107th Congress, 2d Session – – – – – – – – – – – – – House Document 107–206

AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

COMMUNICATION

FROM

THE CHIEF JUSTICE, THE SUPREME COURT OF THE UNITED STATES

TRANSMITTING

AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE THAT HAVE BEEN ADOPTED BY THE COURT, PURSUANT TO 28 U.S.C. 2072

MAY 3, 2000.—Referred to the Committee on the Judiciary and ordered to be printed

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79–419 WASHINGTON : 2002

SUPREME COURT OF THE UNITED STATES,
Washington, DC, April 29, 2002.

Hon. J. DENNIS HASTERT,
Speaker of the House of Representatives,
Washington, DC.

DEAR MR. SPEAKER: By direction of the Supreme Court of the United States, I have the honor to submit to the Congress the amendments to the Federal Rules of Appellate Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

WILLIAM H. REHNQUIST.

APR 29 2002

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Appellate Procedure be, and they hereby are, amended by including therein amendments to Appellate Rules 1, 4, 5, 21, 24, 25, 26, 26.1, 27, 28, 31, 32, 36, 41, 44, and 45 and new Form 6.

[See infra., pp. __ __ __.]

2. That the foregoing amendments to the Federal Rules of Appellate Procedure shall take effect on December 1, 2002, and shall govern in all proceedings in appellate cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Appellate Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

Rule 1. Scope of Rules; Title

* * * * *

(b) [Abrogated]

* * * * *

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

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

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

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

the judgment or order appealed from is entered.

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

* * * * *

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

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

* * * * *

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

* * * * *

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

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

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

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

* * * * *

(7) **Entry Defined.**

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

(i) if Federal Rule of Civil Procedure 58(a)(1) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a); or

(ii) if Federal Rule of Civil Procedure 58(a)(1) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

- the judgment or order is set forth on a separate document, or
- 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a)(1) does not affect the validity of an appeal from that judgment or order.

(b) Appeal in a Criminal Case.

* * * * *

(5) **Jurisdiction.** The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under

Federal Rule of Criminal Procedure 35(a), nor does the filing of a motion under 35(a) affect the validity of a notice of appeal filed before entry of the order disposing of the motion. The filing of a motion under Federal Rule of Criminal Procedure 35(a) does not suspend the time for filing a notice of appeal from a judgment of conviction.

* * * * *

Rule 5. Appeal by Permission

* * * * *

(c) Form of Papers; Number of Copies. All papers must conform to Rule 32(c)(2). Except by the court's permission, a paper must not exceed 20 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required

by Rule 5(b)(1)(E). An original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case.

* * * * *

Rule 21. Writs of Mandamus and Prohibition, and Other Extraordinary Writs

* * * * *

(d) Form of Papers; Number of Copies. All papers must conform to Rule 32(c)(2). Except by the court's permission, a paper must not exceed 30 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 21(a)(2)(C). An original and 3 copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.

Rule 24. Proceeding in Forma Pauperis

(a) Leave to Proceed in Forma Pauperis.

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

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

(B) claims an entitlement to redress; and

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

(2) **Action on the Motion.** If the district court grants the motion, the party may proceed on appeal without prepaying or giving security for

fees and costs, unless a statute provides otherwise. If the district court denies the motion, it must state its reasons in writing.

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

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

(B) a statute provides otherwise.

* * * * *

Rule 25. Filing and Service

* * * * *

(c) Manner of Service.

(1) Service may be any of the following:

(A) personal, including delivery to a responsible person at the office of counsel;

(B) by mail;

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

(D) by electronic means, if the party being served consents in writing.

(2) If authorized by local rule, a party may use the court's transmission equipment to make electronic service under Rule 25(c)(1)(D).

(3) When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, service on a party must be by a manner at least as expeditious as the manner used to file the paper with the court.

(4) Service by mail or by commercial carrier is complete on mailing or delivery to the carrier. Service by electronic means is complete on transmission, unless the party making service is notified that the paper was not received by the party served.

(d) Proof of Service.

(1) A paper presented for filing must contain either of the following:

(A) an acknowledgment of service by the person served; or

(B) proof of service consisting of a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) their mail or electronic addresses, facsimile numbers, or the addresses of the places of delivery, as appropriate for the manner of service.

* * * * *

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.

* * * * *

(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.

Rule 26.1. Corporate Disclosure Statement

(a) Who Must File. Any nongovernmental corporate party to a proceeding in a court of appeals must file a

statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation.

(b) Time for Filing; Supplemental Filing. A party must file the Rule 26.1(a) statement with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include the statement before the table of contents. A party must supplement its statement whenever the information that must be disclosed under Rule 26.1(a) changes.

(c) Number of Copies. If the Rule 26.1(a) statement is filed before the principal brief, or if a supplemental statement is filed, the party must file an original and

3 copies unless the court requires a different number by local rule or by order in a particular case.

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 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 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 days after service of the response. A reply must not present matters that do not relate to the response.

* * * * *

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

(1) **Format.**

* * * * *

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

* * * * *

Rule 28. Briefs

* * * * *

(j) Citation of Supplemental Authorities. If pertinent and significant authorities come to a party's attention after the party's brief has been filed — or after oral argument but before decision — a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations. The letter must state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 350 words. Any response must be made promptly and must be similarly limited.

Rule 31. Serving and Filing Briefs

* * * * *

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

* * * * *

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

(a) Form of a Brief.

* * * * *

(2) **Cover.** Except for filings by unrepresented parties, the cover of the appellant's brief must be blue; the appellee's, red; an intervenor's or amicus curiae's, green; any reply brief, gray; and any supplemental brief, tan. The front cover of a brief must contain:

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

(B) the name of the court;

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

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

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

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

* * * * *

(7) **Length.**

* * * * *

(C) **Certificate of compliance.**

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

processing system used to prepare the brief. The certificate must state either:

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

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

* * * * *

(c) Form of Other Papers.

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

(2) **Other Papers.** Any other paper, including a petition for panel rehearing and a petition for

hearing or rehearing en banc, and any response to such a petition, must be reproduced in the manner prescribed by Rule 32(a), with the following exceptions:

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

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

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

(e) Local Variation. Every court of appeals must accept documents that comply with the form requirements of this rule. By local rule or order in a

particular case a court of appeals may accept documents that do not meet all of the form requirements of this rule.

Rule 36. Entry of Judgment; Notice

* * * * *

(b) Notice. On the date when judgment is entered, the clerk must serve on all parties a copy of the opinion — or the judgment, if no opinion was written — and a notice of the date when the judgment was entered.

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.

* * * * *

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

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

(b) Constitutional Challenge to State Statute. If a party questions the constitutionality of a statute of a

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

Rule 45. Clerk's Duties

* * * * *

(c) Notice of an Order or Judgment. Upon the entry of an order or judgment, the circuit clerk must immediately serve a notice of entry on each party, with a copy of any opinion, and must note the date of service on the docket. Service on a party represented by counsel must be made on counsel.

* * * * *

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

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

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

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

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

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

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

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

(s)_____

Attorney for _____

Dated: _____

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

November 19, 2001

MEMORANDUM TO THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I have the honor to transmit herewith for consideration of the Court proposed amendments to Rules 1, 4, 5, 21, 24, 25, 26, 26.1, 27, 28, 31, 32, 36, 41, 44, and 45 and new Form 6 of the Federal Rules of Appellate Procedure. The Judicial Conference recommends that these amendments be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering these proposed amendments, I am transmitting an excerpt from the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference and the Report of the Advisory Committee on the Federal Rules of Appellate Procedure.

Leonidas Ralph Mecham
Secretary

Attachments

EXCERPT FROM THE
REPORT OF THE JUDICIAL CONFERENCE
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

* * * * *

AMENDMENTS TO THE
FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules submitted proposed amendments to Rules 1, 4, 5, 21, 24, 25, 26, 26.1, 27, 28, 31, 32, 36, 41, 44, and 45 and new Form 6 with a recommendation that they be approved and transmitted to the Judicial Conference. The amendments were circulated to the bench and bar for comment in August 2000. A scheduled hearing was canceled because no witness requested to testify. The proposed changes, other than amendments to Rule 4(a)(7) and Rule 26.1, are generally "housekeeping."

Rule 1(b) (Rules Do Not Affect Jurisdiction), which provides that the rules "do not extend or limit the jurisdiction of the courts of appeals," would be abrogated as obsolete. Recent legislation (Pub. L. 102-572, 102nd Congress) explicitly authorizes the Supreme Court to prescribe rules that may limit or extend jurisdiction.

