

THE IMPORTANT 2002 REVISIONS TO THE *FEDERAL RULES OF APPELLATE PROCEDURE*

Stephen P. Groves, Sr., Esquire

Telephone: 843.577.9440

Telecopier: 843.720.1777

E-mail: sgroves@npj.com

web Address: www.nexenpruet.com

On December 1, 2002, several important amendments to the *Federal Rules of Appellate Procedure*¹ will become effective. These rule changes “shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.”² The 2002 amendments involve additions and/or modifications to Rules 1, 4-5, 21, 24-28, 31-32, 36, 41, 44, and 45, *FRAP*, as well as, the addition of Form No. 6, *FRAP*.

A. Rule 1

The 2002 Amendments eliminate Rule 1b, which previously provided the *Federal Rules of Appellate Procedure* did not extend or limit the jurisdiction of the various Federal Courts of Appeals. The Advisory Committee on Appellate Rules, citing 28 U.S.C. § 2072(c) and 28 U.S.C. § 1292(e), noted these “[t]wo recent enactments ma[d]e it likely that, in the future, one or more of the *Federal Rules of Appellate Procedure* [would] extend or limit the jurisdiction of the courts of appeals.”³

B. Rule 4

New subpart “C” to has been added to section (a) of Rule 4. This new section provides that 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), which sets forth the time period during in which a notice of appeal must be filed.”⁴ The Advisory Committee noted the addition of this new section was needed due to “conflicting conclusions about whether an appeal from a writ of error *coram nobis* [was] governed by the [civil or criminal] time limitations of Rule

¹ See generally White v. Fair, 289 F.2d 1, 8 n.5 (1st Cir. 2002).

² House Document 107-206, 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, 3 in 18 West’s Supreme Court Reporter, Ct.R.-611 (July 15, 2002). See also 207 F.R.D. 656 (2002).

³ Id., 40. The Advisory Committee recognized that 28 U.S.C. § 2072(c) authorized the Supreme Court to define when a District Court ruling was final for 28 U.S.C. § 1291 purposes and 28 U.S.C. § 1292(e) authorized the Supreme Court to use the various federal rules to provide for interlocutory appeals not already permitted under 28 U.S.C. § 1292. See also 207 F.R.D. 656, 695.

⁴ Id., 5. See also 207 F.R.D. 656, 660.

4.5 The new section resolved the conflict by “providing that the [civil case] time limitations of Rule 4(a) will apply.”⁶

Important language has been added to Rule 4(a)(5)(A)(ii). As is widely known, the *FRAP*, unlike most state appellate rules, affords an appellant the ability to extend the time in which to file a notice of appeal. See Rule 4(a)(5).⁷ Generally speaking, a putative appellant may request an extension of time if (a) the motion was made within 30 days of when the notice of appeal should have been filed and (b) the appellant demonstrated excusable neglect or good cause.⁸ Unfortunately, the various courts of appeals have “judicially developed” a somewhat modified procedure inconsistent with the language of Rule 4(a)(5)(A).⁹ On the one, the courts of appeals applied the “good cause” standard for relief to extension requests made before the expiration of the original 30-day time period in which to appeal while, on the other hand, they applied the “excusable neglect” standard for relief to extension requests made after the 30-day period had expired.¹⁰ The Advisory Committee noted that revised Rule 4(a)(5)(A) provides that “[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 [an] [l]ikewise, [the same] motion . . . filed during the 30 days following the expiration of the original deadline may be granted [upon the same showing].”¹¹

In probably the most important change amongst all of the Rules, Rule 4(a)(7) has been modified by deleting certain language and adding significant additional language to clarify the point in time when a judgment and/or order is entered for purposes of Rule 4(a).¹² This is important, of course, since this procedure (when viewed in conjunction with the concurrent changes to Rule 58,

⁵ Id., 42 (citing United States v. Craig, 907 F.2d 653, 655-657, *amended*, 919 F.2d 57 (7th Cir. 1990), United States v. Cooper, 876 F.2d 1192, 1193-1194 (5th Cir. 1989), United States v. Keogh, 391 F.2d 138, 140 (2nd Cir. 1968); Yasuri v. United States, 772 F.2d 1496, 1498-1499 (9th Cir. 1985); United States v. Mills, 430 F.2d 526, 527-528 (8th Cir. 1980)). See also 207 F.R.D. 656, 697.

