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

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MEMORANDUM

DATE: **May 25, 2007 (revised June 22, 2007)**

TO: **Judge David F. Levi, Chair**
Standing Committee on Rules of Practice and Procedure

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

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

I. Introduction

The Advisory Committee on Appellate Rules met on April 26 and 27, in Santa Fe, New Mexico. The Committee approved for publication a number of proposed amendments and a proposed new Rule.

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Part II.B. sets forth proposed new Rule 12.1 concerning indicative rulings; this Rule is designed to dovetail with the Civil Rules Committee's proposed new Civil Rule 62.1. Part II.C. presents a proposed amendment to Rule 22 in the light of the Criminal Rules Committee's proposed new Rule 11(a) of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 and 2255. Parts II.D. through II.F. present a proposed amendment to Rule 4(a)(4)(B)(ii) regarding notices of appeal; proposed amendments to Rules 4(a)(1)(B) and 40(a)(1) to clarify the treatment of U.S. officers or employees sued in an individual capacity; and a proposed amendment to Rule 26(c) to clarify operation of the three-day rule.

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II. Action Items

The Advisory Committee seeks the Standing Committee's permission to publish the following proposed amendments and new rule in August 2007.

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B. New Rule 12.1: Indicative rulings

At our April 2007 meeting, the Committee voted 5 to 3 in favor of adopting an Appellate Rule 12.1 concerning indicative rulings. The Committee then considered specific choices concerning the wording of proposed Rule 12.1; as to those choices, the Committee votes were unanimous.

Appellate Rule 12.1 is designed to work with proposed Civil Rule 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, or state that it would grant the motion if the action is remanded or that the motion raises a substantial issue. Experienced appeal lawyers often refer to the suggestion for remand as an "indicative ruling."

Appellate Rule 12.1's text could encompass indicative rulings in criminal as well as civil cases; however, the Note's discussion of the indicative-ruling practice in criminal cases is bracketed because of uncertainty among some members of the Appellate Rules Committee as to whether the Rule should extend to criminal cases.

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C. Rule 22: Changes to conform to amendments to the Rules Governing Proceedings under 28 U.S.C. §§ 2254 and 2255

At our April 2007 meeting, the Committee unanimously approved proposed amendments that are designed to conform the Appellate Rules to changes that the Criminal Rules Committee proposes to make to the Rules Governing Proceedings under 28 U.S.C. §§ 2254 or 2255.

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Rule 11(a) of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 or 2255 will now address the certificate-of-appealability requirement set by 28 U.S.C. § 2253(c). Appellate Rule 22(b)(1) is revised accordingly.

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D. Rule 4(a)(4)(B)(ii): New or amended notices of appeal

At our April 2007 meeting, the Advisory Committee unanimously approved an amendment to Rule 4(a)(4)(B)(ii) that would eliminate an ambiguity that resulted from the 1998 restyling of the Appellate Rules. 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.

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E. Rules 4(a)(1)(B) and 40(a)(1): U.S. officers or employees sued in an individual capacity

The Advisory Committee in November 2004 approved amendments to Rules 4(a)(1)(B) and 40(a)(1) to clarify those Rules' application to cases in which a federal officer or employee is sued in his or her individual capacity. As is the Committee's practice, it held these proposed amendments to await a time when there were additional amendments to place before the Standing Committee.

The Committee is currently evaluating a proposal to treat state-government litigants the same as federal-government litigants for purposes of Rules 4(a)(1)(B) and 40(a)(1). That proposal, however, requires additional study. The Committee therefore decided not to hold the proposed amendments concerning the treatment of federal officials, but rather to seek permission to publish those proposed amendments at the present time.

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F. Rule 26(c): Clarifying the operation of the three-day rule

The Advisory Committee in November 2003 approved an amendment to Rule 26(c) that would clarify the operation of the three-day rule. Due to the Committee's practice of bundling proposed amendments, it did not immediately submit the amendment to the Standing Committee.

Rule 26(c) currently provides in part that "[w]hen 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." At the time that the Advisory Committee approved the proposed amendment to Rule 26(c), the amendment was designed to clarify two points. First, it would make clear that one should ignore the three-day rule when determining whether a time period qualifies as a period of "less than 11 days" for which intermediate weekends and holidays are excluded under current Rule 26(a)(2). If the Time-Computation Project's shift to a days-are-days approach is adopted, then this issue will be moot. However, the proposed amendment also clarifies a second point – namely, what happens when a period that would end on a weekend or holiday is subject to the three-day rule. Suppose that a period ends on a Saturday. The amendment would make clear that in applying the three-day rule to that period, one should count forward to Monday under Rule 26(a) before adding the three days, and then count forward three days to Thursday.