Rule 4(a)(7) (Entry Defined) would be amended to address conflicting decisions of the courts of appeals regarding the time to appeal a judgment. If a district court's order or judgment has been entered in the civil docket, but not on a separate document as required by Civil Rule 58, neither the time to bring a post-judgment motion nor the time to appeal ever begins to run. Consequently, judgments improperly entered years ago may still be open to appeal.

The proposed amendments to Rule 4(a)(7), in combination with proposed amendments to Civil Rule 58, cure this problem. First, orders disposing of certain post-judgment motions will no

longer have to be entered on a separate document under the proposed amendments to Civil Rules 54 and 58. Second, if a separate document is required under the civil rules, judgment will be deemed to be entered upon the occurrence of the earlier of the following two events: (1) when the judgment or order is entered in the civil docket and is actually set forth on a separate document; or (2) if not set forth on a separate document, when 150 days have run from entry of the judgment or order in the civil docket. The 90-day "cap" (a 60-day grace period plus 30 days to file an appeal) proposed in the original amendment published for comment was thought too short and might result in a trap for the unwary. The expanded period—150 days before the time to appeal begins to run and then 30 days to file the appeal for a total of 180 days—is believed more suitable because it coincides with the time to move to reopen the time to appeal from a judgment. The amendments to Rule 4(a)(7) would also allow an appellant—for whose benefit the separate document requirement exists—to waive the requirement and bring an appeal without waiting for a judgment or order to be set forth on a separate document. Moreover, the parties should be aware of the duty to inquire when there has been no activity for 150 days.

Under other proposed amendments to **Rule 4 (Appeal as of Right — When Taken)**, a court may extend the time to file an appeal on a showing of excusable neglect or good cause, whether or not the motion for additional time is filed before or during the 30 days provided after the original deadline to file an appeal expires. The amended rule makes clear that the provisions governing the time to appeal a decision in a civil case, and not a criminal case, apply to a writ of error *coram nobis*. The amended rule also provides that motions to correct a sentence under what is currently Criminal Rule 35(c)—and what will become Criminal Rule 35(a) if the restyling of the criminal rules is approved—does not toll the time to appeal a notice of appeal from a judgment of conviction.

The proposed amendments to **Rule 5 (Form of Papers; Number of Copies)** correct a cross-rule reference and limit petitions for permission to appeal to 20 pages.

The proposed amendments to **Rule 21(d) (Writs of Mandamus and Prohibition, and Other Extraordinary Writs)** similarly correct a cross-rule reference and limit petitions for extraordinary relief to 30 pages. The advisory committee agreed with submitted public comments recommending that the page limit on a petition for an extraordinary writ should be increased from 20 pages to 30 pages because it closely resembles a principal brief on the merits.

Rule 24 (Proceeding in Forma Pauperis) would be amended to account for enactment of the Prison Litigation Reform Act of 1995, which requires all prisoners upon filing to pay the full amount of the filing fee or a partial amount with the remainder payable in installments, and which does not permit prisoners who have proceeded in forma pauperis in the district court "automatically" to proceed in forma pauperis on appeal.

The proposed amendments to Rules 25, 26, 36, and 45 set out procedures for providing service and notice by electronic means. They are similar to amendments to the Federal Rules of Civil Procedure that will take effect in December 2001, and they reflect an ongoing effort by the rules committees to maintain uniformity among the different sets of rules when essentially the same procedure is involved.

Rule 25(c)-(d) (Filing and Service) would be amended to permit electronic service of papers on parties who consent to such service in writing and to provide that electronic service is generally complete upon "transmittal." **Rule 26(c) (Computing and Extending Time)** would be amended, consistent with the existing three-day "mail rule," to provide a party with an additional three calendar days to respond to a paper served by electronic means. The three-day provision was included to encourage parties to use electronic service. Providing the additional time also

recognizes that although electronic transmission is usually instantaneous, it can be delayed because of technical problems. Under proposed amendments to **Rule 36(b) (Entry of Judgment; Notice)** and **Rule 45(c) (Clerk's Duties)**, a clerk of court would be permitted to serve a judgment or a notice of entry of an order or judgment electronically on a party who has consented to such service by electronic means.

At the request of the Committee on Codes of Conduct, the advisory rules committees considered changes to the Appellate, Bankruptcy, Civil, and Criminal Rules requiring a nongovernmental corporate party to disclose financial interests as presently required under Appellate Rule 26.1, so that a judge can ascertain whether recusal is necessary. For the present time, the rules committees believed that a rule amendment must be sufficiently flexible to accommodate the preferences of the respective courts on an issue so personal and sensitive to judges. Accordingly, the proposed amendments---like Appellate Rule 26.1—continue to permit courts to require additional disclosure information in an individual case or by local rule.

The proposed amendment of **Rule 26.1 (Disclosure Statement)** is similar to proposed new Civil Rule 7.1 and Criminal Rule 12.4. A nongovernmental corporate party would continue to be required to disclose any parent corporation and any publicly held corporation owning at least 10 percent of its stock. If no such corporation exists, the party will now be required affirmatively to report that fact in its disclosure statement. In addition, a party will be required to supplement the disclosure statement if circumstances change.

The proposed amendments to **Rule 26(a) (Computing and Extending Time)** would eliminate the disparity in counting days for deadline purposes between the appellate rules and the civil and criminal rules. It would exclude intermediate Saturdays, Sundays, and legal holidays when computing deadlines under 11 days but count them when computing deadlines of 11 days or

more, similar to the computation methods in the civil and criminal rules. The existing appellate rule accounts for "intermediate" days only for deadlines of fewer than 7 days.

The parenthetical in **Rule 4(a)(4) (Appeal as of Right—When Taken)**, which cross references the time computation method set forth in the civil rules, is deleted as unnecessary in light of the proposed change to Rule 26. Proposed amendments to **Rule 27(a) (Motions)** would change the time to respond to a motion from 10 to 8 days and the time to reply to a response to a motion from 7 to 5 days to account for the additional time provided by including intermediate weekends and holidays in accordance with the computation changes proposed in Rule 26. The time deadline contained in **Rule 41 (Mandate: Contents; Issuance and Effective Date; Stay)** to issue a mandate would be clarified to maintain the existing 7 calendar-day deadline.

The proposed amendments to **Rule 27(d) (Motions)** and **Rule 32 (Form of Briefs, Appendices, and Other Papers)** would specify the color of covers of certain papers filed with the court.

The proposed amendments to **Rule 28(j) (Citation of Supplemental Authorities)** would limit the body of a letter containing supplemental authorities to 350 words and remove the prohibition on "argument." The word limit was increased from 250 words originally proposed by the advisory committee to accommodate public comment expressing concern that the limit was too restrictive.

Rule 31 (Serving and Filing Briefs) would be amended to clarify that copies of briefs must be served on all parties, including unrepresented parties.

The other proposed amendments to **Rule 32 (Form of Briefs, Appendices, and Other Papers)** provide that new Form 6, in which a party certifies that a brief complies with Rule 32's type-volume limitation, must be regarded as sufficient to meet the existing certification

requirement of Rule 32. They also provide that every brief, motion, or other paper filed with the court must be signed by the attorney or unrepresented party who files it.

The proposed amendments to **Rule 44 (Case Involving a Constitutional Question When the United States or the Relevant State is Not a Party)** require a party to give written notice to the clerk of court if it challenges the constitutionality of a state statute in a case in which the state is not a party. The amendments also require the clerk to notify the state's attorney general of the challenge.

The Committee concurred with the advisory committee's recommendations. The proposed amendments to the Federal Rules of Appellate Procedure and new Form 6 are in Appendix A together with an excerpt from the advisory committee report.

> **Recommendation**: That the Judicial Conference approve the proposed amendments to Appellate Rules 1, 4, 5, 21, 24, 25, 26, 26.1, 27, 28, 31, 32, 36, 41, 44, and 45 and new Form 6 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

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

ANTHONY J. SCIRICA
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

WILL L. GARWOOD
APPELLATE RULES

A. THOMAS SMALL
BANKRUPTCY RULES

DAVID F. LEVI
CIVIL RULES

W. EUGENE DAVIS
CRIMINAL RULES

MILTON I. SHADUR
EVIDENCE RULES

MEMORANDUM

DATE: May 11, 2001

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

FROM: Judge Will Garwood, 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 11, 2001, in New Orleans, Louisiana. At that meeting, the Advisory Committee approved a number of proposed amendments that had been published for comment, declined to approve one such proposed amendment, removed four items from the Committee's study agenda, and discussed but took no action on several other items. Following the April 11 meeting, the Committee took two minor actions by mail ballot; those two actions are identified below.

