DATE: December 3, 1999

TO: Judge Anthony J. Scirica, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Judge Will Garwood, Chair
Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on October 21 and 22 in Tucson, Arizona. At that meeting, the Advisory Committee approved numerous items for action by the Standing Committee. The Advisory Committee also removed several other items from its study agenda. Detailed information about the Advisory Committee's activities can be found in the minutes of the meeting and in the Committee's docket, both of which are attached to this report.

II. Action Items

The restylized Federal Rules of Appellate Procedure ("FRAP") took effect on December 1, 1998. As you no doubt recall, the Advisory Committee decided that further amendments to FRAP would not be forwarded to the Standing Committee until the bench and bar had an opportunity to become accustomed to the restylized rules. The Advisory Committee has continued to approve proposed amendments — and we have kept the Standing Committee appraised of our actions — but to date we have not sought permission to publish those proposed rule changes.

The bench and bar have now had over a year to become accustomed to the restylized rules. Moreover, any proposed amendments to FRAP would not be published until August 2000, giving the bench and bar another nine months to work with the restylized rules before being asked to comment on proposed changes to those rules. The Advisory Committee now seeks the Standing Committee's permission to publish the following proposed amendments in August 2000:

A. Rule 1(b)

The Advisory Committee proposes abrogating Rule 1(b), which provides that "[t]hese rules do not extend or limit the jurisdiction of the courts of appeals."

In 1990, Congress amended the Rules Enabling Act to give the Supreme Court authority to use the federal rules of practice and procedure to define when a ruling of a district court is final for purposes of 28 U.S.C. § 1291. In 1992, Congress amended 28 U.S.C. § 1292 to give the Supreme Court authority to use the federal rules of practice and procedure to provide for appeals of interlocutory decisions that are not already authorized by § 1292. Both § 1291 and § 1292 are unquestionably jurisdictional statutes, and thus, as soon as FRAP is amended to define finality for purposes of the former or to authorize interlocutory appeals not provided for by the latter, FRAP will "extend or limit the jurisdiction of the courts of appeals," and Rule 1(b) will become obsolete. For that reason, the Advisory Committee proposes that Rule 1(b) be abrogated.

This amendment was approved by the Advisory Committee at its October 1998 meeting.

Rule 1. Scope of Rules; Title

(b) ~~**Rules Do Not Affect Jurisdiction.** These rules do not extend or limit the jurisdiction of the courts of appeals.~~ [Abrogated]

Committee Note

Subdivision (b). Two recent enactments make it likely that, in the future, one or more of the Federal Rules of Appellate Procedure ("FRAP") will extend or limit the jurisdiction of the courts of appeals. In 1990, Congress amended the Rules Enabling Act to give the Supreme Court authority to use the federal rules of practice and procedure to define when a ruling of a district court is final for purposes of 28 U.S.C. § 1291. *See* 28 U.S.C. § 2072(c). In 1992, Congress amended 28 U.S.C. § 1292 to give the Supreme Court authority to use the federal rules of practice and procedure to provide for appeals of interlocutory decisions that are not already authorized by 28 U.S.C. § 1292. *See* 28 U.S.C. § 1292(e). Both § 1291 and § 1292 are unquestionably jurisdictional statutes, and thus, as soon as FRAP is amended to define finality for purposes of the former or to authorize interlocutory appeals not provided for by the latter, FRAP will "extend or limit the jurisdiction of the courts of appeals," and subdivision (b) will become obsolete. For that reason, subdivision (b) has been abrogated.

B. Rule 4(a)(1)

The courts of appeals have split on the question whether an appeal from an order granting or denying an application for a writ of error *coram nobis* is governed by the time limitations of Rule 4(a) (which apply in civil cases) or by the time limitations of Rule 4(b) (which apply in

criminal cases). The Advisory Committee proposes to resolve this conflict by amending Rule 4(a)(1) to make it clear that the time limitations of Rule 4(a) apply to appeals from *coram nobis* dispositions.

There is some doubt about whether, in the view of the Supreme Court, writs of error *coram nobis* continue to exist. As the Committee Note emphasizes, the Advisory Committee takes no position on that issue. Rather, the amendment simply provides that *if* such writs continue to exist, appeals from orders that grant or deny those writs are governed by Rule 4(a).

This amendment was approved by the Advisory Committee at its April 1998 meeting.

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

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

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

(B) When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

(C) An appeal from an order granting or denying an application for a writ of error *coram nobis* is an appeal in a civil case for purposes of Rule 4(a).

Committee Note

Subdivision 4(a)(1)(C). The federal courts of appeals have reached conflicting conclusions about whether an appeal from an order granting or denying an application for a writ of error *coram nobis* is governed by the time limitations of Rule 4(a) (which apply in civil cases) or by the time limitations of Rule 4(b) (which apply in criminal cases). *Compare United States v. Craig*, 907 F.2d 653, 655-57, *amended* 919 F.2d 57 (7th Cir. 1990); *United States v. Cooper*, 876 F.2d 1192, 1193-94 (5th Cir. 1989); and *United States v. Keogh*, 391 F.2d 138, 140 (2d Cir. 1968) (applying the time limitations of Rule 4(a)); *with Yasui v. United States*, 772 F.2d 1496, 1498-99 (9th Cir. 1985); and *United States v. Mills*, 430 F.2d 526, 527-28 (8th Cir. 1970)

(applying the time limitations of Rule 4(b)). A new part (C) has been added to Rule 4(a)(1) to resolve this conflict by providing that the time limitations of Rule 4(a) will apply.

Subsequent to the enactment of Fed. R. Civ. P. 60(b) and 28 U.S.C. § 2255, the Supreme Court has recognized the continued availability of a writ of error *coram nobis* in at least one narrow circumstance. In 1954, the Court permitted a litigant who had been convicted of a crime, served his full sentence, and been released from prison, but who was continuing to suffer a legal disability on account of the conviction, to seek a writ of error *coram nobis* to set aside the conviction. *United States v. Morgan*, 346 U.S. 502 (1954). As the Court recognized, in the *Morgan* situation an application for a writ of error *coram nobis* "is of the same general character as [a motion] under 28 U.S.C. § 2255." *Id.* at 506 n.4. Thus, it seems appropriate that the time limitations of Rule 4(a), which apply when a district court grants or denies relief under 28 U.S.C. § 2255, should also apply when a district court grants or denies a writ of error *coram nobis*. In addition, the strong public interest in the speedy resolution of criminal appeals that is reflected in the shortened deadlines of Rule 4(b) is not present in the *Morgan* situation, as the party seeking the writ of error *coram nobis* has already served his or her full sentence.

Notwithstanding *Morgan*, it is not clear whether the Supreme Court continues to believe that the writ of error *coram nobis* is available in federal court. In civil cases, the writ has been expressly abolished by Fed. R. Civ. P. 60(b). In criminal cases, the Supreme Court has recently stated that it has become "'difficult to conceive of a situation'" in which the writ "'would be necessary or appropriate.'" *Carlisle v. United States*, 517 U.S. 416, 429 (1996) (quoting *United States v. Smith*, 331 U.S. 469, 475 n.4 (1947)). The amendment to Rule 4(a)(1) is not intended to express any view on this issue; rather, it is merely meant to specify time limitations for appeals.

Rule 4(a)(1)(C) applies only to motions that are in substance, and not merely in form, applications for writs of error *coram nobis*. Litigants may bring and label as applications for a writ of error *coram nobis* what are in reality motions for a new trial under Fed. R. Crim. P. 33 or motions for correction or reduction of a sentence under Fed. R. Crim. P. 35. In such cases, the time limitations of Rule 4(b), and not those of Rule 4(a), should be enforced.

C. Rule 4(a)(5)(A)(ii)

Rule 4(a)(5)(A) permits a district court to extend the time to file a notice of appeal if two conditions are met. First, the party seeking the extension must file its motion no later than 30 days after the expiration of the time originally prescribed by Rule 4(a). Second, the party seeking the extension must show either excusable neglect or good cause.

The text of Rule 4(a)(5)(A) does not distinguish between motions filed prior to the expiration of the original deadline and those filed after the expiration of the original deadline. Regardless of whether the motion is filed before or during the 30 days after the original deadline expires, Rule 4(a)(5)(A) provides that the district court may grant an extension if a party shows *either* excusable neglect *or* good cause.