The proposed amendment will be useful whether or not the time-computation project's recommendations are adopted. In any event, the amendment will clarify the operation of the

three-day rule when a time period ends on a weekend or holiday, and the amendment will bring Rule 26(c) into line with the approach taken in Civil Rule 6. If the time-computation project were not to be adopted, then the amendment would also clarify the three-day rule's interaction with the Rule 26(a) provision directing that short time periods be computed without counting intermediate weekends and holidays.

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PROPOSED NEW FRAP 12.1

INDICATIVE RULINGS

PROPOSED AMENDMENT 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

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*New material is underlined.

parties must promptly notify the circuit clerk when the district court has decided the motion on remand.

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, or state that it would grant the motion if the action is remanded or that the motion raises a substantial issue. Experienced appeal lawyers often refer to the suggestion for remand as an "indicative ruling."

[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.

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 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 the action 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 separate 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.").

PROPOSED AMENDMENT TO FRAP 22

RELATING TO

28 U.S.C. §§ 2254 AND 2255 RULES

PROPOSED AMENDMENT TO THE FEDERAL RULES OF APPELLATE PROCEDURE*

Rule 22. Habeas Corpus and Section 2255 Proceedings

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(b) Certificate of Appealability.

(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

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

statement described in Rule 11(a) of the Rules Governing Proceedings under 28 U.S.C. § 2254 or § 2255 to the court of appeals 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.

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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.

PROPOSED AMENDMENT TO FRAP 4(a)(4)(B)

NOTICE OF APPEAL

PROPOSED AMENDMENT TO THE FEDERAL RULES OF APPELLATE PROCEDURE*

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.

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(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.

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

(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.

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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.

PROPOSED AMENDMENTS TO FRAP 4 AND 40

U.S. EMPLOYEES SUED IN INDIVIDUAL CAPACITY

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE*

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 entry of the judgment or order appealed from ~~is entered~~.

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

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

(i) the United States;

(ii) a United States agency;

(iii) a United States officer or employee sued in an official capacity; or

(iv) a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf.

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Committee Note

Subdivision (a)(1)(B). Rule 4(a)(1)(B) has been amended to make clear that the 60-day appeal period applies in cases in which an officer or employee of the United States is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States. (A concurrent amendment to Rule 40(a)(1) makes clear that the 45-day period to file a petition for panel rehearing also applies in such cases.) The amendment to Rule 4(a)(1)(B) is consistent with a 2000 amendment to Civil Rule 12(a)(3)(B), which specified an extended 60-day period to respond to complaints in such cases. The Committee Note to the 2000

amendment explained: "Time is needed for the United States to determine whether to provide representation to the defendant officer or employee. If the United States provides representation, the need for an extended answer period is the same as in actions against the United States, a United States agency, or a United States officer sued in an official capacity." The same reasons justify providing additional time to the Solicitor General to decide whether to file an appeal.

Rule 40. Petition for Panel Rehearing

(a) Time to File; Contents; Answer; Action by the Court if Granted.

(1) **Time.** Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment. But in a civil case, ~~if the United States or its officer or agency is a party, the time within which any party may seek rehearing is 45 days after entry of judgment,~~ unless an order shortens or extends the time~~.~~, the petition may be filed by any

party within 45 days after entry of judgment if one of the parties is:

(A) the United States;

(B) a United States agency;

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

(D) a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf.

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Committee Note

Subdivision (a)(1). Rule 40(a)(1) has been amended to make clear that the 45-day period to file a petition for panel rehearing applies in cases in which an officer or employee of the United States is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States. (A concurrent amendment to Rule 4(a)(1)(B) makes clear that the 60-day period to file an appeal also applies in such cases.) In such cases, the Solicitor General needs adequate time to review the merits of the panel decision and decide whether to seek rehearing, just as the

Solicitor General does when an appeal involves the United States, a United States agency, or a United States officer or employee sued in an official capacity.

PROPOSED AMENDMENT TO FRAP 26(c)

OPERATION OF THREE-DAY RULE

PROPOSED AMENDMENT TO THE FEDERAL RULES OF APPELLATE PROCEDURE*

Rule 26. Computing and Extending Time

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(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 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.

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

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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