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

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.

Part II.A. of this report describes the Committee's proposed amendments relating to the Time-Computation Project. 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 proposed amendments to Rules 4(a)(4) and 22 in the light of the Criminal Rules Committee's proposed new Rules 11 of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 and 2255. Parts II.D. through II.G. 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; a proposed amendment to Rule 26(c) to clarify operation of the three-day rule; and a proposed amendment to Rule 29 requiring disclosures concerning drafting and funding of amicus briefs.

Part III covers other matters. The Committee discussed and retained three additional items on the study agenda, and removed two other items. The Committee also discussed correspondence relating to circuit-specific briefing requirements.

The Committee has tentatively scheduled its next meeting for November 2007.

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

II. Action Items

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

A. Time Computation package: Amendments to Rule 26(a) and to certain Rules containing time periods

1. Adoption of time-computation template as Rule 26(a)

At our April 2007 meeting, the Advisory Committee unanimously approved a proposed amendment that adopts as Appellate Rule 26(a) the template developed by the Time-Computation Subcommittee.

Due to issues peculiar to the Appellate Rules, proposed subdivisions (a)(4) and (a)(6)(B) diverge from the template. Instead of referring to a "day declared a holiday by ... the state where the district court is located," proposed subdivision (a)(6)(B) carries forward the formulation in current Appellate Rule 26(a)(4) by referring to a "day declared a holiday by ... the state in which is located either the district court that rendered the challenged judgment or order, or the circuit clerk's principal office." Proposed Rule 26(a)(6)(B) defines the term "state" because the Appellate Rules (unlike the Criminal Rules) do not contain a global definition of that term. (As noted in Part III below, the Advisory Committee is considering a proposed amendment that would provide such a global definition, but has not fully evaluated that proposal at this time.)

At our spring meeting, the Committee decided that because some circuits span more than one time zone, Rule 26(a)(4)(A) should read: "for electronic filing, at midnight in the time zone of the circuit clerk's principal office." Subsequent to the meeting, it was pointed out that Rule 26(a) covers a number of deadlines for filings in the district court, including the deadlines for filing a notice of appeal. The language adopted at the meeting would have meant that a litigant filing a notice of appeal electronically in the district court for the District of Hawaii must file it some hours before midnight, Hawaii time. Because this would not be the result that lawyers would intuitively expect, it was suggested that Rule 26(a)(4) should contain separate subsections to deal with electronic filings in the district court and the court of appeals. During the course of these discussions, a member pointed out that the Appellate Rules have special rules for filing by mail, third-party commercial carriers, and prison mail systems. Because it makes more intuitive sense – when considering those filing methods – to think of the filer's time zone than to think of

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

the court's time zone, it was proposed that those methods be treated in a separate subdivision of Rule 26(a)(4). The Committee then discussed – by email – the wording of what had become subdivision (a)(4)(D). An initial proposal suggested that this subdivision should read "for filing by other means, when the relevant clerk's office is scheduled to close." A member suggested that it would be clearer to say "when the clerk's office in which the filing is made is scheduled to close." A couple of members suggested that brevity was preferable, and it was suggested that "relevant" was superfluous. The proposed language shown below deletes "relevant" and thus tracks the template's language: "for filing by other means, when the clerk's office is scheduled to close." The Note to subdivision (a)(4)(D) explains that the subdivision refers to the clerk's office in which the filing is made. The language of subdivision (a)(4) was circulated to the Committee by email, and as of the date of this writing, no members had voiced disapproval of it.

The Committee Note tracks the template's Note, but is customized in several places to reflect the issues discussed above and to provide citations that are relevant to the Appellate Rules.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE[2]

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 11 days, unless stated in calendar days.~~

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

[2]New material is underlined; matter to be omitted is lined through.

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

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

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

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

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

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

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

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

(C) if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

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

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

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

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

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

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

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

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

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

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

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; and

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

'state,' as used in this Rule, includes the District of Columbia and any commonwealth, territory, or possession of the United States.

Committee Note

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

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

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

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

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

Under new subdivision (a)(1), all deadlines stated in days (no matter the length) are computed in the same way. The day of the event that triggers the deadline is not counted. All other days —

including intermediate Saturdays, Sundays, and legal holidays — are counted, with only one exception: If the period ends on a Saturday, Sunday, or legal holiday, then the deadline falls on the next day that is not a Saturday, Sunday, or legal holiday. An illustration is provided below in the discussion of subdivision (a)(5). Subdivision (a)(3) addresses filing deadlines that expire on a day when the clerk's office is inaccessible.

