(A concurrent amendment to Rule 4(a)(1)(B) makes clear that the 60-day period to file an appeal also applies in such cases.) In such cases, the Solicitor General needs adequate time to review the merits of the panel decision and decide whether to seek rehearing, just as the Solicitor General does when an appeal involves the United States, a United States agency, or a United States officer or employee sued in an official capacity.

To promote clarity of application, the amendment to Rule 40(a)(1) includes safe harbor provisions that parties can readily apply and rely upon. Under new subdivision 40(a)(1)(D), a case automatically qualifies for the 45-day 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has appeared in the case, in an official capacity, as counsel for the current or former officer or employee and has not withdrawn the appearance at the time of the entry of the court of appeals' judgment that is the subject of the petition or (2) a legal officer of the United States appears on the petition 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 petition 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 court of appeals' judgment is entered or when the petition 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.

Second, the Committee added, at the end of Rule 40(a)(1)(D), the following new language: ''—including all instances in which the United States represents that person when the court of appeals' judgment is entered or files the petition for that person.'' During the public comment period, concerns were raised that a party might rely on the longer period for filing the petition, only to risk the petition 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 period applies in any ease where the United States either represents the officer or employee at the time of entry of the relevant judgment or files the petition on the officer or employee's behalf.

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

(a) CONTENTS. Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.

(b) WHEN ISSUED. The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 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.

(c) EFFECTIVE DATE. The mandate is effective when issued.

(d) STAYING THE MANDATE.

(1) *On Petition for Rehearing or Motion.* The timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise.

(2) *Pending Petition for Certiorari.*

(A) A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the certiorari petition would present a substantial question and that there is good cause for a stay.

(B) The stay must not exceed 90 days, unless the period is extended for good cause or unless the party who obtained the stay files a petition for the writ and so notifies the circuit clerk in writing within the period of the stay. In that case, the stay continues until the Supreme Court's final disposition.

(C) The court may require a bond or other security as a condition to granting or continuing a stay of the mandate.

(D) The court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed.

(As amended 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

The proposed rule follows the rule or practice in a majority of circuits by which copies of the opinion and the judgment serve in lieu of a formal mandate in the ordinary case. Compare Supreme Court Rule 59. Although 28 U.S.C. §2101(c) permits a writ of certiorari to be filed within 90 days after entry of judgment, seven of the eight circuits which now regulate the matter of stays pending application for certiorari limit the initial stay of the mandate to the 30-day period provided in the proposed rule. Compare D.C. Cir. Rule 27(e).

NOTES OF ADVISORY COMMITTEE ON RULES—1994 AMENDMENT

Subdivision (a). The amendment conforms Rule 41(a) to the amendment made to Rule 40(a). The amendment keys the time for issuance of the mandate to the expiration of the time for filing a petition for rehearing, unless such a petition is filed in which case the mandate issues 7 days after the entry of the order denying the petition. Because the amendment to Rule 40(a) lengthens the time for filing a petition for rehearing in civil cases involving the United States from 14 to 45 days, the rule requiring the mandate to issue 21 days after the entry of judgment would cause the mandate to issue while the government is still considering requesting a rehearing. Therefore, the amendment generally requires the mandate to issue 7 days after the expiration of the time for filing a petition for rehearing.

Subdivision (b). The amendment requires a party who files a motion requesting a stay of mandate to file, at the same time, proof of service on all other parties. The old rule required the party to give notice to the other parties; the amendment merely requires the party to provide the court with evidence of having done so.

The amendment also states that the motion must show that a petition for certiorari would present a substantial question and that there is good cause for a stay. The amendment is intended to alert the parties to the fact that a stay of mandate is not granted automatically and to the type of showing that needs to be made. The Supreme Court has established conditions that must be met before it will stay a mandate. *See*

Robert L. Stern et al., *Supreme Court Practice* §17.19 (6th ed. 1986).

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Several substantive changes are made in this rule, however.

Subdivision (b). The existing rule provides that the mandate issues 7 days after the time to file a petition for panel rehearing expires unless such a petition is timely filed. If the petition is denied, the mandate issues 7 days after entry of the order denying the petition. Those provisions are retained but the amendments further provide that if a timely petition for rehearing en banc or motion for stay of mandate is filed, the mandate does not issue until 7 days after entry of an order denying the last of all such requests. If a petition for rehearing or a petition for rehearing en banc is granted, the court enters a new judgment after the rehearing and the mandate issues within the normal time after entry of that judgment.