Only the First Circuit applies Rule 4(a)(5)(A) as written. All other circuits hold that the good cause standard applies only to motions brought *prior* to the expiration of the original deadline and that the excusable neglect standard applies only to motions brought *after* the expiration of the original deadline. These courts have relied heavily upon the Advisory Committee Note to the 1979 amendment to Rule 4(a)(5), without realizing that the Note refers to a prior draft of the 1979 amendment that was ultimately rejected.

The proposed amendment is intended to resolve the circuit split by instructing the courts to apply Rule 4(a)(5)(A) as written. It will also bring Rule 4(a)(5)(A) into harmony in this respect with Rule 4(b)(4), as the Committee Note observes.

This amendment was approved by the Advisory Committee at its October 1998 meeting.

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

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

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) <u>regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires,</u> that party shows excusable neglect or good cause.

Committee Note

Subdivision (a)(5)(A)(ii). Rule 4(a)(5)(A) permits the district court to extend the time to file a notice of appeal if two conditions are met. First, the party seeking the extension must file its motion no later than 30 days after the expiration of the time originally prescribed by Rule 4(a). Second, the party seeking the extension must show either excusable neglect or good cause. The text of Rule 4(a)(5)(A) does not distinguish between motions filed prior to the expiration of the original deadline and those filed after the expiration of the original deadline. Regardless of whether the motion is filed before or during the 30 days after the original deadline expires, the district court may grant an extension if a party shows either excusable neglect or good cause.

Despite the text of Rule 4(a)(5)(A), most of the courts of appeals have held that the good cause standard applies only to motions brought prior to the expiration of the original deadline and that the excusable neglect standard applies only to motions brought after the expiration of the original deadline. *See Pontarelli v. Stone*, 930 F.2d 104, 109-10 (1st Cir.1991) (collecting cases from the Second, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits). These courts have relied heavily upon the Committee Note to the 1979 amendment to Rule 4(a)(5). What these courts have overlooked is that the Committee Note refers to a draft of the 1979 amendment that was ultimately rejected. The rejected draft directed that the good cause standard apply only to motions filed prior to the expiration of the original deadline. Rule 4(a)(5), as actually amended, did not. *See* 16A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3950.3, at 148-49 (2d ed. 1996).

The failure of the courts of appeals to apply Rule 4(a)(5)(A) as written has also created tension between that rule and Rule 4(b)(4). As amended in 1998, Rule 4(b)(4) permits the district court to extend the time for filing a notice of appeal in a *criminal* case for an additional 30 days upon a finding of excusable neglect or good cause. Both Rule 4(b)(4) and the Committee Note to the 1998 amendment make it clear that an extension can be granted for either excusable neglect or good cause, regardless of whether a motion for an extension is filed before or after the time prescribed by Rule 4(b) expires.

Rule 4(a)(5)(A)(ii) has been amended to correct this misunderstanding and to bring the rule in harmony in this respect with Rule 4(b)(4). A motion for an extension filed prior to the expiration of the original deadline may be granted if the movant shows either excusable neglect or good cause. Likewise, a motion for an extension filed during the 30 days following the expiration of the original deadline may be granted if the movant shows either excusable neglect or good cause.

D. Rule 4(a)(7)

FRCP 58 provides that, to be "effective," a "judgment" must be set forth on a separate document. "Judgment" is defined in FRCP 54(a) to include not only what are traditionally regarded as "judgments," but also "any order from which an appeal lies." Rule 4(a)(7), in turn, provides that a judgment or order is not "entered" for purposes of Rule 4(a) (which, *inter alia*, specifies when notices of appeal must be filed) until that judgment or order "is entered in compliance with Rule[] 58 . . . of the Federal Rules of Civil Procedure." Several circuit splits have arisen out of uncertainties about how Rule 4(a)(7)'s definition of when a judgment or order is "entered" interacts with FRCP 54(a)/58's definition of when a judgment or appealable order is "effective." The Advisory Committee proposes amending Rule 4(a)(7) to resolve four of those circuit splits.

1. The first circuit split is over the question whether Rule 4(a)(7) simply incorporates the separate document requirement as it exists in FRCP 54(a)/58, or whether Rule 4(a)(7) imposes a separate document requirement that is independent of and different from the separate document

requirement imposed by FRCP 54(a)/58. The amendment makes it clear that Rule 4(a)(7) does not independently impose a separate document requirement. Rather, it requires judgments and orders to be set forth on separate documents only when FRCP 54(a)/58 do.

2. The second circuit split is over the question whether, when a judgment or order is required to be set forth on a separate document but is not, the time to appeal the judgment or order ever begins to run. All of the circuits, save one, hold that parties have forever to appeal a judgment or order in these circumstances. The First Circuit disagrees and holds that parties will be deemed to have waived their right to have a judgment or order set forth on a separate document three months after the judgment or order is entered in the civil docket.

Under the amendment, a judgment or order will be treated as entered *for purposes of Rule 4(a)(7)* 150 days after the judgment or order is entered in the civil docket. On the 150th day, the time to appeal the judgment or order will begin to run, even if the judgment or order is one that must otherwise be set forth on a separate document under FRCP 54(a)/58, and even if the judgment or order has not been so set forth. This cap will ensure that parties will not have forever to appeal a judgment or order that should have been set forth on a separate document but was not.

3. The third circuit split is over the question whether the appellant may waive the separate document requirement, even when the appellee objects. In *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 387 (1978), the Supreme Court held that the parties to an appeal may waive the separate document requirement. In other words, the Supreme Court held that although the parties do not *have* to appeal a judgment or order that has not been set forth on a separate document, the parties may *choose* to do so (assuming that the judgment or order is otherwise appealable). But the Supreme Court did not indicate whether the consent of all parties is necessary, or whether the appellant (for whose benefit the separate document requirement is imposed) may waive the requirement over the objection of the appellee.

The circuits have split. Some circuits permit an appellee to object to an attempted *Mallis* waiver and to force the appellant to return to the trial court, request entry of judgment on a separate document, and appeal a second time. Other courts disagree and permit *Mallis* waivers even if the appellee objects. The amendment codifies the Supreme Court's holding in *Mallis* and makes it clear that the decision whether to waive entry of a judgment or order on a separate document is the appellant's alone.

4. The final circuit split concerns the question whether an appellant who chooses to waive the separate document requirement must appeal within 30 days (60 days if the government is a party) from the entry in the civil docket of the judgment or order that should have been set forth on a separate document but was not. The majority of circuits hold that the appellant is under no such time constraint; according to these circuits, if a judgment or order has not been entered on a separate document, the time to appeal has never begun to run, and the appellant can choose to bring an appeal and waive the separate document requirement at any time. The minority of circuits disagree and embrace the approach taken by the Fifth Circuit in *Townsend v. Lucas*, 745 F.2d 933 (5th Cir. 1984). These courts reason that, if an appellant waives the separate document requirement, then the appeal is from the judgment or order that should have

been set forth on a separate document but was not. The time limitations of Rule 4(a)(1) apply to that appeal, so the appeal must be brought within 30 (or 60) days of the improperly entered judgment or order. If the appeal is not brought within that time period, then the separate document requirement cannot be waived; instead, the appellant must return to the district court, move for entry of the judgment or order on a separate document, and appeal from that properly entered judgment or order within 30 (or 60) days.

The Advisory Committee agrees with the majority of courts that have rejected the *Townsend* approach. The amendment has been drafted to avoid imposing the *Townsend* requirement, and the Committee Note explicitly rejects *Townsend.*

An earlier version of this amendment was approved by the Advisory Committee at its October 1998 meeting. That amendment was later withdrawn after the Advisory Committee questioned whether some of the assumptions upon which it had acted were accurate. After exhaustive research by Prof. Schiltz and extensive discussions at three different meetings, the Advisory Committee finally approved the amendment that appears below at its October 1999 meeting.

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

(7) **Entry Defined.**

(A) A judgment or order is entered for purposes of this Rule 4(a)

(i) when it is entered in the civil docket in compliance with Rules ~~58~~ ~~and~~ 79(a) of the Federal Rules of Civil Procedure and,

(ii) if entry on a separate document is required by Rules 54(a) and 58 of the Federal Rules of Civil Procedure,

- when it is set forth on a separate document as required by Rules 54(a) and 58 of the Federal Rules of Civil Procedure, or
- 150 days after it is entered in the civil docket in compliance with Rule 79(a) of the Federal Rules of Civil Procedure,

whichever comes first.

(B) The failure to set forth a judgment or order on a separate document when required by Rules 54(a) and 58 of the Federal Rules of Civil Procedure does not invalidate an appeal from that judgment or order.