Where subdivision (a) formerly referred to the "act, event, or default" that triggers the deadline, new subdivision (a) refers simply to the "event" that triggers the deadline; this change in terminology is adopted for brevity and simplicity, and is not intended to change meaning.

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

Most of the 10-day periods were adjusted to meet the change in computation method by setting 14 days as the new period. A 14-day period corresponds to the most frequent result of a 10-day period under the former computation method — two Saturdays and two Sundays were excluded, giving 14 days in all. A 14-day period has an additional advantage. The final day falls on the same day of the week as the event that triggered the period — the 14th day after a Monday, for example, is a Monday. This advantage of using week-long periods led to adopting 7-day periods to replace some of the periods set at less than 10 days, and 21-day periods to replace

20-day periods. Thirty-day and longer periods, however, were retained without change.

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

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

Subdivision (a)(2)(B) directs that every hour be counted. Thus, for example, a 72-hour period that commences at 10:00 a.m. on Friday, November 2, 2007, will run until 9:00 a.m. on Monday, November 5; the discrepancy in start and end times in this example results from the intervening shift from daylight saving time to standard time.

Subdivision (a)(3). When determining the last day of a filing period stated in days or a longer unit of time, a day on which the clerk's office is not accessible because of the weather or another reason is treated like a Saturday, Sunday, or legal holiday. When

determining the end of a filing period stated in hours, if the clerk's office is inaccessible during the last hour of the filing period computed under subdivision (a)(2) then the period is extended to the same time on the next day that is not a weekend, holiday or day when the clerk's office is inaccessible.

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

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

Subdivision (a)(4). New subdivision (a)(4) defines the end of the last day of a period for purposes of subdivision (a)(1). Subdivision (a)(4) does not apply in computing periods stated in

hours under subdivision (a)(2), and does not apply if a different time is set by a statute, local rule, or order in the case. A local rule may, for example, address the problems that might arise under subdivision (a)(4)(A) if a single district has clerk's offices in different time zones, or provide that papers filed in a drop box after the normal hours of the clerk's office are filed as of the day that is date-stamped on the papers by a device in the drop box.

28 U.S.C. § 452 provides that "[a]ll courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders." A corresponding provision exists in Rule 77(a). Some courts have held that these provisions permit an after-hours filing by handing the papers to an appropriate official. *See, e.g.*, *Casalduc v. Diaz*, 117 F.2d 915, 917 (1st Cir. 1941). Subdivision (a)(4) does not address the effect of the statute on the question of after-hours filing; instead, the rule is designed to deal with filings in the ordinary course without regard to Section 452.

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

Subdivision (a)(4)(C) addresses filings by mail under Rules 25(a)(2)(B)(i) and 13(b), filings by third-party commercial carrier under Rule 25(a)(2)(B)(ii), and inmate filings under Rules 4(c)(1) and 25(a)(2)(C). For such filings, subdivision (a)(4)(C) provides that the "last day" ends at the latest time (prior to midnight in the filer's time zone) that the filer can properly submit the filing to the post office, third-party commercial carrier, or prison mail system (as applicable)

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

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

Subdivision (a)(5). New subdivision (a)(5) defines the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C). The Federal Rules of Appellate Procedure contain both forward-looking time periods and backward-looking time periods. A forward-looking time period requires something to be done within a period of time *after* an event. *See, e.g.*, Rule 4(a)(1)(A) (subject to certain exceptions, notice of appeal in a civil case must be filed "within 30 days after the judgment or order appealed from is entered"). A backward-looking time period requires something to be done within a period of time *before* an event. *See, e.g.*, Rule 31(a)(1) ("[A] reply brief must be filed at least 7 days before argument, unless the court, for good cause, allows a later filing."). In determining what is the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C), one should continue counting in the same direction — that is, forward when computing a forward-looking period and backward when computing a backward-looking period. If, for example, a filing is due within 10 days *after* an

event, and the tenth day falls on Saturday, September 1, 2007, then the filing is due on Tuesday, September 4, 2007 (Monday, September 3, is Labor Day). But if a filing is due 10 days *before* an event, and the tenth day falls on Saturday, September 1, then the filing is due on Friday, August 31.