Detailed information about the Committee's activities can be found in the minutes of the April 11 meeting and in the Committee's docket, both of which are attached to this report.

II. Action Items

Several proposed amendments to the Federal Rules of Appellate Procedure ("FRAP") — as well as several complementary proposed amendments to the Federal Rules of Civil Procedure ("FRCP") — were published for comment in August 2000. The Committee received 20 written comments; no commentator asked to testify in person about the proposed amendments. The Committee approved all but one of the proposed amendments for submission to the Standing Committee. Modifications were made to many of the proposed amendments and Committee Notes, but, in the Committee's view, none of those modifications is so substantial as to require republication.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE*

Rule 1. Scope of Rules; Title

1 * * * * *

2 **(b)** ~~**Rules Do Not Affect Jurisdiction.** These rules do not~~

3 ~~extend or limit the jurisdiction of the courts of appeals.~~

4 [Abrogated]

5 * * * * *

Committee Note

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

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

§ 1292 are unquestionably jurisdictional statutes, and thus, as soon as FRAP is amended to define finality for purposes of the former or to authorize interlocutory appeals not provided for by the latter, FRAP will "extend or limit the jurisdiction of the courts of appeals," and subdivision (b) will become obsolete. For that reason, subdivision (b) has been abrogated.

Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note.

Rule 4. Appeal as of Right — When Taken

1 **(a) Appeal in a Civil Case.**

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

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

8 (B) When the United States or its officer or
9 agency is a party, the notice of appeal may be

10 filed by any party within 60 days after the

11 judgment or order appealed from is entered.

12 (C) An appeal from an order granting or denying

13 an application for a writ of error *coram nobis*

14 is an appeal in a civil case for purposes of

15 Rule 4(a).

16 * * * * *

Committee Note

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

Subsequent to the enactment of Fed. R. Civ. P. 60(b) and 28 U.S.C. § 2255, the Supreme Court has recognized the continued

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

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

Rule 4(a)(1)(C) applies only to motions that are in substance, and not merely in form, applications for writs of error *coram nobis*. Litigants may bring and label as applications for a writ of error *coram nobis* what are in reality motions for a new trial under Fed. R. Crim.

P. 33 or motions for correction or reduction of a sentence under Fed. R. Crim. P. 35. In such cases, the time limitations of Rule 4(b), and not those of Rule 4(a), should be enforced.

Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note.

Rule 4. Appeal as of Right — When Taken

1 **(a) Appeal in a Civil Case.**

2 * * * * *

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

4 (A) The district court may extend the time to file

5 a notice of appeal if:

6 (i) a party so moves no later than 30 days

7 after the time prescribed by this Rule

8 4(a) expires; and

9 (ii) <u>regardless of whether its motion is filed</u>

10 <u>before or during the 30 days after the</u>

11 time prescribed by this Rule 4(a)

12 expires, that party shows excusable

13 neglect or good cause.

14 * * * * *

Committee Note

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

Despite the text of Rule 4(a)(5)(A), most of the courts of appeals have held that the good cause standard applies only to motions brought prior to the expiration of the original deadline and that the excusable neglect standard applies only to motions brought during the 30 days following the expiration of the original deadline. *See Pontarelli v. Stone*, 930 F.2d 104, 109-10 (1st Cir. 1991) (collecting cases from the Second, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits). These courts have relied heavily upon the Advisory Committee Note to the 1979 amendment to Rule 4(a)(5). But the Advisory Committee Note refers to a draft of the 1979

amendment that was ultimately rejected. The rejected draft directed that the good cause standard apply only to motions filed prior to the expiration of the original deadline. Rule 4(a)(5), as actually amended, did not. *See* 16A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3950.3, at 148-49 (2d ed. 1996).

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

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

The good cause and excusable neglect standards have "different domains." *Lorenzen v. Employees Retirement Plan*, 896 F.2d 228, 232 (7th Cir. 1990). They are not interchangeable, and one is not inclusive of the other. The excusable neglect standard applies in situations in which there is fault; in such situations, the need for an extension is usually occasioned by something within the control of the movant. The good cause standard applies in situations in which

there is no fault — excusable or otherwise. In such situations, the need for an extension is usually occasioned by something that is not within the control of the movant.

Thus, the good cause standard can apply to motions brought during the 30 days following the expiration of the original deadline. If, for example, the Postal Service fails to deliver a notice of appeal, a movant might have good cause to seek a post-expiration extension. It may be unfair to make such a movant prove that its "neglect" was excusable, given that the movant may not have been neglectful at all. Similarly, the excusable neglect standard can apply to motions brought prior to the expiration of the original deadline. For example, a movant may bring a pre-expiration motion for an extension of time when an error committed by the movant makes it unlikely that the movant will be able to meet the original deadline.

Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment. The stylistic changes to the Committee Note suggested by Judge Newman were adopted. In addition, two paragraphs were added at the end of the Committee Note to clarify the difference between the good cause and excusable neglect standards.

Rule 4. Appeal as of Right — When Taken

1 **(a) Appeal in a Civil Case.**

2 * * * * *

3 (7) **Entry Defined.**

4 (A) A judgment or order is entered for purposes
5 of this Rule 4(a):
6 (i) if Federal Rule of Civil Procedure
7 58(a)(1) does not require a separate
8 document, when ~~it~~ the judgment or
9 order is entered in ~~compliance with~~
10 ~~Rules 58 and~~ the civil docket under ~~of~~
11 ~~the~~ Federal Rule~~s~~ of Civil Procedure
12 79(a); or
13 (ii) if Federal Rule of Civil Procedure
14 58(a)(1) requires a separate document,
15 when the judgment or order is entered
16 in the civil docket under Federal Rule of
17 Civil Procedure 79(a) and when the
18 earlier of these events occurs:
19 • the judgment or order is set forth
20 on a separate document, or

21 • 150 days have run from entry of
22 the judgment or order in the civil
23 docket under Federal Rule of Civil
24 Procedure 79(a).
25 (B) A failure to set forth a judgment or order on
26 a separate document when required by
27 Federal Rule of Civil Procedure 58(a)(1) does
28 not affect the validity of an appeal from that
29 judgment or order.
30 * * * * *

Committee Note

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

1. The first circuit split addressed by the amendments to Rule 4(a)(7) and Fed. R. Civ. P. 58 concerns the extent to which orders that dispose of post-judgment motions must be set forth on separate documents. Under Rule 4(a)(4)(A), the filing of certain post-

judgment motions tolls the time to appeal the underlying judgment until the "entry" of the order disposing of the last such remaining motion. Courts have disagreed about whether such an order must be set forth on a separate document before it is treated as "entered." This disagreement reflects a broader dispute among courts about whether Rule 4(a)(7) independently imposes a separate document requirement (a requirement that is distinct from the separate document requirement that is imposed by the Federal Rules of Civil Procedure ("FRCP")) or whether Rule 4(a)(7) instead incorporates the separate document requirement as it exists in the FRCP. Further complicating the matter, courts in the former "camp" disagree among themselves about the scope of the separate document requirement that they interpret Rule 4(a)(7) as imposing, and courts in the latter "camp" disagree among themselves about the scope of the separate document requirement imposed by the FRCP.

Rule 4(a)(7) has been amended to make clear that it simply incorporates the separate document requirement as it exists in Fed. R. Civ. P. 58. If Fed. R. Civ. P. 58 does not require that a judgment or order be set forth on a separate document, then neither does Rule 4(a)(7); the judgment or order will be deemed entered for purposes of Rule 4(a) when it is entered in the civil docket. If Fed. R. Civ. P. 58 requires that a judgment or order be set forth on a separate document, then so does Rule 4(a)(7); the judgment or order will not be deemed entered for purposes of Rule 4(a) until it is so set forth and entered in the civil docket (with one important exception, described below).

In conjunction with the amendment to Rule 4(a)(7), Fed. R. Civ. P. 58 has been amended to provide that orders disposing of the post-judgment motions listed in new Fed. R. Civ. P. 58(a)(1) (which post-judgment motions include, but are not limited to, the post-judgment motions that can toll the time to appeal under Rule 4(a)(4)(A)) do not have to be set forth on separate documents. *See* Fed. R. Civ. P.

58(a)(1). Thus, such orders are entered for purposes of Rule 4(a) when they are entered in the civil docket pursuant to Fed. R. Civ. P. 79(a). *See* Rule 4(a)(7)(A)(1).