Committee Note

Subdivision (a)(7). Several circuit splits have arisen out of uncertainties about how Rule 4(a)(7)'s definition of when a judgment or order is "entered" interacts with the requirement in Fed. R. Civ. P. 58 that, to be "effective," a judgment must be set forth on a separate document. Rule 4(a)(7) has been amended to address those circuit splits.

1. The first circuit split addressed by the amendment concerns the extent to which orders that dispose of post-judgment motions must be set forth on separate documents. Under Rule 4(a)(4)(A), the filing of certain post-judgment motions tolls the time to appeal the underlying judgment until "entry" of the order disposing of the last such remaining motion. Rule 4(a)(7) provides that a judgment or order is "entered" for purposes of Rule 4(a) "when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure." Fed. R. Civ. P. 58, in turn, provides that a "judgment" is not "effective" until it is "set forth on a separate document," and Fed. R. Civ. P. 54(a) defines "judgement" as including "any order from which an appeal lies."

Courts have taken at least four approaches in deciding whether an order that disposes of a post-judgment motion must be set forth on a separate document before it is considered entered under Rule 4(a)(7):

First, some courts seem to interpret Rule 4(a)(7) to incorporate the separate document requirement as it exists in the Federal Rules of Civil Procedure. *See, e.g., United States v. Haynes*, 158 F.3d 1327, 1329 (D.C. Cir. 1998); *Fiore v. Washington County Community Mental Health Ctr.*, 960 F.2d 229, 232-33 (1st Cir. 1992) (en banc); *RR Village Ass'n v. Denver Sewer Corp.*, 826 F.2d 1197, 1200-01 (2d Cir. 1987). Read in this manner, Rule 4(a)(7) does not itself impose a separate document requirement. Rather, it simply provides that when — and only when — Fed. R. Civ. P. 54(a) and 58 impose a separate document requirement, a judgment or order will not be treated as entered for purposes of Rule 4(a) until it is set forth on a separate document. Under this approach, then, whether an order disposing of a Rule 4(a)(4)(A) motion must be set forth on a separate document depends entirely on whether the order is one "from which an appeal lies." If it is, then the order is not entered under Rule 4(a)(7) until it is set forth on a separate document; if it is not, then the order is entered under Rule 4(a)(7) as soon as it is entered in the civil docket in compliance with Fed. R. Civ. P. 79(a).

Second, some courts seem to interpret Rule 4(a)(7) *independently* to impose a separate document requirement, and not just when Fed. R. Civ. P. 54(a) and 58 would, but on *all*

judgments and orders whose entry is of consequence under Rule 4(a). *See, e.g., Hard v. Burlington N. R.R. Co.*, 870 F.2d 1454, 1457-58 (9th Cir. 1989); *Allen ex rel. Allen v. Horinek*, 827 F.2d 672, 673 (10th Cir. 1987); *Stern v. Shouldice*, 706 F.2d 742, 746 (6th Cir. 1983); *Calhoun v. United States*, 647 F.2d 6, 8-10 (9th Cir. 1981). Under this approach, all orders disposing of Rule 4(a)(4)(A) motions must be set forth on separate documents before they are considered entered under Rule 4(a)(7). Whether an appeal lies from such an order is irrelevant.

Third, some courts hold that the separate document requirement applies to orders that *grant* post-judgment motions, but not to orders that *deny* post-judgment motions. *See, e.g., Copper v. City of Fargo*, 184 F.3d 994, 998 (8th Cir. 1999) (per curiam); *Marré v. United States*, 38 F.3d 823, 825 (5th Cir. 1994); *Hollywood v. City of Santa Maria*, 886 F.2d 1228, 1231-32 (9th Cir. 1989); *Charles v. Daley*, 799 F.2d 343, 346-47 (7th Cir. 1986). These courts reason that, when a post-judgment motion is denied, the original judgment remains in effect, and therefore entry of the order denying the motion on a separate document is unnecessary. When a post-judgment motion is granted, the original judgment is generally altered or amended, and the altered or amended judgment should be set forth on a separate document.

Finally, the Eleventh Circuit holds that the separate document requirement does not apply to *any* order that grants or denies a post-judgment motion, whether or not the order is one from which an appeal lies. Indeed, according to the Eleventh Circuit, the separate document requirement does not even apply to an altered or amended judgment. *See Wright v. Preferred Research, Inc.*, 937 F.2d 1556, 1560-61 (11th Cir. 1991).

Rule 4(a)(7) has been amended to adopt the first of these four approaches. Under the amended rule, a judgment or order is treated as entered under Rule 4(a)(7) when it is entered in the civil docket in compliance with Fed. R. Civ. P. 79(a), with one exception: If *Fed. R. Civ. P. 54(a) and 58* require that a particular judgment or order must be set forth on a separate document, then that judgment or order will not be treated as entered for purposes of Rule 4(a)(7) until it is so set forth (or, as explained below, until 150 days after its entry in the civil docket). Thus, whether an order disposing of a post-judgment motion must be set forth on a separate document before it is treated as entered depends entirely on whether the order is one "from which an appeal lies" under the law of the relevant circuit. If it is, then Fed. R. Civ. P. 54(a) and 58 require that it be set forth on a separate document, and it will not be treated as entered for purposes of Rule 4(a)(7) until it is so set forth (or until 150 days after its entry in the civil docket). If it is not, then it will be treated as entered for purposes of Rule 4(a)(7) as soon as it is entered in the civil docket, whether or not it is also set forth on a separate document.

2. The second circuit split addressed by the amendment concerns the following question: When a judgment or order is required to be set forth on a separate document under Fed. R. Civ. P. 54(a) and 58 but is not, does the time to appeal the judgment or order ever begin to run? According to every circuit except the First Circuit, the answer is "no." "A party safely may defer the appeal until Judgment Day if that is how long it takes to enter [the judgment or order on] the [separate] document." *In re Kilgus*, 811 F.2d 1112, 1117 (7th Cir. 1987). The First Circuit,

fearing that "long dormant cases could be revived years after the parties had considered them to be over" if Fed. R. Civ. P. 54(a) and 58 and Rule 4(a)(7) were applied literally, holds that parties will be deemed to have waived their right to have a judgment or order set forth on a separate document three months after the judgment or order is entered in the civil docket. *Fiore*, 960 F.2d at 236. Other circuits have rejected this three month cap as contrary to the relevant rules, *see, e.g.*, *Haynes*, 158 F.3d at 1331; *Hammack v. Baroid Corp.*, 142 F.3d 266, 270 (5th Cir. 1998); *Pack v. Burns Int'l Sec. Serv.*, 130 F.3d 1071, 1072-73 (D.C. Cir. 1997); *Rubin v. Schottenstein, Zox & Dunn*, 110 F.3d 1247, 1253 n.4 (6th Cir. 1997), *vacated on other grounds* 143 F.3d 263 (6th Cir. 1998) (en banc), although no court has questioned the wisdom of imposing such a cap as a matter of policy.

Rule 4(a)(7) has been amended to impose such a cap. As noted above, a judgment or order is treated as entered for purposes of Rule 4(a)(7) when it is entered in the civil docket, unless Fed. R. Civ. P. 54(a) and 58 require the judgment or order to be set forth on a separate document, in which case the judgment or order will not be treated as entered for purposes of Rule 4(a)(7) until it is so set forth. There is one exception: A judgment or order will be treated as entered *for purposes of Rule 4(a)(7)* — notwithstanding anything to the contrary in the Federal Rules of Civil Procedure — 150 days after the judgment or order is entered in the civil docket in compliance with Fed. R. Civ. P. 79(a). On the 150th day, the time to appeal the judgment or order will begin to run, even if the judgment or order is one that must otherwise be set forth on a separate document under Fed. R. Civ. P. 54(a) and 58, and even if the judgment or order has not been so set forth.

This cap will ensure that parties will not be given forever to appeal a judgment or order that should have been set forth on a separate document but was not. In the words of the First Circuit, "When a party allows a case to become dormant for such a prolonged period of time, it is reasonable to presume that it views the case as over. A party wishing to pursue an appeal and awaiting the separate document of judgment from the trial court can, and should, within that period file a motion for entry of judgment. This approach will guard against the loss of review for those actually desiring a timely appeal while preventing resurrection of litigation long treated as dead by the parties." *Fiore*, 960 F.2d at 236.