Subdivision (a)(6). New subdivision (a)(6) defines "legal holiday" for purposes of the Federal Rules of Appellate Procedure, including the time-computation provisions of subdivision (a). Subdivision (a)(6)(B) includes certain state holidays within the definition of legal holidays, and defines the term "state" – for purposes of subdivision (a)(6) – to include the District of Columbia and any commonwealth, territory or possession of the United States. Thus, for purposes of subdivision (a)(6)'s definition of "legal holiday," "state" includes the District of Columbia, Guam, American Samoa, the U.S. Virgin Islands, the Commonwealth of Puerto Rico, and the Commonwealth of the Northern Mariana Islands.

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2. Changes to certain Appellate Rules time periods

The Advisory Committee unanimously approved the following proposed amendments at our April 2007 meeting. These amendments lengthen deadlines set by the Appellate Rules so as to offset the proposed change in time-computation approach. The changes can be summarized as follows. References to "calendar days" in Rules 25, 26 and 41 become simply references to "days." Three-day periods in Rules 28.1(f) and 31(a) become seven-day periods. The five-day period in Rule 27(a)(4) becomes a seven-day period. The seven-day period in Rule 4(a)(6) lengthens to 14 days. The seven-day periods in Rules 5(b)(2) and 19 become ten days. The eight-day period in Rule 27(a)(3)(A) becomes ten days. The ten-day period in Rule 4(a)(4)(A)(vi) becomes 30 days to correspond with changes in the Civil Rules. The ten-day periods in Rules 4(a)(5)(C), 4(b), 5, 6, 10, 12, 30 and 39 become 14 days. The 20-day period in Rule 15(b) becomes 21 days.

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:

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

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

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

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

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

(vi) for relief under Rule 60 if the motion is filed no later than ~~10~~ 30 days after the judgment is entered.

* * * * *

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

* * * * *

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

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

* * * * *

(B) the motion is filed within 180 days after the judgment or order is entered or

within ~~7~~ 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and

* * * * *

(b) Appeal in a Criminal Case.

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

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

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

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

* * * * *

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

(A) If a defendant timely makes any of the following motions under the Federal Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within ~~10~~ 14 days after the entry of the order disposing of the last such remaining motion, or within ~~10~~ 14 days after the entry of the judgment of conviction, whichever period ends later. This provision applies to a timely motion:

(i) for judgment of acquittal under Rule 29;

(ii) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than

~~10~~ 14 days after the entry of the judgment; or

(iii) for arrest of judgment under Rule 34.

* * * * *

Committee Note

Subdivision (a)(4)(A)(vi). Subdivision (a)(4) provides that certain timely post-trial motions extend the time for filing an appeal. Lawyers sometimes move under Civil Rule 60 for relief that is still available under another rule such as Civil Rule 59. Subdivision (a)(4)(A)(vi) provides for such eventualities by extending the time for filing an appeal so long as the Rule 60 motion is filed within a limited time. Formerly, the time limit under subdivision (a)(4)(A)(vi) was 10 days, reflecting the 10-day limits for making motions under Civil Rules 50(b), 52(b), and 59. Subdivision (a)(4)(A)(vi) now contains a 30-day limit to match the revisions to the time limits in the Civil Rules.

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

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

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

Rule 5. Appeal by Permission

* * * * *

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

* * * * *

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

* * * * *

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

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

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

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

* * * * *

Committee Note

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

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

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

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(b) Appeal From a Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel

FEDERAL RULES OF APPELLATE PROCEDURE

Exercising Appellate Jurisdiction in a Bankruptcy Case.

* * * * *

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

* * * * *

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

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

designation of the record to be certified and sent to the circuit clerk.

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

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Committee Note

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

Rule 10. The Record on Appeal

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(b) The Transcript of Proceedings.

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

* * * * *

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

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

(B) if the appellee considers it necessary to have a transcript of other parts of the proceedings,

the appellee must, within ~~10~~ 14 days after the service of the order or certificate and the statement of the issues, file and serve on the appellant a designation of additional parts to be ordered; and

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

* * * * *

(c) Statement of the Evidence When the Proceedings Were Not Recorded or When a Transcript Is Unavailable. If the transcript of a hearing or trial is

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

* * * * *

Committee Note

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

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

* * * * *

(b) Filing a Representation Statement. Unless the court of appeals designates another time, the attorney who filed the notice of appeal must, within ~~10~~ 14 days after filing the notice, file a statement with the circuit clerk naming the parties that the attorney represents on appeal.