2. The second circuit split addressed by the amendments to Rule 4(a)(7) and Fed. R. Civ. P. 58 concerns the following question: When a judgment or order is required to be set forth on a separate document under Fed. R. Civ. P. 58 but is not, does the time to appeal the judgment or order — or the time to bring post-judgment motions, such as a motion for a new trial under Fed. R. Civ. P. 59 — ever begin to run? According to every circuit except the First Circuit, the answer is "no." The First Circuit alone holds that parties will be deemed to have waived their right to have a judgment or order entered on a separate document three months after the judgment or order is entered in the civil docket. *See Fiore v. Washington County Community Mental Health Ctr.*, 960 F.2d 229, 236 (1st Cir. 1992) (en banc). Other circuits have rejected this cap as contrary to the relevant rules. *See, e.g.*, *United States v. Haynes*, 158 F.3d 1327, 1331 (D.C. Cir. 1998); *Hammack v. Baroid Corp.*, 142 F.3d 266, 269-70 (5th Cir. 1998); *Rubin v. Schottenstein, Zox & Dunn*, 110 F.3d 1247, 1253 n.4 (6th Cir. 1997), *vacated on other grounds*, 143 F.3d 263 (6th Cir. 1998) (en banc). However, no court has questioned the wisdom of imposing such a cap as a matter of policy.

Both Rule 4(a)(7)(A) and Fed. R. Civ. P. 58 have been amended to impose such a cap. Under the amendments, a judgment or order is generally treated as entered when it is entered in the civil docket pursuant to Fed. R. Civ. P. 79(a). There is one exception: When Fed. R. Civ. P. 58(a)(1) requires the judgment or order to be set forth on a separate document, that judgment or order is not treated as entered until it is set forth on a separate document (in addition to being entered in the civil docket) or until the expiration of 150 days after its entry in the civil docket, whichever occurs first. This cap will ensure

that parties will not be given forever to appeal (or to bring a post-judgment motion) when a court fails to set forth a judgment or order on a separate document in violation of Fed. R. Civ. P. 58(a)(1).

3. The third circuit split — this split addressed only by the amendment to Rule 4(a)(7) — concerns whether the appellant may waive the separate document requirement over the objection of the appellee. In *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 387 (1978) (per curiam), the Supreme Court held that the "parties to an appeal may waive the separate-judgment requirement of Rule 58." Specifically, the Supreme Court held that when a district court enters an order and "clearly evidence[s] its intent that the . . . order . . . represent[s] the final decision in the case," the order is a "final decision" for purposes of 28 U.S.C. § 1291, even if the order has not been set forth on a separate document for purposes of Fed. R. Civ. P. 58. *Id.* Thus, the parties can choose to appeal without waiting for the order to be set forth on a separate document.

Courts have disagreed about whether the consent of all parties is necessary to waive the separate document requirement. Some circuits permit appellees to object to attempted *Mallis* waivers and to force appellants to return to the trial court, request that judgment be set forth on a separate document, and appeal a second time. *See, e.g.*, *Selletti v. Carey*, 173 F.3d 104, 109-10 (2d Cir. 1999); *Williams v. Borg*, 139 F.3d 737, 739-40 (9th Cir. 1998); *Silver Star Enters., Inc. v. M/V Saramacca*, 19 F.3d 1008, 1013 (5th Cir. 1994). Other courts disagree and permit *Mallis* waivers even if the appellee objects. *See, e.g.*, *Haynes*, 158 F.3d at 1331; *Miller v. Artistic Cleaners*, 153 F.3d 781, 783-84 (7th Cir. 1998); *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1006 n.8 (3d Cir. 1994).

New Rule 4(a)(7)(B) is intended both to codify the Supreme Court's holding in *Mallis* and to make clear that the decision whether

to waive the requirement that the judgment or order be set forth on a separate document is the appellant's alone. It is, after all, the appellant who needs a clear signal as to when the time to file a notice of appeal has begun to run. If the appellant chooses to bring an appeal without waiting for the judgment or order to be set forth on a separate document, then there is no reason why the appellee should be able to object. All that would result from honoring the appellee's objection would be delay.

4. The final circuit split addressed by the amendment to Rule 4(a)(7) concerns the question whether an appellant who chooses to waive the separate document requirement must appeal within 30 days (60 days if the government is a party) from the entry in the civil docket of the judgment or order that should have been set forth on a separate document but was not. In *Townsend v. Lucas*, 745 F.2d 933 (5th Cir. 1984), the district court dismissed a 28 U.S.C. § 2254 action on May 6, 1983, but failed to set forth the judgment on a separate document. The plaintiff appealed on January 10, 1984. The Fifth Circuit dismissed the appeal, reasoning that, if the plaintiff waived the separate document requirement, then his appeal would be from the May 6 order, and if his appeal was from the May 6 order, then it was untimely under Rule 4(a)(1). The Fifth Circuit stressed that the plaintiff could return to the district court, move that the judgment be set forth on a separate document, and appeal from that judgment within 30 days. *Id.* at 934. Several other cases have embraced the *Townsend* approach. *See, e.g.*, *Armstrong v. Ahitow*, 36 F.3d 574, 575 (7th Cir. 1994) (per curiam); *Hughes v. Halifax County Sch. Bd.*, 823 F.2d 832, 835-36 (4th Cir. 1987); *Harris v. McCarthy*, 790 F.2d 753, 756 n.1 (9th Cir. 1986).

Those cases are in the distinct minority. There are numerous cases in which courts have heard appeals that were not filed within 30 days (60 days if the government was a party) from the judgment or

order that should have been set forth on a separate document but was not. *See, e.g.*, *Haynes*, 158 F.3d at 1330-31; *Clough v. Rush*, 959 F.2d 182, 186 (10th Cir. 1992); *McCalden v. California Library Ass'n*, 955 F.2d 1214, 1218-19 (9th Cir. 1990). In the view of these courts, the remand in *Townsend* was "precisely the purposeless spinning of wheels abjured by the Court in the [*Mallis*] case." 15B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3915, at 259 n.8 (3d ed. 1992).

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

Changes Made After Publication and Comments

No changes were made to the text of proposed Rule 4(a)(7)(B) or to the third or fourth numbered sections of the Committee Note, except that, in several places, references to a judgment being "entered" on a separate document were changed to references to a judgment being "set forth" on a separate document. This was to maintain stylistic consistency. The appellate rules and the civil rules consistently refer to "entering" judgments on the civil docket and to "setting forth" judgments on separate documents.

Two major changes were made to the text of proposed Rule 4(a)(7)(A) — one substantive and one stylistic. The substantive change was to increase the "cap" from 60 days to 150 days. The Appellate Rules Committee and the Civil Rules Committee had to balance two concerns that are implicated whenever a court fails to enter its final decision on a separate document. On the one hand, potential appellants need a clear signal that the time to appeal has

begun to run, so that they do not unknowingly forfeit their rights. On the other hand, the time to appeal cannot be allowed to run forever. A party who receives no notice whatsoever of a judgment has only 180 days to move to reopen the time to appeal from that judgment. *See* Rule 4(a)(6)(A). It hardly seems fair to give a party who *does* receive notice of a judgment an unlimited amount of time to appeal, merely because that judgment was not set forth on a separate piece of paper. Potential appellees and the judicial system need *some* limit on the time within which appeals can be brought.

The 150-day cap properly balances these two concerns. When an order is not set forth on a separate document, what signals litigants that the order is final and appealable is a lack of further activity from the court. A 60-day period of inactivity is not sufficiently rare to signal to litigants that the court has entered its last order. By contrast, 150 days of inactivity is much less common and thus more clearly signals to litigants that the court is done with their case.

The major stylistic change to Rule 4(a)(7) requires some explanation. In the published draft, proposed Rule 4(a)(7)(A) provided that "[a] judgment or order is entered for purposes of this Rule 4(a) when it is entered for purposes of Rule 58(b) of the Federal Rules of Civil Procedure." In other words, Rule 4(a)(7)(A) told readers to look to FRCP 58(b) to ascertain when a judgment is entered for purposes of starting the running of the time to appeal. Sending appellate lawyers to the civil rules to discover when time began to run for purposes of the appellate rules was itself somewhat awkward, but it was made more confusing by the fact that, when readers went to proposed FRCP 58(b), they found this introductory clause: "Judgment is entered for purposes of Rules 50, 52, 54(d)(2)(B), 59, 60, and 62 when . . . ."