3. The third circuit split addressed by the amendment concerns whether the appellant may waive the separate document requirement over the objection of the appellee. In *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 387 (1978) (per curiam), the Supreme Court held that the "parties to an appeal may waive the separate-judgment requirement of Rule 58." Specifically, the Supreme Court held that when a district court enters an order and "clearly evidence[s] its intent that the . . . order . . . represent[s] the final decision in the case," the order is a "final decision" for purposes of 28 U.S.C. § 1291, even if the order has not been set forth on a separate document for purposes of Fed. R. Civ. P. 58. *Id.* Such an order would not be "effective" — that is, the time to appeal the order would not begin to run, and thus a potential appellant would not *have* to appeal. However, such an order would be a "final decision" — and thus, a potential appellant *could* appeal if it wanted to.

Courts have disagreed about whether the consent of all parties is necessary to waive the separate document requirement. Some circuits permit appellees to object to attempted *Mallis* waivers and to force appellants to return to the trial court, request entry of judgment on a separate document, and appeal a second time. *See, e.g.*, *Selletti v. Carey*, 173 F.3d 104, 109-10 (2d Cir. 1999); *Williams v. Borg*, 139 F.3d 737, 739-40 (9th Cir.), *cert. denied*, 119 S. Ct. 353 (1998); *Silver Star Enters., Inc. v. M/V Saramacca*, 19 F.3d 1008, 1013 (5th Cir. 1994); *Whittington v. Milby*, 928 F.2d 188, 192 (6th Cir. 1991); *Wang Labs., Inc. v. Applied Computer Sciences, Inc.*, 926 F.2d 92, 96 (1st Cir. 1991); *Anoka Orthopaedic Assocs., P.A. v. Lechner*, 910 F.2d 514, 515 n.2 (8th Cir. 1990); *Long Island Lighting Co. v. Town of Brookhaven*, 889 F.2d 428, 430 (2d Cir. 1989). Other courts disagree and permit *Mallis* waivers even if the appellee objects. *See, e.g.*, *Haynes*, 158 F.3d at 1331; *Miller v. Artistic Cleaners*, 153 F.3d 781, 783-84 (7th Cir. 1998); *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1006 n.8 (3d Cir. 1994); *Mitchell v. Idaho*, 814 F.2d 1404, 1405 (9th Cir. 1987).

New Rule 4(a)(7)(B) is intended both to codify the Supreme Court's holding in *Mallis* and to make clear that the decision whether to waive entry of a judgment or order on a separate document is the appellant's alone. It is, after all, the appellant who needs a clear signal as to when the time to file a notice of appeal has begun to run. If the appellant chooses to bring an appeal without awaiting entry of the judgment or order on a separate document, then there is no reason why the appellee should be able to object. All that would result from honoring the appellee's objection would be delay. The appellant would return to the trial court, ask the court to enter the judgment or order on a separate document, and appeal again. "Wheels would spin for no practical purpose." *Mallis*, 435 U.S. at 385.

4. The final circuit split addressed by the amendment concerns the question whether an appellant who chooses to waive the separate document requirement must appeal within 30 days (60 days if the government is a party) from the entry in the civil docket of the judgment or order that should have been set forth on a separate document but was not. In *Townsend v. Lucas*, 745 F.2d 933 (5th Cir. 1984), the district court dismissed a 28 U.S.C. § 2254 action on May 6, 1983, but failed to enter judgment on a separate document. The plaintiff appealed on January 10, 1984. The Fifth Circuit held that the appeal was premature, in that the time to appeal the May 6 order had never begun to run because the May 6 order had not been set forth on a separate document. However, the Fifth Circuit said that it had to dismiss the appeal, rather than consider it on the merits, even though the parties were willing to waive the separate document requirement. The Fifth Circuit reasoned that, if the plaintiff waived the separate document requirement, then his appeal would be from the May 6 order, and if his appeal was from the May 6 order, then it was untimely under Rule 4(a)(1). By dismissing the appeal, the Fifth Circuit said, it was giving the plaintiff the opportunity to return to the district court, move for entry of judgment on a separate document, and appeal from that judgment within 30 days. *Id.* at 934. Several other cases have embraced the *Townsend* approach. *See, e.g.*, *Armstrong v. Ahitow*, 36 F.3d 574, 575 (7th Cir. 1994); *Hughes v. Halifax County Sch. Bd.*, 823 F.2d 832, 835-36 (4th Cir. 1987); *Harris v. McCarthy*, 790 F.2d 753, 756 n.1 (9th Cir. 1986).

Those cases are in the distinct minority. There are numerous cases in which courts have heard appeals that were not filed within 30 days (60 days if the government was a party) from the judgment or order that should have been set forth on a separate document but was not. *See, e.g.*, *Haynes*, 158 F.3d at 1330-31; *Pack*, 130 F.3d at 1073; *Rubin*, 110 F.3d at 1253; *Clough v. Rush*, 959 F.2d 182, 186 (10th Cir. 1992); *McCalden v. California Library Ass'n*, 955 F.2d 1214, 1218-19 (9th Cir. 1990); *Allah v. Superior Court*, 871 F.2d 887, 890 (9th Cir. 1989); *Gregson & Assocs. Architects v. Virgin Islands*, 675 F.2d 589, 593 (3d Cir. 1982) (per curiam). In the view of these courts, the remand in *Townsend* was "precisely the purposeless spinning of wheels abjured by the Court in the [*Mallis*] case." 15B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3915, at 259 n.8 (3d ed. 1992).

The Advisory Committee agrees with the majority of courts that have rejected the *Townsend* approach. In drafting new Rule 4(a)(7)(B), the Advisory Committee has been careful to avoid phrases such as "otherwise timely appeal" that might imply an endorsement of *Townsend*.

E. Rule 4(b)(5)

The circuits disagree about whether the filing of a FRCrP 35(c) motion to correct a sentence tolls the time to appeal the underlying judgment of conviction and, if so, for how long. Rule 4(b)(3)(A) lists the motions that toll the time to appeal in a criminal case, and notably omits any mention of FRCrP 35(c) motions. Some courts have nonetheless held that the list of tolling motions in Rule 4(b)(3)(A) is not exclusive; that under the "*Healy* doctrine" of the common law, any "motion for reconsideration" is sufficient to toll the time to appeal; and that a FRCrP 35(c) motion is such a "motion for reconsideration."

The Advisory Committee proposes to amend Rule 4(b)(3)(A) to make it clear that the filing of a FRCP 35(c) motion does not toll the time to appeal.

This amendment (which was drafted by the Department of Justice) was approved by the Advisory Committee at its October 1999 meeting.

Rule 4. Appeal as of Right — When Taken

(b) Appeal in a Criminal Case.

(5) **Jurisdiction.** The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(c), nor does the filing of a motion under 35(c) affect the validity of a

notice of appeal filed before entry of the order disposing of the motion. The filing of a motion under Federal Rule of Criminal Procedure 35(c) does not suspend the time for filing a notice of appeal from a judgment of conviction.

Committee Note

Subdivision (b)(5). Federal Rule of Criminal Procedure 35(c) permits a district court, acting within seven days after the imposition of sentence, to correct an erroneous sentence in a criminal case. Some courts have held that the filing of a motion for correction of a sentence suspends the time for filing a notice of appeal from the judgment of conviction. *See, e.g.*, *United States v. Carmouche*, 138 F.3d 1014, 1016 (5th Cir. 1998) (per curiam); *United States v. Morillo*, 8 F.3d 864, 869 (1st Cir. 1993). Those courts establish conflicting timetables for appealing a judgment of conviction after the filing of a motion to correct a sentence. In the First Circuit, the time to appeal is suspended only for the period provided by Fed. R. Crim. P. 35(c) for the district court to correct a sentence; the time to appeal begins to run again once seven days have passed after sentencing, even if the motion is still pending. By contrast, in the Fifth Circuit, the time to appeal does not begin to run again until the district court actually issues an order disposing of the motion.

Rule 4(b)(5) has been amended to eliminate the inconsistency concerning the effect of a motion to correct a sentence on the time for filing a notice of appeal. The amended rule makes it clear that the time to appeal continues to run, even if a motion to correct a sentence is filed. The amendment is consistent with Rule 4(b)(3)(A), which lists the motions that toll the time to appeal, and notably omits any mention of a Fed. R. Crim. P. 35(c) motion. The amendment also should promote certainty and minimize the likelihood of confusion concerning the time to appeal a judgment of conviction.

