

**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 CRIMINAL PROCEDURE**

### ***Rules Recommended for Approval and Transmission***

The Advisory Committee on Criminal Rules submitted proposed amendments to Rules 7, 32, 32.2, 41, and Rule 11 of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 and 2255 with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments 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 asked to testify.

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

The proposed amendment to Rule 32 provides that a presentence report should state whether the government is seeking forfeiture to promote timely consideration of issues concerning forfeiture as part of the sentencing.

The proposed amendments to Rule 32.2: (1) state that the government's notice of forfeiture should not be designated as a count in an indictment or information; (2) provide that the notice of forfeiture need not identify the specific property or money judgment that is subject

to forfeiture (additional detail may be provided in a bill of particulars); (3) require the court to enter a preliminary forfeiture order sufficiently in advance of sentencing to permit the parties to suggest modifications; (4) expressly authorize a court 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; (5) clarify when the forfeiture order becomes final as to the defendant, state what the district court is required to do at sentencing, and require the government to submit a special verdict form; and (6) provide technical changes modifying the notice, publication, and interlocutory sale of property subject to forfeiture.

The proposed amendment to Rule 41 clarifies how the rule's warrant provisions apply to the seizure of electronically stored information. It sets up a two-stage process, authorizing the seizure of electronic storage media or the seizure and copying of electronically stored information and a subsequent review of the storage media or electronically stored information consistent with the warrant. No specific time period is imposed on any off-site review of the media or electronically stored information because the review time can be substantial, depending on the volume of information and the presence of hidden "traps" or encrypted data. A judge may impose a specific deadline, however, for the return of the storage media or access to the electronically stored information when the warrant is issued. Under the proposed amendment, the inventory describing the electronically stored information may be limited to a description of the physical storage media seized or copied.

The proposed amendments to Rule 11 of the Rules Governing Proceedings under §§ 2254 and 2255 consolidate and highlight the requirements concerning certificates of appealability. The proposed amendments also require the district court judge to rule on the certificate of appealability when a final order is issued, rather than later after a notice of appeal is filed. The proposed procedure ensures that the judge will promptly rule on the certificate when the issues

and facts are fresh. The proposed procedure will expedite proceedings, avoid unnecessary remands, and inform the moving party's decision whether to file an appeal. The proposed amendments clarify the requirements for filing a notice of appeal and expressly state that a district court's grant of a certificate of appealability does not eliminate the need to file a notice of appeal. This last provision was added after the public comment period. The advisory committee concluded that the proposed amendments need not be republished because the added provision did not represent a substantial change from the published version, was uncontroversial, and was consistent with the public comments. Also, current Rule 11 of the § 2254 Rules was renumbered Rule 12 to accommodate the proposed amendments on certificates of appealability.

The Committee concurred with the advisory committee's recommendations.

**Recommendation:** That the Judicial Conference —

Approve the proposed amendments to Criminal Rules 7, 32, 32.2, 41, and Rule 11 of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 and 2255, and renumbered Rule 12 of the § 2254 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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The advisory committee also proposed amendments to Rules 5.1, 7, 12.1, 12.3, 29, 33, 34, 35, 41, 47, 58, 59, and Rule 8 of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 and 2255, 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 45 clarifies and simplifies the general time-computation method. The proposed amendments to the other 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. The following adjustments are proposed:

- 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.

The Committee concurred with the advisory committee's recommendations.

**Recommendation:** That the Judicial Conference —

Approve the proposed amendments to Criminal Rules 5.1, 7, 12.1, 12.3, 29, 33, 34, 35, 41, 45, 47, 58, 59, and Rule 8 of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 and 2255 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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