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

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

FROM: **Judge Carl E. Stewart, Chair**
Advisory Committee on Appellate Rules

DATE: **May 13, 2008**

RE: **Report of Advisory Committee on Appellate Rules**

I. Introduction

The Advisory Committee on Appellate Rules met on April 10 and 11 in Monterey, California. The Committee gave final approval to the package of time-computation amendments, to one new rule, and to three other proposed amendments. The Committee approved for publication three proposed amendments, and removed two items from its study agenda.

Part II A of this report discusses the proposals for which the Committee seeks final approval the time-computation amendments, proposed new Rule 12.1, and amendments to Rules 26(c), 4(a)(4)(B)(ii) and 22. Part II.B discusses the Committee's requests to publish for comment proposed amendments to Form 4, Rule 1, and Rule 29 Part III covers other matters.

The Committee has tentatively scheduled its next meeting for November 13 and 14, 2008.

Detailed information about the Committee's activities can be found in the Reporter's draft of the minutes of the April meeting[1] and in the Committee's study agenda, both of which are attached to this report.

II. Action Items

The Committee is seeking final approval of the time-computation amendments and of four other items. The Committee is seeking approval for publication of three items

[1] These minutes have not yet been approved by the Committee

A. Items for Final Approval

1. Time-Computation Amendments

a. Introduction

The Committee proposes to amend Rule 26(a) to implement the time-computation project. The project's core innovation is to adopt a days-are-days approach to the computation of all time periods, including short time periods.

To offset the change in the method of computing short time periods, the Committee proposes to amend time periods contained in the Appellate Rules The changes can be summarized as follows. References to "calendar days" in Rules 25, 26 and 41 become simply references to "days." Three-day periods in Rules 28.1(f) and 31(a) become seven-day periods. The five-day period in Rule 27(a)(4) becomes a seven-day period. The seven-day period in Rule 4(a)(6) lengthens to 14 days. The seven-day periods in Rules 5(b)(2) and 19 become ten days. The eight-day period in Rule 27(a)(3)(A) becomes ten days. The ten-day period in Rule 4(a)(4)(A)(vi) becomes 28 days to correspond with proposed changes in the Civil Rules. The ten-day periods in Rules 4(a)(5)(C), 4(b), 5, 6, 10, 12, 30 and 39 become 14 days. The 20-day period in Rule 15(b) becomes 21 days

The Committee also compiled a short list of appeal-related statutory time periods that the Committee recommends including among the periods that Congress will be asked to amend. The Committee's recommendations are as follows:

- The 7-day deadline in 28 U.S.C. § 2107(c) should be increased to 14 days.
    - This period, which constitutes one of the time limits on making a motion to reopen the time to appeal in a civil case, should be extended from 7 to 14 days in keeping with the proposed amendment to the corresponding time period in Rule 4(a)(6)(B)
- The "not less than 7" day period in 28 U S C § 1453(c)(1) should be changed to "not more than 10" days.
    - This period limits the time for seeking appellate review, under the Class Action Fairness Act, of a district court's remand order, "not less than" was clearly a drafting error Section 1453 should be amended to set the time limit at "not more than 10 days" to correct the drafting error and offset the shift in time-computation method.

- The four-day deadlines in the Classified Information Procedures Act ("CIPA") § 7(b) and in the material-support statute, 18 U.S.C. § 2339B(f)(5)(B), should be amended to specify that intermediate weekends and holidays are excluded.

  - CIPA § 7(b) sets a 10-day deadline for pretrial appeals relating to orders concerning disclosure of classified information, and sets 4-day deadlines for the court of appeals to hear argument and render decision with respect to appeals taken during trial. 18 U.S.C. § 2339B(f)(5)(B) sets 10-day and 4-day deadlines (similar to those in CIPA § 7(b)) relating to certain appeals of orders concerning classified information in civil actions brought by the United States concerning the provision of material support to foreign terrorist organizations.

  - Concerning the 10-day deadlines in CIPA and the material-support statute, the Committee voted to defer to the views of the Criminal Rules Committee.

- The 10-day mandamus petition deadline in the Crime Victims' Rights Act ("CVRA"), 18 U.S.C. § 3771(d)(5), should be extended to 14 days

  - 18 U.S.C. § 3771(d)(5) sets a 10-day time period for victims to seek mandamus review in the court of appeals for certain purposes. 18 U.S.C. § 3771(d)(3) sets a 72-hour deadline for the court of appeals to decide a victim's mandamus petition and a 5-day limit on continuances in the district court.

  - The Committee does not recommend any changes to the 72-hour or 5-day periods in the CVRA.

b. Text of Proposed Amendments and Committee Notes

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE*

Rule 26. Computing and Extending Time

(a) **Computing Time.** ~~The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute.~~

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

~~(1) Exclude the day of the act, event, or default that begins the period.~~

~~(2) Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days, unless stated in calendar days.~~

~~(3) Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or--if the act to be done is filing a paper in court--a day on which the weather or other conditions make the clerk's office inaccessible.~~

~~(4) As used in this rule, "legal holiday" means New Year's Day, Martin Luther King, Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day, and any other day declared a holiday by the President, Congress, or the state in which is located either the district court that rendered the challenged judgment or order, or the circuit clerk's principal office.~~ The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.

(1) ***Period Stated in Days or a Longer Unit.*** When the period is stated in days or a longer unit of time:

(A) exclude the day of the event that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(2) ***Period Stated in Hours.*** When the period is stated in hours.

(A) begin counting immediately on the occurrence of the event that triggers the period;

(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(C) if the period would end on a Saturday, Sunday, or legal holiday, the period continues

to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(3) ***Inaccessibility of the Clerk's Office.*** Unless the court orders otherwise, if the clerk's office is inaccessible:

(A) on the last day for filing under Rule 26(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday; or

(B) during the last hour for filing under Rule 26(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

(4) ***"Last Day" Defined.*** Unless a different time is set by a statute, local rule, or court order, the last day ends:

(A) for electronic filing in the district court, at midnight in the court's time zone;

(B) for electronic filing in the court of appeals, at midnight in the time zone of the circuit clerk's principal office;

(C) for filing under Rules 4(c)(1), 25(a)(2)(B), and 25(a)(2)(C) – and filing by mail under Rule 13(b) – at the latest time for the method chosen for delivery to the post office, third-party commercial carrier, or prison mailing system; and

(D) for filing by other means, when the clerk's office is scheduled to close.

(5) ***"Next Day" Defined.*** The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(6) ***"Legal Holiday" Defined.*** "Legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day,

Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; and

(B) any other day declared a holiday by the President, Congress, or the state in which is located either the district court that rendered the challenged judgment or order, or the circuit clerk's principal office.

* * * * *

Committee Note

Subdivision (a). Subdivision (a) has been amended to simplify and clarify the provisions that describe how deadlines are computed. Subdivision (a) governs the computation of any time period found in a statute that does not specify a method of computing time, a Federal Rule of Appellate Procedure, a local rule, or a court order. In accordance with Rule 47(a)(1), a local rule may not direct that a deadline be computed in a manner inconsistent with subdivision (a).

The time-computation provisions of subdivision (a) apply only when a time period must be computed. They do not apply when a fixed time to act is set. The amendments thus carry forward the approach taken in *Violette v P A. Days, Inc* , 427 F.3d 1015, 1016 (6th Cir 2005) (holding that Civil Rule 6(a) "does not apply to situations where the court has established a specific calendar day as a deadline"), and reject the contrary holding of *In re American Healthcare Management, Inc.*, 900 F.2d 827, 832 (5th Cir. 1990) (holding that Bankruptcy Rule 9006(a) governs treatment of date-certain deadline set by court order) If, for example, the date for filing is "no later than November 1, 2007," subdivision (a) does not govern But if a filing is required to be made "within 10 days" or "within 72 hours," subdivision (a) describes how that deadline is computed.

Subdivision (a) does not apply when computing a time period set by a statute if the statute specifies a method of computing time *See, e g*, 20 U.S.C § 7711(b)(1) (requiring certain petitions for review by a local educational agency or a state to be filed "within 30 working days (as determined by the local educational agency or State) after receiving notice of" federal agency decision).

Subdivision (a)(1). New subdivision (a)(1) addresses the computation of time periods that are stated in days. It also applies to time periods that are stated in weeks, months, or years; though no such time period currently appears in the Federal Rules of Appellate Procedure, such periods may be set by other covered provisions such as a local rule *See, e g*, Third Circuit Local Appellate Rule 46.3(c)(1). Subdivision (a)(1)(B)'s directive to "count every day" is relevant only if the period is stated in days (not weeks, months or years).

Under former Rule 26(a), a period of 11 days or more was computed differently than a period of less than 11 days Intermediate Saturdays, Sundays, and legal holidays were included in computing the longer periods, but excluded in computing the shorter periods. Former Rule 26(a) thus made computing deadlines unnecessarily complicated and led to counterintuitive results. For example, a 10-day period and a 14-day period that started on the same day usually ended on the same day — and the 10-day period not infrequently ended later than the 14-day period. *See Miltimore Sales, Inc v. Int'l Rectifier, Inc.*, 412 F.3d 685, 686 (6th Cir. 2005).

Under new subdivision (a)(1), all deadlines stated in days (no matter the length) are computed in the same way. The day of the event that triggers the deadline is not counted. All other days — including intermediate Saturdays, Sundays, and legal holidays — are counted, with only one exception: If the period ends on a Saturday, Sunday, or legal holiday, then the deadline falls on the next day that is not a Saturday, Sunday, or legal holiday. An illustration is provided below in the discussion of subdivision (a)(5) Subdivision (a)(3) addresses filing deadlines that expire on a day when the clerk's office is inaccessible.

Where subdivision (a) formerly referred to the "act, event, or default" that triggers the deadline, new subdivision (a) refers simply to the "event" that triggers the deadline; this change in terminology

is adopted for brevity and simplicity, and is not intended to change meaning.

