

omissions occurring in connection with duties performed on behalf of the United States. (A concurrent amendment to Rule 40(a)(1) makes clear that the 45-day period to file a petition for panel rehearing also applies in such cases.)

The amendment to Rule 4(a)(1)(B) is consistent with a 2000 amendment to Civil Rule 12(a)(3), which specified an extended 60-day period to respond to complaints when “[a] United States officer or employee [is] sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States’ behalf.” The Committee Note to the 2000 amendment explained: “Time is needed for the United States to determine whether to provide representation to the defendant officer or employee. If the United States provides representation, the need for an extended answer period is the same as in actions against the United States, a United States agency, or a United States officer sued in an official capacity.” The same reasons justify providing additional time to the Solicitor General to decide whether to file an appeal.

However, because of the greater need for clarity of application when appeal rights are at stake, the amendment to Rule 4(a)(1)(B), and the corresponding legislative amendment to 28 U.S.C. §2107 that is simultaneously proposed, include safe harbor provisions that parties can readily apply and rely upon. Under new subdivision 4(a)(1)(B)(iv), a case automatically qualifies for the 60-day appeal period if (1) a legal officer of the United States has appeared in the case, in an official capacity, as counsel for the current or former officer or employee and has not withdrawn the appearance at the time of the entry of the judgment or order appealed from or (2) a legal officer of the United States appears on the notice of appeal as counsel, in an official capacity, for the current or former officer or employee. There will be cases that do not fall within either safe harbor but that qualify for the longer appeal period. An example would be a case in which a federal employee is sued in an individual capacity for an act occurring in connection with federal duties and the United States does not represent the employee either when the judgment is entered or when the appeal is filed but the United States pays for private counsel for the employee.

*Changes Made After Publication and Comment.* The Committee made two changes to the proposal after publication and comment.

First, the Committee inserted the words “current or former” before “United States officer or employee.” This insertion causes the text of the proposed Rule to diverge slightly from that of Civil Rules 4(i)(3) and 12(a)(3), which refer simply to “a United States officer or employee [etc.]” This divergence, though, is only stylistic. The 2000 Committee Notes to Civil Rules 4(i)(3) and 12(a)(3) make clear that those rules are intended to encompass former as well as current officers or employees. It is desirable to make this clarification in the text of Rule 4(a)(1) because that Rule’s appeal time periods are jurisdictional.

Second, the Committee added, at the end of Rule 4(a)(1)(B)(iv), the following new language: “—including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person.” During the public comment period, concerns were raised that a party might rely on the longer appeal period, only to risk the appeal being held untimely by a court that later concluded that the relevant act or omission had not actually occurred in connection with federal duties. The Committee decided to respond to this concern by adding two safe harbor provisions. These provisions make clear that the longer appeal periods apply in any case where the United States either represents the officer or employee at the time of entry of the relevant judgment or files the notice of appeal on the officer or employee’s behalf.

#### REFERENCES IN TEXT

The Federal Rules of Civil Procedure, referred to in subd. (a)(4), (6), and (7), are set out in this Appendix.

The Federal Rules of Criminal Procedure, referred to in subd. (b)(3), (5), are set out in the Appendix to Title 18, Crimes and Criminal Procedure.

#### AMENDMENT BY PUBLIC LAW

1988—Subd. (b). Pub. L. 100-690 inserted “(i)” and “or (ii) a notice of appeal by the Government” in first sentence, and “(i)” and “or (ii) a notice of appeal by any defendant” in fifth sentence.

### Rule 5. Appeal by Permission

#### (a) PETITION FOR PERMISSION TO APPEAL.

(1) To request permission to appeal when an appeal is within the court of appeals’ discretion, a party must file a petition for permission to appeal. The petition must be filed with the circuit clerk with proof of service on all other parties to the district-court action.

(2) The petition must be filed within the time specified by the statute or rule authorizing the appeal or, if no such time is specified, within the time provided by Rule 4(a) for filing a notice of appeal.

(3) If a party cannot petition for appeal unless the district court first enters an order granting permission to do so or stating that the necessary conditions are met, the district court may amend its order, either on its own or in response to a party’s motion, to include the required permission or statement. In that event, the time to petition runs from entry of the amended order.

#### (b) CONTENTS OF THE PETITION; ANSWER OR CROSS-PETITION; ORAL ARGUMENT.

(1) The petition must include the following:

- (A) the facts necessary to understand the question presented;
- (B) the question itself;
- (C) the relief sought;
- (D) the reasons why the appeal should be allowed and is authorized by a statute or rule; and
- (E) an attached copy of:
  - (i) the order, decree, or judgment complained of and any related opinion or memorandum, and
  - (ii) any order stating the district court’s permission to appeal or finding that the necessary conditions are met.

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

(3) The petition and answer will be submitted without oral argument unless the court of appeals orders otherwise.

(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.

