

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 SUPREME COURT OF THE UNITED STATES, PURSUANT TO 28 U.S.C. 2072



APRIL 25, 2023.—Referred to the Committee on the Judiciary and ordered
to be printed

U.S. GOVERNMENT PUBLISHING OFFICE

39-011

WASHINGTON : 2023

SUPREME COURT OF THE UNITED STATES,
Washington, DC, April 24, 2023.

Hon. KEVIN MCCARTHY,
Speaker, House of Representatives,
Washington, DC.

DEAR MR. SPEAKER: I have the honor to submit to the Congress 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 the amended rules are the following materials that were submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code: a transmittal letter to the Court dated October 19, 2022; a blackline version of the rules with committee notes; an excerpt from the September 2022 report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and excerpts from the May 2022 reports of the Advisory Committee on Appellate Rules.

Sincerely,

JOHN G. ROBERTS, Jr.
Chief Justice.

April 24, 2023

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. The Federal Rules of Appellate Procedure are amended to include amendments to Rules 2, 4, 26, and 45.

[*See infra* pp. ____ ____.]

2. The foregoing amendments to the Federal Rules of Appellate Procedure shall take effect on December 1, 2023, and shall govern in all proceedings in appellate cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. THE CHIEF JUSTICE is authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Appellate Procedure in accordance with the provisions of Section 2074 of Title 28, United States Code.

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF APPELLATE PROCEDURE**

Rule 2. Suspension of Rules

(a) **In a Particular Case.** On its own or a party's motion, a court of appeals may—to expedite its decision or for other good cause—suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b).

(b) **In an Appellate Rules Emergency.**

(1) **Conditions for an Emergency.** The Judicial Conference of the United States may declare an Appellate Rules emergency if it determines that extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its functions in compliance with these rules.

- (2) **Content.** The declaration must:
 - (A) designate the circuit or circuits affected; and
 - (B) be limited to a stated period of no more than 90 days.
- (3) **Early Termination.** The Judicial Conference may terminate a declaration for one or more circuits before the termination date.
- (4) **Additional Declarations.** The Judicial Conference may issue additional declarations under this rule.
- (5) **Proceedings in a Rules Emergency.** When a rules emergency is declared, the court may:
 - (A) suspend in all or part of that circuit any provision of these rules, other than time limits imposed by statute

and described in Rule 26(b)(1)-(2);

and

(B) order proceedings as it directs.

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 entry of the judgment or order appealed from.

* * * * *

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

- (A) If a party files in the district court any of the following motions under the Federal Rules of Civil Procedure—and does so within the time allowed by those rules—the time to file an appeal runs for all parties from the

entry of the order disposing of the last
such remaining motion:

- (i) for judgment under
Rule 50(b);
 - (ii) to amend or make additional
factual findings under
Rule 52(b), whether or not
granting the motion would
alter the judgment;
 - (iii) for attorney's fees under
Rule 54 if the district court
extends the time to appeal
under Rule 58;
 - (iv) to alter or amend the judgment
under Rule 59;
 - (v) for a new trial under Rule 59;
- or

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- (vi) for relief under Rule 60 if the motion is filed within the time allowed for filing a motion under Rule 59.

* * * * *

Rule 26. Computing and Extending Time

(a) **Computing Time.** The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.

* * * * *

(6) **“Legal Holiday” Defined.** “Legal holiday”

means:

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

* * * * *

Rule 45. Clerk's Duties**(a) General Provisions.**

(1) **Qualifications.** The circuit clerk must take the oath and post any bond required by law. Neither the clerk nor any deputy clerk may practice as an attorney or counselor in any court while in office.

(2) **When Court Is Open.** The court of appeals is always open for filing any paper, issuing and returning process, making a motion, and entering an order. The clerk's office with the clerk or a deputy in attendance must be open during business hours on all days except Saturdays, Sundays, and legal holidays. A court may provide by local rule or by order that the clerk's office be open for specified hours on Saturdays or on legal holidays other than New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Juneteenth National Independence Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day.