⁶ Id., 42. See also 207 F.R.D. 656, 697.

⁷ Id., 45. See also 207 F.R.D. 656, 699-700.

⁸ Id. See also 207 F.R.D. 656, 699-700.

⁹ Id. See also 207 F.R.D. 656, 699-700.

¹⁰ Id. (citing Pontarelli v. Stone, 930 F.2d 104, 109-110 (1st Cir. 1991) (collecting cases)). Apparently the courts of appeals, in making this non-existent distinction, were inexplicably relying on the rejected draft of a proposed 1979 amendment to Rule 4(a)(5)(A). Id., 45-46 (citing 16A Charles A. Wright, *et. al.*, Federal Practice and Procedure, § 3950.3 (West Group 2d ed. 1996)). See also 207 F.R.D. 656, 700. Much like the Rule 55(c), *FRCP*, and Rule 60(b), *FRCP*, standards for relief from an entry of default verses an entry of a default judgment, the “good cause” standard is generally viewed as being significantly less than the “excusable neglect” standard. Id., 46 (citing Lorenzen v. Employees Retirement Plan, 896 F.2d 228, 232 (7th Cir. 1990)). See also 207 F.R.D. 656, 701.

¹¹ Id., 46. See also 207 F.R.D. 656, 702.

¹² Id., 7-8, 47-48. See also 207 F.R.D. 656, 662-663, 702-703.

FRCP) determines the point when the “clock begins to run” on the time to file a notice of appeal.¹³

Prior to the amendment, old Rule 58, *FRCP*, required a District Court to set forth a judgment on a separate document in order to render the judgment valid and, in turn, if there was no separate document, then the judgment was not effective.¹⁴ The problem with this procedure was that many District Courts failed to comply with the separate document requirement and, therefore, the time to appeal or file post-judgment motions never commenced.¹⁵

The eliminate this seemingly “never-ending” story, Rule 58, *FRCP*, has been amended to eliminate the “separate document” requirement for several common post-judgment motions.¹⁶ Additionally, Rule 58, *FRCP*, will now require the clerk of court (unless the District Court directs otherwise) to prepare and file the “separate document” in most other instances and, in limited circumstances, to require the District Court to approve a judgment form and have the clerk of court promptly enter it.¹⁷ Moreover, Rule 58, *FRCP*, now defines the “time of entry of judgment” as the date when the judgment is entered on the civil docket if no “separate document is required.¹⁸ When, however, a “separate document” is required the operative date is the date when the judgment is entered on the civil docket and when the judgment is set out in a “separate document” or, if there is no “separate document”, 150 days after the entry of the judgment in the civil docket.¹⁹

Concurrently, Rule 4(a)(7) has been amended to reflect the same judgment definitions and time frame requirements as set forth in Rule 58, *FRCP*. The Advisory Committee noted that if Rule 58, *FRCP*, “does not require that a judgment or order be set forth on a separate document, then neither does Rule 4(a)(7)” and if the rule “requires that a judgment or order be set forth on a separate document, then so does Rule 4(a)(7).”²⁰ Moreover, there is the 150-day time limit cap upon which the judgment is deemed entered, by operation of law, regardless of whether the District Court has properly produced the required

¹³ See Rule 4(a)(1). See also 207 *F.R.D.* 656, 696-697.

¹⁴ See Rule 58, *FRCP*. See also 207 *F.R.D.* 51, 74-79 (2002).

¹⁵ See generally Howard J. Bashman, December 2002 Brings Significant Changes To The Federal Rules of Appellate Procedures, 3-4 (“www.bipc.com/articles-a-e/appellateproc.htm”).

