

**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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**FEDERAL RULES OF APPELLATE PROCEDURE**

*Rules Recommended for Approval and Transmission*

The Advisory Committee on Appellate Rules submitted proposed amendments to Rules 4 and 40 with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed rule changes were circulated to the bench and bar for comment in August 2007. The scheduled public hearings on the proposed rule changes were cancelled because no one asked to testify. The advisory committee also proposed seeking companion legislative amendments to 28 U.S.C. § 2107.

The proposed amendments to Rules 4 and 40 clarify the time to appeal or to seek rehearing in a case in which a United States officer or employee is a party. The proposed amendment to Rule 4(a)(1)(B) makes 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. The amendment is consistent with Civil Rule 12(a)(3), which provides an extended 60-day period to respond to the complaint 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. Civil Rule 12 recognizes that the government requires additional time to determine whether to provide representation to the defendant officer or employee. The same reasons justify providing additional time to the Solicitor General to decide whether to file an

appeal. Because these reasons also apply to a petition for panel rehearing in such cases, the proposed amendment to Rule 40(a)(1) makes clear that the period to file the petition is 45 days. The extended time provides the Solicitor General adequate time to review the merits of the panel decision and decide whether to seek rehearing.

The advisory committee deferred action on the proposed amendments to Rule 4 after the Supreme Court emphasized in *Bowles v. Russell*, 551 U.S. 205 (2007), that statutory appeal time periods are jurisdictional. The advisory committee carefully considered whether, in light of *Bowles*, amending the Rule 4 appeal period would raise a jurisdictional issue because the period is set by 28 U.S.C. § 2107 as well as by rule. The advisory committee concluded that amending § 2107 using language identical to the proposed amendments to Rule 4 would avoid any potential jurisdictional issue raised by *Bowles*. The advisory committee recommended seeking legislation to amend § 2107, coordinated to have the same provisions and to take effect on the same day as the amendments to Rule 4. Although the proposed amendment to Rule 40 does not affect a time period with a statutory counterpart and does not raise any *Bowles* issue, the advisory committee concluded that the two rules proposals should be presented together because they are so closely related.

The proposed amendments to Rules 4 and 40 and the proposed amendments to § 2107 include two “safe harbor” provisions that address concerns about a party relying on the longer period for filing the appeal or the petition for rehearing, only to risk being held untimely by a court that later concludes that the relevant act or omission had not actually occurred in connection with duties performed on the United States’ behalf. The amendments make explicit that the longer periods apply in any case in which the United States either represents the officer or employee at the time of entry of the relevant judgment or files the notice of appeal or petition

on the officer's or employee's behalf. The two safe harbors are not exclusive and other circumstances may qualify for the extended period. For example, the longer period would apply in a case when the United States does not represent the affected employee either when the judgment is entered or when the appeal or petition is filed, but is paying for private counsel for the employee.

The Committee concurred with the advisory committee's recommendations.

**Recommendation:** That the Judicial Conference —

- a. Approve the proposed amendments to Appellate Rules 4 and 40 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.
- b. Seek legislation amending 28 U.S.C. § 2107, consistent with the proposed amendments to Rule 4, to clarify the treatment of the time to appeal in a case in which a United States officer or employee is a party.

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