

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

LEE H. ROSENTHAL
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JEFFREY S. SUTTON
APPELLATE RULES

LAURA TAYLOR SWAIN
BANKRUPTCY RULES

MARK R. KRAVITZ
CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

ROBERT L. HINKLE
EVIDENCE RULES

MEMORANDUM

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

FROM: Honorable Jeffrey S. Sutton, Chair
Advisory Committee on Appellate Rules

RE: Report of the Advisory Committee on Appellate Rules

DATE: May 28, 2010 (revised June 14, 2010)

I. Introduction

The Advisory Committee on Appellate Rules met on April 8 and 9, 2010, in Asheville, North Carolina. The Committee gave final approval to proposed amendments to Appellate Rules 4 and 40,¹ removed one item from its study agenda, and discussed a number of other items.

Part II of this report discusses the proposals for which the Committee seeks final approval: proposed amendments to Rules 4 and 40, accompanied by a proposed legislative amendment to 28 U.S.C. § 2107. Part III covers other matters.

¹ The wording of the proposed amendments was finalized and approved after the meeting by an email vote in May 2010.

* * * * *

II. Action Item

The Committee is seeking final approval of proposed amendments to Rules 4 and 40. The Committee also proposes seeking a legislative amendment to 28 U.S.C. § 2107. The proposed amendments would clarify the treatment of the time to appeal or to seek rehearing in cases to which a United States officer or employee is a party.

The Rule 4 and Rule 40 proposals were published for comment in 2007. However, the Committee subsequently noted that the Supreme Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007), raised questions concerning the advisability of pursuing the proposed amendment to Rule 4(a)(1)(B). That amendment addresses the scope of the 60-day appeal period in Rule 4(a)(1)(B) – a period that is also set by 28 U.S.C. § 2107. Because *Bowles* indicates that statutory appeal time periods are jurisdictional, concerns were raised that amending Rule 4(a)(1)(B)'s 60-day period without a similar statutory amendment to Section 2107 would not remove any uncertainty that exists concerning the scope of the 60-day appeal period. The Department of Justice (which initially proposed the Rule 4(a)(1)(B) and Rule 40(a)(1) amendments) withdrew its proposal to amend Rule 4(a)(1)(B). As a result, the Committee initially decided to pursue the Rule 40(a)(1) amendment without the Rule 4(a)(1) amendment.

The proposed Rule 40(a)(1) amendment was placed before the Standing Committee for discussion rather than action at its January 2009 meeting. Shortly thereafter, the Supreme Court granted certiorari in *United States ex rel. Eisenstein v. City of New York*, 129 S. Ct. 988 (2009) – a case that concerned the applicability of Rule 4's and Section 2107's 60-day appeal periods in *qui tam* actions under the False Claims Act. At its June 2009 meeting, the Standing Committee remanded the Rule 40 proposal to the Appellate Rules Committee for further consideration in light of the *Eisenstein* decision.

After further discussion, the Committee decided to pursue both the Rule 4 and the Rule 40 amendments, along with a proposed legislative amendment to Section 2107. Amending all three of these provisions will render uniform their treatment of cases in which a United States officer or employee is a party. It will bring clarity to these provisions and allow the United States (and other parties) to rely upon the longer appeal and rehearing periods in many cases where uncertainty (concerning the applicable time period) may currently exist.

There was unanimous support among the Committee members for the general goal of the proposed amendments. There was some division among the Committee members concerning one aspect of the proposals. As discussed below, the proposals set a general principle – namely, that the longer periods apply in cases where a current or former United States officer or employee is sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf. For the reasons discussed in Part II.A.2 below, the Committee decided to

specify certain safe harbors that ensure the application of the longer time periods. All members supported the inclusion of two safe harbors – one that applies when the United States represents the officer or employee at the time of the entry of the relevant judgment, and another that applies when the United States files the appeal or petition for the officer or employee. The Department of Justice also supported including a third safe harbor, which would apply if the United States had paid for private representation for the officer or employee. However, the Committee voted 7-2 in favor of adopting the proposed amendments without that third safe harbor. The two members voting in the minority indicated that even if the third safe harbor were excluded they would support the proposed amendments.²

A. Rule 4

The proposed amendment to Rule 4 will clarify the applicability of Rule 4(a)(1)(B)'s 60-day appeal deadline. A corresponding proposed amendment to 28 U.S.C. § 2107 is discussed in Part II.C of this report.