Subdivision (c). Subdivision (c) is new. It provides that the mandate is effective when the court issues it. A court of appeals' judgment or order is not final until issuance of the mandate; at that time the parties' obligations become fixed. This amendment is intended to make it clear that the mandate is effective upon issuance and that its effectiveness is not delayed until receipt of the mandate by the trial court or agency, or until the trial court or agency acts upon it. This amendment is consistent with the current understanding. Unless the court orders that the mandate issue earlier than provided in the rule, the parties can easily calculate the anticipated date of issuance and verify issuance with the clerk's office. In those instances in which the court orders earlier issuance of the mandate, the entry of the order on the docket alerts the parties to that fact.

Subdivision (d). Amended paragraph (1) provides that the filing of a petition for panel rehearing, a petition for rehearing en banc or a motion for a stay of mandate pending petition to the Supreme Court for a writ of certiorari stays the issuance of the mandate until the court disposes of the petition or motion. The provision that a petition for rehearing en banc stays the mandate is a companion to the amendment of Rule 35 that deletes the language stating that a request for a rehearing en banc does not affect the finality of the judgment or stay the issuance of the mandate. The Committee's objective is to treat a request for a rehearing en banc like a petition for panel rehearing so that a request for a rehearing en banc will suspend the finality of the court of appeals' judgment and delay the running of the period for filing a petition for writ of certiorari. Because the filing of a petition for rehearing en banc will stay the mandate, a court of appeals will need to take final action on the petition but the procedure for doing so is left to local practice.

Paragraph (1) also provides that the filing of a motion for a stay of mandate pending petition to the Supreme Court for a writ of certiorari stays the mandate until the court disposes of the motion. If the court denies the motion, the court must issue the mandate 7 days after entering the order denying the motion. If the court grants the motion, the mandate is stayed according to the terms of the order granting the stay. Delaying issuance of the mandate eliminates the need to recall the mandate if the motion for a stay is granted. If, however, the court believes that it would be inappropriate to delay issuance of the mandate until disposition of the motion for a stay, the court may order that the mandate issue immediately.

Paragraph (2). The amendment changes the maximum period for a stay of mandate, absent the court of appeals granting an extension for cause, to 90 days. The presumptive 30-day period was adopted when a party had to file a petition for a writ of certiorari in criminal cases within 30 days after entry of judgment. Supreme Court Rule 13.1 now provides that a party has 90 days after entry of judgment by a court of appeals to file a petition for a writ of certiorari whether the case is civil or criminal.

The amendment does not require a court of appeals to grant a stay of mandate that is coextensive with the period granted for filing a petition for a writ of certiorari. The granting of a stay and the length of the stay remain within the discretion of the court of appeals. The amendment means only that a 90-day stay may be granted without a need to show cause for a stay longer than 30 days.

Subparagraph (C) is not new; it has been moved from the end of the rule to this position.

COMMITTEE NOTES ON RULES—2002 AMENDMENT

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.

COMMITTEE NOTES ON RULES—2009 AMENDMENT

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

Changes Made After Publication and Comment. The Appellate Rules Committee made only one change to Rule 26(a) after publication and comment: Because the Committee is seeking permission to publish for comment a proposed new Rule 1(b) that would adopt a FRAP-wide definition of the term ''state,'' the Committee decided to delete from Rule 26(a)(6)(B) the following parenthetical sentence: ''(In this rule, 'state' includes the District of Columbia and any United States commonwealth, territory, or possession.)'' That change required the corresponding deletion—from the Note to Rule 26(a)(6)—of part of the final sentence (the deleted portion read '', and defines the term 'state'—for purposes of subdivision (a)(6)—to include the District of Columbia and any commonwealth, territory or possession of the United States. Thus, for purposes of subdivision (a)(6)'s definition of 'legal holiday,' 'state' includes the District of Columbia, Guam, American Samoa, the

U.S. Virgin Islands, the Commonwealth of Puerto Rico, and the Commonwealth of the Northern Mariana Islands.'')

The Appellate Rules Committee made one change to its proposed amendments concerning Appellate Rules deadlines. Based on comments received with respect to the timing for motions that toll the time for taking a civil appeal, the Committee changed the cutoff time in Rule 4(a)(4)(A)(vi) to 28 days (rather than to 30 days as in the published proposal). The published proposal's choice of 30 days had been designed to accord with the proposed amendments published by the Civil Rules Committee, which would have extended the deadline for tolling motions to 30 days. Because 30 days is also the time period set by Appellate Rule 4 and by 28 U.S.C. §2107 for taking a civil appeal (when the United States and its officers or agencies are not parties), commentators pointed out that adopting 30 days as the cutoff for filing tolling motions would sometimes place would-be appellants in an awkward position: If the deadline for making a tolling motion falls on the same day as the deadline for filing a notice of appeal, then in a case involving multiple parties on one side, a litigant who wishes to appeal may not know, when filing the notice of appeal, whether a tolling motion will be filed; such a timing system can be expected to produce instances when appeals are filed, only to go into abeyance while the tolling motion is resolved.

