EXCERPT FROM THE
REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

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TIME-COMPUTATION PROJECT

In consultation with the Committee's Time-Computation Subcommittee, the Appellate, Bankruptcy, Civil, and Criminal Rules Advisory Committees proposed amendments to Appellate Rule 26, Bankruptcy Rule 9006, Civil Rule 6, and Criminal Rule 45 to make the method of computing time consistent, simpler, and clearer. In tandem with this work, each advisory rules committee also reviewed and proposed changes to the time periods in all the rules to ensure that every deadline is reasonable and that changing the time-computation method did not have the effect of shortening existing time periods.

The time-computation project was launched in response to frequent complaints about the time, energy, and anxiety expended in calculating time periods, the potential for error, and the anomalous results of the current computation provisions.

Proposed Rules Changes

The principal simplifying change in the amended time-computation rules is the adoption of a "days-are-days" approach to computing all time periods. Under some of the current rules, intermediate weekends and holidays are omitted when computing short periods but included when computing longer periods. By contrast, under the proposed rules amendments, intermediate weekends and holidays are counted regardless of the length of the specified period.

Other changes in the amended time-computation rules clarify how to count forward when the period measured is after an event (for example, 21 days after service of a motion) and the

deadline falls on a weekend or holiday; and how to count backward when the period measured is before an event (for example, 14 days before a scheduled hearing) and the deadline falls on a weekend or holiday. The proposed amendments also provide for computing hourly time periods, to address recent legislation affecting court proceedings in which deadlines are expressed in hours (for example, 72 hours for action).

The amended time-computation rules also fill a gap in the present rules by addressing the special timing considerations that accompany electronic filing. Under the proposed amendments, unless a statute, local rule, or court order provides otherwise, the last day of a period for an electronic filing ends at midnight in the court's time zone, while the last day for a paper filing ends when the clerk's office is scheduled to close. (Additional refinements to these principles are made in proposed Appellate Rule 26(a)(4) for reasons specific to appellate practice.) Filing deadlines are extended if the clerk's office is inaccessible. The proposed amendments provide a court with flexibility to define when a deadline should be adjusted or a failure to comply with a deadline should be excused because the clerk's office was "inaccessible." The proposed amendments and the Committee Notes do not specify the meaning of "inaccessibility," which can vary depending on whether a filing is electronic or paper, leaving the definition to local rules and case law development.

The advisory committees also reviewed every rule to ensure that all time periods would be reasonable taking into account the effect of changing the time-computation method. The advisory committees concluded that virtually all short time deadlines should be extended to adjust for the effect of including intermediate weekends and holidays in calculating deadlines. To further simplify time-counting, the advisory committees proposed changing most periods of less than 30 days to multiples of 7 days. The advisory committees adopted 7, 14, 21, and 28-day periods when possible, so that deadlines will usually fall on weekdays. The advisory

committees' comprehensive review of time-computation rules and the rules containing time periods resulted in proposed amendments to a total of 91 rules.

In August 2007, proposed amendments to each set of rules were published for comment from the bench and bar. Scheduled public hearings on the amendments were canceled because no one asked to testify. The specific proposed amendments are discussed later in this report in the respective sections describing the advisory committees' recommendations.

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FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules submitted proposed amendments to Rules 4, 22, and 26(c), and new Rule 12.1 with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed changes were circulated to the bench and bar for comment in August 2007. The scheduled public hearings on the proposed changes were canceled because no one requested to testify.

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

Proposed new Rule 12.1, which is coordinated with proposed new Civil Rule 62.1, provides a clearly stated and consistent procedure for a party to request an "indicative ruling" on a motion that the district court lacks authority to grant because of a pending appeal. Many courts follow a variation of this practice but there is no clear or consistent statement in the rules. The proposed new appellate rule facilitates the remand to the district court for a ruling on the motion when the district court has indicated that it would grant the motion if the court of appeals

remanded for that purpose or that the motion raises a substantial issue. The proposed procedure ensures proper coordination of proceedings dealing with indicative rulings in the district court and court of appeals. Unless the court of appeals expressly dismisses the appeal, it retains jurisdiction despite the remand and may consider the appeal even after the district court has granted relief on remand. The proposed new rule is integrated with proposed new Civil Rule 62.1.

The proposed amendment to Rule 22 conforms the rule to changes proposed to Rule 11(a) of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 or 2255. The proposed amendment deletes the requirement that the district court judge who rendered the judgment either issue a certificate of appealability or state why a certificate should not issue, because the relevant requirement is now set out in proposed Rule 11(a) of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 or 2255, where it is more appropriately located.

The proposed amendment to Rule 26, in addition to the changes made to adopt the revised time-computation method, clarifies the operation of the three-day rule when a time period ends on a weekend or holiday. The proposed amendment tracks the language of similar recent amendments to Civil Rule 6 and Criminal Rule 45.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference —

> Approve the proposed amendments to Appellate Rules 4(a)(4), 22, and 26(c), and new Rule 12.1 and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

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The advisory committee also proposed amendments to Rules 4, 5, 6, 10, 12, 15, 19, 25, 26, 27, 28.1, 30, 31, 39, and 41 as part of the time-computation project with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendment to

Rule 26 simplifies and clarifies the general time-computation method. The proposed amendments to the listed rules adjust time periods consistent with the change to the time-computation method.

The proposed adjustments to the time periods in the rules are minor — accounting for the inclusion of holidays and weekends in the time-computation method and the preference for stating periods in multiples of seven days — with some exceptions noted below. The following adjustments are proposed:

- References to "calendar days" in Rules 25, 26, and 41 become simply references to "days," consistent with the change to the time-computation method.
- 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. The seven-day time period in Rule 4, which governs motions to reopen the time to appeal, is increased to 14 days. As noted above with respect to the recommendations concerning statutory deadlines, the advisory committee suggested choosing 14 days as opposed to 10 days in keeping with the time-computation project's preference for stating periods that are multiples of seven days. Lengthening the time period to 14 days would not unduly threaten any principle of repose; a party that wished to be confident about the expiration of appeal time could protect itself by giving notice of the judgment to other parties.
- Ten days are extended to 28 days in Rule 4(a)(4)(A)(vi). The provision delineates which motions under Civil Rule 60 have the effect under Appellate Rule 4(a)(4)(A) of extending the time to file an appeal. The proposed change in Appellate Rule

4(a)(4)(A)(vi) matches the revision to the time limits for postjudgment motions under Civil Rules 50, 52, and 59.

• Twenty days are extended to 21 days in Rule 15.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference —

Approve the proposed amendments to Appellate Rules 4, 5, 6, 10, 12, 15, 19, 25, 26, 27, 28.1, 30, 31, 39, and 41 as part of the project to improve the time-computation rules and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

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