PROPOSED RULE AMENDMENTS
OF SIGNIFICANT INTEREST

The following summary outlines considerations underlying the recommendations of the advisory committees and the Standing Rules Committee on topics that raised significant interest. A fuller explanation of the committees' considerations was submitted to the Judicial Conference and is sent together with this report.

Time-Computation Project

A. Brief Description

The proposed amendments to Appellate Rule 26, Bankruptcy Rule 9006, Civil Rule 6, and Criminal Rule 45 make the method of computing time simpler, clearer, and consistent. These amendments adopt essentially the same time-computation provisions for each set of rules.

The principal simplifying change in these rules is the adoption of a "days are days" approach to computing all time periods. Under current rules, intermediate weekend days and holidays are omitted when computing most – but not all – short time periods. By contrast, under the proposed amendments, intermediate weekend days and holidays are counted when computing all time periods.

The proposed amendments to 14 Appellate Rules, 38 Bankruptcy Rules, 23 Civil Rules, 3 Official Civil Forms, and 13 Criminal Rules extend deadlines to accommodate changes resulting from the proposed time-computation method. Each of these rule amendments appears in the accompanying materials. Virtually all short deadlines are extended by two or more days to offset the effect of including intermediate weekend days and holidays in calculating deadlines. To further simplify time counting, most time periods of less than 30 days are changed to multiples of 7 days (7, 14, 21, or 28 days) so that deadlines will usually fall on weekdays.

Under the proposed amendments, the various sets of rules will continue – as generally under the current rules – to govern the computation of statutory deadlines as well as deadlines established by the rules. The current Criminal Rule 45(a) is ambiguous on this point, but the proposed amendment would make clear that the time-computation provisions of Criminal Rule 45 do apply to statutory deadlines, making the rule consistent with the other sets of rules and with many court decisions.

The rules committees, working closely with the Department of Justice, identified 29 statutory provisions containing short time deadlines (such as 4, 5, 7, or 10 days) that should be extended to offset the effect of the changes in the time-computation rules. For most of the 29 statutory provisions, the requested adjustment would involve increasing the stated

time period by two or four days, to keep the existing time period unchanged in practice. During the public comment period, the public was invited to comment on this issue of statutory deadlines. The Standing Rules Committee is working with Congress to coordinate the effective dates of the new deadlines in both the statutes and the rules. A list of the 29 statutory provisions is attached.

B. Arguments in Favor

- The amendments address frequent complaints from the bar about the unnecessary complexity of the current time-computation rules and the time, energy, and anxiety expended in calculating time periods.

- The amendments address frequent complaints from the bar about the risk of error in calculating time periods under the current time-computation rules. When error occurs, it may prejudice litigants' substantive rights.

C. Objections

- Litigants are accustomed to the current time-counting methods; any change has the potential to be confusing.

- The rule changes require conforming statutory amendments, and synchronizing the effective dates of both rules and statutory changes may be problematic.

D. Rules Committees' Consideration

Public comment received during the notice-and-comment period indicated that the vast majority of practitioners supports the proposed rule amendments and the recommended conforming statutory changes. The current time-computation rules are counterintuitive, unnecessarily complex, and can lead to anomalous results and deprive litigants of substantive rights. The proposed changes are simple and can be easily implemented. Although the enactment of conforming statutory amendments cannot be guaranteed, congressional staff members have stated broad support for these changes and have indicated that they see no obstacle to prompt congressional action.

Federal Rules of Civil Procedure

I. Civil Rule 62.1

A. Brief Description

New Civil Rule 62.1 would codify and make consistent the "indicative rulings" practice that is used (with variations) in almost all circuits when a motion is made regarding a matter that the district court is in a better position to determine than the court of appeals, but the district court cannot rule because an appeal has been filed and jurisdiction is in the court of appeals. Requests for indicative rulings typically arise when a party files a Rule 60(b) motion (Relief from Judgement or Order) after an appeal has been filed. Consistent with the basic current practice, the new rule permits the district court to defer ruling, deny the motion, or indicate either that the motion raises a substantial issue or that it would be inclined to grant the motion if the case were remanded.

B. Arguments in Favor

- The indicative-ruling procedure facilitates cooperation between the district court and the court of appeals, enabling them to determine in tandem whether it is better to decide the appeal before deciding the motion.

- The amendment would make uniform a procedure that is practiced in almost all circuits but with variations.

- Many litigants, and even some judges, are not aware of the indicative-ruling procedure. Codifying the procedure in the national rules rule would promote this efficient practice.

C. Objections

- It is unnecessary.

- Codifying the procedure in a rule may lead to frivolous attempts to invoke it.

D. Rules Committees' Consideration

An indicative ruling is an efficient tool that eliminates unnecessary deliberations by a court of appeals on matters that are more suitably addressed and resolved by a district court. The fact that so many litigants and judges are unaware of the indicative-ruling procedure – causing confusion and a waste of judicial resources when the procedure is needed but goes unused – calls for a national rule. As under the current approach, any frivolous motions can be denied by the district court.