Periods previously expressed as less than 11 days will be shortened as a practical matter by the decision to count intermediate Saturdays, Sundays, and legal holidays in computing all periods Many of those periods have been lengthened to compensate for the change. *See, e g* , Rules 5(b)(2), 5(d)(1), 28.1(f), & 31(a)

Most of the 10-day periods were adjusted to meet the change in computation method by setting 14 days as the new period. A 14-day period corresponds to the most frequent result of a 10-day period under the former computation method — two Saturdays and two Sundays were excluded, giving 14 days in all. A 14-day period has an additional advantage. The final day falls on the same day of the week as the event that triggered the period — the 14th day after a Monday, for example, is a Monday This advantage of using week-long periods led to adopting 7-day periods to replace some of the periods set at less than 10 days, and 21-day periods to replace 20-day periods Thirty-day and longer periods, however, were retained without change.

Subdivision (a)(2). New subdivision (a)(2) addresses the computation of time periods that are stated in hours. No such deadline currently appears in the Federal Rules of Appellate Procedure But some statutes contain deadlines stated in hours, as do some court orders issued in expedited proceedings.

Under subdivision (a)(2), a deadline stated in hours starts to run immediately on the occurrence of the event that triggers the deadline. The deadline generally ends when the time expires. If, however, the time period expires at a specific time (say, 2·17 p.m.) on a Saturday, Sunday, or legal holiday, then the deadline is extended to the same time (2:17 p.m) on the next day that is not a Saturday, Sunday, or legal holiday. Periods stated in hours are not to be "rounded up" to the next whole hour Subdivision (a)(3) addresses situations when the clerk's office is inaccessible during the last hour before a filing deadline expires.

Subdivision (a)(2)(B) directs that every hour be counted. Thus, for example, a 72-hour period that commences at 10:00 a m on Friday, November 2, 2007, will run until 9:00 a.m on Monday,

November 5; the discrepancy in start and end times in this example results from the intervening shift from daylight saving time to standard time.

Subdivision (a)(3). When determining the last day of a filing period stated in days or a longer unit of time, a day on which the clerk's office is not accessible because of the weather or another reason is treated like a Saturday, Sunday, or legal holiday. When determining the end of a filing period stated in hours, if the clerk's office is inaccessible during the last hour of the filing period computed under subdivision (a)(2) then the period is extended to the same time on the next day that is not a weekend, holiday or day when the clerk's office is inaccessible.

Subdivision (a)(3)'s extensions apply "[u]nless the court orders otherwise." In some circumstances, the court might not wish a period of inaccessibility to trigger a full 24-hour extension; in those instances, the court can specify a briefer extension.

The text of the rule no longer refers to "weather or other conditions" as the reason for the inaccessibility of the clerk's office. The reference to "weather" was deleted from the text to underscore that inaccessibility can occur for reasons unrelated to weather, such as an outage of the electronic filing system. Weather can still be a reason for inaccessibility of the clerk's office. The rule does not attempt to define inaccessibility. Rather, the concept will continue to develop through caselaw, *see, e.g.*, *Tchakmakjian v Department of Defense*, 57 Fed. Appx. 438, 441 (Fed. Cir. 2003) (unpublished per curiam opinion) (inaccessibility "due to anthrax concerns"); *cf.* William G. Phelps, *When Is Office of Clerk of Court Inaccessible Due to Weather or Other Conditions for Purpose of Computing Time Period for Filing Papers under Rule 6(a) of Federal Rules of Civil Procedure*, 135 A.L.R Fed. 259 (1996) (collecting cases). In addition, local provisions may address inaccessibility for purposes of electronic filing

Subdivision (a)(4). New subdivision (a)(4) defines the end of the last day of a period for purposes of subdivision (a)(1). Subdivision (a)(4) does not apply in computing periods stated in hours under subdivision (a)(2), and does not apply if a different time is set by a statute, local rule, or order in the case A local rule may, for example, address the problems that might arise under subdivision

(a)(4)(A) if a single district has clerk's offices in different time zones, or provide that papers filed in a drop box after the normal hours of the clerk's office are filed as of the day that is date-stamped on the papers by a device in the drop box.

28 U.S.C. § 452 provides that "[a]ll courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders." A corresponding provision exists in Rule 45(a)(2). Some courts have held that these provisions permit an after-hours filing by handing the papers to an appropriate official *See, e g., Casalduc v Diaz*, 117 F.2d 915, 917 (1st Cir. 1941). Subdivision (a)(4) does not address the effect of the statute on the question of after-hours filing; instead, the rule is designed to deal with filings in the ordinary course without regard to Section 452.

Subdivision (a)(4)(A) addresses electronic filings in the district court For example, subdivision (a)(4)(A) would apply to an electronically-filed notice of appeal. Subdivision (a)(4)(B) addresses electronic filings in the court of appeals

Subdivision (a)(4)(C) addresses filings by mail under Rules 25(a)(2)(B)(i) and 13(b), filings by third-party commercial carrier under Rule 25(a)(2)(B)(ii), and inmate filings under Rules 4(c)(1) and 25(a)(2)(C). For such filings, subdivision (a)(4)(C) provides that the "last day" ends at the latest time (prior to midnight in the filer's time zone) that the filer can properly submit the filing to the post office, third-party commercial carrier, or prison mail system (as applicable) using the filer's chosen method of submission. For example, if a correctional institution's legal mail system's rules of operation provide that items may only be placed in the mail system between 9:00 a m. and 5 00 p.m., then the "last day" for filings under Rules 4(c)(1) and 25(a)(2)(C) by inmates in that institution ends at 5 00 p.m. As another example, if a filer uses a drop box maintained by a third-party commercial carrier, the "last day" ends at the time of that drop box's last scheduled pickup. Filings by mail under Rule 13(b) continue to be subject to § 7502 of the Internal Revenue Code, as amended, and the applicable regulations.

Subdivision (a)(4)(D) addresses all other non-electronic filings; for such filings, the last day ends under (a)(4)(D) when the clerk's office in which the filing is made is scheduled to close.

Subdivision (a)(5). New subdivision (a)(5) defines the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C). The Federal Rules of Appellate Procedure contain both forward-looking time periods and backward-looking time periods. A forward-looking time period requires something to be done within a period of time *after* an event. *See, e g* , Rule 4(a)(1)(A) (subject to certain exceptions, notice of appeal in a civil case must be filed "within 30 days after the judgment or order appealed from is entered") A backward-looking time period requires something to be done within a period of time *before* an event. *See, e g* , Rule 31(a)(1) ("[A] reply brief must be filed at least 7 days before argument, unless the court, for good cause, allows a later filing."). In determining what is the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C), one should continue counting in the same direction — that is, forward when computing a forward-looking period and backward when computing a backward-looking period. If, for example, a filing is due within 10 days *after* an event, and the tenth day falls on Saturday, September 1, 2007, then the filing is due on Tuesday, September 4, 2007 (Monday, September 3, is Labor Day). But if a filing is due 10 days *before* an event, and the tenth day falls on Saturday, September 1, then the filing is due on Friday, August 31. If the clerk's office is inaccessible on August 31, then subdivision (a)(3) extends the filing deadline forward to the next accessible day that is not a Saturday, Sunday or legal holiday—no earlier than Tuesday, September 4.

Subdivision (a)(6). New subdivision (a)(6) defines "legal holiday" for purposes of the Federal Rules of Appellate Procedure, including the time-computation provisions of subdivision (a). Subdivision (a)(6) continues to include within the definition of "legal holiday" days that are "declared a holiday by the President." For two cases that applied this provision to find a legal holiday on days when the President ordered the government closed for purposes of celebration or commemoration, *see Hart v Sheahan*, 396 F 3d 887, 891 (7th Cir. 2005) (President included December 26, 2003 within scope of executive order specifying pay for executive department and independent agency employees on legal holidays), and *Mashpee Wampanoag Tribal Council, Inc. v Norton*, 336 F.3d 1094, 1098 (D.C. Cir. 2003) (executive order provided that "[a]ll executive branch departments and agencies of the Federal Government shall be closed and their employees excused from duty on Monday, December 24, 2001"). Subdivision (a)(6)(B) includes certain state holidays within the definition of legal holidays.

Rule 4. Appeal as of Right–When Taken

(a) Appeal in a Civil Case.

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(4) **Effect of a Motion on a Notice of Appeal.**

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than ~~10~~ 28 days after the judgment is entered.

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(5) **Motion for Extension of Time.**

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(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or ~~10~~ 14 days after the date when the order granting the motion is entered, whichever is later.

(6) **Reopening the Time to File an Appeal.** The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

* * * * *

(B) the motion is filed within 180 days after the judgment or order is entered or within ~~7~~ 14 days after the moving party

receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and

* * * * *

(b) Appeal in a Criminal Case.

(1) Time for Filing a Notice of Appeal.

(A) In a criminal case, a defendant's notice of appeal must be filed in the district court within ~~10~~ 14 days after the later of:

(i) the entry of either the judgment or the order being appealed; or

(ii) the filing of the government's notice of appeal.

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(3) Effect of a Motion on a Notice of Appeal.

(A) If a defendant timely makes any of the following motions under the Federal Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within ~~10~~ 14 days after the entry of the order

disposing of the last such remaining motion, or within ~~10~~ 14 days after the entry of the judgment of conviction, whichever period ends later. This provision applies to a timely motion:

(i) for judgment of acquittal under Rule 29;

(ii) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than ~~10~~ 14 days after the entry of the judgment, or

(iii) for arrest of judgment under Rule 34.

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Committee Note

Subdivision (a)(4)(A)(vi). Subdivision (a)(4) provides that certain timely post-trial motions extend the time for filing an appeal Lawyers sometimes move under Civil Rule 60 for relief that is still available under another rule such as Civil Rule 59. Subdivision (a)(4)(A)(vi) provides for such eventualities by extending the time for filing an appeal so long as the Rule 60 motion is filed within a limited time. Formerly, the time limit under subdivision (a)(4)(A)(vi) was 10 days, reflecting the 10-day limits for making motions under Civil Rules 50(b), 52(b), and 59 Subdivision (a)(4)(A)(vi) now contains a 28-day limit to match the revisions to the time limits in the Civil Rules.

Subdivision (a)(5)(C). The time set in the former rule at 10 days has been revised to 14 days See the Note to Rule 26.