This introductory clause was confusing for both appellate lawyers and trial lawyers. It was confusing for appellate lawyers because Rule 4(a)(7) informed them that FRCP 58(b) would tell them when the time begins to run for purposes of the *appellate* rules, but when they got to FRCP 58(b) they found a rule that, by its terms, dictated only when the time begins to run for purposes of certain *civil* rules. The introductory clause was confusing for trial lawyers because FRCP 58(b) described when judgment is entered for some purposes under the civil rules, but then was completely silent about when judgment is entered for other purposes.

To avoid this confusion, the Civil Rules Committee, on the recommendation of the Appellate Rules Committee, changed the introductory clause in FRCP 58(b) to read simply: "Judgment is entered for purposes of *these Rules* when . . . ." In addition, Rule 4(a)(7)(A) was redrafted[1] so that the triggering events for the running of the time to appeal (entry in the civil docket, and being set forth on a separate document or passage of 150 days) were incorporated directly into Rule 4(a)(7), rather than indirectly through a reference to FRCP 58(b). This eliminates the need for appellate lawyers to examine Rule 58(b) and any chance that Rule 58(b)'s introductory clause (even as modified) might confuse them.

We do not believe that republication of Rule 4(a)(7) or FRCP 58 is necessary. In *substance*, rewritten Rule 4(a)(7)(A) and FRCP 58(b) operate identically to the published versions, except that the 60-day cap has been replaced with a 150-day cap — a change that was suggested by some of the commentators and that makes the cap more forgiving.

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[1] A redraft of Rule 4(a)(7) was faxed to members of the Appellate Rules Committee two weeks after our meeting in New Orleans. The Committee consented to the redraft without objection.

Rule 4. Appeal as of Right — When Taken

1 * * * * *

2 **(b) Appeal in a Criminal Case.**

3 (5) **Jurisdiction.** The filing of a notice of appeal
4 under this Rule 4(b) does not divest a district court
5 of jurisdiction to correct a sentence under Federal
6 Rule of Criminal Procedure 35(a), nor does the
7 filing of a motion under 35(a) affect the validity of
8 a notice of appeal filed before entry of the order
9 disposing of the motion. The filing of a motion
10 under Federal Rule of Criminal Procedure 35(a)
11 does not suspend the time for filing a notice of
12 appeal from a judgment of conviction.

13 * * * * *

Committee Note

Subdivision (b)(5). Federal Rule of Criminal Procedure 35(a) permits a district court, acting within 7 days after the imposition of sentence, to correct an erroneous sentence in a criminal case. Some courts have held that the filing of a motion for correction of a

sentence suspends the time for filing a notice of appeal from the judgment of conviction. *See, e.g.*, *United States v. Carmouche*, 138 F.3d 1014, 1016 (5th Cir. 1998) (per curiam); *United States v. Morillo*, 8 F.3d 864, 869 (1st Cir. 1993). Those courts establish conflicting timetables for appealing a judgment of conviction after the filing of a motion to correct a sentence. In the First Circuit, the time to appeal is suspended only for the period provided by Fed. R. Crim. P. 35(a) for the district court to correct a sentence; the time to appeal begins to run again once 7 days have passed after sentencing, even if the motion is still pending. By contrast, in the Fifth Circuit, the time to appeal does not begin to run again until the district court actually issues an order disposing of the motion.

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

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

Changes Made After Publication and Comments

The reference to Federal Rule of Criminal Procedure 35(c) was changed to Rule 35(a) to reflect the pending amendment of Rule 35.

The proposed amendment to Criminal Rule 35, if approved, will take effect at the same time that the proposed amendment to Appellate Rule 4 will take effect, if approved.

Rule 5. Appeal by Permission

1 * * * * *

2 **(c) Form of Papers; Number of Copies.** All papers must
3 conform to Rule ~~32(a)(1)~~ 32(c)(2). Except by the
4 court's permission, a paper must not exceed 20 pages,
5 exclusive of the disclosure statement, the proof of
6 service, and the accompanying documents required by
7 Rule 5(b)(1)(E). An original and 3 copies must be filed
8 unless the court requires a different number by local rule
9 or by order in a particular case.

10 * * * * *

Committee Note

Subdivision (c). A petition for permission to appeal, a cross-petition for permission to appeal, and an answer to a petition or cross-petition for permission to appeal are all "other papers" for purposes of Rule 32(c)(2), and all of the requirements of Rule 32(a) apply to those papers, except as provided in Rule 32(c)(2). During the 1998 restyling of the Federal Rules of Appellate Procedure, Rule 5(c) was

inadvertently changed to suggest that only the requirements of Rule 32(a)(1) apply to such papers. Rule 5(c) has been amended to correct that error.

Rule 5(c) has been further amended to limit the length of papers filed under Rule 5.

Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note.

Rule 15(f)

The Committee proposed to add a new Rule 15(f) to provide that when, under governing law, an agency order is rendered non-reviewable by the filing of a petition for rehearing or similar petition with the agency, any petition for review or application to enforce that non-reviewable order would be held in abeyance and become effective when the agency disposes of the last such review-blocking petition. Proposed Rule 15(f) was modeled after Rule 4(a)(4)(B)(i) and was intended to align the treatment of premature petitions for review of agency orders with the treatment of premature notices of appeal of judicial decisions. The Committee voted to defer action on this proposal in light of the strong opposition of the Advisory Committee on Procedures for the D.C. Circuit. The Committee hopes to meet with the chief judge and clerk of the D.C. Circuit about those objections.

Rule 21. Writs of Mandamus and Prohibition, and Other Extraordinary Writs

1 * * * * *

2 **(d) Form of Papers; Number of Copies.** All papers must
3 conform to Rule ~~32(a)(1)~~ 32(c)(2). Except by the
4 court's permission, a paper must not exceed 30 pages,
5 exclusive of the disclosure statement, the proof of
6 service, and the accompanying documents required by
7 Rule 21(a)(2)(C). An original and 3 copies must be
8 filed unless the court requires the filing of a different
9 number by local rule or by order in a particular case.

Committee Note

Subdivision (d). A petition for a writ of mandamus or prohibition, an application for another extraordinary writ, and an answer to such a petition or application are all "other papers" for purposes of Rule 32(c)(2), and all of the requirements of Rule 32(a) apply to those papers, except as provided in Rule 32(c)(2). During the 1998 restyling of the Federal Rules of Appellate Procedure, Rule 21(d) was inadvertently changed to suggest that only the requirements of Rule 32(a)(1) apply to such papers. Rule 21(d) has been amended to correct that error.

Rule 21(d) has been further amended to limit the length of papers filed under Rule 21.

Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note, except that the page limit was increased from 20 pages to 30 pages. The Committee was persuaded by some commentators that petitions for extraordinary writs closely resemble principal briefs on the merits and should be allotted more than 20 pages.

Rule 24. Proceeding in Forma Pauperis

1 **(a) Leave to Proceed in Forma Pauperis.**

2 (1) **Motion in the District Court.** Except as stated in
3 Rule 24(a)(3), a party to a district-court action who
4 desires to appeal in forma pauperis must file a
5 motion in the district court. The party must attach
6 an affidavit that:
7 (A) shows in the detail prescribed by Form 4 of
8 the Appendix of Forms the party's inability to
9 pay or to give security for fees and costs;

10 (B) claims an entitlement to redress; and

11 (C) states the issues that the party intends to

12 present on appeal.

13 (2) **Action on the Motion.** If the district court grants

14 the motion, the party may proceed on appeal

15 without prepaying or giving security for fees and

16 costs, unless a statute provides otherwise. If the

17 district court denies the motion, it must state its

18 reasons in writing.

19 (3) **Prior Approval.** A party who was permitted to

20 proceed in forma pauperis in the district-court

21 action, or who was determined to be financially

22 unable to obtain an adequate defense in a criminal

23 case, may proceed on appeal in forma pauperis

24 without further authorization, unless:

25 (A) the district court — before or after the notice

26 of appeal is filed — certifies that the appeal

27 is not taken in good faith or finds that the
28 party is not otherwise entitled to proceed in
29 forma pauperis~~. In that event, the district~~
30 ~~court must~~ and states in writing its reasons
31 for the certification or finding; or
32 (B) a statute provides otherwise.
33 * * * * *

Committee Note

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

Rule 24(a)(2) has been amended to resolve this conflict. Recognizing that future legislation regarding prisoner litigation is likely, the Committee has not attempted to incorporate into Rule 24 all of the requirements of the current version of 28 U.S.C. § 1915. Rather, the Committee has amended Rule 24(a)(2) to clarify that the

rule is not meant to conflict with anything required by the PLRA or any other statute.