Federal Rules of Criminal Procedure

I. Criminal Rule 41

A. Brief Description

The proposed amendment to Criminal Rule 41 clarifies how the rule's warrant provisions apply to the seizure of electronically stored information. It establishes a two-stage process, authorizing (1) the seizure of electronic storage media or the seizure and copying of electronically stored information, and (2) a subsequent review, consistent with the warrant, of the storage media or electronically stored information. Because the time required by this review can be substantial, depending on the volume of information and the presence of encrypted data or hidden "booby traps," the amendment imposes no specific time limit on the review. A judge may impose a specific deadline, however, when the warrant is issued.

B. Arguments in Favor

- A two-stage process – permitting the government first to seize the storage media and then conduct a review offsite for information within the warrant's scope– is necessary for effective review of electronically stored information. The government's review cannot, as a practical matter, be conducted onsite, because of the enormous quantities of information often involved and the difficulties often encountered in accessing encrypted or "booby trapped' data. These time-consuming reviews have to be conducted offsite in centralized law-enforcement facilities, requiring additional time.

C. Objections

- Much seized electronically stored information typically is not relevant in a given prosecution. Providing government access to potentially private and confidential matter not relevant to the prosecution raises concern.

D. Rules Committees' Consideration

There is a need to adapt federal warrant procedures to electronically stored information, which is becoming increasingly important in federal criminal cases. The proposed amendments essentially codify the case law on this issue. The proposed amendments provide the court with discretion to fashion appropriate conditions for executing a warrant.

ATTACHMENT

The Judicial Conference has approved seeking legislation to change the time periods in the certain statutory provisions that affect court proceedings. These changes take into account the effect of the proposed Rules amendments on how to calculate time periods and avoid confusion and inconsistency between the Rules amendments and related statutory time periods. The proposed legislation would slightly alter a modest number of statutory time periods to offset the shortening that might result from the Rules amendments and to maintain consistency.

The proposed legislation would change the following statutory provisions:

1. The proposed amendments to the following bankruptcy-related statutes change five-day periods to seven-day periods:

    a. 11 U.S.C. § 109(h)(3)(A)(ii) — If within five days after requesting credit counseling services from an approved agency a debtor is unable to obtain the services, the debtor may qualify under certain circumstances for a waiver of the requirement to receive a briefing on credit counseling and perform a budget analysis within 180 days before the petition is filed.
    b. 11 U.S.C. § 322(a) — A trustee has five days after selection to file a bond in favor of the United States before beginning official duties.
    c. 11 U.S.C. § 332(a) — A trustee has five days after a hearing begins to appoint a consumer privacy ombudsman in a case.
    d. 11 U.S.C. § 342(e)(2) — Five days after the court and debtor receive a creditor's notice of address at which it desires to receive notice in a chapter 7 or chapter 13 individual-debtor case, the court and the debtor must use that address for any notice required to be sent to the creditor.
    e. 11 U.S.C. § 521(e)(3)(B) — No later than five days after a creditor in a chapter 13 case files a request to receive a copy of the plan filed by the debtor, the court shall make a copy of the plan available to the creditor.
    f. 11 U.S.C. § 521(i)(2) — No later than five days after a party in interest requests a dismissal in certain cases — if an individual debtor fails to file required information within 45 days after filing the petition, subject to certain other provisions — the court shall enter the dismissal order.
    g. 11 U.S.C. § 704(b)(1)(B) — No later than five days after receiving a statement from the United States trustee as to whether the debtor's case would be presumed to be an abuse under § 707(b), the court shall provide a copy of the statement to all creditors.
    h. 11 U.S.C. § 764(b) — A trustee handling commodity-broker liquidations may not avoid a transfer made before five days after the order for relief in certain cases.
    i. 11 U.S.C. § 749(b) — A trustee handling stockbroker liquidations may not avoid a transfer made before five days after the order for relief in certain cases.

2. The proposed amendments to the following statutes change certain timing provisions applicable to the period between a criminal defendant's initial appearance and the

preliminary hearing, and related provisions concerning that initial phase of a prosecution, from 10 to 14 days:

a. 18 U.S.C. § 3060(b) – Preliminary examinations, except in certain circumstances, "shall be held . . . no later than the tenth day following the date of the initial appearance of the arrested person."
b. 18 U.S.C. § 983(j)(3) – A temporary restraining order with respect to property against which no complaint has yet been filed "shall expire not more than 10 days after the date on which it is entered."
c. 18 U.S.C. § 1514(a)(2)(C) – A temporary restraining order "prohibiting harassment of a victim or witness in a Federal criminal case" shall not remain in effect more than "10 days from issuance."
d. 18 U.S.C. § 1963(d)(2) – A restraining order, injunction, or "any other action to preserve the availability of property . . . shall expire not more than ten days after the date on which it is entered."
e. 21 U.S.C. § 853(e)(2) – "A temporary restraining order under this subsection . . . shall expire not more than ten days after the date on which it is entered."