Subdivision (a)(6)(B). The time set in the former rule at 7 days has been revised to 14 days. Under the time-computation approach set by former Rule 26(a), "7 days" always meant at least 9 days and could mean as many as 11 or even 13 days. Under current Rule 26(a), intermediate weekends and holidays are counted Changing the period from 7 to 14 days offsets the change in computation approach. See the Note to Rule 26.

Subdivisions (b)(1)(A) and (b)(3)(A). The times set in the former rule at 10 days have been revised to 14 days. See the Note to Rule 26.

Rule 5. Appeal by Permission

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(b) Contents of the Petition; Answer or Cross-Petition; Oral Argument.

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(2) A party may file an answer in opposition or a cross-petition within ~~7~~ 10 days after the petition is served.

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(d) Grant of Permission; Fees; Cost Bond; Filing the Record.

(1) Within ~~10~~ 14 days after the entry of the order granting permission to appeal, the appellant must:

(A) pay the district clerk all required fees, and

(B) file a cost bond if required under Rule 7.

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Committee Note

Subdivision (b)(2). Subdivision (b)(2) is amended in the light of the change in Rule 26(a)'s time computation rules. Subdivision (b)(2) formerly required that an answer in opposition to a petition for permission to appeal, or a cross-petition for permission to appeal, be filed "within 7 days after the petition is served." Under former Rule 26(a), "7 days" always meant at least 9 days and could mean as many as 11 or even 13 days. Under current Rule 26(a), intermediate weekends and holidays are counted. Changing the period from 7 to 10 days offsets the change in computation approach. See the Note to Rule 26.

Subdivision (d)(1). The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 26

Rule 6. Appeal in a Bankruptcy Case From a Final Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel

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(b) Appeal From a Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel Exercising Appellate Jurisdiction in a Bankruptcy Case.

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(2) **Additional Rules.** In addition to the rules made applicable by Rule 6(b)(1), the following rules apply:

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(B) **The record on appeal.**

(i) Within ~~10~~ 14 days after filing the notice of appeal, the appellant must file with the clerk possessing the record assembled in accordance with Bankruptcy Rule 8006 — and serve on the appellee — a statement of the issues to be presented on appeal and a designation of the record to be certified and sent to the circuit clerk.

(ii) An appellee who believes that other parts of the record are necessary must, within ~~10~~ 14 days after being served with the appellant's designation, file with the clerk and serve on the appellant a designation of additional parts to be included.

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Committee Note

Subdivision (b)(2)(B). The times set in the former rule at 10 days have been revised to 14 days. See the Note to Rule 26.

Rule 10. The Record on Appeal

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(b) The Transcript of Proceedings.

(1) **Appellant's Duty to Order.** Within ~~10~~ 14 days after filing the notice of appeal or entry of an order disposing of the last timely remaining motion of a type specified in Rule 4(a)(4)(A), whichever is later, the appellant must do either of the following:

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(3) **Partial Transcript.** Unless the entire transcript is ordered:

(A) the appellant must — within the ~~10~~ 14 days provided in Rule 10(b)(1) — file a statement of the issues that the appellant intends to present on the appeal and must serve on the

appellee a copy of both the order or certificate and the statement;

(B) if the appellee considers it necessary to have a transcript of other parts of the proceedings, the appellee must, within ~~10~~ 14 days after the service of the order or certificate and the statement of the issues, file and serve on the appellant a designation of additional parts to be ordered; and

(C) unless within ~~10~~ 14 days after service of that designation the appellant has ordered all such parts, and has so notified the appellee, the appellee may within the following ~~10~~ 14 days either order the parts or move in the district court for an order requiring the appellant to do so.

* * * * *

(c) Statement of the Evidence When the Proceedings Were Not Recorded or When a Transcript Is Unavailable. If the transcript of a hearing or trial is unavailable, the appellant may prepare a statement of the

evidence or proceedings from the best available means, including the appellant's recollection. The statement must be served on the appellee, who may serve objections or proposed amendments within ~~10~~ 14 days after being served. The statement and any objections or proposed amendments must then be submitted to the district court for settlement and approval. As settled and approved, the statement must be included by the district clerk in the record on appeal.

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Committee Note

Subdivisions (b)(1), (b)(3) and (c). The times set in the former rule at 10 days have been revised to 14 days. See the Note to Rule 26.

Rule 12. Docketing the Appeal; Filing a Representation Statement; Filing the Record

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(b) Filing a Representation Statement. Unless the court of appeals designates another time, the attorney who filed the notice of appeal must, within ~~10~~ 14 days after

filing the notice, file a statement with the circuit clerk naming the parties that the attorney represents on appeal.

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Committee Note

Subdivision (b). The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 26.

Rule 15. Review or Enforcement of an Agency Order—How Obtained; Intervention

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(b) Application or Cross-Application to Enforce an Order; Answer; Default.

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(2) Within ~~20~~ 21 days after the application for enforcement is filed, the respondent must serve on the applicant an answer to the application and file it with the clerk. If the respondent fails to answer in time, the court will enter judgment for the relief requested.

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Committee Note

Subdivision (b)(2). The time set in the former rule at 20 days has been revised to 21 days. See the Note to Rule 26.

Rule 19. Settlement of a Judgment Enforcing an Agency Order in Part

When the court files an opinion directing entry of judgment enforcing the agency's order in part, the agency must within 14 days file with the clerk and serve on each other party a proposed judgment conforming to the opinion. A party who disagrees with the agency's proposed judgment must within ~~7~~ 10 days file with the clerk and serve the agency with a proposed judgment that the party believes conforms to the opinion. The court will settle the judgment and direct entry without further hearing or argument.

Committee Note

Rule 19 formerly required a party who disagreed with the agency's proposed judgment to file a proposed judgment "within 7 days." Under former Rule 26(a), "7 days" always meant at least 9 days and could mean as many as 11 or even 13 days. Under current Rule 26(a), intermediate weekends and holidays are counted. Changing the period from 7 to 10 days offsets the change in computation approach. See the Note to Rule 26.

Rule 25. Filing and Service

(a) Filing.

* * * * *

(2) **Filing: Method and Timeliness.**

* * * * *

(B) **A brief or appendix.** A brief or appendix is timely filed, however, if on or before the last day for filing, it is:

(i) mailed to the clerk by First-Class Mail, or other class of mail that is at least as expeditious, postage prepaid; or

(ii) dispatched to a third-party commercial carrier for delivery to the clerk within 3 ~~calendar~~ days.

* * * * *

(c) Manner of Service.

(1) Service may be any of the following:

* * * * *

(C) by third-party commercial carrier for delivery within 3 ~~calendar~~ days; or

* * * * *

Committee Note

Under former Rule 26(a), short periods that span weekends or holidays were computed without counting those weekends or holidays. To specify that a period should be calculated by counting all intermediate days, including weekends or holidays, the Rules used the term "calendar days." Rule 26(a) now takes a "days-are-days" approach under which all intermediate days are counted, no matter how short the period. Accordingly, "3 calendar days" in subdivisions (a)(2)(B)(ii) and (c)(1)(C) is amended to read simply "3 days."

Rule 26. Computing and Extending Time

* * * * *

(c) Additional Time after Service. When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 ~~calendar~~ days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service.

Committee Note

Subdivision (c). To specify that a period should be calculated by counting all intermediate days, including weekends or holidays, the Rules formerly used the term "calendar days." Because new subdivision (a) takes a "days-are-days" approach under which all intermediate days are counted, no matter how short the period, "3 calendar days" in subdivision (c) is amended to read simply "3 days."

Rule 27. Motions

(a) In General.

* * * * *

(3) **Response.**

(A) **Time to file.** Any party may file a response to a motion; Rule 27(a)(2) governs its contents. The response must be filed within ~~8~~ 10 days after service of the motion unless the court shortens or extends the time. A motion authorized by Rules 8, 9, 18, or 41 may be granted before the ~~8-day~~ 10-day period runs only if the court gives reasonable notice to the parties that it intends to act sooner.

* * * * *

(4) **Reply to Response.** Any reply to a response must be filed within ~~5~~ 7 days after service of the response. A reply must not present matters that do not relate to the response

* * * * *

Committee Note

Subdivision (a)(3)(A). Subdivision (a)(3)(A) formerly required that a response to a motion be filed "within 8 days after service of the motion unless the court shortens or extends the time." Prior to the 2002 amendments to Rule 27, subdivision (a)(3)(A) set this period at 10 days rather than 8 days. The period was changed in 2002 to reflect the change from a time-computation approach that counted intermediate weekends and holidays to an approach that did not. (Prior to the 2002 amendments, intermediate weekends and holidays were excluded only if the period was less than 7 days; after those amendments, such days were excluded if the period was less than 11 days.) Under current Rule 26(a), intermediate weekends and holidays are counted for all periods. Accordingly, revised subdivision (a)(3)(A) once again sets the period at 10 days.

Subdivision (a)(4). Subdivision (a)(4) formerly required that a reply to a response be filed "within 5 days after service of the response." Prior to the 2002 amendments, this period was set at 7 days; in 2002 it was shortened in the light of the 2002 change in time-computation approach (discussed above). Under current Rule 26(a), intermediate weekends and holidays are counted for all periods, and revised subdivision (a)(4) once again sets the period at 7 days

Rule 28.1. Cross-Appeals

* * * * *

(f) Time to Serve and File a Brief. Briefs must be served and filed as follows.

* * * * *

(4) the appellee's reply brief, within 14 days after the appellant's response and reply brief is served, but at least ~~3~~ 7 days before argument unless the court, for good cause, allows a later filing

Committee Note

Subdivision (f)(4). Subdivision (f)(4) formerly required that the appellee's reply brief be served "at least 3 days before argument unless the court, for good cause, allows a later filing." Under former Rule 26(a), "3 days" could mean as many as 5 or even 6 days. See the Note to Rule 26. Under revised Rule 26(a), intermediate weekends and holidays are counted. Changing "3 days" to "7 days" alters the period accordingly. Under revised Rule 26(a), when a period ends on a weekend or holiday, one must continue to count in the same direction until the next day that is not a weekend or holiday; the choice of the 7-day period for subdivision (f)(4) will minimize such occurrences.

Rule 30. Appendix to the Briefs

* * * * *

(b) All Parties' Responsibilities.