If a district court corrects a sentence pursuant to Fed. R. Crim. P. 35(c), the time for filing a notice of appeal of the corrected sentence under Rule 4(b)(1) would begin to run when the court enters a new judgment reflecting the corrected sentence.

F. Rule 5(c)

The Advisory Committee proposes that Rule 5(c) be amended to correct a typographical error that arose during the restyling of the appellate rules. The error is described in the Committee Note.

This amendment was approved by the Advisory Committee at its October 1999 meeting.

Rule 5. Appeal by Permission

(c) Form of Papers; Number of Copies. All papers must conform to Rule ~~32(a)(1)~~ 32(c)(2). An original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case.

Committee Note

Subdivision (c). A petition for permission to appeal, a cross-petition for permission to appeal, and an answer to a petition or cross-petition for permission to appeal are all "other papers" for purposes of Rule 32(c)(2), and all of the requirements of Rule 32(a) apply to those papers, except as provided in Rule 32(c)(2). During the 1998 restyling of the Federal Rules of Appellate Procedure, Rule 5(c) was inadvertently changed to suggest that only the requirements of Rule 32(a)(1) apply to such papers. Rule 5(c) has been amended to correct that error.

G. Rule 15(f)

Under Rule 4(a)(4)(A), the timely filing of certain post-judgment motions tolls the time to appeal the underlying judgment until the district court disposes of the last such remaining motion. Rule 4(a)(4)(B)(i) provides that if a notice of appeal is filed while one of these post-judgment motions is pending, the notice of appeal is held in abeyance and becomes effective to appeal the underlying judgment when the court disposes of the last such remaining motion.

The proposed amendment to Rule 15(f) is intended to align the treatment of premature petitions for review of agency orders with the treatment of premature notices of appeal from court decisions. The amendment provides that when, under governing law, an agency order is rendered non-final and non-appealable by the filing of a petition for rehearing, petition for reopening, petition for reconsideration, or functionally similar petition, any petition for review or application to enforce that non-final order will be held in abeyance and become effective when the agency disposes of the last such finality-blocking petition. The amendment does *not* address the question of *when* (or even *whether*) the filing of a petition for rehearing or similar paper renders an agency action non-final and non-appealable; that question is left to the myriad statutes, regulations, and judicial decisions that govern various agencies.

This amendment was approved by the Advisory Committee at its October 1998 meeting.

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

(f) **Petition or Application Filed Before Agency Action Becomes Final.** If a petition for review or application to enforce is filed after an agency announces or enters its order — but before it disposes of any petition for rehearing, reopening, or reconsideration that renders that order non-final and non-appealable — the petition or application becomes effective to appeal or seek enforcement of the order when the agency disposes of the last such petition for rehearing, reopening, or reconsideration.

Committee Note

Subdivision (f). Subdivision (f) is modeled after Rule 4(a)(4)(B)(i) and is intended to align the treatment of premature petitions for review of agency orders with the treatment of premature notices of appeal. Subdivision (f) does not address whether or when the filing of a petition for rehearing, reopening, or reconsideration renders an agency order non-final and hence non-appealable. That is left to the wide variety of statutes, regulations, and judicial decisions that govern agencies and appeals from agency decisions. *See, e.g., ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270 (1987). Rather, subdivision (f) provides that when, under governing law, an agency order is rendered non-final and non-appealable by the filing of a petition for rehearing, petition for reopening, petition for reconsideration, or functionally similar petition, any petition for review or application to enforce that non-final order will be held in abeyance and become effective when the agency disposes of the last such finality-blocking petition.

Subdivision (f) is designed to eliminate a procedural trap. Some circuits hold that petitions for review of agency orders that have been rendered non-final (and hence non-appealable) by the filing of a petition for rehearing (or similar petition) are "incurably premature," meaning that they do not ripen or become valid after the agency disposes of the rehearing petition. *See, e.g., TeleSTAR, Inc. v. FCC*, 888 F.2d 132, 134 (D.C. Cir. 1989) (per curiam); *Chu v. INS*, 875 F.2d 777, 781 (9th Cir. 1989), *overruled on other grounds by Pablo v. INS*, 72 F.3d 110 (9th Cir. 1995); *West Penn Power Co. v. EPA*, 860 F.2d 581, 588 (3d Cir. 1988); *Aeromar, C. Por A. v. Department of Transp.*, 767 F.2d 1491, 1493-94 (11th Cir. 1985). In these circuits, if a party aggrieved by an agency action does not file a second timely petition for review after the petition for rehearing is denied by the agency, that party will find itself out of time: Its first petition for review will be dismissed as premature, and the deadline for filing a second petition for review will have passed. Subdivision (f) removes this trap.

H. Rule 24(a)

The Advisory Committee proposes two amendments to Rule 24(a) to resolve potential conflicts between the rule and the Prison Litigation Reform Act ("PLRA"). Rule 24(a)(2) now provides that after a litigant's motion to proceed IFP is granted, the litigant need not prepay any part of the filing fee; the PLRA, by contrast, provides that a prisoner whose motion to proceed IFP is granted must usually prepay at least a part of the filing fee, and then pay the remainder of the fee in installments. Rule 24(a)(3) now provides that if a litigant is given permission to proceed IFP in the district court, that status "automatically" carries over to the appellate court; the PLRA, by contrast, provides that a prisoner must reapply in order to proceed IFP on appeal, even if the prisoner was permitted to proceed IFP in the district court. The amendments to Rule 24(a) would make it clear that nothing in the rule is meant to supercede anything in the PLRA.

The amendment to Rule 24(a)(2) was approved by the Advisory Committee at its April 1998 meeting. The amendment to Rule 24(a)(3) was approved by the Advisory Committee at its October 1999 meeting.

Rule 24. Proceeding in Forma Pauperis

(a) Leave to Proceed in Forma Pauperis.

(1) **Motion in the District Court.** Except as stated in Rule 24(a)(3), a party to a district-court action who desires to appeal in forma pauperis must file a motion in the district court. The party must attach an affidavit that:

(A) shows in the detail prescribed by Form 4 of the Appendix of Forms, the party's inability to pay or to give security for fees and costs;

(B) claims an entitlement to redress; and

(C) states the issues that the party intends to present on appeal.

(2) **Action on the Motion.** If the district court grants the motion, the party may proceed on appeal without prepaying or giving security for fees and costs, unless the law requires otherwise. If the district court denies the motion, it must state its reasons in writing.

(3) **Prior Approval.** A party who was permitted to proceed in forma pauperis in the district-court action, or who was determined to be financially unable to obtain an adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization, unless

(A) the district court — before or after the notice of appeal is filed — certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis~~. In that event, the district court must~~ and states in writing its reasons for the certification or finding; or

(B) the law requires otherwise.

Committee Note

Subdivision (a)(2). Section 804 of the Prison Litigation Reform Act of 1995 ("PLRA") amended 28 U.S.C. § 1915 to require that prisoners who bring civil actions or appeals from civil actions must "pay the full amount of a filing fee." 28 U.S.C. § 1915(b)(1). Prisoners who are unable to pay the full amount of the filing fee at the time that their actions or appeals are filed are generally required to pay part of the fee and then to pay the remainder of the fee in installments. 28 U.S.C. § 1915(b). By contrast, Rule 24(a)(2) provides that, after the district court grants a litigant's motion to proceed on appeal in forma pauperis, the litigant may proceed "without prepaying or giving security for fees and costs." Thus, the PLRA and Rule 24(a)(2) appear to be in conflict.

Rule 24(a)(2) has been amended to resolve this conflict. Recognizing that future legislation regarding prisoner litigation is likely, the Advisory Committee has not attempted to incorporate into Rule 24 all of the requirements of the current version of 28 U.S.C. § 1915. Rather, the Advisory Committee has amended Rule 24(a)(2) to clarify that the rule is not meant to conflict with anything required by the PLRA or any other law.

Subdivision (a)(3). Rule 24(a)(3) has also been amended to eliminate an apparent conflict with the PLRA. Rule 24(a)(3) provides that a party who was permitted to proceed in forma pauperis in the district court may continue to proceed in forma pauperis in the court of appeals without further authorization, subject to certain conditions. The PLRA, by contrast, provides that a prisoner who was permitted to proceed in forma pauperis in the district court and

who wishes to continue to proceed in forma pauperis on appeal may not do so "automatically," but must seek permission. *See, e.g., Morgan v. Haro*, 112 F.3d 788, 789 (5th Cir. 1997) ("A prisoner who seeks to proceed IFP on appeal must obtain leave to so proceed despite proceeding IFP in the district court.").