(d) GRANT OF PERMISSION; FEES; COST BOND; FILING THE RECORD.

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

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

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

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

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

(2) A notice of appeal need not be filed. The date when the order granting permission to appeal is entered serves as the date of the notice of appeal for calculating time under these rules.

(3) The district clerk must notify the circuit clerk once the petitioner has paid the fees. Upon receiving this notice, the circuit clerk must enter the appeal on the docket. The record must be forwarded and filed in accordance with Rules 11 and 12(c).

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; Mar. 26, 2009, eff. Dec. 1, 2009.)

#### NOTES OF ADVISORY COMMITTEE ON RULES—1967

This rule is derived in the main from Third Circuit Rule 11(2), which is similar to the rule governing appeals under 28 U.S.C. §1292(b) in a majority of the circuits. The second sentence of subdivision (a) resolves a conflict over the question of whether the district court can amend an order by supplying the statement required by §1292(b) at any time after entry of the order, with the result that the time fixed by the statute commences to run on the date of entry of the order as amended. Compare *Milbert v. Bison Laboratories*, 260 F.2d 431 (3d Cir., 1958) with *Sperry Rand Corporation v. Bell Telephone Laboratories*, 272 F.2d (2d Cir., 1959), *Hadjipateras v. Pacifica, S.A.*, 290 F.2d 697 (5th Cir., 1961), and *Houston Fearless Corporation v. Teter*, 313 F.2d 91 (10th Cir., 1962). The view taken by the Second, Fifth and Tenth Circuits seems theoretically and practically sound, and the rule adopts it. Although a majority of the circuits now require the filing of a notice of appeal following the grant of permission to appeal, filing of the notice serves no function other than to provide a time from which the time for transmitting the record and docketing the appeal begins to run.

#### NOTES OF ADVISORY COMMITTEE ON RULES—1979 AMENDMENT

The proposed amendment adapts to the practice in appeals from interlocutory orders under 28 U.S.C. §1292(b) the provisions of proposed Rule 3(e) above, requiring payment of all fees in the district court upon the filing of the notice of appeal. See Note to proposed amended Rule 3(e), *supra*.

#### NOTES OF ADVISORY COMMITTEE ON RULES—1994 AMENDMENT

*Subdivision (c).* The amendment makes it clear that a court may require a different number of copies either by rule or by order in an individual case. The number of copies of any document that a court of appeals needs varies depending upon the way in which the court conducts business. The internal operation of the courts of appeals necessarily varies from circuit to circuit because of differences in the number of judges, the geographic area included within the circuit, and other such factors. Uniformity could be achieved only by setting the number of copies artificially high so that parties in all circuits file enough copies to satisfy the needs of the court requiring the greatest number. Rather than do that, the Committee decided to make it clear that local rules may require a greater or lesser number of copies and that, if the circumstances of a particular case indicate the need for a different number of copies in that case, the court may so order.

#### COMMITTEE NOTES ON RULES—1998 AMENDMENT

In 1992 Congress added subsection (e) to 28 U.S.C. §1292. Subsection (e) says that the Supreme Court has power to prescribe rules that “provide for an appeal of

an interlocutory decision to the courts of appeals that is not otherwise provided for” in section 1292. The amendment of Rule 5 was prompted by the possibility of new rules authorizing additional interlocutory appeals. Rather than add a separate rule governing each such appeal, the Committee believes it is preferable to amend Rule 5 so that it will govern all such appeals.

In addition the Federal Courts Improvement Act of 1996, Pub. L. 104-317, abolished appeals by permission under 28 U.S.C. §636(c)(5), making Rule 5.1 obsolete.

This new Rule 5 is intended to govern all discretionary appeals from district-court orders, judgments, or decrees. At this time that includes interlocutory appeals under 28 U.S.C. §1292(b), (c)(1), and (d)(1) & (2). If additional interlocutory appeals are authorized under §1292(e), the new Rule is intended to govern them if the appeals are discretionary.

*Subdivision (a).* Paragraph (a)(1) says that when granting an appeal is within a court of appeals’ discretion, a party may file a petition for permission to appeal. The time for filing provision states only that the petition must be filed within the time provided in the statute or rule authorizing the appeal or, if no such time is specified, within the time provided by Rule 4(a) for filing a notice of appeal.

Section 1292(b), (c), and (d) provide that the petition must be filed within 10 days after entry of the order containing the statement prescribed in the statute. Existing Rule 5(a) provides that if a district court amends an order to contain the prescribed statement, the petition must be filed within 10 days after entry of the amended order. The new rule similarly says that if a party cannot petition without the district court’s permission or statement that necessary circumstances are present, the district court may amend its order to include such a statement and the time to petition runs from the entry of the amended order.

The provision that the Rule 4(a) time for filing a notice of appeal should apply if the statute or rule is silent about the filing time was drawn from existing Rule 5.1.