Subdivision (a)(3). Rule 24(a)(3) has also been amended to eliminate an apparent conflict with the PLRA. Rule 24(a)(3) has provided that a party who was permitted to proceed in forma pauperis in the district court may continue to proceed in forma pauperis in the court of appeals without further authorization, subject to certain conditions. The PLRA, by contrast, provides that a prisoner who was permitted to proceed in forma pauperis in the district court and who wishes to continue to proceed in forma pauperis on appeal may not do so "automatically," but must seek permission. *See, e.g.*, *Morgan v. Haro*, 112 F.3d 788, 789 (5th Cir. 1997) ("A prisoner who seeks to proceed IFP on appeal must obtain leave to so proceed despite proceeding IFP in the district court.").

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

Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note, except that "a statute provides otherwise" was substituted in place of "the law requires otherwise" in the text of the rule and conforming changes (as well as a couple of minor stylistic changes) were made to the Committee Note.

Rule 25. Filing and Service

1 * * * * *

2 **(c) Manner of Service.**

3 (1) Service may be any of the following:

4 (A) personal, including delivery to a responsible

5 person at the office of counsel;

6 (B) by mail, ~~or~~ ;

7 (C) by third-party commercial carrier for delivery

8 within 3 calendar days. ; or

9 (D) by electronic means, if the party being served

10 consents in writing.

11 (2) If authorized by local rule, a party may use the

12 court's transmission equipment to make electronic

13 service under Rule 25(c)(1)(D).

14 (3) When reasonable considering such factors as the

15 immediacy of the relief sought, distance, and cost,

16 service on a party must be by a manner at least as

17 expeditious as the manner used to file the paper
18 with the court.
19 (4) ~~Personal service includes delivery of the copy to a~~
20 ~~responsible person at the office of counsel.~~
21 Service by mail or by commercial carrier is
22 complete on mailing or delivery to the carrier.
23 Service by electronic means is complete on
24 transmission, unless the party making service is
25 notified that the paper was not received by the
26 party served.
27 * * * * *

Committee Note

Rule 25(a)(2)(D) presently authorizes the courts of appeals to permit papers to be *filed* by electronic means. Rule 25 has been amended in several respects to permit papers also to be *served* electronically. In addition, Rule 25(c) has been reorganized and subdivided to make it easier to understand.

Subdivision (c)(1)(D). New subdivision (c)(1)(D) has been added to permit service to be made electronically, such as by e-mail or fax. No party may be served electronically, either by the clerk or

by another party, unless the party has consented in writing to such service.

A court of appeals may not, by local rule, forbid the use of electronic service on a party that has consented to its use. At the same time, courts have considerable discretion to use local rules to regulate electronic service. Difficult and presently unforeseeable questions are likely to arise as electronic service becomes more common. Courts have the flexibility to use their local rules to address those questions. For example, courts may use local rules to set forth specific procedures that a party must follow before the party will be deemed to have given written consent to electronic service.

Parties also have the flexibility to define the terms of their consent; a party's consent to electronic service does not have to be "all-or-nothing." For example, a party may consent to service by facsimile transmission, but not by electronic mail; or a party may consent to electronic service only if "courtesy" copies of all transmissions are mailed within 24 hours; or a party may consent to electronic service of only documents that were created with Corel WordPerfect.

Subdivision (c)(2). The courts of appeals are authorized under Rule 25(a)(2)(D) to permit papers to be filed electronically. Technological advances may someday make it possible for a court to forward an electronically filed paper to all parties automatically or semi-automatically. When such court-facilitated service becomes possible, courts may decide to permit parties to use the courts' transmission facilities to serve electronically filed papers on other parties who have consented to such service. Court personnel would use the court's computer system to forward the papers, but the papers would be considered served by the filing parties, just as papers that are carried from one address to another by the United States Postal Service are considered served by the sending parties. New

subdivision (c)(2) has been added so that the courts of appeals may use local rules to authorize such use of their transmission facilities, as well as to address the many questions that court-facilitated electronic service is likely to raise.

Subdivision (c)(4). The second sentence of new subdivision (c)(4) has been added to provide that electronic service is complete upon transmission. Transmission occurs when the sender performs the last act that he or she must perform to transmit a paper electronically; typically, it occurs when the sender hits the "send" or "transmit" button on an electronic mail program. There is one exception to the rule that electronic service is complete upon transmission: If the sender is notified — by the sender's e-mail program or otherwise — that the paper was not received, service is not complete, and the sender must take additional steps to effect service. A paper has been "received" by the party on which it has been served as long as the party has the ability to retrieve it. A party cannot defeat service by choosing not to access electronic mail on its server.

Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment. A paragraph was added to the Committee Note to clarify that consent to electronic service is not an "all-or-nothing" matter.

Rule 25. Filing and Service

1 * * * * *

2 **(d) Proof of Service.**

3 (1) A paper presented for filing must contain either of the
4 following:
5 (A) an acknowledgment of service by the person served;
6 or
7 (B) proof of service consisting of a statement by the
8 person who made service certifying:
9 (i) the date and manner of service;
10 (ii) the names of the persons served; and
11 (iii) their mail~~ing~~ or electronic addresses, facsimile
12 numbers, or the addresses of the places of
13 delivery, as appropriate for the manner of
14 service.
15 * * * * *

Committee Note

Subdivision (d)(1)(B)(iii). Subdivision (d)(1)(B)(iii) has been amended to require that, when a paper is served electronically, the proof of service of that paper must include the electronic address or facsimile number to which the paper was transmitted.

Changes Made After Publication and Comments

The text of the proposed amendment was changed to refer to "electronic" addresses (instead of to "e-mail" addresses), to include "facsimile numbers," and to add the concluding phrase "as appropriate for the manner of service." Conforming changes were made to the Committee Note.

Rule 26. Computing and Extending Time

1 * * * * *

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

Subdivision (c). Rule 26(c) has been amended to provide that when a paper is served on a party by electronic means, and that party is required or permitted to respond to that paper within a prescribed period, 3 calendar days are added to the prescribed period. Electronic service is usually instantaneous, but sometimes it is not, because of technical problems. Also, if a paper is electronically transmitted to a party on a Friday evening, the party may not realize that he or she has been served until two or three days later. Finally, extending the "3-day rule" to electronic service will encourage parties to consent to such service under Rule 25(c).

Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note.

Rule 36. Entry of Judgment; Notice

1 * * * * *

2 **(b) Notice.** On the date when judgment is entered, the clerk

3 must ~~mail to~~ serve on all parties a copy of the opinion —

4 or the judgment, if no opinion was written — and a

5 notice of the date when the judgment was entered.

Subdivision (b). Subdivision (b) has been amended so that the clerk may use electronic means to serve a copy of the opinion or judgment or to serve notice of the date when judgment was entered upon parties who have consented to such service.

Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note.

Rule 45. Clerk's Duties

1 * * * * *

2 **(c) Notice of an Order or Judgment.** Upon the entry of an
3 order or judgment, the circuit clerk must immediately
4 serve ~~by mail~~ a notice of entry on each party~~ to the~~
5 ~~proceeding~~, with a copy of any opinion, and must note
6 the ~~mailing~~ date of service on the docket. Service on a
7 party represented by counsel must be made on counsel.

8 * * * * *

Committee Note

Subdivision (c). Subdivision (c) has been amended so that the clerk may use electronic means to serve notice of entry of an order or judgment upon parties who have consented to such service.

Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note.

Rule 26. Computing and Extending Time

1 **(a) Computing Time.** The following rules apply in
2 computing any period of time specified in these rules or
3 in any local rule, court order, or applicable statute:
4 (1) Exclude the day of the act, event, or default that
5 begins the period.
6 (2) Exclude intermediate Saturdays, Sundays, and
7 legal holidays when the period is less than ~~7~~ 11
8 days, unless stated in calendar days.
9 * * * * *

Committee Note

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

Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note.

Rule 4. Appeal as of Right — When Taken

1 **(a) Appeal in a Civil Case.**

2 * * * * *

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

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

10 * * * * *

11 (vi) for relief under Rule 60 if the motion is
12 filed no later than 10 days ~~(computed~~
13 ~~using Federal Rule of Civil Procedure~~
14 ~~6(a))~~ after the judgment is entered.