¹⁶ House Document 107-204, Communication From The Chief Justice, The Supreme Court of The United States Transmitting Amendments To The Federal Rules Of Civil Procedure That Have Been Adopted By The Court, Pursuant To 28 U.S.C. 2072, 26 in 18 West’s Supreme Court Reporter, Ct.R.-4 (July 15, 2002). See also 207 *F.R.D.* 51, 54.

¹⁷ Id., 26-27. See Rules 58(a)(2)-(3), *FRCP*. See also 207 *F.R.D.* 51, 76-77.

¹⁸ Id., 27, 29-31. See Rule 58(b)(1), *FRCP*. See also 207 *F.R.D.* 51, 77, 79-81.

¹⁹ Id., 28, 29-31. See Rules 58(b)(2)(A)-(B), *FRCP*. See also 207 *F.R.D.* 51, 78, 79-81.

²⁰ House Document 107-206, 50-51. See also 207 *F.R.D.* 656, 705-706.

“separate document”.²¹ Finally, Rule 4(a)(7)(B), provides that when Rule 58(a)(1), *FRCP*, requires a “separate document” from a judgment or order, but the “separate document” is not entered, such action does not affect the validity of any appeal from the order or judgment.²²

Rule 4(b)(5) has been revised to eliminate any confusion regarding the effect of a District Court’s decision to correct an erroneous sentence in a criminal case on the time in which to appeal that sentence.²³ While some courts of appeals have held that a Motion for Correction of a Sentence suspended the appellate time, the amended rule provides that such a motion specifically does not suspend the time for appeal.²⁴

C. Rule 5

Rule 5(c) has been modified to require all papers filed under Rule 5 (appeal by permission) to conform the requirements of Rule 32(c)(2).²⁵ Moreover, any petition, cross-petition, answering petition, *etc.* cannot exceed 20 pages except with the court of appeals’ permission.²⁶

D. Rule 21

Rule 21(d) has been altered in a similar fashion as was done with Rule 5(c), to require all papers under Rule 21 (writs of mandamus and prohibition, other extraordinary writs) to conform the requirements of Rule 32(c)(2).²⁷ Moreover, any petition, cross-petition, answering petition, *etc.* cannot exceed 30 pages except with the court of appeals’ permission.²⁸

E. Rule 24

Rule 24(a)(2) has been amended to prevent an *in forma pauperis* appellant from proceeding with the appeal, even with a District Court’s permission, when a statute requires payment of all applicable appellate fees in order to continue.²⁹ This modification complies with the *Prison Litigation Reform Act*, codified in 28 U.S.C. § 1915(b)(1), which mandates that “prisoners who bring civil actions or appeals from civil actions must `pay the full amount of a filing fee’

²¹ Id., 48-49, 51-52. *See also* 207 F.R.D. 656, 703-704, 705-706. Interestingly, the United States Court of Appeals for the First Circuit self-imposed a three month time frame in which to have a judgment or order entered on a separate document. *See generally* Fiore v. Washington County Community Mental Health Center, 960 F.2d 229, 236 (1st Cir. 1992) (*en banc*). No other court of appeals imposed any type of time limit.

²² Id., 49, 53-54. . *See also* 207 F.R.D. 656, 704, 708-709.

²³ Id., 57-58. . *See also* 207 F.R.D. 656, 712-713.

²⁴ Id., 58 (*citing* 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)). *See also* 207 F.R.D. 656, 713.

²⁵ Id., 59-60. *See also* 207 F.R.D. 656, 714-715.

²⁶ Id. *See also* 207 F.R.D. 656, 714-715.

²⁷ Id., 61-62. *See also* 207 F.R.D. 656, 716-717.

²⁸ Id.. *See also* 207 F.R.D. 656, 716-717.

²⁹ Id., 63. . *See also* 207 F.R.D. 656, 718.