(1) **Determining the Contents of the Appendix.** The parties are encouraged to agree on the contents of the appendix. In the absence of an agreement, the appellant must, within ~~10~~ 14 days after the record is filed, serve on the appellee a designation of the parts of the record the appellant intends to include in the appendix and a statement of the issues the appellant intends to present for review. The appellee may, within ~~10~~ 14 days after receiving the designation, serve on the appellant a designation of additional parts to which it wishes to direct the

court's attention The appellant must include the designated parts in the appendix. The parties must not engage in unnecessary designation of parts of the record, because the entire record is available to the court. This paragraph applies also to a cross-appellant and a cross-appellee.

* * * * *

Committee Note

Subdivision (b)(1). The times set in the former rule at 10 days have been revised to 14 days. See the Note to Rule 26.

Rule 31. Serving and Filing Briefs

(a) Time to Serve and File a Brief.

(1) The appellant must serve and file a brief within 40 days after the record is filed. The appellee must serve and file a brief within 30 days after the appellant's brief is served. The appellant may serve and file a reply brief within 14 days after service of the appellee's brief but a reply brief must be filed at least ~~3~~ 7 days before argument, unless the court, for good cause, allows a later filing

* * * * *

Committee Note

Subdivision (a)(1). Subdivision (a)(1) formerly required that the appellant's reply brief be served "at least 3 days before argument, unless the court, for good cause, allows a later filing." Under former Rule 26(a), "3 days" could mean as many as 5 or even 6 days. See the Note to Rule 26. Under revised Rule 26(a), intermediate weekends and holidays are counted. Changing "3 days" to "7 days" alters the period accordingly Under revised Rule 26(a), when a period ends on a weekend or holiday, one must continue to count in the same direction until the next day that is not a weekend or holiday, the choice of the 7-day period for subdivision (a)(1) will minimize such occurrences.

Rule 39. Costs

* * * * *

(d) Bill of Costs: Objections; Insertion in Mandate.

* * * * *

(2) Objections must be filed within ~~10~~ 14 days after service of the bill of costs, unless the court extends the time.

* * * * *

Committee Note

Subdivision (d)(2). The time set in the former rule at 10 days has been revised to 14 days See the Note to Rule 26.

Rule 41. Mandate: Contents; Issuance and Effective Date; Stay

* * * * *

(b) When Issued. The court's mandate must issue 7 ~~calendar~~ days after the time to file a petition for rehearing expires, or 7 ~~calendar~~ days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.

* * * * *

Committee Note

Under former Rule 26(a), short periods that span weekends or holidays were computed without counting those weekends or holidays. To specify that a period should be calculated by counting all intermediate days, including weekends or holidays, the Rules used the term "calendar days." Rule 26(a) now takes a "days-are-days" approach under which all intermediate days are counted, no matter how short the period. Accordingly, "7 calendar days" in subdivision (b) is amended to read simply "7 days."

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c. Changes Made After Publication and Comment

The Committee made only one change to Rule 26(a) after publication and comment: Because the Committee is seeking permission to publish for comment a proposed new Rule 1(b) that would adopt a FRAP-wide definition of the term "state," the Committee decided to delete from Rule 26(a)(6)(B) the following parenthetical sentence "(In this rule, 'state' includes the District of Columbia and any United States commonwealth, territory, or possession.)" That change required the corresponding deletion – from the Note to Rule 26(a)(6) – of part of the final sentence (the deleted portion read ", and defines the term 'state' – for purposes of subdivision (a)(6) – to include

the District of Columbia and any commonwealth, territory or possession of the United States. Thus, for purposes of subdivision (a)(6)'s definition of 'legal holiday,' 'state' includes the District of Columbia, Guam, American Samoa, the U.S. Virgin Islands, the Commonwealth of Puerto Rico, and the Commonwealth of the Northern Mariana Islands.")

The Committee made one change to its proposed amendments concerning Appellate Rules deadlines. Based on comments received with respect to the timing for motions that toll the time for taking a civil appeal, the Committee changed the cutoff time in Rule 4(a)(4)(A)(vi) to 28 days (rather than to 30 days as in the published proposal). The published proposal's choice of 30 days had been designed to accord with the proposed amendments published by the Civil Rules Committee, which would have extended the deadline for tolling motions to 30 days. Because 30 days is also the time period set by Appellate Rule 4 and by 28 U.S.C § 2107 for taking a civil appeal (when the United States and its officers or agencies are not parties), commentators pointed out that adopting 30 days as the cutoff for filing tolling motions would sometimes place would-be appellants in an awkward position: If the deadline for making a tolling motion falls on the same day as the deadline for filing a notice of appeal, then in a case involving multiple parties on one side, a litigant who wishes to appeal may not know, when filing the notice of appeal, whether a tolling motion will be filed, such a timing system can be expected to produce instances when appeals are filed, only to go into abeyance while the tolling motion is resolved.

By the time of the Appellate Rules Committee's April 2008 meeting, the Civil Rules Committee had discussed this issue and had determined that the best resolution would be to extend the deadline for tolling motions to 28 days rather than 30 days. The choice of a 28-day deadline responds to the concerns of those who feel that the current 10-day deadlines are much too short, but also takes into account the problem of the 30-day appeal deadline. As described in the draft minutes of the Committee's April meeting, Committee members carefully discussed the relevant concerns and determined, by a vote of 7 to 1, to assent to the 28-day time period for tolling motions and to change the cutoff time in Rule 4(a)(4)(A)(vi) to 28 days.

d. Summary of Public Comments

The public comments concerning the time-computation project as a whole are discussed in the Time-Computation Subcommittee's report. I summarize here the comments that pertain specifically to the Appellate Rules deadlines proposals.

07-AP-001; 07-CV-001: Americans United for Separation of Church and State. Alex Luchenitser of Americans United for Separation of Church and State writes that the 8-day response deadline in Rule 27(a)(3)(A) should be enlarged not to 10 days (the Committee's proposal) but "to a higher number, such as 12 or 14 calendar days." He argues that under the new time-computation method an 8-day deadline will result in less total response time than currently exists. He notes that "[w]hile some appellate motions are quite simple and easy to respond to, other[] motions are major substantive motions that require a long time to properly respond [to]." As an alternative to

lengthening the deadline for all responses, he suggests that the Committee consider "provid[ing] different response times for substantive and procedural motions, such as 7 calendar days for procedural ones and 21 for substantive ones. "

07-AP-002; 07-BK-004; 07-CR-002; 07-CV-002: Committee on Civil Litigation of the U.S. District Court for the Eastern District of New York ("EDNY Committee"). As noted in the Time-Computation memo, the EDNY Committee warns that the proposed amendments, by clarifying the way to compute backward-counted time periods, would effectively shorten the response time allowed under rules that count backwards. Moreover, the EDNY Committee notes that when a period is counted backward from a future event, one will be unable to get the benefit of the three-day rule's extension (which of course is triggered only for periods that are counted forward from the service of papers). The EDNY Committee proposes that the best solution to the backward-counting problem is to eliminate backward-counted periods such as Civil Rule 6(c)'s provision concerning motion papers; the EDNY Committee suggests substituting a provision modeled on the Local Civil Rule 6.1 which is in use in the Eastern and Southern Districts of New York (which counts forward rather than backward).

07-AP-005; 07-BK-008; 07-CR-006; 07-CV-006: Jack E. Horsley. Overall, Mr. Horsley views the proposed amendments with favor He supports the deletion of "calendar" from Rule 26(c). With respect to one or more of the time periods in Appellate Rule 4 that the proposed amendments would lengthen from 10 to 14 days, Mr. Horsley proposes a further lengthening so that the period in question would be 21 days, "to assure even a more liberal time frame."

07-AP-010; 07-CV-010: Public Citizen Litigation Group Brian Wolfman writes on behalf of Public Citizen Litigation Group to express general support for the proposed days-are-days time-counting approach. Public Citizen suggests, however, that the deadlines for certain post-trial motions (and for the tolling effect – under Appellate Rule 4(a) – of Civil Rule 60 motions) be lengthened only to 21 rather than 30 days. Public Citizen argues that a 30-day period is unnecessarily long and will cause unwarranted delays Public Citizen (like Howard Bashman) argues that it is awkward for the post-trial motion deadline to fall on the same day as the deadline for filing the notice of appeal.

07-AP-019; 07-CV-020; 07-CR-016: Jordan Center for Criminal Justice and Penal Reform. Mark Jordan writes on behalf of the Jordan Center for Criminal Justice and Penal Reform to urge that Rule 29(e)'s seven-day deadlines for amicus briefs be lengthened to 14 days.

Howard Bashman's Law.com article. Mr Bashman wrote a column on the time-computation proposals which can be accessed at http://www law.com/jsp/article.jsp?id=1201918759261 Mr. Bashman's main comment in his column concerns the Civil Rules proposal to extend certain post-trial motion deadlines As has been noted, extending those deadlines from 10 to 30 days will mean that those deadlines fall on the same day as the Rule 4(a) deadline for taking an appeal in cases that do not involve U.S. government parties. Mr Bashman's concern is that this will (1) prevent a potential appellant from

knowing whether any post-trial motions will be filed prior to the deadline for taking an appeal and thus (2) increase the number of appeals that are filed only to be suspended pending the resolution of a timely post-trial motion.

2. Rule 26(c)

a. Introduction

During the time-computation project the question arose whether the three-day rule should be altered. The decision was taken not to change the three-day rule for the time being The Appellate Rules Committee did, however, publish for comment a technical amendment designed to clarify the three-day rule's application and to make Rule 26(c)'s three-day rule parallel the three-day rule in Civil Rule 6. The Committee seeks final approval of this proposal. Assuming that the Standing Committee also gives final approval to the time-computation amendments, the word "calendar" will be deleted from Rule 26(c) as stated in the package of time-computation amendments (discussed above).

b. Text of Proposed Amendment and Committee Note

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE*

Rule 26. Computing and Extending Time

* * * * *

(c) Additional Time After Service. When a party is ~~required or permitted to act within a prescribed period after a paper is served on that party~~ may or must act within a specified time after service, 3 calendar days are added ~~to~~ after the ~~prescribed~~ period would otherwise expire under Rule 26(a), unless the paper is delivered on

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

the date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service

Committee Note

Subdivision (c). Rule 26(c) has been amended to eliminate uncertainty about application of the 3-day rule Civil Rule 6(e) was amended in 2004 to eliminate similar uncertainty in the Civil Rules.