By the time of the Appellate Rules Committee's April 2008 meeting, the Civil Rules Committee had discussed this issue and had determined that the best resolution would be to extend the deadline for tolling motions to 28 days rather than 30 days. The choice of a 28-day deadline responds to the concerns of those who feel that the current 10-day deadlines are much too short, but also takes into account the problem of the 30-day appeal deadline. As described in the draft minutes of the Committee's April meeting, Committee members carefully discussed the relevant concerns and determined, by a vote of 7 to 1, to assent to the 28-day time period for tolling motions and to change the cutoff time in Rule 4(a)(4)(A)(vi) to 28 days.

The Standing Committee changed Rule 26(a)(6) to exclude state holidays from the definition of ''legal holiday'' for purposes of computing backward-counted periods; conforming changes were made to the Committee Note.

Rule 42. Voluntary Dismissal

(a) DISMISSAL IN THE DISTRICT COURT. Before an appeal has been docketed by the circuit clerk, the district court may dismiss the appeal on the filing of a stipulation signed by all parties or on the appellant's motion with notice to all parties.

(b) DISMISSAL IN THE COURT OF APPEALS. The circuit clerk may dismiss a docketed appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that are due. But no mandate or other process may issue without a court order. An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court.

(As amended Apr. 24, 1998, eff. Dec. 1, 1998.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

Subdivision (a). This subdivision is derived from FRCP 73(a) without change of substance.

Subdivision (b). The first sentence is a common provision in present circuit rules. The second sentence is added. Compare Supreme Court Rule 60.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Rule 43. Substitution of Parties

(a) DEATH OF A PARTY.

(1) *After Notice of Appeal Is Filed*. If a party dies after a notice of appeal has been filed or while a proceeding is pending in the court of appeals, the decedent's personal representative may be substituted as a party on motion filed with the circuit clerk by the representative or by any party. A party's motion must be served on the representative in accordance with Rule 25. If the decedent has no representative, any party may suggest the death on the record, and the court of appeals may then direct appropriate proceedings.

(2) *Before Notice of Appeal Is Filed—Potential Appellant*. If a party entitled to appeal dies before filing a notice of appeal, the decedent's personal representative—or, if there is no personal representative, the decedent's attorney of record—may file a notice of appeal within the time prescribed by these rules. After the notice of appeal is filed, substitution must be in accordance with Rule 43(a)(1).

(3) *Before Notice of Appeal Is Filed—Potential Appellee*. If a party against whom an appeal may be taken dies after entry of a judgment or order in the district court, but before a notice of appeal is filed, an appellant may proceed as if the death had not occurred. After the notice of appeal is filed, substitution must be in accordance with Rule 43(a)(1).

(b) SUBSTITUTION FOR A REASON OTHER THAN DEATH. If a party needs to be substituted for any reason other than death, the procedure prescribed in Rule 43(a) applies.

(c) PUBLIC OFFICER: IDENTIFICATION; SUBSTITUTION.

(1) *Identification of Party*. A public officer who is a party to an appeal or other proceeding in an official capacity may be described as a party by the public officer's official title rather than by name. But the court may require the public officer's name to be added.

(2) *Automatic Substitution of Officeholder*. When a public officer who is a party to an appeal or other proceeding in an official capacity dies, resigns, or otherwise ceases to hold office, the action does not abate. The public officer's successor is automatically substituted as a party. Proceedings following the substitution are to be in the name of the substituted party, but any misnomer that does not affect the substantial rights of the parties may be disregarded. An order of substitution may be entered at any time, but failure to enter an order does not affect the substitution.

(As amended Mar. 10, 1986, eff. July 1, 1986; Apr. 24, 1998, eff. Dec. 1, 1998.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

Subdivision (a). The first three sentences described a procedure similar to the rule on substitution in civil actions in the district court. See FRCP 25(a). The fourth sentence expressly authorizes an appeal to be taken against one who has died after the entry of judgment. Compare FRCP 73(b), which impliedly authorizes such an appeal.