feel that the current 10-day deadlines are much too short, but also takes into account the problem of the 30-day appeal deadline. As described in the draft minutes of the Committee's April meeting, Committee members carefully discussed the relevant concerns and determined, by a vote of 7 to 1, to assent to the 28-day time period for tolling motions and to change the cutoff time in Rule 4(a)(4)(A)(vi) to 28 days.

The Standing Committee changed Rule 26(a)(6) to exclude state holidays from the definition of "legal holiday" for purposes of computing backward-counted periods; conforming changes were made to the Committee Note.

* * * * *

2. Rule 26(c)**a. Introduction**

During the time-computation project the question arose whether the three-day rule should be altered. The decision was taken not to change the three-day rule for the time being. The Appellate Rules Committee did, however, publish for comment a technical amendment designed to clarify the three-day rule's application and to make Rule 26(c)'s three-day rule parallel the three-day rule in Civil Rule 6. The Committee seeks final approval of this proposal. Assuming that the Standing Committee also gives final approval to the time-computation amendments, the word "calendar" will be deleted from Rule 26(c) as stated in the package of time-computation amendments (discussed above).

b. Text of Proposed Amendment and Committee Note

Rule 26. Computing and Extending Time

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* * * * *

2

(c) Additional Time After Service. When a party is

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~~required or permitted to act within a prescribed period~~

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~~after a paper is served on that party~~ may or must act

5

within a specified time after service, 3 calendar days are

6

added to after the prescribed period would otherwise

7

expire under Rule 26(a), unless the paper is delivered on

8

the date of service stated in the proof of service. For

9

purposes of this Rule 26(c), a paper that is served

10

electronically is not treated as delivered on the date of

11

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 rule. Civil Rule 6(e) was amended in 2004 to eliminate similar uncertainty in the Civil Rules.

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 rule 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.

* * * * *

c. Changes Made After Publication and Comment

No changes were made after publication and comment, except for the style changes (described below) which were suggested by Professor Kimble.

* * * * *

Style suggestions. Professor Kimble suggests capitalizing “after” in the subdivision heading; deleting “prescribed” from “prescribed period”; and placing a comma after “under Rule 26(a)”.

3. New Rule 12.1

a. Introduction

The Committee seeks final approval of proposed new Appellate Rule 12.1 concerning indicative rulings. This Rule was published for comment in August along with proposed Civil Rule 62.1. Both rules will formalize (and raise awareness concerning) the practice of indicative rulings.

b. Text of Proposed Amendment and Committee Note**Rule 12.1. Remand After an Indicative Ruling by the District Court on a Motion for Relief That Is Barred by a Pending Appeal**

- 1 **(a) Notice to the Court of Appeals.** If a timely motion is
2 made in the district court for relief that it lacks authority
3 to grant because of an appeal that has been docketed and
4 is pending, the movant must promptly notify the circuit
5 clerk if the district court states either that it would grant
6 the motion or that the motion raises a substantial issue.
- 7 **(b) Remand After an Indicative Ruling.** If the district
8 court states that it would grant the motion or that the
9 motion raises a substantial issue, the court of appeals
10 may remand for further proceedings but retains
11 jurisdiction unless it expressly dismisses the appeal. If
12 the court of appeals remands but retains jurisdiction, the
13 parties must promptly notify the circuit clerk when the
14 district court has decided the motion on remand.

Committee Note

This new rule corresponds to Federal Rule of Civil Procedure 62.1, which adopts for any motion that the district court cannot grant because of a pending appeal 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 grant relief under a rule such as Civil Rule 60(b) without a remand. But it can entertain the motion and deny it, defer consideration, state that it would grant the motion if the court of appeals remands for that purpose, or state that the motion raises a substantial issue. Experienced lawyers often refer to the suggestion for remand as an “indicative ruling.” (Appellate Rule 4(a)(4) lists six motions that, if filed within the relevant time limit, suspend the effect of a notice of appeal filed before or after the motion is filed until the last such motion is disposed of. The district court has authority to grant the motion without resorting to the indicative ruling procedure.)