Under the amendment, a party that is required or permitted to act within a prescribed period should first calculate that period, without reference to the 3-day rule provided by Rule 26(c), but with reference to the other time computation provisions of the Appellate Rules. After the party has identified the date on which the prescribed period would expire but for the operation of Rule 26(c), the party should add 3 calendar days. The party must act by the third day of the extension, unless that day is a Saturday, Sunday, or legal holiday, in which case the party must act by the next day that is not a Saturday, Sunday, or legal holiday.

To illustrate: A paper is served by mail on Thursday, November 1, 2007. The prescribed time to respond is 30 days. The prescribed period ends on Monday, December 3 (because the 30th day falls on a Saturday, the prescribed period extends to the following Monday). Under Rule 26(c), three calendar days are added — Tuesday, Wednesday, and Thursday — and thus the response is due on Thursday, December 6.

* * * * *

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c. Changes Made After Publication and Comment

No changes were made after publication and comment, except for the style changes (described below) which were suggested by Professor Kimble

As noted below, public comments on the time-computation project have raised once again the possibility of altering or eliminating the three-day rule. The Appellate Rules Committee agrees that it is worthwhile to study this proposal, and the proposal has been added to the Committee's agenda

d. Summary of Public Comments

07-AP-001; 07-CV-001: Americans United for Separation of Church and State. In a comment concerning the time-computation proposals, Alex Luchenitser of Americans United for Separation of Church and State suggests that "the amended rules [should] clarify the working of the 3-day rule so that it is clear and is consistent among the district and appellate rules."

07-AP-003; 07-BR-015; 07-CR-003; 07-CV-003: Chief Judge Frank H. Easterbrook. Chief Judge Easterbrook asserts that the three-day rule contained in Appellate Rule 26(c) should be abolished. He argues that the three-day rule is particularly incongruous for electronic service, and that adding three days to a period thwarts the goal served by the time-computation project's preference for setting periods in multiples of seven days.

07-AP-005; 07-BK-008; 07-CR-006; 07-CV-006: Jack E. Horsley. In connection with his comments on the time-computation proposals, Mr Horsley suggests amending Appellate Rule 26(c) to clarify how the three-day rule works when the last day of a period falls on a weekend or holiday Specifically, Mr. Horsley suggests that Rule 26(c) be amended to read:

> When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 ~~calendar~~ days are added to the prescribed period extended to the next business day if the 3rd day falls on a holiday or non-business day or unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service.

Style suggestions. Professor Kimble suggests capitalizing "after" in the subdivision heading; deleting "prescribed" from "prescribed period"; and placing a comma after "under Rule 26(a)".

3. New Rule 12.1

a. Introduction

The Committee seeks final approval of proposed new Appellate Rule 12.1 concerning indicative rulings. This Rule was published for comment in August along with proposed Civil Rule 62 1 Both rules will formalize (and raise awareness concerning) the practice of indicative rulings.

b. Text of Proposed Amendment and Committee Note

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE*

Rule 12.1. Remand After an Indicative Ruling by the District Court on a Motion for Relief That Is Barred by a Pending Appeal

(a) Notice to the Court of Appeals. If a timely motion is made in the district court for relief that it lacks authority to grant because of an appeal that has been docketed and is pending, the movant must promptly notify the circuit clerk if the district court states either that it would grant the motion or that the motion raises a substantial issue

(b) Remand After an Indicative Ruling. If the district court states that it would grant the motion or that the motion raises a substantial issue, the court of appeals may remand for further proceedings but retains jurisdiction unless it expressly dismisses the appeal. If the court of appeals remands but retains jurisdiction, the parties must promptly notify the circuit clerk when the district court has decided the motion on remand.

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*New material is underlined

Committee Note

This new rule corresponds to Federal Rule of Civil Procedure 62.1, which adopts for any motion that the district court cannot grant because of a pending appeal the practice that most courts follow when a party moves under Civil Rule 60(b) to vacate a judgment that is pending on appeal. After an appeal has been docketed and while it remains pending, the district court cannot grant relief under a rule such as Civil Rule 60(b) without a remand. But it can entertain the motion and deny it, defer consideration, state that it would grant the motion if the court of appeals remands for that purpose, or state that the motion raises a substantial issue. Experienced lawyers often refer to the suggestion for remand as an "indicative ruling." (The effect of a notice of appeal on district-court authority is addressed by Appellate Rule 4(a)(4), which lists six motions that, if filed within the relevant time limit, suspend the effect of a notice of appeal filed before or after the motion is filed until the last such motion is disposed of. The district court has authority to grant the motion without resorting to the indicative ruling procedure.)

The procedure formalized by Rule 12.1 is helpful when relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal. In the criminal context, the Committee anticipates that Rule 12.1's use will be limited to newly discovered evidence motions under Criminal Rule 33(b)(1) (*see United States v. Cronic*, 466 U.S. 648, 667 n 42 (1984)), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. § 3582(c).

Rule 12.1 does not attempt to define the circumstances in which an appeal limits or defeats the district court's authority to act in the face of a pending appeal The rules that govern the relationship between trial courts and appellate courts may be complex, depending in part on the nature of the order and the source of appeal jurisdiction Appellate Rule 12.1 applies only when those rules deprive the district court of authority to grant relief without appellate permission.

To ensure proper coordination of proceedings in the district court and in the court of appeals, the movant must notify the circuit clerk if the district court states that it would grant the motion or that the motion raises a substantial issue. The "substantial issue" standard may be illustrated by the following hypothetical The district court

grants summary judgment dismissing a case. While the plaintiff's appeal is pending, the plaintiff moves for relief from the judgment, claiming newly discovered evidence and also possible fraud by the defendant during the discovery process. If the district court reviews the motion and indicates that the motion "raises a substantial issue," the court of appeals may well wish to remand rather than proceed to determine the appeal.

If the district court states that it would grant the motion or that the motion raises a substantial issue, the movant may ask the court of appeals to remand so that the district court can make its final ruling on the motion. In accordance with Rule 47(a)(1), a local rule may prescribe the format for the litigants' notifications and the district court's statement.

Remand is in the court of appeals' discretion. The court of appeals may remand all proceedings, terminating the initial appeal. In the context of postjudgment motions, however, that procedure should be followed only when the appellant has stated clearly its intention to abandon the appeal. The danger is that if the initial appeal is terminated and the district court then denies the requested relief, the time for appealing the initial judgment will have run out and a court might rule that the appellant is limited to appealing the denial of the postjudgment motion. The latter appeal may well not provide the appellant with the opportunity to raise all the challenges that could have been raised on appeal from the underlying judgment. *See, e g., Browder v. Dir., Dep't of Corrections of Ill* , 434 U.S. 257, 263 n.7 (1978) ("[A]n appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review."). The Committee does not endorse the notion that a court of appeals should decide that the initial appeal was abandoned – despite the absence of any clear statement of intent to abandon the appeal – merely because an unlimited remand occurred, but the possibility that a court might take that troubling view underscores the need for caution in delimiting the scope of the remand.

The court of appeals may instead choose to remand for the sole purpose of ruling on the motion while retaining jurisdiction to proceed with the appeal after the district court rules on the motion (if the appeal is not moot at that point and if any party wishes to proceed). This will often be the preferred course in the light of the concerns expressed above. It is also possible that the court of appeals

may wish to proceed to hear the appeal even after the district court has granted relief on remand, thus, even when the district court indicates that it would grant relief, the court of appeals may in appropriate circumstances choose a limited rather than unlimited remand.

If the court of appeals remands but retains jurisdiction, subdivision (b) requires the parties to notify the circuit clerk when the district court has decided the motion on remand This is a joint obligation that is discharged when the required notice is given by any litigant involved in the motion in the district court.

When relief is sought in the district court during the pendency of an appeal, litigants should bear in mind the likelihood that a new or amended notice of appeal will be necessary in order to challenge the district court's disposition of the motion. *See, e.g., Jordan v Bowen*, 808 F.2d 733, 736-37 (10th Cir. 1987) (viewing district court's response to appellant's motion for indicative ruling as a denial of appellant's request for relief under Rule 60(b), and refusing to review that denial because appellant had failed to take an appeal from the denial); *TAAG Linhas Aereas de Angola v Transamerica Airlines, Inc.*, 915 F.2d 1351, 1354 (9th Cir. 1990) ("[W]here a 60(b) motion is filed subsequent to the notice of appeal and considered by the district court after a limited remand, an appeal specifically from the ruling on the motion must be taken if the issues raised in that motion are to be considered by the Court of Appeals.").

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c. Changes Made After Publication and Comment

No changes were made to the text of Rule 12.1 Two changes to the Note were made in response to public comments. Additional changes were made in consultation with the Civil Rules Committee and in response to some Appellate Rules Committee members' suggestions.

As published for comment, the second paragraph of the Note read: "[Appellate Rule 12.1 is not limited to the Civil Rule 62 1 context; Rule 12.1 may also be used, for example, in connection with motions under Criminal Rule 33. *See United States v Cronic*, 466 U S 648, 667 n.42 (1984).] The procedure formalized by Rule 12 1 is helpful whenever relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal." The Committee discussed the Solicitor General's concern that Appellate Rule 12 1 might be misused in the criminal context. In response, the Committee deleted the second paragraph as published and substituted the following language: "The procedure formalized by Rule 12.1 is helpful when relief is sought from

an order that the court cannot reconsider because the order is the subject of a pending appeal. In the criminal context, the Committee anticipates that Rule 12.1's use will be limited to newly discovered evidence motions under Criminal Rule 33(b)(1) (*see United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984)), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. § 3582(c)."

As published for comment, the first sentence of the Note's last paragraph read. "When relief is sought in the district court during the pendency of an appeal, litigants should bear in mind the likelihood that a separate notice of appeal will be necessary in order to challenge the district court's disposition of the motion." In response to a suggestion by Public Citizen, the Committee revised this sentence to refer to a "new or amended" notice of appeal rather than a "separate" notice of appeal.