Rule 24(a)(3) has been amended to resolve this conflict. Again, recognizing that future legislation regarding prisoner litigation is likely, the Advisory Committee has not attempted to incorporate into Rule 24 all of the requirements of the current version of 28 U.S.C. § 1915. Rather, the Advisory Committee has amended Rule 24(a)(3) to clarify that the rule is not meant to conflict with anything required by the PLRA or any other law.

I. The "Time Computation" Package

1. Rule 26(a)(2)

This amendment is intended to eliminate a discrepancy between the rules of appellate procedure, on the one hand, and the rules of civil and criminal procedure, on the other hand. FRCP 6(a) and FRCrP 45(a) provide that, in computing any period of time, "[w]hen the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation." Rule 26(a)(2) provides that, in computing any period of time, a litigant should "[e]xclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 7 days, unless stated in calendar days." Thus, deadlines of 7, 8, 9, and 10 days are calculated differently under the rules of civil and criminal procedure than they are under the rules of appellate procedure. Because no good reason for this discrepancy is apparent, and because this discrepancy creates a trap for unwary litigants, the Advisory Committee proposes amending Rule 26(a)(2) to bring it into conformity with FRCP 6(a) and FRCrP 45(a) by changing "less than 7 days" to "less than 11 days."

This amendment was approved by the Advisory Committee at its October 1998 meeting.

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:

(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 ~~7~~ 11 days, unless stated in calendar days.

Committee Note

Subdivision (a)(2). The Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure compute time differently than the Federal Rules of Appellate Procedure. Fed. R. Civ. P. 6(a) and Fed. R. Crim. P. 45(a) provide that, in computing any period of time, "[w]hen the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation." By contrast, Fed. R. App. P. 26(a)(2) provides that, in computing any period of time, a litigant should "[e]xclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 7 days, unless stated in calendar days." Thus, deadlines of 7, 8, 9, and 10 days are calculated differently under the rules of civil and criminal procedure than they are under the rules of appellate procedure. This creates a trap for unwary litigants. No good reason for this discrepancy is apparent, and thus Rule 26(a)(2) has been amended so that, under all three sets of rules, intermediate Saturdays, Sundays, and legal holidays will be excluded when computing deadlines under 11 days but will be counted when computing deadlines of 11 days and over.

2. Rules 4(a)(4)(A)(vi), 27(a)(3)(A), 27(a)(4) and 41(b)

If the proposed amendment to Rule 26(a)(2) is approved, all deadlines in FRAP of 7, 8, 9, and 10 days will be lengthened as a *practical* matter. There are numerous 7 and 10 day deadlines in FRAP. (There are no 8 or 9 day deadlines.) With three exceptions, the Advisory Committee is not concerned about the fact that those deadlines will be lengthened as a practical matter. The three exceptions are as follows:

a. Rule 27(a)(3)(A) presently gives parties 10 days to respond to a motion — which, under amended Rule 26(a)(2), would mean that parties would never have fewer than 14 days to file such a response. The Advisory Committee believes that 14 days is an unduly lengthy period of time to file a response to a motion and therefore proposes amending Rule 27(a)(3)(A) to substitute "7" for "10."

b. Rule 27(a)(4) presently gives parties 7 days to reply to a response to a motion — which, under amended Rule 26(a)(2), would mean that parties would never have fewer than 9 days to file such a reply. The Advisory Committee believes that 9 days is an unduly lengthy period of time to file a reply to a response to a motion and therefore proposes amending Rule 27(a)(4) to substitute "5" for "7."

c. Rule 41(b) directs that the mandate of a court must issue 7 days after the time to file a petition for rehearing expires or 7 days after the court denies a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. Under the present version of Rule 26(a)(2), 7 days means 7 days, and thus mandates always issue exactly one week after the triggering event (except when the seventh day falls on a legal holiday). Because the practice of issuing mandates exactly one week after the triggering event is

extremely familiar to judges, parties, and clerks, and because the Advisory Committee believes that mandates should not issue more than 7 days after the triggering event, the Advisory Committee proposes amending Rule 41(b) by substituting "7 calendar days" for "7 days." Under Rule 26(a)(2), intermediate Saturdays, Sundays, and legal holidays are always counted in computing deadlines that are stated in "calendar days."

The Advisory Committee also proposes amending Rule 4(a)(4)(A)(vi) to delete a parenthetical that would become superfluous in light of the proposed change to Rule 26(a)(2).

These amendments were approved by the Advisory Committee at its April 1999 meeting.

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

(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:

(vi) for relief under Rule 60 if the motion is filed no later than 10 days ~~(computed using Federal Rule of Civil Procedure 6(a))~~ after the judgment is entered.

Committee Note

Subdivision (a)(4)(A)(vi). Rule 4(a)(4)(A)(vi) has been amended to remove a parenthetical that directed that the 10 day deadline be "computed using Federal Rule of Civil Procedure 6(a)." That parenthetical has become superfluous because Rule 26(a)(2) has been amended to require that all deadlines under 11 days be calculated as they are under Fed. R. Civ. P. 6(a).

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 ~~10~~ 7 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 ~~10~~7-day period runs only if the court gives reasonable notice to the parties that it intends to act sooner.

Committee Note

Subdivision (a)(3)(A). Subdivision (a)(3)(A) presently requires that a response to a motion be filed within 10 days after service of the motion. Intermediate Saturdays, Sundays, and legal holidays are counted in computing that 10 day deadline, which means that, except when the 10 day deadline ends on a weekend or legal holiday, parties generally must respond to motions within 10 actual days.

Fed. R. App. P. 26(a)(2) has been amended to provide that, in computing any period of time, a litigant should "[e]xclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days, unless stated in calendar days." This change in the method of computing deadlines means that 10 day deadlines (such as that in subdivision (a)(3)(A)) have been lengthened as a practical matter. Under the new computation method, parties would never have less than 14 actual days to respond to motions, and legal holidays could extend that period to as much as 18 days.

Permitting parties to take two weeks or more to respond to motions would introduce significant and unwarranted delay into appellate proceedings. For that reason, the 10 day deadline in subdivision (a)(3)(A) has been reduced to 7 days. This change will, as a practical matter, ensure that every party will have at least 9 actual days — but, in the absence of a legal holiday, no more than 11 actual days — to respond to motions. The court continues to have discretion to shorten or extend that time in appropriate cases.

Rule 27. Motions

(a) In General.

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

Committee Note

Subdivision (a)(4). Subdivision (a)(4) presently requires that a reply to a response to a motion be filed within 7 days after service of the response. Intermediate Saturdays, Sundays, and legal holidays are counted in computing that 7 day deadline, which means that, except when the 7 day deadline ends on a weekend or legal holiday, parties generally must reply to responses to motions within one week.

Fed. R. App. P. 26(a)(2) has been amended to provide that, in computing any period of time, a litigant should "[e]xclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days, unless stated in calendar days." This change in the method of computing deadlines means that 7 day deadlines (such as that in subdivision (a)(4)) have been lengthened as a practical matter. Under the new computation method, parties would never have less than 9 actual days to reply to responses to motions, and legal holidays could extend that period to as much as 13 days.

Permitting parties to take 9 or more days to reply to a response to a motion would introduce significant and unwarranted delay into appellate proceedings. For that reason, the 7 day deadline in subdivision (a)(4) has been reduced to 5 days. This change will, as a practical matter, ensure that every party will have 7 actual days to file replies to responses to motions (in the absence of a legal holiday).

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

Subdivision (b). Subdivision (b) directs that the mandate of a court must issue 7 days after the time to file a petition for rehearing expires or 7 days after the court denies a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. Intermediate Saturdays, Sundays, and legal holidays are counted in computing that 7 day deadline, which means that, except when the 7 day deadline ends on a weekend or legal holiday, the mandate issues exactly one week after the triggering event.

Fed. R. App. P. 26(a)(2) has been amended to provide that, in computing any period of time, one should "[e]xclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days, unless stated in calendar days." This change in the method of computing deadlines means that 7 day deadlines (such as that in subdivision (b)) have been lengthened as a practical matter. Under the new computation method, a mandate would never issue sooner than 9 actual days after a triggering event, and legal holidays could extend that period to as much as 13 days.

Delaying mandates for 9 or more days would introduce significant and unwarranted delay into appellate proceedings. For that reason, subdivision (b) has been amended to require that mandates issue 7 *calendar* days after a triggering event.