The procedure formalized by Rule 12.1 is helpful when relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal. In the criminal context, the Committee anticipates that Rule 12.1 will be used primarily if not exclusively for newly discovered evidence motions under Criminal Rule 33(b)(1) (*see United States v. Cronin*, 466 U.S. 648, 667 n.42 (1984)), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. § 3582(c).

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 the 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 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 if the district court states that it would grant the motion or that the motion raises a substantial issue. The “substantial issue” standard may be illustrated by the following hypothetical: The district court grants summary judgment dismissing a case. While the plaintiff’s appeal is pending, the plaintiff moves for relief from the judgment, claiming newly discovered evidence and also possible fraud by the defendant during the discovery process. If the district court reviews the motion and indicates that the motion “raises a substantial issue,” the court of appeals may well wish to remand rather than proceed to determine the appeal.

If the district court states that it would grant the motion or that the motion raises a substantial issue, the movant may ask the court of appeals to remand 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 litigants’ notifications and the district court’s statement.

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 new or amended 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.”).

c. Changes Made After Publication and Comment

No changes were made to the text of Rule 12.1. The Appellate Rules Committee made two changes to the Note in response to public comments, and made additional changes in consultation with the Civil Rules Committee and in response to some Appellate Rules Committee members' suggestions. The Standing Committee made two further changes to the Note.

As published for comment, the second paragraph of the Note read: “[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. Cronin*, 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.” The Appellate Rules Committee discussed the Solicitor General's concern that Appellate Rule 12.1 might be misused in the criminal context. In response, the Appellate Rules Committee deleted the second paragraph as published and substituted the following language: “The procedure formalized by Rule 12.1 is helpful when

relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal. In the criminal context, the Committee anticipates that Rule 12.1's use will be limited to newly discovered evidence motions under Criminal Rule 33(b)(1) (*see United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984)), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. § 3582(c).” The Standing Committee further revised the latter sentence to read: “In the criminal context, the Committee anticipates that Rule 12.1 will be used primarily if not exclusively for newly discovered evidence motions under Criminal Rule 33(b)(1) (*see United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984)), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. § 3582(c).”

As published for comment, the first sentence of the Note's last paragraph read: “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.” In response to a suggestion by Public Citizen, the Appellate Rules Committee revised this sentence to refer to a “new or amended” notice of appeal rather than a “separate” notice of appeal.

The Appellate Rules Committee, in consultation with the Civil Rules Committee, added the following parenthetical at the end of the Note's first paragraph: “(The effect of a notice of appeal on district-court authority is addressed by Appellate Rule 4(a)(4), which lists six motions that, if filed within the relevant time limit, suspend the effect of a notice of appeal filed before or after the motion is filed until the last such motion is disposed of. The district court has authority to grant the motion without resorting to the indicative ruling procedure.)” This parenthetical is designed to forestall confusion concerning the effect of tolling motions on a district court's power to

act. The Standing Committee approved a change to the first sentence of the parenthetical; it now reads: “Appellate Rule 4(a)(4) lists six motions that, if filed within the relevant time limit, suspend the effect of a notice of appeal filed before or after the motion is filed until the last such motion is disposed of. “

The Appellate Rules Committee, acting at the suggestion of the Civil Rules Committee, altered the wording of one sentence in the first paragraph and one sentence in the fifth paragraph of the Note. The changes are designed to remove references to remands of “the action,” since those references would be in tension with the Note’s advice concerning the advisability of limited remands. Thus, in the Note’s first paragraph “if the action is remanded” became “if the court of appeals remands for that purpose,” and in the Note’s fifth paragraph “may ask the court of appeals to remand the action” became “may ask the court of appeals to remand.”

The Appellate Rules Committee also made stylistic changes to the Note’s first and third paragraphs. “Experienced appeal lawyers” became “Experienced lawyers,” and “act in face of a pending appeal” became “act in the face of a pending appeal.”