15 * * * * *

Committee Note

Subdivision (a)(4)(A)(vi). Rule 4(a)(4)(A)(vi) has been amended to remove a parenthetical that directed that the 10-day deadline be "computed using Federal Rule of Civil Procedure 6(a)." That parenthetical has become superfluous because Rule 26(a)(2) has

been amended to require that all deadlines under 11 days be calculated as they are under Fed. R. Civ. P. 6(a).

Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note.

Rule 27. Motions

1 **(a) In General.**

2 * * * * *

3 (3) **Response.**

4 (A) **Time to file.** Any party may file a response

5 to a motion; Rule 27(a)(2) governs its

6 contents. The response must be filed within

7 ~~10~~ 8 days after service of the motion unless

8 the court shortens or extends the time. A

9 motion authorized by Rules 8, 9, 18, or 41

10 may be granted before the ~~10~~8-day period

11 runs only if the court gives reasonable notice

12 to the parties that it intends to act sooner.

13 * * * * *

Committee Note

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

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

Permitting parties to take two weeks or more to respond to motions would introduce significant and unwarranted delay into appellate proceedings. For that reason, the 10-day deadline in subdivision (a)(3)(A) has been reduced to 8 days. This change will, as a practical matter, ensure that every party will have at least 10 actual days — but, in the absence of a legal holiday, no more than 12 actual days — to respond to motions. The court continues to have discretion to shorten or extend that time in appropriate cases.

Changes Made After Publication and Comments

In response to the objections of commentators, the time to respond to a motion was increased from the proposed 7 days to 8 days. No other changes were made to the text of the proposed amendment or to the Committee Note.

Rule 27. Motions

1 **(a) In General.**

2 * * * * *

3 (4) **Reply to Response.** Any reply to a response must

4 be filed within ~~7~~ 5 days after service of the

5 response. A reply must not present matters that do

6 not relate to the response.

7 * * * * *

Committee Note

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

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

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

Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note.

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

1 * * * * *

2 **(b) When Issued.** The court's mandate must issue 7

3 calendar days after the time to file a petition for

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

9 * * * * *

Committee Note

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

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

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

Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note.

a. Alternative One[2]

Rule 26.1. ~~Corporate~~ Disclosure Statement

1 **(a) Who Must File.**

2 (1) **Nongovernmental corporate party.** Any

3 nongovernmental corporate party to a proceeding

4 in a court of appeals must file a statement that:

5 (A) identif~~ying~~ies ~~all its~~ any parent corporation~~s~~

6 and ~~listing~~ any publicly held ~~company~~

7 corporation that owns 10% or more of ~~the~~

---

[2] At its June 7-8, 2001, meeting, the Committee on Rules of Practice and Procedure voted to reject Alternative One.

8 ~~party's~~ its stock or states that there is no such
9 corporation, and
10 (B) discloses any additional information that may
11 be publicly designated by the Judicial
12 Conference of the United States.
13 (2) **Other party.** Any other party to a proceeding in
14 a court of appeals must file a statement that
15 discloses any information that may be publicly
16 designated by the Judicial Conference of the
17 United States.
18 **(b) Time for Filing; Supplemental Filing.** A party must
19 file the Rule 26.1(a) statement with the principal brief or
20 upon filing a motion, response, petition, or answer in the
21 court of appeals, whichever occurs first, unless a local
22 rule requires earlier filing. Even if the statement has
23 already been filed, the party's principal brief must
24 include the statement before the table of contents. A

25 party must supplement its statement whenever the
26 information that must be disclosed under Rule 26.1(a)
27 changes.
28 **(c) Number of Copies.** If the Rule 26.1(a) statement is
29 filed before the principal brief, or if a supplemental
30 statement is filed, the party must file an original and 3
31 copies unless the court requires a different number by
32 local rule or by order in a particular case.

Committee Note

Subdivision (a). Rule 26.1(a) presently requires nongovernmental corporate parties to file a "corporate disclosure statement." In that statement, a nongovernmental corporate party is required to identify all of its parent corporations and all publicly held corporations that own 10% or more of its stock. The corporate disclosure statement is intended to assist judges in determining whether they must recuse themselves by reason of "a financial interest in the subject matter in controversy." Code of Judicial Conduct, Canon 3C(1)(c) (1972).

Rule 26.1(a) has been amended to require that nongovernmental corporate parties who currently do not have to file a corporate disclosure statement — that is, nongovernmental corporate parties who do not have any parent corporations and at least 10% of whose stock is not owned by any publicly held corporation — inform the

court of that fact. At present, when a corporate disclosure statement is not filed, courts do not know whether it has not been filed because there was nothing to report or because of ignorance of Rule 26.1(a).

Rule 26.1(a) does not require the disclosure of all information that could conceivably be relevant to a judge who is trying to decide whether he or she has a "financial interest" in a case. Experience with divergent disclosure practices and improving technology may provide the foundation for more comprehensive disclosure requirements. The Judicial Conference, supported by the committees that work regularly with the Code of Judicial Conduct and by the Administrative Office of the United States Courts, is in the best position to develop any additional requirements and to adjust those requirements as technological and other developments warrant. Thus, Rule 26.1(a) has been amended to authorize the Judicial Conference to promulgate more detailed financial disclosure requirements — requirements that might apply beyond nongovernmental corporate parties.

As has been true in the past, Rule 26.1(a) does not forbid the promulgation of local rules that require disclosures in addition to those required by Rule 26.1(a) itself. However, along with the authority provided to the Judicial Conference to require additional disclosures is the authority to preempt any local rulemaking on the topic of financial disclosure.

Subdivision (b). Rule 26.1(b) has been amended to require parties to file supplemental disclosure statements whenever there is a change in the information that Rule 26.1(a) requires the parties to disclose. For example, if a publicly held corporation acquires 10% or more of a party's stock after the party has filed its disclosure statement, the party should file a supplemental statement identifying that publicly held corporation.

Subdivision (c). Rule 26.1(c) has been amended to provide that a party who is required to file a supplemental disclosure statement must file an original and 3 copies, unless a local rule or an order entered in a particular case provides otherwise.

b. Alternative Two[3]

Rule 26.1. Corporate Disclosure Statement

1 **(a) Who Must File.** Any nongovernmental corporate party
2 to a proceeding in a court of appeals must file a
3 statement that identif~~ying~~ies ~~all its~~ any parent
4 corporation~~s~~ and ~~listing~~ any publicly held ~~company~~
5 corporation that owns 10% or more of ~~the party's~~ its
6 stock or states that there is no such corporation.
7 **(b) Time for Filing; Supplemental Filing.** A party must
8 file the Rule 26.1(a) statement with the principal brief or
9 upon filing a motion, response, petition, or answer in the
10 court of appeals, whichever occurs first, unless a local

[3] At its June 7-8, 2001, meeting, the Committee on Rules of Practice and Procedure voted to approve Alternative Two.

11 rule requires earlier filing. Even if the statement has
12 already been filed, the party's principal brief must
13 include the statement before the table of contents. A
14 party must supplement its statement whenever the
15 information that must be disclosed under Rule 26.1(a)
16 changes.

17 **(c) Number of Copies.** If the Rule 26.1(a) statement is
18 filed before the principal brief, or if a supplemental
19 statement is filed, the party must file an original and 3
20 copies unless the court requires a different number by
21 local rule or by order in a particular case.

Committee Note

Subdivision (a). Rule 26.1(a) requires nongovernmental corporate parties to file a "corporate disclosure statement." In that statement, a nongovernmental corporate party is required to identify all of its parent corporations and all publicly held corporations that own 10% or more of its stock. The corporate disclosure statement is intended to assist judges in determining whether they must recuse themselves by reason of "a financial interest in the subject matter in controversy." Code of Judicial Conduct, Canon 3C(1)(c) (1972).

Rule 26.1(a) has been amended to require that nongovernmental corporate parties who have not been required to file a corporate disclosure statement — that is, nongovernmental corporate parties who do not have any parent corporations and at least 10% of whose stock is not owned by any publicly held corporation — inform the court of that fact. At present, when a corporate disclosure statement is not filed, courts do not know whether it has not been filed because there was nothing to report or because of ignorance of Rule 26.1.

Subdivision (b). Rule 26.1(b) has been amended to require parties to file supplemental disclosure statements whenever there is a change in the information that Rule 26.1(a) requires the parties to disclose. For example, if a publicly held corporation acquires 10% or more of a party's stock after the party has filed its disclosure statement, the party should file a supplemental statement identifying that publicly held corporation.

Subdivision (c). Rule 26.1(c) has been amended to provide that a party who is required to file a supplemental disclosure statement must file an original and 3 copies, unless a local rule or an order entered in a particular case provides otherwise.