”**30** Additionally, that same *Act* requires “[p]risoners who are unable to pay the full amount of the filing fee at the time of their actions or appeals are filed are generally required to pay part of the fee and then pay the remainder of the fee in installments.”**31**

Rule 24(a)(3) has been modified to eliminate any conflict between an appellant’s District Court-granted right to proceed *in forma pauperis* in an appeal and the *Prison Litigation Reform Act*. Under the prior law, if a District Court granted an appellant leave to proceed *in forma pauperis* then that status continued to the court of appeals.**32** The *Prison Litigation Reform Act* requires a renewed request for *in forma pauperis* status.**33** The amended rule takes the *Prison Litigation Reform Act* into account and effectively eliminates the continued *in forma pauperis* status.**34**

F. Rule 25

In another important change, Rule 25 will now to permit electronic (*i.e.*; e-mail, telecopier, *etc.*) **filing and service of papers** in the courts of appeals.**35** Under prior practice, Rule 25(a)(2)(D) permitted electronic filing but did not make any provision for electronic service. Nevertheless, under the new rule, no party nor the clerk of court may use electronic service unless the party to be served has consented to such service in writing.**36** The Advisory Committee noted that “courts have considerable discretion to use local rules to regulate electronic service [since] [d]ifficult and presently unforeseeable questions are likely to arise as electronic service becomes more common.”**37** Importantly, the “[p]arties also have the flexibility to define the terms of their consent [in that] a party’s consent to electronic service does not have to be ‘all-or-nothing’ ”.**38**

This added section authorizes the courts of appeal to use their own electronic transmission facilities (*i.e.*; blast fax, telecopier, e-mail, *etc.*) to “forward an electronically filed paper to all parties automatically or semi-automatically.”**39** As technology advances and the courts obtain more advanced facilities, this new provision will allow courts to “use local rules to authorize such use of their

30 Id., 64. . See also 207 F.R.D. 656, 719.

31 Id. (citing 28 U.S.C. § 1915(b)). See also 207 F.R.D. 656, 719.

32 Id., 65. See also 207 F.R.D. 656, 720.

33 Id. (citing Morgan v. Haro, 112 F.3d 788, 789 (5th Cir. 1997)). See also 207 F.R.D. 656, 720.

34 Id. See also 207 F.R.D. 656, 720.

35 Id., 66-67. See also 207 F.R.D. 656, 721-722.

36 Id., 67-68. See also 207 F.R.D. 656, 722-723.

37 Id., 68. See also 207 F.R.D. 656, 723.

38 Id. See also 207 F.R.D. 656, 723.

39 Id. See also 207 F.R.D. 656, 723.

transmission facilities, as well as, to address the many questions that court-facilitated electronic service is likely to raise.”⁴⁰

This modified section provides that “[s]ervice by electronic means is complete on transmission, unless the party making service is notified that the paper was not received by the party served.”⁴¹ The Advisory Committee noted that “[t]ransmission 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 the electronic mail program.”⁴²

This amended section “require[s] 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.”⁴³

G. Rule 26

Rule 26(c) has been changed to provide that when a document is served electronically, the document is not considered to have been served on the date of service as shown in the proof of service.⁴⁴ Moreover, this rule now extends the “3-day rule” (adding three extra calendar days to response time) to electronic filing.⁴⁵

H. Rules 26.1

Rule 26.1 now requires any non-governmental corporate party to file a “corporate disclosure statement”.⁴⁶ This “corporate disclosure statement” requires the reporting party to “identify any parent corporations and any publicly held corporation that own 10% or more of its stock or [affirmatively state] that there is no such corporation.”⁴⁷

A party’s “corporate disclosure statement” must be filed with the court of appeals when such party files its principal brief, motion, response, petition, and/or answer unless a particular court of appeals’ local rule requires a filing at an earlier time.⁴⁸ Under the 2002 Amendments, a party must file a supplemental “corporate disclosure statement if and when the information contained in the original filing changes.”⁴⁹

When a “corporate disclosure statement” is filed before the party’s principal brief or if a supplemental “corporate disclosure statement” is required, the party is required to file the original and three copies of the statement unless a

⁴⁰ *Id.*, 69. *See also* 207 F.R.D. 656, 724.

⁴¹ *Id.*, 67, 69. *See also* 207 F.R.D. 656, 722, 724.

⁴² *Id.*, 69. *See also* 207 F.R.D. 656, 724.