* * * * *

Committee Note

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

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

* * * * *

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

* * * * *

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

* * * * *

Committee Note

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

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

When the court files an opinion directing entry of judgment enforcing the agency's order in part, the agency must within 14 days file with the clerk and serve on each other party a proposed judgment conforming to the opinion. A party who disagrees with the agency's proposed judgment

must within ~~7~~ 10 days file with the clerk and serve the agency with a proposed judgment that the party believes conforms to the opinion. The court will settle the judgment and direct entry without further hearing or argument.

Committee Note

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

Rule 25. Filing and Service

(a) Filing.

* * * * *

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

* * * * *

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

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

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

* * * * *

(c) Manner of Service.

(1) Service may be any of the following:

* * * * *

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

* * * * *

Committee Note

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

Rule 26. Computing and Extending Time

* * * * *

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

Committee Note

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

Rule 27. Motions

(a) In General.

* * * * *

(3) **Response.**

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

only if the court gives reasonable notice to the parties that it intends to act sooner.

* * * * *

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

* * * * *

Committee Note

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

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

Rule 28.1. Cross-Appeals

* * * * *

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

* * * * *

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

Committee Note

Subdivision (f)(4). Subdivision (f)(4) formerly required that the appellee's reply brief be served "at least 3 days before argument

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

Rule 30. Appendix to the Briefs

* * * * *

(b) All Parties' Responsibilities.

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

appellee may, within ~~10~~ 14 days after receiving the designation, serve on the appellant a designation of additional parts to which it wishes to direct the court's attention. The appellant must include the designated parts in the appendix. The parties must not engage in unnecessary designation of parts of the record, because the entire record is available to the court. This paragraph applies also to a cross-appellant and a cross-appellee.

* * * * *

Committee Note

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

Rule 31. Serving and Filing Briefs

(a) Time to Serve and File a Brief.

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

* * * * *

Committee Note

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

Rule 39. Costs

* * * * *

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

* * * * *

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

* * * * *

Committee Note

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

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

* * * * *

(b) When Issued. The court's mandate must issue 7 ~~calendar~~ days after the time to file a petition for

rehearing expires, or 7 ~~calendar~~ days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.

* * * * *

Committee Note

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

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3. Proposals concerning certain statutory deadlines

At our April 2007 meeting, the Committee unanimously voted to recommend that the following statutes be considered for amendment in the light of the proposed shift in time-computation approach: 28 U.S.C. § 2107(c); 18 U.S.C. § 3771(d); Classified Information Procedures Act § 7(b); and 28 U.S.C. § 1453(c).

10B

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. Both rules will formalize the practice of indicative rulings. 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.

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

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

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

Committee Note

This new rule corresponds to Federal Rule of Civil Procedure 62.1, which adopts and generalizes 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 indicate that it might or would grant the motion if the action is remanded. 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.").

FEDERAL RULES OF APPELLATE PROCEDURE

C. Rules 4(a)(4)(A) and 22: Changes to conform to proposed new Rules 11 of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 and 2255

At our April 2007 meeting, the Committee unanimously approved the following proposed amendments. These amendments 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.

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 — or a motion for reconsideration under Rule 11(b) of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 or 2255 — ; the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

12 * * * * *

Committee Note

Subdivision (a)(4)(A). New Rule 11(b) of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 or 2255 concerns motions for reconsideration in Section 2254 and 2255 proceedings. Subdivision (a)(4)(A) is revised to provide that a timely motion under Rule 11(b) has the same effect on the time to file an appeal as the other motions listed in subdivision (a)(4)(A).

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 22. Habeas Corpus and Section 2255 Proceedings

* * * * *

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

the court of appeals with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.

* * * * *

Committee Note

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

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

The Advisory Committee unanimously approved this amendment at our April 2007 meeting. The amendment would eliminate an ambiguity that resulted from the 1998 restyling. The Rule's current language might be read to require the appellant to amend a prior notice of appeal if the district court amends the judgment after the notice of appeal is filed, even if the amendment is in the appellant's favor. This ambiguity will be removed by replacing the current reference to challenging "a judgment altered or amended upon" a timely post-trial motion with a reference to challenging "a judgment's alteration or amendment upon" such a motion.

Rule 4. Appeal as of Right--When Taken

(a) Appeal in a Civil Case.

* * * * *

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

* * * * *

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

order disposing of the last such remaining motion is entered.

