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OF THE  
JUDICIAL CONFERENCE OF THE UNITED STATES  
WASHINGTON, D.C. 20544

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October 15, 2004

To: The Chief Justice of the United States  
Associate Justices of the United States

From: Judge David F. Levi

Re: Summary of the Proposed Amendments to the Federal Rules

The amendments to the Federal Rules of Practice and Procedure transmitted from the Judicial Conference are intended to have the following consequences.

**APPELLATE RULES**

The proposed amendment to Rule 4 clarifies when a district court may reopen the time to file an appeal. Under the amendment, if notice under Civil Rule 77(d) is not received within 21 days after entry of the judgment or order, a party may file a motion to reopen the time to appeal: (1) within 180 days after the judgment or order is entered, or (2) within seven days after the party receives notice under Civil Rule 77(d), whichever is earlier. The amendment also requires formal notice under Civil Rule 77(d), resolving a circuit split over the type of notice that must be received to trigger the prescribed seven-day period.

The proposed amendments to Rules 26 and 45 correct the references to President George Washington's Birthday.

Under the proposed amendments to Rule 27, the typeface and type-style requirements governing briefs and other papers under Rule 32 are made applicable to motions.

Proposed new Rule 28.1 establishes comprehensive procedures for cross-appeals based on the existing requirements governing briefs not involving cross-appeals and the practices of the large majority of circuits. In accordance with most circuit rules, the proposed national rule recognizes the filing of four types of briefs in a case involving a cross-appeal, *i.e.*, the "appellant's principal brief," "appellee's principal and response brief," "appellant's response and reply brief," and "appellee's reply brief." The rule limits the length of each type of brief, and

these limits are consistent with the practices of most circuits, with the exception of the second brief, where the limit is increased from 14,000 words to 16,500 words. Cross-appeal provisions contained in Rules 28, 31, and 32 are transferred to the new rule, and conforming cross-references to the new rule are added in Rules 32 and 34.

The proposed amendments to Rule 35(a) resolve an inter-circuit conflict regarding the make-up of the vote for a hearing or a rehearing en banc. The amendments adopt the case majority approach and make clear that disqualified judges are not counted in the “base” in calculating whether a “majority” of the circuit judges have voted in favor of an en banc hearing. For example, in a case in which five of a circuit's twelve active judges are disqualified, only four judges (a majority of the seven non-disqualified judges) must vote to hear a case en banc. Consistent with the majority quorum requirements of 28 U.S.C. § 46(d), the total number of non-recused judges voting on the en banc petition must be a majority of the active judges in all cases.

## **BANKRUPTCY RULES**

The Judicial Conference is transmitting amendments to six Bankruptcy Rules.

The proposed amendment to Rule 1007 requires the debtor in a voluntary bankruptcy case to submit with the petition a list of the names and addresses of each person and entity entitled — under specified schedules prescribed by the Official Forms — to receive notice of the bankruptcy filing.

Under the proposed amendments to Rule 3004, the debtor and trustee may not file a proof of claim as provided for in § 501(c) of the Bankruptcy Code until the creditors' opportunity to file a proof of claim has expired.

The proposed amendments to Rule 3005(a) conform to the proposed amendments to Rule 3004 and delete as unnecessary the language in the existing rule that permits a creditor to file a proof of claim that supersedes a claim filed on behalf of the creditor by a codebtor.

The proposed amendments to Rule 4008 establish deadlines for filing a reaffirmation agreement. The amendments also eliminate the deadlines for setting and holding the discharge hearing and instead provide a court with discretion to set and hold the hearing as appropriate in the circumstances of each case. Any party to the reaffirmation agreement may file it with the court.

The proposed amendments to Rule 7004 explicitly authorize a clerk of court to issue a summons by electronic means, including the sealing of the summonses.

Rule 9006 would be amended to clarify the method of counting the additional three days provided to respond if service is by mail or by one of the methods prescribed in Civil Rule

5(b)(2)(C) or (D). The counting of the three days commences after the prescribed period to respond otherwise expires. Similar amendments are being proposed to Civil Rule 6.

Under separate copy, the rules committees are submitting amendments to Rules 2002, 9001, and 9036, which are currently being reviewed by the public for comment. Because these amendments could save the courts considerable amounts of money in mailing and administrative expenses, they are being handled on an expedited basis. Absent negative public comment, it is expected that the amendments will be approved by the Judicial Conference at its March 2005 session and transmitted immediately to the Court for its consideration. A copy of the proposals is included in these materials to provide additional time for the Court's review.

### **CIVIL RULES**

The Judicial Conference is transmitting amendments to Rules 6, 27, 45, and Supplemental Rules B and C.

The proposed amendment to Rule 6(e) clarifies the method of determining the time to respond when the time is extended after service by mail, by leaving with the clerk of court, by electronic means, or by other means consented to by the party served. The amendment makes clear that three days are added after the prescribed period otherwise expires. Intermediate Saturdays, Sundays, and legal holidays are included in counting these added three days.

The proposed amendment to Rule 27 corrects outdated references to former Rule 4(d).

Under the proposed amendment to Rule 45, a deposition subpoena must state the method for recording the testimony. The amendment ensures that a nonparty deponent has notice of the recording method, providing the deponent an opportunity to raise objections in a timely and efficient manner.

The proposed amendment to Supplemental Rule B fixes the time for determining whether a defendant is "found" in the district at the time when the verified complaint and the accompanying affidavit are filed.

The proposed amendments to Supplemental Rule C are technical in nature and correct an oversight contained in amendments made in 2000.

### **CRIMINAL RULES**

The Judicial Conference is transmitting amendments to six rules and one proposed new rule.

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The proposed amendments to Rule 12.2 authorize a court to exclude the defense's expert evidence on the issue of the defendant's mental disease, mental defect, or any other mental condition if the evidence is not timely disclosed or if the defendant fails to submit to an examination in accordance with the rule.

The proposed amendments to Rules 29, 33, and 34 permit a court to extend the time for filing the post-trial motion designated in the respective rule, even if the court rules on the extension request after the expiration of the seven days specified in the rule, as long as the motion for an extension is filed within the prescribed seven-day period. Rule 45 would be amended to achieve consistency with the proposed amendments to Rules 29, 33, and 34. The amendments remedy the jurisdictional problem caused when a judge fails to act within the specified time period even though the party had filed a timely motion.

The proposed amendment to Rule 32.1 provides the defendant with a right of allocution to speak in mitigation of the penalty to be imposed in a revocation hearing, or a modification hearing in which the terms or conditions of the defendant's probation or supervised release may be modified.

Proposed new Rule 59 parallels provisions in Civil Rule 72 for handling and appealing a decision by a magistrate judge. The new rule codifies statutory law, case law, and the practices of the courts dealing with the assignment, disposition, and appeal of non-dispositive and dispositive matters handled by a magistrate judge.

David F. Levi  
Chair, Committee on Rules of Practice  
and Procedure

cc: Honorable Samuel A. Alito, Chair, Advisory Committee on Appellate Rules  
Honorable Thomas S. Zilly, Chair, Advisory Committee On Bankruptcy Rules  
Honorable Susan C. Bucklew, Chair, Advisory Committee on Criminal Rules  
Honorable Lee H. Rosenthal, Chair, Advisory Committee on Civil Rules