⁴³ *Id.*, 69-70. *See also* 207 F.R.D. 656, 724-725.

⁴⁴ *Id.*, 71-72. *See also* 207 F.R.D. 656, 726-727.

⁴⁵ *Id.*, 72. *See also* 207 F.R.D. 656, 727.

⁴⁶ *Id.*, 86. *See also* 207 F.R.D. 656, 741.

⁴⁷ *Id.* *See also* 207 F.R.D. 656, 741, 743.

⁴⁸ *Id.*, 86-87. *See also* 207 F.R.D. 656, 741-742.

⁴⁹ *Id.*, 87. *See also* 207 F.R.D. 656, 742, 743.

particular court of appeals' local rule requires a different number or the order in a particular appeal requires a different number.⁵⁰

I. Rule 27

Under the additions to Rule 27, addressing motions filed in the courts of appeals, a party submitting a motion to a court of appeals and using a cover on the motion must now specifically use a white cover.⁵¹ Covers, of course, are not required on Rule 27 motions.⁵²

J. Rule 28

Another important and welcome change comes in Rule 28(j). Under old Rule 28(j), a party which discovered "pertinent and significant" authorities after the party's brief had been filed was authorized to advise the court of appeals of those authorities in a letter.⁵³ The submitting party, while pointing out the applicability of the authorities to section in the previously-filed brief or from oral argument, was **prohibited** from presenting any additional argument to the court of appeals.⁵⁴ The 2002 Amendments have revised the rule to now **permit** argument addressing "the reasons for the supplemental citations", but limiting the "body of the letter [to not more than] 350 words".⁵⁵ The Advisory Committee notes that "[a]ll words found in footnotes will count toward the 350-word limit."⁵⁶

K. Rule 31

The 2002 Amendments now specifically require two copies of a party's brief to be served on **parties who or which have not retained legal counsel** (*i.e.*; unrepresented parties) to represent them in the court of appeals.⁵⁷ There was some degree of confusion in the prior version of Rule 31(b) which was often read to mean a party did not have to serve copies of brief on unrepresented parties.⁵⁸

L. Rule 32

Rule 32 addresses the physical form of briefs, Joint Appendices, and other papers filed in the court of appeals. Under the revisions to Rule 32(a)(2) the *FRAP* now requires any supplemental brief allowed by a court of appeals to have a tan cover.⁵⁹ The Advisory Committee noted that the "amendment is intended

⁵⁰ *Id.*, 87. *See also* 207 F.R.D. 656, 742, 743.

⁵¹ *Id.*, 90. *See also* 207 F.R.D. 656, 745.

⁵² *Id.*, 90-91. *See also* 207 F.R.D. 656, 745-746.

⁵³ *Id.*, 95-96. *See also* 207 F.R.D. 656, 75-751.

⁵⁴ *Id.*, 95. *See also* 207 F.R.D. 656, 750.

⁵⁵ *Id.*, 96. *See also* 207 F.R.D. 656, 751.

⁵⁶ *Id.* *See also* 207 F.R.D. 656, 751.

⁵⁷ *Id.*, 97. *See also* 207 F.R.D. 656, 752.

⁵⁸ *Id.*, 98. *See also* 207 F.R.D. 656, 753.

⁵⁹ *Id.*, 91. *See also* 207 F.R.D. 656, 746.

to promote uniformity in federal appellate practice[since at] present, the local rules of the circuit courts conflict.”**60**

The 2002 Amendments made very minor changes in Rule 32(a)(7)(C) which requires that a party must certify that a principal brief exceeding 30 pages or a reply brief exceeding 15 pages still complies with the required type-volume limitations.**61** The modification renumber the provision to add sections (i) and (ii). Under Rule 32(a)(7)(C)(ii) the provision adds Form 6 in the Appendix of Forms as the certificate of compliance for Rule 32(a)(7)(C).**62**

Rule 32(c)(2) mandates that a cover is not required on “other papers” such as a petition for rehearing or a petition for hearing/rehearing *en banc*.**63** Nevertheless, when a party uses a cover, the 2002 Amendments now require the cover to be white.**64**