Changes Made After Publication and Comments

The Committee is submitting two versions of proposed Rule 26.1 for the consideration of the Standing Committee.

The first version — "Alternative One" — is the same as the version that was published, except that the rule has been amended to refer to "any information that may be *publicly designated* by the Judicial Conference" instead of to "any information that may be

required by the Judicial Conference." At its April meeting, the Committee gave unconditional approval to all of "Alternative One," except the Judicial Conference provisions. The Committee conditioned its approval of the Judicial Conference provisions on the Standing Committee's assuring itself that lawyers would have ready access to any standards promulgated by the Judicial Conference and that the Judicial Conference provisions were consistent with the Rules Enabling Act.

The second version — "Alternative Two" — is the same as the version that was published, except that the Judicial Conference provisions have been eliminated. The Civil Rules Committee met several days after the Appellate Rules Committee and joined the Bankruptcy Rules Committee in disapproving the Judicial Conference provisions. Given the decreasing likelihood that the Judicial Conference provisions will be approved by the Standing Committee, I asked Prof. Schiltz to draft, and the Appellate Rules Committee to approve, a version of Rule 26.1 that omitted those provisions. "Alternative Two" was circulated to and approved by the Committee in late April.

I should note that, at its April meeting, the Appellate Rules Committee discussed the financial disclosure provision that was approved by the Bankruptcy Rules Committee. That provision defines the scope of the financial disclosure obligation much differently than the provisions approved by the Appellate, Civil, and Criminal Rules Committees, which are based on existing Rule 26.1. For example, the bankruptcy provision requires disclosure when a party "directly or indirectly" owns 10 percent or more of "any class" of a publicly *or* privately held corporation's "equity interests." Members of the Appellate Rules Committee expressed several concerns about the provision approved by the Bankruptcy Rules Committee, objecting both to its substance and to its ambiguity.

Rule 27. Motions

1 * * * * *

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

3 (1) **Format.**

4 * * * * *

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

12 * * * * *

Committee Note

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

amendment is intended to promote uniformity in federal appellate practice.

Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note.

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

1 **(a) Form of a Brief.**

2 * * * * *

3 (2) **Cover.** Except for filings by unrepresented parties,
4 the cover of the appellant's brief must be blue; the
5 appellee's, red; an intervenor's or amicus curiae's,
6 green; ~~and~~ any reply brief, gray; and any
7 supplemental brief, tan. The front cover of a brief
8 must contain:
9 (A) the number of the case centered at the top;
10 (B) the name of the court;

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

12 (D) the nature of the proceeding (e.g., Appeal,

13 Petition for Review) and the name of the

14 court, agency, or board below;

15 (E) the title of the brief, identifying the party or

16 parties for whom the brief is filed; and

17 (F) the name, office address, and telephone

18 number of counsel representing the party for

19 whom the brief is filed.

20 * * * * *

Committee Note

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

Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note.

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

1 * * * * *

2 **(c) Form of Other Papers.**

3 (1) **Motion.** The form of a motion is governed by

4 Rule 27(d).

5 (2) **Other Papers.** Any other paper, including a

6 petition for panel rehearing and a petition for

7 hearing or rehearing en banc, and any response to

8 such a petition, must be reproduced in the manner

9 prescribed by Rule 32(a), with the following

10 exceptions:

11 (A) A ~~a~~ cover is not necessary if the caption and

12 signature page of the paper together contain

13 the information required by Rule 32(a)(2)~~;~~

14 ~~and~~. If a cover is used, it must be white.

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

16 * * * * *

Committee Note

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

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

Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note.

Rule 28. Briefs

1 * * * * *

2 **(j) Citation of Supplemental Authorities.** If pertinent and
3 significant authorities come to a party's attention after
4 the party's brief has been filed — or after oral argument
5 but before decision — a party may promptly advise the
6 circuit clerk by letter, with a copy to all other parties,
7 setting forth the citations. The letter must state ~~without~~
8 ~~argument~~ the reasons for the supplemental citations,

9 referring either to the page of the brief or to a point

10 argued orally. The body of the letter must not exceed

11 350 words. Any response must be made promptly and

12 must be similarly limited.

Committee Note

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

As amended, Rule 28(j) continues to require parties to state the reasons for supplemental citations, with reference to the part of a brief or oral argument to which the supplemental citations pertain. But Rule 28(j) no longer forbids "argument." Rather, Rule 28(j) permits parties to decide for themselves what they wish to say about supplemental authorities. The only restriction upon parties is that the body of a Rule 28(j) letter — that is, the part of the letter that begins with the first word after the salutation and ends with the last word before the complimentary close — cannot exceed 350 words. All words found in footnotes will count toward the 350-word limit.

Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note, except that the word limit was increased from 250 to 350 in response to the complaint of some commentators that parties would have difficulty bringing multiple supplemental authorities to the attention of the court in one 250-word letter.

Rule 31. Serving and Filing Briefs

1 * * * * *

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

12 * * * * *

Committee Note

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

Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note.

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

1 **(a) Form of a Brief.**

2 * * * * *

3 (7) **Length.**

4 (C) **Certificate of compliance.**

5 (i) A brief submitted under Rule

6 32(a)(7)(B) must include a certificate by

7 the attorney, or an unrepresented party,

8 that the brief complies with the type-
9 volume limitation. The person
10 preparing the certificate may rely on the
11 word or line count of the word-
12 processing system used to prepare the
13 brief. The certificate must state either:
14 ~~(i)~~ ● the number of words in the
15 brief; or
16 ~~(ii)~~ ● the number of lines of
17 monospaced type in the brief.
18 (ii) Form 6 in the Appendix of Forms is a
19 suggested form of a certificate of
20 compliance. Use of Form 6 must be
21 regarded as sufficient to meet the
22 requirements of Rule 32(a)(7)(C)(i).
23 * * * * *

Committee Note

Subdivision (a)(7)(C). If the principal brief of a party exceeds 30 pages, or if the reply brief of a party exceeds 15 pages, Rule 32(a)(7)(C) provides that the party or the party's attorney must certify that the brief complies with the type-volume limitation of Rule 32(a)(7)(B). Rule 32(a)(7)(C) has been amended to refer to Form 6 (which has been added to the Appendix of Forms) and to provide that a party or attorney who uses Form 6 has complied with Rule 32(a)(7)(C). No court may provide to the contrary, in its local rules or otherwise.

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

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

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

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

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

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

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

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

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

(s)_____

Attorney for _____

Dated: _____

Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note.

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

1 * * * * *

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

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

Committee Note

Subdivisions (d) and (e). Former subdivision (d) has been redesignated as subdivision (e), and a new subdivision (d) has been added. The new subdivision (d) requires that every brief, motion, or other paper filed with the court be signed by the attorney or unrepresented party who files it, much as Fed. R. Civ. P. 11(a) imposes a signature requirement on papers filed in district court. Only the original copy of every paper must be signed. An appendix filed with the court does not have to be signed at all.

By requiring a signature, subdivision (d) ensures that a readily identifiable attorney or party takes responsibility for every paper. The courts of appeals already have authority to sanction attorneys and parties who file papers that contain misleading or frivolous assertions, *see, e.g.,* 28 U.S.C. § 1912, Fed. R. App. P. 38 & 46(b)(1)(B), and thus subdivision (d) has not been amended to incorporate provisions similar to those found in Fed. R. Civ. P. 11(b) and 11(c).

Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment. A line was added to the Committee Note to clarify that only the original copy of a paper needs to be signed.

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

1 **<u>(a)</u> <u>Constitutional Challenge to Federal Statute</u>.** If a
2 party questions the constitutionality of an Act of
3 Congress in a proceeding in which the United States or
4 its agency, officer, or employee is not a party in an
5 official capacity, the questioning party must give written
6 notice to the circuit clerk immediately upon the filing of
7 the record or as soon as the question is raised in the

8 court of appeals. The clerk must then certify that fact to
9 the Attorney General.
10 **(b) Constitutional Challenge to State Statute.** If a party
11 questions the constitutionality of a statute of a State in
12 a proceeding in which that State or its agency, officer, or
13 employee is not a party in an official capacity, the
14 questioning party must give written notice to the circuit
15 clerk immediately upon the filing of the record or as
16 soon as the question is raised in the court of appeals.
17 The clerk must then certify that fact to the attorney
18 general of the State.

Committee Note

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

> In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the

> constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene . . . for argument on the question of constitutionality.

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

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

Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note.

○