* * * * *

4. Rule 4(a)(4)(B)(ii)**a. Introduction**

The Committee seeks final approval for an amendment to Rule 4(a)(4)(B)(ii) that will eliminate an ambiguity that resulted from the 1998 restyling. The Rule's current language might be read to require the appellant to amend a prior notice of appeal if the district court amends the judgment after the notice of appeal is filed, even if the amendment is in the appellant's favor. This ambiguity will be removed by replacing the current reference to challenging "a judgment altered or amended upon" a timely post-trial motion with a reference to challenging "a judgment's alteration or amendment upon" such a motion.

b. Text of Proposed Amendment and Committee Note

Rule 4. Appeal as of Right — When Taken

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

2 * * * * *

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

4 * * * * *

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

13 (ii) A party intending to challenge an order
14 disposing of any motion listed in Rule
15 4(a)(4)(A), or a judgment ~~altered or~~

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16 ~~amended~~ judgment's alteration or
17 amendment upon such a motion, must
18 file a notice of appeal, or an amended
19 notice of appeal — in compliance with
20 Rule 3(c) — within the time prescribed
21 by this Rule measured from the entry of
22 the order disposing of the last such
23 remaining motion.

24 * * * * *

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. Thus, subdivision (a)(4)(B)(ii) requires a new or amended notice of appeal when an appellant wishes to challenge an order disposing of a motion listed in Rule 4(a)(4)(A) or a judgment’s alteration or amendment upon such a motion.

c. Changes Made After Publication and Comment

No changes were made to the proposal as published. Instead, the Committee has added the commentators’ suggestions to its study agenda.

* * * * *

5. Rule 22(b)(1)**a. Introduction**

The Committee seeks final approval of an amendment to Rule 22 that would conform the Appellate Rules to a change that the Criminal Rules Committee proposes to make to the Rules Governing Proceedings Under 28 U.S.C. §§ 2254 or 2255. The Appellate Rules amendment deletes from Rule 22 the requirement that the district judge who rendered the judgment either issue a certificate of appealability (COA) or state why a certificate should not issue. The relevant requirement will be delineated in Rule 11(a) of the Rules Governing Proceedings Under 28 U.S.C. § 2254 or § 2255.

b. Text of Proposed Amendment and Committee Note

Rule 22. Habeas Corpus and Section 2255 Proceedings

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* * * * *

(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~~ the district clerk must send to the court of appeals the certificate ~~or statement~~ (if any) and the statement described in Rule 11(a) of the Rules Governing

16 Proceedings Under 28 U.S.C. § 2254 or § 2255 (if
17 any) to the court of appeals, along with the notice
18 of appeal and the file of the district-court
19 proceedings. If the district judge has denied the
20 certificate, the applicant may request a circuit
21 judge to issue ~~the certificate~~ it.

22 * * * * *

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 deleted from subdivision (b)(1). Rule 11(a) of the Rules Governing Proceedings under 28 U.S.C. § 2254 or § 2255 now delineates the relevant requirement. When an applicant has filed a notice of appeal, the district clerk must transmit the record to the court of appeals; if the district judge has issued a certificate of appealability, the district clerk must include in this transmission the certificate and the statement of reasons for grant of the certificate.

c. Changes Made After Publication and Comment

The Appellate Rules Committee approved the proposed amendment to Appellate Rule 22(b) with the style changes (described below) which were suggested by Professor Kimble. As detailed in the report of the Criminal Rules Committee, a number of changes were made to the proposals concerning Rule 11 of the habeas and Section 2255 rules in response to public comment.

At the Standing Committee's direction, the language proposed for Appellate Rule 22(b) was circulated to the circuit clerks for their comment. Pursuant to comments received from the circuit clerks, the second sentence of Rule 22(b) was revised to make clear that the Rule requires the transmission of the record by the district court when an appeal is filed, regardless of whether the certificate of appealability was granted or denied by the district judge; a conforming change was made to the last sentence of the Committee Note.

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Style suggestions. Professor Kimble suggests that the proposed Rule 22 amendment be slightly modified, by capitalizing "under" in the phrase "Proceedings under 28 U.S.C. § 2254 or § 2255," and by inserting ", along" between "court of appeals" and "with the notice."

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