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

* * * * *

Committee Note

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

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

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

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.

As discussed at further length in the draft minutes, 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.

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, 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:

(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 behalf of the United States.

* * * * *

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~~.~~, a petition for panel rehearing 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 behalf of the United States.

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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.

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, it did not immediately submit the amendment to the Standing Committee.

The 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.

Because the amendment would serve an additional function if the time-computation project were not to proceed, the Committee proposes to publish the proposed amendment with two alternative versions of the Committee Note – one for use if the time-computation amendments are adopted (Option A), and one for use if they are not (Option B). For ease of reference, portions of Option B are bolded to show how they differ from Option A.

Rule 26. Computing and Extending Time

* * * * *

(c) **Additional Time after Service.** When a party ~~is required or permitted to act within a prescribed period after a paper is served on that party~~ may or must act within a specified time after service, 3 calendar days are

added ~~to~~ after the prescribed period would otherwise expire under Rule 26(a) unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service.

Committee Note [Option A]

Subdivision (c). Rule 26(c) has been amended to eliminate uncertainty about application of the 3-day extension. 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 extension 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.

Committee Note [Option B]

Subdivision (c). Rule 26(c) has been amended to eliminate uncertainty about application of the 3-day extension. 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 extension provided by Rule 26(c), but with reference to the other time computation provisions of the Appellate Rules. **(For example, if the prescribed period is less than 11 days, the party should exclude intermediate Saturdays, Sundays, and legal holidays, as instructed by Rule 26(a)(2).)** 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 Wednesday, June 4, 2008. The prescribed time to respond is 10 days. Assuming there are no intervening legal holidays, the prescribed period ends on Wednesday, June 18. (See Rules 26(a)(1) and (2).) Under Rule 26(c), three calendar days are added — Thursday,

Friday, and Saturday. Because the last day is a Saturday, the time to act extends to the next day that is not a Saturday, Sunday, or legal holiday. Thus, the response is due on Monday, June 23.

To illustrate **further**: 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.

G. Rule 29: Disclosures concerning drafting and funding of amicus briefs

At our April 2007 meeting, the Advisory Committee unanimously approved the following proposed amendment to Rule 29. The amendment would add a new subdivision (c)(7) requiring amicus briefs to indicate whether counsel for a party authored the brief in whole or in part and to identify every person or entity (other than the amicus, its members and its counsel) who contributed monetarily to the brief's preparation or submission. The provision would exempt from the disclosure requirement amicus filings by various government entities. The amendment also moves the requirement of a corporate disclosure statement from the initial block of text in Rule 29(c) to a new subdivision (c)(6).

Subdivision (c)(7)'s requirement is designed to parallel Supreme Court Rule 37.6. Subsequent to the Advisory Committee's April meeting, the Supreme Court published for comment a proposed amendment to Rule 37.6. That proposed amendment reads as follows:

> Except for briefs presented on behalf of *amicus curiae* listed in Rule 37.4, a brief filed under this Rule shall indicate whether counsel for a party authored the brief in whole or in part, whether such counsel or a party is a member of the *amicus curiae*, or made a monetary contribution to the preparation or submission of the brief, and shall identify every person or entity, other than the amicus curiae, its members, or its counsel, who made such a monetary contribution ~~to the preparation or submission of the brief~~. The disclosure shall be made in the first footnote on the first page of text.

The Clerk's Comment to the proposed rule change states that "the change would require the disclosure that a party made a monetary contribution to the preparation or submission of an *amicus curiae* brief in the capacity of a member of the entity filing as *amicus curiae*."

Our Reporter suggested to the Committee that it consider an alternative formulation of the proposed amendment to Rule 29, for use in the event that the Supreme Court rule is amended. As of this writing, no Committee member has voiced an objection to the proposed alternative language. Accordingly, the amendment is presented in two versions. We would request that the Standing Committee authorize publication of Option A if the proposed Rule 37.6 amendment is rejected, and

of Option B if the Rule 37.6 amendment is adopted. It is unclear at this time whether the Supreme Court will adopt the proposed rule change. Public comment on the Rule 37.6 proposal closes June 4; the proposal is slated for adoption as of June 25 and, if adopted, would take effect August 1.