1. Text of Proposed Amendment and Committee Note

The Committee recommends final approval of the proposed amendment to Rule 4 as set out in the enclosure to this report.

2. Changes Made After Publication and Comment

The public comments on the proposed amendment are summarized in the enclosure to this report. The Committee made two changes to the proposal after publication and comment.

First, the Committee inserted the words “current or former” before “United States officer or employee.” This insertion causes the text of the proposed Rule to diverge slightly from that of Civil Rules 4(i)(3) and 12(a)(3), which refer simply to “a United States officer or employee [etc.]” This divergence, though, is only stylistic. The 2000 Committee Notes to Civil Rules 4(i)(3) and 12(a)(3) make clear that those rules are intended to encompass former as well as current officers or employees. It is desirable to make this clarification in the text of Rule 4(a)(1) because that Rule's appeal time periods are jurisdictional.

Second, the Committee added, at the end of Rule 4(a)(1)(B)(iv), the following new language: “– including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person.” During the public comment period, concerns were raised that a party might rely on the longer appeal period, only to risk the appeal being held untimely by a court that later concluded that the relevant act or omission had not actually occurred

² At the Standing Committee's request, the Committee Note was revised to recognize that the two safe harbors mentioned in the rule were not exclusive.

in connection with federal duties. The Committee decided to respond to this concern by adding two safe harbor provisions. These provisions make clear that the longer appeal periods apply in any case where the United States either represents the officer or employee at the time of entry of the relevant judgment or files the notice of appeal on the officer or employee's behalf.

B. Rule 40

The proposed amendment to Rule 40 will clarify the applicability of Rule 40(a)(1)'s 45-day period for seeking rehearing.

1. Text of Proposed Amendment and Committee Note

The Committee recommends final approval of the proposed amendment to Rule 40 as set out in the enclosure to this report.

2. Changes Made After Publication and Comment

The public comments on the proposed amendment are summarized in the enclosure to this report. The Committee made two changes to the proposal after publication and comment.

The two changes to the Rule 40(a) proposal correspond to those discussed in Part II.A.2 of this report with respect to the Rule 4(a)(1) proposal. First, the Committee inserted the words "current or former" before "United States officer or employee." Second, the Committee added, at the end of new Rule 40(a)(1)(D), the following new language: "- including all instances in which the United States represents that person when the judgment or order is entered or files the petition for that person."

C. 28 U.S.C. § 2107

As noted above, to ensure achievement of the goals of the proposed amendment to Rule 4, it is desirable to request a corresponding statutory amendment to 28 U.S.C. § 2107.

1. Text of Proposed Amendment

The Committee recommends that the Standing Committee approve the goal of seeking legislative amendment of 28 U.S.C. § 2107 as set out in the enclosure to this report.

2. Tentative Draft of Proposed Bill

A tentative draft bill that would accomplish the proposed amendment to Section 2107 is set out in the enclosure to this report.

* * * * *

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

Rule 4. Appeal as of Right — When Taken

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

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

3 (A) In a civil case, except as provided in Rules
4 4(a)(1)(B), 4(a)(4), and 4(c), the notice of
5 appeal required by Rule 3 must be filed with
6 the district clerk within 30 days after entry of
7 the judgment or order appealed from ~~is~~
8 entered.

9 (B) ~~When the United States or its officer or~~
10 ~~agency is a party, †~~The notice of appeal may
11 be filed by any party within 60 days after
12 entry of the judgment or order appealed from
13 ~~is entered. if one of the parties is:~~

14 (i) the United States;

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

2 FEDERAL RULES OF APPELLATE PROCEDURE

- 15 (ii) a United States agency;
16 (iii) a United States officer or employee
17 sued in an official capacity; or
18 (iv) a current or former United States officer
19 or employee sued in an individual
20 capacity for an act or omission
21 occurring in connection with duties
22 performed on the United States' behalf
23 – including all instances in which the
24 United States represents that person
25 when the judgment or order is entered
26 or files the appeal for that person.

27 * * * * *

Committee Note

Subdivision (a)(1)(B). Rule 4(a)(1)(B) has been amended to make clear that the 60-day appeal period applies in cases in which 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. (A concurrent amendment

to Rule 40(a)(1) makes clear that the 45-day period to file a petition for panel rehearing also applies in such cases.)