The Committee, in consultation with the Civil Rules Committee, added the following parenthetical at the end of the Note's first paragraph: "(The effect of a notice of appeal on district-court authority is addressed by Appellate Rule 4(a)(4), which lists six motions that, if filed within the relevant time limit, suspend the effect of a notice of appeal filed before or after the motion is filed until the last such motion is disposed of. The district court has authority to grant the motion without resorting to the indicative ruling procedure.)" This parenthetical is designed to forestall confusion concerning the effect of tolling motions on a district court's power to act.

The Committee, acting at the suggestion of the Civil Rules Committee, altered the wording of one sentence in the first paragraph and one sentence in the fifth paragraph of the Note. The changes are designed to remove references to remands of "the action," since those references would be in tension with the Note's advice concerning the advisability of limited remands. Thus, in the Note's first paragraph "if the action is remanded" became "if the court of appeals remands for that purpose," and in the Note's fifth paragraph "may ask the court of appeals to remand the action" became "may ask the court of appeals to remand."

The Committee also made stylistic changes to the Note's first and third paragraphs. "Experienced appeal lawyers" became "Experienced lawyers," and "act in face of a pending appeal" became "act in the face of a pending appeal."

d. Summary of Public Comments

Three comments were submitted concerning proposed new Appellate Rule 12.1. In addition, two other comments concern proposed new Civil Rule 62.1. In the interest of completeness, all five of those comments are summarized here.

07-AP-011: Public Citizen Litigation Group. Public Citizen suggests one substantive and one stylistic change in the text of proposed Rule 12.1, and also suggests a change in the Note

The proposed substantive change to the text stems from Public Citizen's concern that courts of appeals should be absolutely barred from dismissing an appeal (when remanding for an indicative ruling) unless the appellant expressly requests that the appeal be dismissed To set such an absolute bar, Public Citizen suggests adding a new sentence to Rule 12.1(b). With their proposed addition, Rule 12.1(b) would read:

> **Remand After an Indicative Ruling.** If the district court states that it would grant the motion or that the motion raises a substantial issue, the court of appeals may remand for further proceedings but retains jurisdiction unless it expressly dismisses the appeal. The court of appeals shall not dismiss the appeal unless, in the notice referred to in subdivision (a), the appellant expressly requests that the appeal be dismissed. If the court of appeals remands but retains jurisdiction, the parties must promptly notify the circuit clerk when the district court has decided the motion on remand.

Public Citizen also suggests amending the Note's observation that "[w]hen relief is sought in the district court during the pendency of an appeal, litigants should bear in mind the likelihood that a separate notice of appeal will be necessary in order to challenge the district court's disposition of the motion." Public Citizen "believe[s] that the committee note should remind litigants that an *amended* notice of appeal may be filed in this circumstance. That is a worthwhile reminder because an amended notice of appeal does not require a new filing fee "

Finally, Public Citizen suggests that in Rule 12.1(a) "because of an appeal that has been docketed" should be changed to read "because an appeal has been docketed "

07-AP-014: United States Solicitor General. Paul D. Clement writes in support of proposed Rule 12 1 but urges that the Note be amended. The Department of Justice is concerned about the potential breadth of Rule 12.1's application. The DOJ has identified only three instances in the criminal context where the indicative-ruling procedure would "legitimately arise[]," and the DOJ worries that unless the Note restricts Rule 12.1's application in the criminal context to those instances, the federal trial courts "will be swamped with inappropriate motions by prisoners acting *pro se* who do not understand the limited purposes for which indicative rulings are warranted." Thus, the DOJ proposes that the first sentence of the Note's second paragraph be deleted and the following sentence added in its place: "Appellate Rule 12.1 is limited to the Civil Rule 62.1 context and to newly discovered evidence motions under Criminal Rule 33(b)(1), as provided in *United States v Cronic*, 466 U.S. 648 n.42 (1984), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. 3582(c)."

07-AP-018; 07-BR-036; 07-CV-018: Rules and Practice Committee of the Seventh Circuit Bar Association. Thomas J. Wiegand writes on behalf of the Seventh Circuit Bar Association's Rules and Practice Committee ("Seventh Circuit Bar Association") He reports that the Seventh Circuit Bar Association sponsored a lunchtime discussion of the proposed Rules amendments this past December One of the comments that resulted from this discussion is as follows: "It appear[s] that [Civil Rule 62.1 and Appellate Rule 12 1] are aimed primarily or

exclusively at motions pursuant to [C]ivil Rule 60. If that indeed is the case, then the new rules or the comments might mention that fact, so as to avoid a variety of other motions being made under the new rules, such as motions for fees."

07-CV-012: Professor Bradley Scott Shannon. Professor Shannon "agree[s] that proposed Rule 62 1 is eminently pragmatic," but he "object[s] to this (and any) rule that purports to authorize courts to decide matters (or indicate how they might decide matters) that are not currently before them." If the district court lacks jurisdiction to decide the motion, he asserts, than an indicative ruling on the motion "is improper, certainly as a matter of established principles of American legal process, if not also as a matter of constitutional justiciability."

07-CV-015: U.S. Department of Justice. Jeffrey S. Bucholtz, Acting Assistant Attorney General, Civil Division, writes on behalf of the Department of Justice to support proposed Civil Rule 62.1.

4. Rule 4(a)(4)(B)(ii)

a. Introduction

The Committee seeks final approval for an amendment to Rule 4(a)(4)(B)(ii) that will eliminate an ambiguity that resulted from the 1998 restyling. The Rule's current language might be read to require the appellant to amend a prior notice of appeal if the district court amends the judgment after the notice of appeal is filed, even if the amendment is in the appellant's favor. This ambiguity will be removed by replacing the current reference to challenging "a judgment altered or amended upon" a timely post-trial motion with a reference to challenging "a judgment's alteration or amendment upon" such a motion.

b. Text of Proposed Amendment and Committee Note

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 * * * * *

*New material is underlined, matter to be omitted is lined through

(4) **Effect of a Motion on a Notice of Appeal.**

* * * * *

(B) (i) If a party files a notice of appeal after the court announces or enters a judgment — but before it disposes of any motion listed in Rule 4(a)(4)(A) — the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a ~~judgment altered or amended~~ judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal — in compliance with Rule 3(c) — within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

* * * * *

Committee Note

Subdivision (a)(4)(B)(ii). Subdivision (a)(4)(B)(ii) is amended to address problems that stemmed from the adoption — during the 1998 restyling project — of language referring to "a judgment altered or amended upon" a post-trial motion.

Prior to the restyling, subdivision (a)(4) instructed that "[a]ppellate review of an order disposing of any of [the post-trial motions listed in subdivision (a)(4)] requires the party, in compliance with Appellate Rule 3(c), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment shall file a notice, or amended notice, of appeal within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last such motion outstanding." After the restyling, subdivision (a)(4)(B)(ii) provided: "A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal — in compliance with Rule 3(c) — within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion."

One court has explained that the 1998 amendment introduced ambiguity into the Rule: "The new formulation could be read to expand the obligation to file an amended notice to circumstances where the ruling on the post-trial motion alters the prior judgment in an insignificant manner or in a manner favorable to the appellant, even though the appeal is not directed against the alteration of the judgment." *Sorensen v City of New York*, 413 F.3d 292, 296 n.2 (2d Cir 2005). The current amendment removes that ambiguous reference to "a judgment altered or amended upon" a post-trial motion, and refers instead to "a judgment's alteration or amendment" upon such a motion. Thus, subdivision (a)(4)(B)(ii) requires a new or amended notice of appeal when an appellant wishes to challenge an order disposing of a motion listed in Rule 4(a)(4)(A) or a judgment's alteration or amendment upon such a motion.

c. Changes Made After Publication and Comment

No changes were made to the proposal as published. Instead, the Committee has added the commentators' suggestions to its study agenda.

d. Summary of Public Comments

07-AP-009: Peder K. Batalden. Peder K. Batalden, an associate at Horvitz & Levy, LLP, argues that the proposed amendment "carries an unintended consequence." He points out that the proposed amended Rule 4(a)(4)(B)(ii) "[t]ether[s] the time to appeal from the *amended judgment* to the entry of the *order*" disposing of the last remaining tolling motion. He observes that this "poses a problem in cases where the amended judgment is not entered until more than 30 days after the entry of the order." He points out that a district court may permit the prevailing party to submit a proposed amended judgment, may then allow the other party time to object, and thus may take more than 30 days between entering the order disposing of the tolling motion and entering the amended judgment. Mr. Batalden underscores his point by reporting that he "face[s] a comparable issue in a current case."

Mr. Batalden suggests "delet[ing] entirely the language 'or a judgment's alteration or amendment upon such a motion' from the amended rule." He envisions that the effect of such a deletion would be as follows:

> In the few cases where the district court does enter an amended judgment, the losing party could file a separate notice of appeal from the amended judgment if the amendment is substantive.... [B]y operation of Rule 4, the losing party could timely file that separate notice of appeal within 30 days of the entry of the amended judgment.

07-AP-011: Public Citizen Litigation Group. Public Citizen has "no quarrel with the proposed wording change." But Public Citizen further suggests deleting Rule 4(a)(4)(B)(ii) and substituting a provision stating that "the original notice of appeal serves as the appellant's appeal from any order disposing of any post-trial motion " Public Citizen argues that where the appellant has already filed a notice of appeal from the original judgment, it serves no useful purpose to require a new or amended notice of appeal when the appellant also wishes to challenge the disposition of a post-judgment motion. Public Citizen asserts that there are many instances when a notice of appeal does not itself provide clear notice of the precise nature of the issues to be raised on appeal – for example, when a notice of appeal from a final judgment brings up for review issues relating to prior orders that merged into that judgment. In many instances, Public Citizen argues, the appellee instead "is put on notice of the issues on appeal when, shortly after an appeal is filed, the appellant states the issues on a form or in some other filing required by the circuit clerk." Thus, deleting the requirement that appellants file a new or amended notice

in order to challenge the disposition of a postjudgment motion "would prevent the inadvertent loss of issues on appeal, without harming appellees or the courts "

07-AP-018; 07-BR-036; 07-CV-018: Rules and Practice Committee of the Seventh Circuit Bar Association. Thomas J. Wiegand writes on behalf of the Seventh Circuit Bar Association's Rules and Practice Committee ("Seventh Circuit Bar Association") He reports that the Seventh Circuit Bar Association sponsored a lunchtime discussion of the proposed Rules amendments this past December. Participants in that discussion doubted whether the proposed amendment to Rule 4(a)(4)(B)(ii) "would have any practical effect because, if there is any chance that the amended judgment could be argued as affecting the appeal, the appealing party always will file an amended notice of appeal." Participants suggested amending Rule 4(a) "to state that any post-appeal amendment to an underlying judgment is automatically incorporated into the scope of the originally filed notice of appeal."