Prior Rule 32(d) has been redesignated a Rule 32(e) and, under the 2002 Amendments, Rule 32(d) has been added.**65** New Rule 32(d) specifically requires that “[e]very [original] brief, motion, or other paper filed with [a] court [of appeals] must be signed by the party filing the paper or, if the party is represented, by one of the party’s attorneys.”**66** The Advisory Committee notes that this revision effectively imposes a Rule 11(a), *FRCP*-like, requirement in the courts of appeals.**67**

M. Rule 36

This rule has been amended to require the clerk of court to serve an opinion of a court of appeals on the parties when judgment is entered and, if there is no opinion, then to advise the parties of the judgment.**68** Moreover, the rule now authorizes the courts of appeals to use electronic means to serve the opinion or the judgment on the parties.

N. Rule 44

The 2002 Amendments redesignate Rule 44 in such a way as to add subparagraphs (a) and (b).**69** New subdivision (a) comprises the content of the old rule which had been adopted to comply with 28 *U.S.C.* § 2403(b) requiring the court of appeals’ clerks of court to notify the United States Attorney General

60 *Id.*, 92. See also 207 *F.R.D.* 656, 747 (citing *D.C.Cir. Rule 28(g)* (yellow covers); *11th Cir. Rule 32* and *I.O.P. 1* (white covers)).

61 *Id.*, 98-99. See also 207 *F.R.D.* 656, 753-754.

62 *Id.*, 99-100. See also 207 *F.R.D.* 656, 754-755.

63 *Id.*, 93-94. See also 207 *F.R.D.* 656, 748-749.

64 *Id.*, 94. See also 207 *F.R.D.* 656, 749 (citing *Fed.Cir. Rule 35(2)* (yellow and brown covers); *7th Cir. Rule 28* (blue and brown covers); *9th Cir. Rule 40-1* (blue and red covers); *11th Cir. Rule 35-6* (white covers)).

65 *Id.*, 102. See also 207 *F.R.D.* 656, 757.

66 *Id.*, 102-103. See also 207 *F.R.D.* 656, 757-758.

67 *Id.* See also 207 *F.R.D.* 656, 757.

68 *Id.*, 72-73. See also 207 *F.R.D.* 656, 727-728.

69 *Id.*, 103-104. See also 207 *F.R.D.* 656, 758-759.

when the constitutionality of an Act of Congress was challenged and the United State was not a party to the action. The revisions contained in new subdivision (b) incorporate the provisions of 28 *U.S.C.* § 2403(b) which require a similar notification to States' Attorneys General when the constitutionality of a state statute is challenged and the state was not a party to the action.⁷⁰ In both the federal and state situations, notification to the respective Attorneys General afford them the opportunity to intervene into the case to defend the constitutional attack.⁷¹

O. Rule 45)

In the same vein as the modifications to Rule 36(b), this rule has been amended to require the clerk of court of the courts of appeals to use electronic means to serve the opinion or the judgment on the parties which have consented to such service.⁷²

P. Rules 4, 26, 27, 41, and 45

The 2002 Amendments make several changes in Rules 4(a)(4)(A)(vi), 26(a), 27(a)(3)(A), 27(a)(4), 41(b), and 45(c) regarding the computation and extension of time periods in which to perform some task. Generally speaking, as always has been the case, the day of the act, event, or default is excluded. Moreover intermediate Saturdays, Sundays, and legal holidays are excluded when the applicable time period is less than 11 days.⁷³ These changes have eliminated traps for the unwary when viewed in association with time computations from the *Federal Rules of Civil Procedure* and *Federal Rules of Criminal Procedure*.⁷⁴

70 Id. See also 207 F.R.D. 656, 758-759.

71 Id., 104-105. See also 207 F.R.D. 656, 759-760.

72 Id., 73-74. See also 207 F.R.D. 656, 728-729.

73 Id., 74-83. See also 207 F.R.D. 656, 729-737.

74 Id., 75. See also 207 F.R.D. 656, 730.