The amendment to Rule 4(a)(1)(B) is consistent with a 2000 amendment to Civil Rule 12(a)(3), which specified an extended 60-day period to respond to complaints when “[a] United States officer or employee [is] sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States’ behalf.” The Committee Note to the 2000 amendment explained: “Time is needed for the United States to determine whether to provide representation to the defendant officer or employee. If the United States provides representation, the need for an extended answer period is the same as in actions against the United States, a United States agency, or a United States officer sued in an official capacity.” The same reasons justify providing additional time to the Solicitor General to decide whether to file an appeal.

However, because of the greater need for clarity of application when appeal rights are at stake, the amendment to Rule 4(a)(1)(B), and the corresponding legislative amendment to 28 U.S.C. § 2107 that is simultaneously proposed, include safe harbor provisions that parties can readily apply and rely upon. Under new subdivision 4(a)(1)(B)(iv), a case automatically qualifies for the 60-day appeal period if (1) a legal officer of the United States has appeared in the case, in an official capacity, as counsel for the current or former officer or employee and has not withdrawn the appearance at the time of the entry of the judgment or order appealed from or (2) a legal officer of the United States appears on the notice of appeal as counsel, in an official capacity, for the current or former officer or employee. There will be cases that do not fall within either safe harbor but that qualify for the longer appeal period. An example would be a case in which a federal employee is sued in an individual capacity for an act occurring in connection with federal duties and the

United States does not represent the employee either when the judgment is entered or when the appeal is filed but the United States pays for private counsel for the employee.

CHANGES MADE AFTER PUBLICATION AND COMMENT

The Committee made two changes to the proposal after publication and comment.

First, the Committee inserted the words “current or former” before “United States officer or employee.” This insertion causes the text of the proposed Rule to diverge slightly from that of Civil Rules 4(i)(3) and 12(a)(3), which refer simply to “a United States officer or employee [etc.]” This divergence, though, is only stylistic. The 2000 Committee Notes to Civil Rules 4(i)(3) and 12(a)(3) make clear that those rules are intended to encompass former as well as current officers or employees. It is desirable to make this clarification in the text of Rule 4(a)(1) because that Rule’s appeal time periods are jurisdictional.

Second, the Committee added, at the end of Rule 4(a)(1)(B)(iv), the following new language: “– including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person.” During the public comment period, concerns were raised that a party might rely on the longer appeal period, only to risk the appeal being held untimely by a court that later concluded that the relevant act or omission had not actually occurred in connection with federal duties. The Committee decided to respond to this concern by adding two safe harbor provisions. These provisions make clear that the longer appeal periods apply in any case where the United States either represents

the officer or employee at the time of entry of the relevant judgment or files the notice of appeal on the officer or employee's behalf.

* * * * *

Rule 40. Petition for Panel Rehearing

1 (a) **Time to File; Contents; Answer; Action by the Court**

2 **if Granted.**

3 (1) **Time.** Unless the time is shortened or extended by

4 order or local rule, a petition for panel rehearing

5 may be filed within 14 days after entry of

6 judgment. But in a civil case, ~~if the United States~~

7 ~~or its officer or agency is a party, the time within~~

8 ~~which any party may seek rehearing is 45 days~~

9 ~~after entry of judgment, unless an order shortens or~~

10 ~~extends the time-, the petition may be filed by any~~

11 ~~party within 45 days after entry of judgment if one~~

12 ~~of the parties is:~~

13 ~~(A) the United States;~~

14 ~~(B) a United States agency;~~

6 FEDERAL RULES OF APPELLATE PROCEDURE

15 (C) a United States officer or employee sued in
16 an official capacity; or

17 (D) a current or former United States officer or
18 employee sued in an individual capacity for
19 an act or omission occurring in connection
20 with duties performed on the United States'
21 behalf – including all instances in which the
22 United States represents that person when the
23 court of appeals' judgment is entered or files
24 the petition for that person.

25 * * * * *

Committee Note

Subdivision (a)(1). Rule 40(a)(1) has been amended to make clear that the 45-day period to file a petition for panel rehearing applies in cases in which 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. (A concurrent amendment to Rule 4(a)(1)(B) makes clear that the 60-day period to file an appeal also applies in such cases.) In such cases, the Solicitor General needs adequate time to review the merits of the panel decision and decide whether to seek rehearing, just as the Solicitor General does when an appeal involves the United States, a

United States agency, or a United States officer or employee sued in an official capacity.