5. Rule 22(b)(1)

a. Introduction

The Committee seeks final approval of an amendment to Rule 22 that would conform the Appellate Rules to a change that the Criminal Rules Committee proposes to make to the Rules Governing Proceedings Under 28 U S.C. §§ 2254 or 2255. The Appellate Rules amendment deletes from Rule 22 the requirement that the district judge who rendered the judgment either issue a certificate of appealability (COA) or state why a certificate should not issue. The relevant requirement will be delineated in Rule 11(a) of the Rules Governing Proceedings Under 28 U.S.C. § 2254 or § 2255.

b. Text of Proposed Amendment and Committee Note

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE*

Rule 22. Habeas Corpus and Section 2255 Proceedings

* * * * *

(b) Certificate of Appealability.

*New material is underlined, matter to be omitted is lined through

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C § 2253(c). ~~If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue.~~ The district clerk must send the certificate ~~or statement~~ and the statement described in Rule 11(a) of the Rules Governing Proceedings Under 28 U.S.C. § 2254 or § 2255 to the court of appeals, along with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.

* * * * *

Committee Note

Subdivision (b)(1). The requirement that the district judge who rendered the judgment either issue a certificate of appealability or

state why a certificate should not issue has been deleted from subdivision (b)(1). Rule 11(a) of the Rules Governing Proceedings under 28 U.S.C. § 2254 or § 2255 now delineates the relevant requirement. Subdivision (b)(1) continues to require that the district clerk send the certificate and the statement of reasons for grant of the certificate to the court of appeals along with the notice of appeal and the file of the district-court proceedings.

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c. Changes Made After Publication and Comment

No changes were made to Appellate Rule 22 after publication and comment, except for the style changes (described below) which were suggested by Professor Kimble. However, as detailed in the report of the Criminal Rules Committee, a number of changes have been made to the proposals concerning Rule 11 of the habeas and Section 2255 rules in response to public comment. At the Appellate Rules Committee meeting (which took place before the Criminal Rules Committee meeting), members discussed the version of the revised Rule 11 amendments that had been proposed by the writs subcommittee of the Criminal Rules Committee, the Appellate Rules Committee concluded that the revised version of the Rule 11 proposals would be compatible with the published version of the Appellate Rule 22(b) proposal. Thus, the Appellate Rules Committee gave final approval to the Rule 22(b) amendment, subject to Professor Kimble's style suggestions and contingent upon the approval by the Criminal Rules Committee of a corresponding amendment to Rule 11 of the habeas and Section 2255 rules.

d. Summary of Public Comments

A number of the public comments focused on the habeas / 2255 Rule 11 proposal rather than the Appellate Rule 22 proposal. In the interests of completeness, all comments on either Rule 11 or Rule 22 are summarized here.

07-AP-005; 07-BK-008; 07-CR-006; 07-CV-006: Jack E. Horsley. Mr. Horsley states that the proposed amendment to Rule 22 "is well put as shown," and he "do[es] not suggest any changes."

07-AP-013; 07-CR-012: Massachusetts Attorney General. Martha Coakley, the Attorney General of Massachusetts, writes in opposition to both the Rule 11 proposal and the Rule 22 proposal. Ms. Coakley fears that these proposed amendments "would (1) impose unnecessary burdens on district court judges and (2) dramatically increase the number of habeas appeals filed in courts of appeal." The proposal would burden district judges, she argues, by requiring the district judge to assess whether a COA should issue under 28 U.S.C. § 2253(c) in *all cases*, rather than only those in which an appeal is ultimately taken. She also suggests that such a requirement – by producing some instances where the district judge issues a COA – might lead

some habeas petitioners to appeal when they would not otherwise have done so. And she notes that by requiring the district judge to make the COA determination "without any opportunity for input from petitioners or their counsel," the proposal would eliminate the chance for petitioners to "narrow the claims on which they seek issuance of a certificate." Ms. Coakley suggests that the goal of efficiency would be better served by stricter enforcement of Rule 22's existing requirements, which she asserts are "rarely followed in practice."

07-AP-019; 07-CV-020; 07-CR-016: Jordan Center for Criminal Justice and Penal Reform. Mark Jordan writes on behalf of the Jordan Center for Criminal Justice and Penal Reform to oppose the Rule 11 proposals. He states that "requiring judges entering adverse final orders to contemporaneously issue or deny a certificate of appealability deprives, possibly in an unconstitutional fashion, the parties of the opportunity to brief ... the issue." He suggests that the Rule 11 proposals not be adopted, or alternatively that "the Court, before issue or denial of a certificate of appealability, first be required to permit the parties to show cause why a certificate of appealability should not issue."

07-CR-005: Gene Vorobyov. Mr. Vorobyov, a criminal appellate practitioner who devotes a portion of his practice to handling § 2254 appeals in the Ninth Circuit, writes in opposition to the proposed amendment because he prefers the existing procedure under which the would-be appellant seeks a COA post-judgment. The time span that may elapse between the entry of judgment and the request for the COA benefits the judge, Mr. Vorobyov argues, by providing an opportunity to "look at [the case] with a fresh eye " Moreover, he argues that this time span gives habeas petitioners an opportunity to research and "prepare a more effective argument" in favor of a COA, and that the petitioner may also use the time span to seek counsel. Mr. Vorobyov predicts that in a case in which the habeas petition is referred to a magistrate judge, and the magistrate judge's report and recommendation recommends dismissal of the petition, the proposed procedure would be inefficient and unfair because the habeas petitioner would feel constrained to "make an anticipatory request for the COA [when filing objections to the report and recommendation] even though [the report and recommendation] may not be fully adopted by the district court."

07-CR-010: Paul R. Bottei. Mr. Bottei, an Assistant Federal Public Defender in Nashville, Tennessee, expresses concern about the proposed amendment because it would deprive the petitioner of the opportunity to brief the issue of his or her entitlement to a COA. The petitioner should have the opportunity to brief that issue separately from and after the merits, Mr. Bottei argues, because "[i]t is the petitioner who bears the burden of showing entitlement to a certificate," because "[s]uch entitlement is governed by a standard that differs from the standard for granting habeas relief," and because the authorities that the petitioner may adduce to meet the COA standard may differ from those that would have been relevant to the merits briefing itself. Those authorities might, for example, include "otherwise non-precedential rulings from other courts (including other circuits, district courts, and possibly state courts)."

In place of the proposed provisions, Mr. Bottei offers a different proposal under which (1) the district judge must issue a COA when dismissing a habeas petition if the judge "independently determines" the petitioner is entitled to a COA; (2) the petitioner then has a time limit for asking the district judge to issue a COA on any other claims; and (3) the district judge then rules on the petitioner's entitlement to a COA on any other claims

07-CR-013: Public Interest Litigation Clinic. Joseph W. Luby, Acting Executive Director of the Public Interest Litigation Clinic, writes to express "great concern" about the proposed Rule 11 for cases under Section 2254. Mr. Luby, whose office represents capital habeas petitioners, observes that "a district court's decision to grant or deny a COA carries tremendous and often final consequences " Like Mr. Bottei, Mr. Luby points out that "the standard governing issuance of a COA differs from that governing the petitioner's entitlement to relief." Like Ms. Coakley, Mr. Luby notes that the proposal would eliminate the opportunity for petitioners to narrow the issues by seeking a COA only as to a handful of the strongest claims. He also observes that the proposal "deprives a petitioner of the opportunity to cite post-petition developments in support of" the issuance of a COA. He argues that it would be undesirable "for the court to deny a COA before the parties even know what the [district court's] reasoning is, much less before they have the opportunity to comment upon it."

Mr Luby offers an alternative proposal: He suggests setting a 10- or 15-day deadline post-judgment for prisoners to apply to the district court for a COA.

Style suggestions. Professor Kimble suggests that the proposed Rule 22 amendment be slightly modified, by capitalizing "under" in the phrase "Proceedings under 28 U.S.C § 2254 or § 2255," and by inserting ", along" between "court of appeals" and "with the notice."

B. Items for Publication

The Committee is aware that the preferred practice is to hold proposed amendments so that they can be published in groups. The Committee notes, however, the need to amend Form 4 as soon as possible to comply with the privacy rules The Committee therefore suggests that Form 4 should be published for comment in summer 2008. Assuming that Form 4 is published for comment in summer 2008, the Committee seeks permission to publish proposed amendments to Rules 1 and 29 at that time as well

1. Form 4

The privacy rules which took effect December 1, 2007, require redaction of social security numbers (except for the last four digits) and provide that references to an individual known to be a minor should include only the minor's initials. New Criminal Rule 49.1(a)(5) also requires redaction of individuals' home addresses (so that only the city and state are shown). These rules

require changes in Appellate Form 4, which concerns the information that must accompany a motion for permission to appeal in forma pauperis. The Administrative Office ("AO") has made interim changes to the version of Form 4 that is posted on the AO's website, but those interim changes do not remove the need to amend the official version of Form 4 to conform to the privacy requirements.

Moving forward, the Committee will also consider other changes to Form 4 For one thing, an effort is underway to restyle all the forms. More substantively, participants in the Committee's fall 2007 meeting noted that Form 4 requires a lot of detail. Not all i.f.p. applications require so much detail; for example, a much simpler form might be appropriate in the habeas context. In addition, the Committee will consider whether to revise Question 10, which requests the name of any attorney whom the litigant has paid (or will pay) for services in connection with the case, as well as the amount of such payments. The Committee has placed these matters on its study agenda, and plans to consult other Advisory Committees about them because Form 4 is often used in the district courts.