J. Rules 27(d)(1)(B), 32(a)(2), 32(c)(2)(A)

Rule 32 specifies that covers must be used on an appellant's brief (blue), an appellee's brief (red), an intervenor's or amicus curiae's brief (green), a reply brief (gray), and a separately bound appendix (white). Otherwise, Rule 32 makes it clear that a cover is not required on any other kind of document.

Under Rule 32(d), the courts of appeals are required to accept documents that comply with the form requirements of Rule 32. Thus, the courts of appeals cannot — in their local rules or otherwise — *force* litigants to use a cover on a document when Rule 32 does not. However, nothing prohibits the courts of appeals from using local rules to provide that if a cover is *voluntarily* used by a litigant, that cover must be a particular color. Four circuits specify cover colors for petitions for panel rehearing or rehearing en banc (CAFC, CA7, CA9, and CA11), three circuits specify cover colors for answers to petitions for panel rehearing or responses to petitions for rehearing en banc (CAFC, CA9, and CA11), two circuits specify cover colors for supplemental briefs (CADC and CA11), and one circuit specifies cover colors for motions (CA7).

These conflicting local rules create a needless hardship for counsel, particularly those who practice in more than one circuit. The Advisory Committee proposes three amendments that would supercede all local rulemaking on the issue of cover colors:

1. an amendment to Rule 27(d)(1)(B) to provide that if a cover is voluntarily used on a motion, it must be white;

2. an amendment to Rule 32(a)(2) to provide that tan covers must be used on supplemental briefs; and

3. an amendment to Rule 32(c)(2)(A) to provide that if a cover is voluntarily used on any "other paper," it must be white.

These amendments were approved by the Advisory Committee at its April 1998 meeting.

Rule 27. Motions

(d) Form of Papers; Page Limits; and Number of Copies

(1) **Format.**

(B) **Cover.** A cover is not required, but there must be a caption that includes the case number, the name of the court, the title of the case, and a brief descriptive title indicating the purpose of the motion and identifying the party or parties for whom it is filed. If a cover is used, it must be white.

Committee Note

Subdivision (d)(1)(B). A cover is not required on motions, responses to motions, or replies to responses to motions. However, Rule 27(d)(1)(B) has been amended to provide that if a cover is nevertheless used on such a paper, the cover must be white. The amendment is intended to promote uniformity in federal appellate practice.

Rule 32. Form of Briefs, Appendices, and Other Papers

(a) Form of a Brief.

(2) **Cover.** Except for filings by unrepresented parties, the cover of the appellant's brief must be blue; the appellee's, red; an intervenor's or amicus curiae's, green;

and any reply brief, gray; and any supplemental brief, tan. The front cover of a brief must contain:

(A) the number of the case centered at the top;

(B) the name of the court;

(C) the title of the case (see Rule 12(a));

(D) the nature of the proceeding (e.g., Appeal, Petition for Review) and the name of the court, agency, or board below;

(E) the title of the brief, identifying the party or parties for whom the brief is filed; and

(F) the name, office address, and telephone number of counsel representing the party for whom the brief is filed.

Committee Note

Subdivision (a)(2). On occasion, a court may permit or order the parties to file supplemental briefs addressing an issue that was not addressed — or adequately addressed — in the principal briefs. Rule 32(a)(2) has been amended to require that tan covers be used on such supplemental briefs. The amendment is intended to promote uniformity in federal appellate practice. At present, the local rules of the circuit courts conflict. *See, e.g.*, D.C. Cir. R. 28(g) (requiring yellow covers on supplemental briefs); 11th Cir. R. 32, I.O.P. 1 (requiring white covers on supplemental briefs).

Rule 32. Form of Briefs, Appendices, and Other Papers

(c) Form of Other Papers.

(1) **Motion.** The form of a motion is governed by Rule 27(d).

(2) **Other Papers.** Any other paper, including a petition for panel rehearing and a petition for hearing or rehearing en banc, and any response to such a petition,

must be reproduced in the manner prescribed by Rule 32(a), with the following exceptions:

(A) A ~~a~~ cover is not necessary if the caption and signature page of the paper together contain the information required by Rule 32(a)(2)~~; and~~. If a cover is used, it must be white.

(B) Rule 32(a)(7) does not apply.

Committee Note

Subdivision (c)(2)(A). Under Rule 32(c)(2)(A), a cover is not required on a petition for panel rehearing, petition for hearing or rehearing en banc, answer to a petition for panel rehearing, response to a petition for hearing or rehearing en banc, or any other paper. Rule 32(d) makes it clear that no court can require that a cover be used on any of these papers. However, nothing prohibits a court from providing in its local rules that if a cover on one of these papers is "voluntarily" used, it must be a particular color. Several circuits have adopted such local rules. *See, e.g.*, Fed. Cir. R. 35(c) (requiring yellow covers on petitions for hearing or rehearing en banc and brown covers on responses to such petitions); Fed. Cir. R. 40(a) (requiring yellow covers on petitions for panel rehearing and brown covers on answers to such petitions); 7th Cir. R. 28 (requiring blue covers on petitions for rehearing filed by appellants or answers to such petitions, and requiring red covers on petitions for rehearing filed by appellees or answers to such petitions); 9th Cir. R. 40-1 (requiring blue covers on petitions for panel rehearing filed by appellants and red covers on answers to such petitions, and requiring red covers on petitions for panel rehearing filed by appellees and blue covers on answers to such petitions); 11th Cir. R. 35-6 (requiring white covers on petitions for hearing or rehearing en banc).

These conflicting local rules create a hardship for counsel who practice in more than one circuit. For that reason, Rule 32(c)(2)(A) has been amended to provide that if a party chooses to use a cover on a paper that is not required to have one, that cover must be white. The amendment is intended to preempt all local rulemaking on the subject of cover colors and thereby promote uniformity in federal appellate practice.

K. Rule 28(j)

Rule 28(j) permits a party to notify the court of appeals by letter of "pertinent and significant authorities" that come to the party's attention after the party has filed its brief. At present, Rule 28(j) *requires* parties to state "the reasons for the supplemental citations" but *forbids* the parties to include "argument" in their letters. This distinction is almost impossible for

clerks' offices to enforce. As a result, parties often abuse Rule 28(j) and file lengthy and argumentative letters.

The Advisory Committee proposes amending Rule 28(j) to eliminate the rarely enforced ban on "argument" and to incorporate in its place an easily enforced 250 word limit on the letters. In short, under the amendment, parties could say anything they want about supplemental authorities in their Rule 28(j) letters, but they couldn't say much.

This amendment was approved by the Advisory Committee at its April 1998 meeting.

Rule 28. Briefs

(j) Citation of Supplemental Authorities. If pertinent and significant authorities come to a party's attention after the party's brief has been filed — or after oral argument but before decision — a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations. The letter must state ~~without argument~~ the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 250 words. Any response must be made promptly and must be similarly limited.

Committee Note

Subdivision (j). In the past, Rule 28(j) has required parties to describe supplemental authorities "without argument." Enforcement of this restriction has been lax, in part because of the difficulty of distinguishing "state[ment] . . . [of] the reasons for the supplemental citations," which is required, from "argument" about the supplemental citations, which is forbidden.

As amended, Rule 28(j) continues to require parties to state the reasons for supplemental citations, with reference to the part of a brief or oral argument to which the supplemental citations pertain. But Rule 28(j) no longer forbids "argument." Rather, Rule 28(j) permits parties to decide for themselves what they wish to say about supplemental authorities. The only restriction upon parties is that the body of a Rule 28(j) letter — that is, the part of the letter that begins with the first word after the salutation and ends with the last word before the complimentary close — cannot exceed 250 words. All words found in footnotes will count toward the 250 word limit.

L. Rule 31(b)

Rule 31(b) inadvertently implies that parties who are not represented by counsel need not be served with briefs. The Advisory Committee proposes amending Rule 31(b) to correct that mistake.

This amendment was approved by the Advisory Committee at its September 1997 meeting.

Rule 31. Serving and Filing Briefs

(b) Number of Copies. Twenty-five copies of each brief must be filed with the clerk and 2 copies must be served on <u>each unrepresented party and on</u> counsel for each separately represented party. An unrepresented party proceeding in forma pauperis must file 4 legible copies with the clerk, and one copy must be served on <u>each unrepresented party and on</u> counsel for each separately represented party. The court may by local rule or by order in a particular case require the filing or service of a different number.