Option A:

Rule 29. Brief of an Amicus Curiae

* * * * *

(c) Contents and Form. An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. ~~If an amicus curiae is a corporation, the brief must include a disclosure statement like that required of parties by Rule 26.1.~~ An amicus brief need not comply with Rule 28, but must include the following:

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

(2) a table of authorities — cases (alphabetically arranged), statutes and other authorities — with

references to the pages of the brief where they are cited;

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

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

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

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

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

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

(B) identifies every person or entity — other than the amicus curiae, its members, or its counsel — who contributed money toward preparing or submitting the brief.

* * * * *

Committee Note

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

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

Subdivision (c)(7). New subdivision (c)(7) requires amicus briefs to disclose whether counsel for a party authored the brief in whole or in part and to identify every person or entity (other than the

amicus, its members, or its counsel) who contributed monetarily to the preparation or submission of the brief. Entities entitled under subdivision (a) to file an amicus brief without the consent of the parties or leave of court are exempt from this disclosure requirement.

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

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

FEDERAL RULES OF APPELLATE PROCEDURE

Option B:

Rule 29. Brief of an Amicus Curiae

* * * * *

(c) Contents and Form. An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. ~~If an amicus curiae is a corporation, the brief must include a disclosure statement like that required of parties by Rule 26.1.~~ An amicus brief need not comply with Rule 28, but must include the following:

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

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

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

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

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

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

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

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

(B) indicates whether a party or a party's counsel is a member of the amicus curiae or contributed money toward preparing or submitting the brief; and

(C) identifies every person or entity — other than the amicus curiae, its members, or its counsel — who contributed money toward preparing or submitting the brief.

* * * * *

Committee Note

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

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

Subdivision (c)(7). New subdivision (c)(7) requires amicus briefs to disclose whether counsel for a party authored the brief in whole or in part, and whether a party or a party's counsel is a member of the amicus or contributed money toward the preparation or submission of the brief. Subdivision (c)(7) also requires the amicus brief to identify every person or entity (other than the amicus, its members, or its counsel) who contributed monetarily to the preparation or submission of the brief. Entities entitled under subdivision (a) to file an amicus brief without the consent of the parties or leave of court are exempt from subdivision (c)(7)'s disclosure requirement.

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

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

discussion between party counsel and *amici* counsel regarding their respective arguments . . . .").

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III. Information Items

As you know, the Committee has extensively discussed practitioners' concerns about idiosyncratic briefing requirements in the circuits. Last fall I wrote to the Chief Judge of each circuit to express the Committee's concern over circuit-specific briefing requirements, to emphasize the need to make each circuit's briefing requirements readily accessible to practitioners, and to urge each circuit to consider whether the circuit's additional briefing requirements are truly necessary. To date, eight circuits have responded to the letter.

A pending proposal by the Virginia State Solicitor General would amend Rules 4(a)(1)(B) and 40(a)(1) so as to treat state-government litigants the same as federal-government litigants for purposes of the time to take an appeal or to seek rehearing. The Committee has appointed an informal subcommittee to study the relevant issues. At our April meeting the Committee noted the need for further information in order to assess the possible effects of the proposed amendments. The Committee has decided to retain this item on the study agenda, and will seek data concerning the number of appeals in cases involving state or local government litigants.

At the suggestion of the time-computation subcommittee, the Committee considered whether to adopt a global definition of the term "state" for the Appellate Rules. The proposed definition would encompass the District of Columbia and any commonwealth, territory or possession of the United States. The Committee decided that it needs further information on the definition of relevant terms such as "territory" and "possession," and that it would like to consult the potentially affected entities for their views on the proposed definition. The Department of Justice has undertaken to perform that research. This item has been retained on the Committee's study agenda.

In 2003 the Committee approved an amendment to Rule 7 to resolve a circuit split by making clear that attorney's fees are not among the 'costs on appeal' that may be secured by a Rule 7 bond. At our April meeting the Committee reconsidered the wording of the proposed amendment and concluded that further study concerning that wording would be helpful; thus, this item has been retained on the study agenda.

FEDERAL RULES OF APPELLATE PROCEDURE

Two proposals were considered by the Committee and removed from the study agenda. One proposed amendment would have required the courts of appeals to give at least ten days' advance notice of the identity of members of an oral argument panel. The Committee discussed the possible costs and benefits of this proposal. It was noted that circuit practice concerning the disclosure of panel composition relates to the local culture of each circuit, and that the proposed rule would likely be vigorously opposed by some circuits. The other proposal related to the recently-adopted Rule 32.1; the Committee determined that consideration of any proposed changes to Rule 32.1 should await further experience with the new Rule.