*Subdivision (b).* The changes made in the provisions in paragraph (b)(1) are intended only to broaden them sufficiently to make them appropriate for all discretionary appeals.

In paragraph (b)(2) a uniform time—7 days—is established for filing an answer in opposition or cross-petition. Seven days is the time for responding under existing Rule 5 and is an appropriate length of time when dealing with an interlocutory appeal. Although existing Rule 5.1 provides 14 days for responding, the Committee does not believe that the longer response time is necessary.

*Subdivision (c).* Subdivision (c) is substantively unchanged.

*Subdivision (d).* Paragraph (d)(2) is amended to state that “the date when the order granting permission to appeal is entered serves as the date of the notice of appeal” for purposes of calculating time under the rules. That language simply clarifies existing practice.

#### COMMITTEE NOTES ON RULES—2002 AMENDMENT

*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.

#### COMMITTEE NOTES ON RULES—2009 AMENDMENT

*Subdivision (b)(2).* Subdivision (b)(2) is amended in the light of the change in Rule 26(a)’s time computation

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

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

**[Rule 5.1. Appeal by Leave under 28 U.S.C. § 636(c)(5)]** (Abrogated Apr. 24, 1998, eff. Dec. 1, 1998)

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, abolished appeals by permission under 28 U.S.C. § 636(c)(5), making Rule 5.1 obsolete. Rule 5.1 is, therefore, abrogated.

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

(a) APPEAL FROM A JUDGMENT, ORDER, OR DECREE OF A DISTRICT COURT EXERCISING ORIGINAL JURISDICTION IN A BANKRUPTCY CASE. An appeal to a court of appeals from a final judgment, order, or decree of a district court exercising jurisdiction under 28 U.S.C. § 1334 is taken as any other civil appeal under these rules.

(b) APPEAL FROM A JUDGMENT, ORDER, OR DECREE OF A DISTRICT COURT OR BANKRUPTCY APPELLATE PANEL EXERCISING APPELLATE JURISDICTION IN A BANKRUPTCY CASE.

(1) *Applicability of Other Rules.* These rules apply to an appeal to a court of appeals under 28 U.S.C. § 158(d) from a final judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction under 28 U.S.C. § 158(a) or (b). But there are 3 exceptions:

(A) Rules 4(a)(4), 4(b), 9, 10, 11, 12(b), 13-20, 22-23, and 24(b) do not apply;

(B) the reference in Rule 3(c) to “Form 1 in the Appendix of Forms” must be read as a reference to Form 5; and

(C) when the appeal is from a bankruptcy appellate panel, the term “district court,” as used in any applicable rule, means “appellate panel.”

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

(A) *Motion for Rehearing.*

(i) If a timely motion for rehearing under Bankruptcy Rule 8015 is filed, the time to appeal for all parties runs from the entry of the order disposing of the motion. A notice of appeal filed after the district court or bankruptcy appellate panel announces or enters a judgment, order, or decree—but before disposition of the motion for rehearing—becomes effective when the order disposing of the motion for rehearing is entered.

(ii) Appellate review of the order disposing of the motion requires the party, in compliance with Rules 3(c) and 6(b)(1)(B),

to amend a previously filed notice of appeal. A party intending to challenge an altered or amended judgment, order, or decree must file a notice of appeal or amended notice of appeal within the time prescribed by Rule 4—excluding Rules 4(a)(4) and 4(b)—measured from the entry of the order disposing of the motion.

(iii) No additional fee is required to file an amended notice.

(B) *The record on appeal.*

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

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

(iii) The record on appeal consists of:

- the redesignated record as provided above;
- the proceedings in the district court or bankruptcy appellate panel; and
- a certified copy of the docket entries prepared by the clerk under Rule 3(d).

(C) *Forwarding the Record.*

(i) When the record is complete, the district clerk or bankruptcy appellate panel clerk must number the documents constituting the record and send them promptly to the circuit clerk together with a list of the documents correspondingly numbered and reasonably identified. Unless directed to do so by a party or the circuit clerk, the clerk will not send to the court of appeals documents of unusual bulk or weight, physical exhibits other than documents, or other parts of the record designated for omission by local rule of the court of appeals. If the exhibits are unusually bulky or heavy, a party must arrange with the clerks in advance for their transportation and receipt.

(ii) All parties must do whatever else is necessary to enable the clerk to assemble and forward the record. The court of appeals may provide by rule or order that a certified copy of the docket entries be sent in place of the redesignated record, but any party may request at any time during the pendency of the appeal that the redesignated record be sent.

(D) *Filing the Record.* Upon receiving the record—or a certified copy of the docket entries sent in place of the redesignated record—the circuit clerk must file it and immediately notify all parties of the filing date.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Apr. 25, 1989, eff. Dec. 1, 1989; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 24, 1998, eff. Dec. 1, 1998; Mar. 26, 2009, eff. Dec. 1, 2009.)