Committee Note

Subdivision (b). In requiring that two copies of each brief "must be served on counsel for each separately represented party," Rule 31(b) may be read to imply that copies of briefs need not be served on unrepresented parties. The Rule has been amended to clarify that briefs must be served on all parties, including those who are not represented by counsel.

M. Rule 32(a)(7)(C)/New Form 6

Effective December 1, 1998, Rule 32(a) has required that briefs *either* meet specified page limitations *or* meet new "type-volume" limitations. If a party opts to rely on the type-volume limitations, the party must file a "certificate of compliance" under Rule 32(a)(7)(C).

To aid counsel in filing that certificate, the Advisory Committee proposes to add a new "Form 6" to the Appendix of Forms. The Advisory Committee also proposes to amend Rule 32(a)(7)(C) to provide that, although use of Form 6 is not *required*, when Form 6 is used courts must regard it as sufficient.

I should note that the new Form 6 also requests from the parties information that is not required by any rule, but that will assist the clerks' offices in enforcing the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6).

This amendment and form were approved by the Advisory Committee at its April 1998 meeting.

Rule 32. Form of Briefs, Appendices, and Other Papers

(a) Form of Brief.

(7) **Length.**

(C) **Certificate of compliance.**

(i) A brief submitted under Rule 32(a)(7)(B) must include a certificate by the attorney, or an unrepresented party, that the brief complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the brief. The certificate must state either:

- the number of words in the brief; or
- the number of lines of monospaced type in the brief.

(ii) Form 6 in the Appendix of Forms is a suggested form of a certificate of compliance. Use of Form 6 must be regarded as sufficient to meet the requirements of Rule 32(a)(7)(C)(i).

Committee Note

Subdivision (a)(7)(C). If the principal brief of a party exceeds 30 pages, or if the reply brief of a party exceeds 15 pages, Rule 32(a)(7)(C) provides that the party or the party's attorney must certify that the brief complies with the type-volume limitation of Rule 32(a)(7)(B). Rule 32(a)(7)(C) has been amended to refer to Form 6 (which has been added to the Appendix of

Forms) and to provide that a party or attorney who uses Form 6 has complied with Rule 32(a)(7)(C). No court may provide to the contrary, in its local rules or otherwise.

Form 6 requests not only the information mandated by Rule 32(a)(7)(C), but also information that will assist courts in enforcing the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6). Parties and attorneys are not required to use Form 6, but they are encouraged to do so.

Form 6. Certificate of Compliance With Rule 32(a)

Certificate of Compliance With Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

□ this brief contains [*state the number of*] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

□ this brief uses a monospaced typeface and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

□ this brief has been prepared in a proportionally spaced typeface using [*state name and version of word processing program*] in [*state font size and name of type style*], *or*

□ this brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

(s)_____

Attorney for _____

Dated: _____

N. Rule 32(d)

The Advisory Committee recently discovered that nothing in FRAP requires any brief, motion, or other paper to be signed. The Advisory Committee proposes to amend Rule 32 to add a signature requirement similar to the signature requirement imposed in the district courts by FRCP 11(a). Because the courts of appeals already have authority to sanction attorneys and parties who file papers that contain misleading or frivolous assertions, the Advisory Committee does not propose that Rule 32 be amended to incorporate "good faith" provisions similar to those found in FRCP 11(b) and 11(c).

An earlier version of this amendment was approved by the Advisory Committee at its April 1999 meeting. After a member of the Advisory Committee pointed out that the amendment approved in April 1999 would overlap to some extent with other provisions of FRAP, the Advisory Committee approved a modified version of this amendment at its October 1999 meeting.

Rule 32. Form of Briefs, Appendices, and Other Papers

(d) **Signature.** Every brief, motion, or other paper filed with the court must be signed by the party filing the paper or, if the party is represented, by one of the party's attorneys.

(de) **Local Variation.** Every court of appeals must accept documents that comply with the form requirements of this rule. By local rule or order in a particular case a court of appeals may accept documents that do not meet all of the form requirements of this rule.

Committee Note

Subdivisions (d) and (e). Former subdivision (d) has been redesignated as subdivision (e), and a new subdivision (d) has been added. The new subdivision (d) requires that every brief, motion, or other paper filed with the court be signed by the attorney or unrepresented party who files it, much as Fed. R. Civ. P. 11(a) imposes a signature requirement on papers filed in district court. (An appendix filed with the court does not have to be signed.) By requiring a signature, subdivision (d) ensures that a readily identifiable attorney or party takes responsibility for every paper. The courts of appeals already have authority to sanction attorneys and parties who file papers that contain misleading or frivolous assertions, *see, e.g.*, 28 U.S.C. § 1912, Fed. R. App. P. 38 & 46(b)(1)(B), and thus subdivision (d) has not been amended to incorporate provisions similar to those found in Fed. R. Civ. P. 11(b) and 11(c).

O. Rule 44

Under 28 U.S.C. § 2403(a), when the constitutionality of a federal statute is challenged in a case in which the United States is not a party, the court must notify the Attorney General of that challenge. Under 28 U.S.C. § 2403(b), when the constitutionality of a state statute is challenged in a case in which the state is not a party, the court must notify the state's attorney general of that challenge. For some reason, 28 U.S.C. § 2403(a) is implemented in FRAP, but not 28 U.S.C. § 2403(b). The Advisory Committee proposes amending Rule 44 to correct this omission.

This amendment was approved by the Advisory Committee at its April 1998 meeting.

Rule 44. Case Involving a Constitutional Question When the United States or the Relevant State is Not a Party

(a) Constitutional Challenge to Federal Statute. If a party questions the constitutionality of an Act of Congress in a proceeding in which the United States or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the Attorney General.

(b) Constitutional Challenge to State Statute. If a party questions the constitutionality of a statute of a State in a proceeding in which that State or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the attorney general of the State.

Committee Note

Rule 44 requires that a party who "questions the constitutionality of an Act of Congress" in a proceeding in which the United States is not a party must provide written notice of that challenge to the clerk. Rule 44 is designed to implement 28 U.S.C. § 2403(a), which states that:

> In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene . . . for argument on the question of constitutionality.

The subsequent section of the statute — § 2403(*b*) — contains virtually identical language imposing upon the courts the duty to notify the attorney general of a *state* of a constitutional challenge to any statute of that state. But § 2403(b), unlike § 2403(a), was not implemented in Rule 44.

Rule 44 has been amended to correct this omission. The text of former Rule 44 regarding constitutional challenges to federal statutes now appears as Rule 44(a), while new language regarding constitutional challenges to state statutes now appears as Rule 44(b).

III. Information Items

A. Electronic Service Rules

The Advisory Committee hopes to approve electronic service rules at its April 2000 meeting, to present those rules to the Standing Committee in June 2000, and to publish those rules for comment in August 2000.

B. Withholding of Amendment Regarding Local Rules

At its April 1998 meeting, the Advisory Committee approved a draft amendment to Rule 47(a)(1). The amendment would do two things: First, it would bar the enforcement of any local rule that had not been filed with the Administrative Office. Second, it would require that any change to a local rule must take effect on December 1, barring an emergency.

The Advisory Committee intended to seek the Standing Committee's permission to publish this amendment at the January 2000 meeting. However, the Advisory Committee has decided to postpone presenting this amendment to the Standing Committee. The Advisory Committee has several concerns.

First, Judge Niemeyer, Prof. Cooper, and others have suggested to the Standing Committee that using FRAP to prescribe a uniform effective date for changes to local rules might violate 28 U.S.C. § 2071(b), which provides that a local rule "shall take effect upon the date specified by the prescribing court." We are unaware of any case law on this issue, and we have not yet received a response to our request for guidance from the Standing Committee on whether it wishes to move forward on this matter notwithstanding the concerns about § 2071(b). Second, the Administrative Office has asserted that conditioning the enforcement of local rules upon their receipt by the A.O. would trigger a flood of inquiries to the A.O. Most members of the Advisory Committee are skeptical about whether the problem feared by the A.O. would materialize, but we are certainly open to alternative suggestions. Finally, the Advisory Committee has moved more quickly on these issues than the other advisory committees, and thus the other advisory committees have not yet fully considered the § 2071(b) issue or other possible problems.

For all of these reasons, the Advisory Committee has determined that the proposed amendment to Rule 47(a)(1) will be withheld pending further action by the other advisory committees or direction from the Standing Committee.