The Committee believes, however, that it is important to take immediate action to bring the official version of Form 4 into compliance with the new privacy requirements. Accordingly, the Committee seeks permission to publish the following proposed amendment

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE*

Form 4. Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis

* * * * *

7. *State the persons who rely on you or your spouse for support*

Name [or, if under 18, initials only]	Relationship	Age
_____	_____	___

* * * * *

13. *State the ~~address~~ city and state of your legal residence*

_____

*New material is underlined, matter to be omitted is lined through

Your daytime phone number: (____) _____

Your age. _____ Your years of schooling: _____

~~Your~~ Last four digits of your social-security number: _____

2. Rule 1(b)

Proposed new Rule 1(b) would define the term "state" for the purposes of the Appellate Rules. The proposal to define the term "state" grew out of the time-computation project's discussion of the definition of "legal holiday"; that definition includes state holidays, and it was thought useful to define "state," for that purpose, to encompass the District of Columbia and federal territories, commonwealths and possessions. (As published for comment, the proposed amendment to Rule 26(a) included such a definition for purposes of the time-computation rule. However, as noted above, the Advisory Committee has deleted the definition from proposed Rule 26(a) on the assumption that the proposed amendment to Rule 1(b) will be approved for publication in summer 2008.)

As discussed below, the adoption of the proposed definition in Rule 1(b) will permit the deletion of the reference to a "Territory, Commonwealth, or the District of Columbia" from Rule 29(a) The term "state" also appears in Rules 22, 44, and 46. The Committee does not believe that the adoption of proposed Rule 1(b) would require any changes in Rules 22, 44 or 46, but the Committee welcomes public comment on the proposed definition's effects on those Rules.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE*

Rule 1. Scope of Rules; Definition; Title

(a) Scope of Rules.

(1) These rules govern procedure in the United States courts of appeals.

*New material is underlined, matter to be omitted is lined through

(2) When these rules provide for filing a motion or other document in the district court, the procedure must comply with the practice of the district court.

(b) ~~[Abrogated]~~ **Definition.** In these rules, 'state' includes the District of Columbia and any United States commonwealth or territory

(c) Title. These rules are to be known as the Federal Rules of Appellate Procedure.

Committee Note

Subdivision (b). New subdivision (b) defines the term "state" to include the District of Columbia and any commonwealth or territory of the United States. Thus, as used in these Rules, "state" includes the District of Columbia, Guam, American Samoa, the U.S. Virgin Islands, the Commonwealth of Puerto Rico, and the Commonwealth of the Northern Mariana Islands.

3. Rule 29

Rule 29(a) currently provides that "[t]he United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing." If proposed Rule 1(b) is adopted, it will define "state" to include D.C. and U S. commonwealths or territories In that event, the reference to a "Territory, Commonwealth, or the District of Columbia" should be deleted from Rule 29(a).

Accordingly, the Committee seeks permission to publish for comment the following proposed amendment to Rule 29(a). The amendment is shown along with the proposed amendment to Rule 29(c) which the Standing Committee approved for publication at its January 2008 meeting Assuming that the Standing Committee approves the Rule 29(a) amendment for

publication, the Advisory Committee suggests that both of the Rule 29 proposals should be published for comment in August 2008.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE*

Rule 29. Brief of an Amicus Curiae

(a) **When Permitted**. The United States or its officer or agency~~;~~ or a state ~~State, Territory, Commonwealth, or the District of Columbia~~ may file an amicus-curiae brief without the consent of the parties or leave of court Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.

* * * * *

(c) **Contents and Form.** An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. ~~If an amicus curiae is a corporation, the brief must include a disclosure statement like that required of~~

*New material is underlined, matter to be omitted is lined through

parties by ~~Rule 26.1.~~ An amicus brief need not comply with Rule 28, but must include the following:

(1) a table of contents, with page references,

(2) a table of authorities — cases (alphabetically arranged), statutes and other authorities — with references to the pages of the brief where they are cited;

(3) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;

(4) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review; ~~and~~

(5) a certificate of compliance, if required by Rule 32(a)(7)~~.~~;

(6) if filed by an amicus curiae that is a corporation, a disclosure statement like that required of parties by Rule 26.1; and

(7) unless filed by an amicus curiae listed in the first sentence of Rule 29(a), a statement that, in the first footnote on the first page

(A) indicates whether a party's counsel authored the brief in whole or in part;

(B) indicates whether a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief, and

(C) identifies every person — other than the amicus curiae, its members, or its counsel — who contributed money that was intended to fund preparing or submitting the brief.

* * * * *

Committee Note

Subdivision (a). New Rule 1(b) defines the term "state" to include "the District of Columbia and any United States commonwealth or territory." That definition renders subdivision (a)'s reference to a "Territory, Commonwealth, or the District of Columbia" redundant. Accordingly, subdivision (a) is amended to refer simply to "[t]he United States or its officer or agency or a state "

Subdivision (c). Two items are added to the numbered list in subdivision (c) The items are added as subdivisions (c)(6) and (c)(7) so as not to alter the numbering of existing items. The disclosure required by subdivision (c)(6) should be placed before the table of contents, while the disclosure required by subdivision (c)(7) should appear in the first footnote on the first page of text

Subdivision (c)(6). The requirement that corporate amici include a disclosure statement like that required of parties by Rule 26.1 was previously stated in the third sentence of subdivision (c) The requirement has been moved to new subdivision (c)(6) for ease of reference

Subdivision (c)(7). New subdivision (c)(7) sets certain disclosure requirements for amicus briefs, but exempts from those disclosure requirements entities entitled under subdivision (a) to file an amicus brief without the consent of the parties or leave of court. Subdivision (c)(7) requires amicus briefs to disclose whether counsel for a party authored the brief in whole or in part and whether a party or a party's counsel contributed money with the intention of funding the preparation or submission of the brief A party's or counsel's payment of general membership dues to an amicus need not be disclosed. Subdivision (c)(7) also requires amicus briefs to identify every other "person" (other than the amicus, its members, or its counsel) who contributed money with the intention of funding the brief's preparation or submission. "Person," as used in subdivision (c)(7), includes artificial persons as well as natural persons.

The disclosure requirement, which is modeled on Supreme Court Rule 37.6, serves to deter counsel from using an amicus brief to circumvent page limits on the parties' briefs. *See Glassroth v. Moore*, 347 F.3d 916, 919 (11th Cir 2003) (noting the majority's suspicion "that amicus briefs are often used as a means of evading the page limitations on a party's briefs"). It also may help judges to assess whether the amicus itself considers the issue important enough to sustain the cost and effort of filing an amicus brief.

It should be noted that coordination between the amicus and the party whose position the amicus supports is desirable, to the extent that it helps to avoid duplicative arguments This was particularly true prior to the 1998 amendments, when deadlines for amici were the same as those for the party whose position they supported. Now that the filing deadlines are staggered, coordination may not always be essential in order to avoid duplication. In any event, mere coordination – in the sense of sharing drafts of briefs – need not be disclosed under subdivision (c)(7). *Cf.* Robert L. Stern et al., Supreme Court Practice 662 (8th ed. 2002) (Supreme Court Rule 37.6 does not "require disclosure of any coordination and discussion between party counsel and *amici* counsel regarding their respective arguments . . .")

III. Information Items

The Committee discussed and retained on its study agenda the proposed amendments to Rules 4(a)(1) and 40(a)(1) that would clarify those Rules' application to cases in which a federal officer or employee is sued in his or her individual capacity. Those proposed amendments were published for comment in August 2007; the comments received on them were favorable although commentators did suggest a few changes. However, shortly after the Standing Committee approved these proposed amendments for publication, the Supreme Court decided *Bowles v. Russell*, 127 S. Ct. 2360 (2007). *Bowles* holds that Rule 4(a)(6)'s 14-day time limit on reopening the time to take a civil appeal is mandatory and jurisdictional In the course of explaining that conclusion, the Supreme Court relied on the notion that statutory appeal time limits are jurisdictional. In the wake of *Bowles*, the proposed amendment to Rule 4(a)(1) must be reassessed in the light of the fact that civil appeal deadlines are set not only by Rule 4(a) but also by 28 U.S.C. § 2107. The Committee has asked the Department of Justice for its views on this question, and has retained the proposed amendments on its study agenda.

More generally, the Committee continues to monitor developments under *Bowles*. *John R Sand & Gravel Co v. United States*, 128 S. Ct. 750 (2008), did not directly concern appeal times, rather, it concerned the statute of limitations for suits filed against the United States in the Court of Federal Claims. But because the question was whether that statute of limitations is jurisdictional and thus non-waivable, both the argument and the Court's opinion touched upon *Bowles*. Jurisdictional issues are also implicated in *Greenlaw v. United States*, which was argued on April 15, 2008. Meanwhile, the courts of appeals are working out *Bowles*' implications in a variety of contexts Under the developing caselaw, statutorily-backed appeal deadlines are likely to be held jurisdictional. Some courts have now held certain entirely rule-based appeal deadlines to be non-jurisdictional And there is a nascent circuit split concerning rule-based provisions that fill gaps in statutory appeal deadline schemes; some courts hold such provisions non-jurisdictional because they are rule-based, while other courts, focusing on the fact that the provisions fill gaps in a statutory scheme, hold even the rule-based gap-filling provisions to be jurisdictional requirements.

The Committee discussed and retained on its study agenda several other issues, concerning appeal bonds under Appellate Rule 7; amicus briefs with respect to panel rehearing and rehearing en banc; the effect of the separate document requirement in cases involving belated tolling motions, and the prepayment of postage in connection with inmate filings.

The Committee discussed and removed from its study agenda two proposals. One proposal, by Judge Jerry Smith, was that Rule 35(e) be amended so that the procedure with respect to responses to requests for en banc hearing or rehearing tracks the procedure set by Rule 40(a)(3) with respect to responses to requests for panel rehearing The other proposal, by Judge Alan Lourie, was that Rule 28.1 should be amended to curb abuse of the page limits for briefing on cross-appeals. Following the April meeting, I wrote to Judges Smith and Lourie to let them know of the Committee's decision not to proceed further with their respective proposals, and I thanked them for bringing these matters to the Committee's attention.