To promote clarity of application, the amendment to Rule 40(a)(1) includes safe harbor provisions that parties can readily apply and rely upon. Under new subdivision 40(a)(1)(D), a case automatically qualifies for the 45-day period if (1) a legal officer of the United States has appeared in the case, in an official capacity, as counsel for the current or former officer or employee and has not withdrawn the appearance at the time of the entry of the court of appeals' judgment that is the subject of the petition or (2) a legal officer of the United States appears on the petition as counsel, in an official capacity, for the current or former officer or employee. There will be cases that do not fall within either safe harbor but that qualify for the longer petition period. An example would be a case in which a federal employee is sued in an individual capacity for an act occurring in connection with federal duties and the United States does not represent the employee either when the court of appeals' judgment is entered or when the petition is filed but the United States pays for private counsel for the employee.

CHANGES MADE AFTER PUBLICATION AND COMMENT

The Committee made two changes to the proposal after publication and comment.

First, the Committee inserted the words "current or former" before "United States officer or employee." This insertion causes the text of the proposed Rule to diverge slightly from that of Civil Rules 4(i)(3) and 12(a)(3), which refer simply to "a United States officer or employee [etc.]." This divergence, though, is only stylistic. The 2000 Committee Notes to Civil Rules 4(i)(3) and 12(a)(3) make clear

that those rules are intended to encompass former as well as current officers or employees.

Second, the Committee added, at the end of Rule 40(a)(1)(D), the following new language: “– including all instances in which the United States represents that person when the court of appeals’ judgment is entered or files the petition for that person.” During the public comment period, concerns were raised that a party might rely on the longer period for filing the petition, only to risk the petition being held untimely by a court that later concluded that the relevant act or omission had not actually occurred in connection with federal duties. The Committee decided to respond to this concern by adding two safe harbor provisions. These provisions make clear that the longer period applies in any case where the United States either represents the officer or employee at the time of entry of the relevant judgment or files the petition on the officer or employee’s behalf.

* * * * *

PROPOSED AMENDMENT TO
28 U.S.C. § 2107

1 **§ 2107. Time for appeal to court of appeals**

2 (a) Except as otherwise provided in this section, no appeal shall
3 bring any judgment, order or decree in an action, suit or proceeding
4 of a civil nature before a court of appeals for review unless notice of
5 appeal is filed, within thirty days after the entry of such judgment,
6 order or decree.

7 (b) In any such action, suit or proceeding ~~in which the United~~
8 ~~States or an officer or agency thereof is a party~~, the time as to all
9 parties shall be sixty days from such entry if one of the parties is:

10 (1) the United States;

11 (2) a United States agency;

12 (3) a United States officer or employee sued in an official
13 capacity; or

14 (4) a current or former United States officer or employee
15 sued in an individual capacity for an act or omission occurring
16

10 FEDERAL RULES OF APPELLATE PROCEDURE

16 in connection with duties performed on the United States'
17 behalf – including all instances in which the United States
18 represents that person when the judgment, order, or decree is
19 entered or files the appeal for that person.

20 (c) The district court may, upon motion filed not later than 30
21 days after the expiration of the time otherwise set for bringing appeal,
22 extend the time for appeal upon a showing of excusable neglect or
23 good cause. In addition, if the district court finds –

24 (1) that a party entitled to notice of the entry of a
25 judgment or order did not receive such notice from the clerk or
26 any party within 21 days of its entry, and

27 (2) that no party would be prejudiced,
28 the district court may, upon motion filed within 180 days after entry
29 of the judgment or order or within 14 days after receipt of such
30 notice, whichever is earlier, reopen the time for appeal for a period
31 of

31 14 days from the date of entry of the order reopening the time for
32 appeal.

33 (d) This section shall not apply to bankruptcy matters or other
34 proceedings under Title 11.

35 * * * * *

A BILL

To clarify appeal time limits in civil cases to which United States officers or employees are parties.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ‘Appeal Time Clarification Act of 2011.’

SEC. 2. AMENDMENT RELATED TO TITLE 28, UNITED STATES CODE.

Section 2107(b) is amended by striking its current contents and substituting the following: ‘In any such action, suit or proceeding, the time as to all parties shall be sixty days from such entry if one of the parties is:

12 FEDERAL RULES OF APPELLATE PROCEDURE

- (1) the United States;
- (2) a United States agency;
- (3) a United States officer or employee sued in an official capacity; or
- (4) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf – including all instances in which the United States represents that person when the judgment, order, or decree is entered or files the appeal for that person.

SEC. 3. EFFECTIVE DATE.

The amendment made by this Act shall take effect on December 1, 2011, and shall govern appeals from judgments, orders, or decrees entered on or after November 1, 2011.