3. The proposed amendments modify the four-day deadlines in the Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. 3 § 7(b), and in the material-support statute, 18 U.S.C. § 2339B(f)(5)(B), to specify that intermediate weekends and holidays are excluded. This change has the effect of maintaining the existing statutory deadlines.

a. 18 U.S.C. App. 3 § 7(b)(1) – In an appeal under the CIPA statute, "the court of appeals shall hear argument . . . within four days of the adjournment of the trial."
b. 18 U.S.C. App. 3 § 7(b)(3) – In an appeal under the CIPA statute, the court of appeals "shall render its decision within four days of argument on appeal."
c. 18 U.S.C. § 2339B(f)(5)(B)(iii)(I) – If an appeal is taken under 18 U.S.C. § 2339B (prohibiting providing material support or resources to designated foreign terrorists), "the trial court shall adjourn the trial until the appeal is resolved, and the court of appeals — (I) shall hear argument . . . not later than 4 days after the adjournment of the trial; . . . ."
d. 18 U.S.C. § 2339B(f)(5)(B)(iii)(III) – If an appeal is taken under 18 U.S.C. § 2339B, "the trial court shall adjourn the trial until the appeal is resolved, and the court of appeals — (III) shall render its decision not later than 4 days after argument on appeal . . . ."

4. The proposed amendments change the deadlines in CIPA and in the material-support statute for taking a pretrial appeal from 10 to 14 days.

a. 18 U.S.C. App. 3 § 7(b) – "Prior to trial, an appeal shall be taken within ten days after the decision or order appealed from and the trial shall not commence until the appeal is resolved."

b. 18 U.S.C. § 2339B(f)(5)(B)(ii) – "If an appeal is of an order made prior to trial, an appeal shall be taken not later than 10 days after the decision or order appealed from, and the trial shall not commence until the appeal is resolved."

5. The proposed amendments, in order to maintain the existing statutory deadline, modify the two-day notice provision in 18 U.S.C. § 1514(a)(2)(E) to exclude weekends and holidays. The statute provides that "if on two days notice to the attorney for the Government . . . the adverse party appears and moves to dissolve or modify [a] temporary restraining order, the court shall proceed to hear and determine such motion . . . ."

6. The proposed amendments change the 10-day notice deadline in 18 U.S.C. § 2252A(c) to 14 days. Under the statute, a defendant seeking to use certain affirmative defenses against child pornography charges must notify the court "in no event later than 10 days before the commencement of the trial."

7. The proposed amendments, in order to maintain the existing statutory deadline, modify the three-day period set by 18 U.S.C. § 3432 to exclude weekends and holidays. Under the statute "a person charged with treason or other capital offense shall at least three entire days before commencement of trial be furnished with a copy of the indictment and a list of the veniremen, and of the witnesses to be produced on the trial for proving the indictment. . . ."

8. The proposed amendments change the five-day deadline for applications under 18 U.S.C. § 3509(b)(1)(A) to seven days. The statute provides that a person seeking an order for a child's testimony to be taken via two-way closed circuit video "shall apply for such an order at least five days before the trial date."

9. The proposed amendments change the 10-day mandamus petition deadline in the Crime Victims' Rights Act ("CVRA"), 18 U.S.C. § 3771(d)(5), to 14 days. The statute sets a 10-day time period for victims to seek mandamus review in the court of appeals for certain purposes. Under the proposed amendment to Appellate Rule 4(b), the defendant's time to appeal would also be extended from 10 to 14 days, so the statutory change avoids inconsistency between the parallel statutory and rules provisions.

10. The proposed amendments change the 10-day period in 28 U.S.C. § 636(b)(1), for objecting to magistrate judge orders and recommendations, to 14 days. Proposed Civil Rules 72(a) and (b), and Criminal Rule 59, which address the same subject matter, extend the time from 10 days to 14 days. The statutory changes avoid inconsistency between the parallel statutory and rules provisions.

11. The proposed amendments change the "not less than 7" day period in 28 U.S.C. § 1453(c)(1) to "not more than 10" days. This period limits the time for seeking appellate review, under the Class Action Fairness Act, of a district court's remand order; "not less than" was clearly a drafting error. Section 1453 would be amended to set the time limit at "not more than 10

days" to correct the drafting error and to offset the change in the rules' time-computation method.

12. The proposed amendments change the seven-day deadline in 28 U.S.C. § 2107(c), one of the time limits on making a motion to reopen the time to appeal in a civil case, to 14 days. The proposed amendment to Appellate Rule 4(a)(6)(B) would also extend the time to 14 days, so the statutory changes avoid inconsistency between the parallel statutory and rules provisions.