* * * * *



JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

HONORABLE ROSLYNN R. MAUSKOPF
Secretary

October 19, 2022

MEMORANDUM

To: The Chief Justice of the United States
The Associate Justices of the Supreme Court

From: Judge Roslynn R. Mauskopf *Roslynn R. Mauskopf*

RE: TRANSMITTAL OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF
APPELLATE PROCEDURE

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit for the Court's consideration proposed amendments to Rules 2, 4, 26, and 45 of the Federal Rules of Appellate Procedure, which have been approved by the Judicial Conference. The Judicial Conference recommends that the amendments be adopted by the Court and transmitted to Congress pursuant to law.

For your assistance in considering the proposed amendments, I am transmitting (i) clean and blackline copies of the amended rules along with committee notes; (ii) an excerpt from the September 2022 report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iii) excerpts from the May 2022 reports of the Advisory Committee on Appellate Rules.

Attachments



**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF APPELLATE PROCEDURE¹**

1 **Rule 2. Suspension of Rules**

2 **(a) In a Particular Case.** On its own or a party's
3 motion, a court of appeals may—to expedite its
4 decision or for other good cause—suspend any
5 provision of these rules in a particular case and order
6 proceedings as it directs, except as otherwise
7 provided in Rule 26(b).

8 **(b) In an Appellate Rules Emergency.**

9 **(1) Conditions for an Emergency.** The Judicial
10 Conference of the United States may declare
11 an Appellate Rules emergency if it
12 determines that extraordinary circumstances
13 relating to public health or safety, or affecting
14 physical or electronic access to a court,
15 substantially impair the court's ability to

¹ New material is underlined.

2 FEDERAL RULES OF APPELLATE PROCEDURE

16 perform its functions in compliance with
17 these rules.

18 (2) **Content.** The declaration must:

19 (A) designate the circuit or
20 circuits affected; and

21 (B) be limited to a stated period of
22 no more than 90 days.

23 (3) **Early Termination.** The Judicial
24 Conference may terminate a
25 declaration for one or more circuits
26 before the termination date.

27 (4) **Additional Declarations.** The
28 Judicial Conference may issue
29 additional declarations under this
30 rule.

31 (5) **Proceedings in a Rules Emergency.**
32 When a rules emergency is declared,
33 the court may:

- 34 (A) suspend in all or part of that
35 circuit any provision of these
36 rules, other than time limits
37 imposed by statute and
38 described in Rule 26(b)(1)-
39 (2); and
40 (B) order proceedings as it directs.

Committee Note

Flexible application of the Federal Rules of Appellate Procedure, including Rule 2, has enabled the courts of appeals to continue their operations despite the coronavirus pandemic. Future emergencies, however, may pose problems that call for broader authority to suspend provisions of the Federal Rules of Appellate Procedure. For that reason, the amendment adds a new subdivision authorizing broader suspension authority when the Judicial Conference of the United States declares an Appellate Rules emergency. The amendment is designed to add to the authority of courts of appeals; it should not be interpreted to restrict the authority previously exercised by the courts of appeals.

The circumstances warranting the declaration of an Appellate Rules emergency mirror those warranting a declaration of a Civil Rules emergency and a Bankruptcy Rules emergency: extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, that substantially impair the court's ability

to perform its functions in compliance with these rules. A declaration must designate the circuit or circuits affected. It must also have a sunset provision so that the declaration is in effect for no more than 90 days unless the Judicial Conference makes an additional declaration. The Judicial Conference may also terminate the declaration for one or more circuits before the termination date.

When a rules emergency is declared, the court of appeals may suspend in all or part of that circuit any provision of these rules, other than time limits imposed by statute and described in Rule 26(b)(1)-(2). This enables the court of appeals to suspend the time to appeal or seek review set only by a rule, but it does not authorize the court of appeals to suspend jurisdictional time limits imposed by statute. Sometimes when a rule is suspended, there is no need to provide any alternative to the suspended rule. For example, if the requirement of submitting paper copies of briefs is suspended, it may be enough to rely on electronic submissions. However, to deal with situations in which an alternative is required, the amendment empowers the court to “order proceedings as it directs,” the same language that existed in Rule 2—now Rule 2(a)—before this amendment.

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF APPELLATE PROCEDURE¹**

1 Rule 4. Appeal as of Right—When Taken

2 (a) Appeal in a Civil Case.

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

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

10 * * * * *

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

12 (A) If a party files in the district court any
13 of the following motions under the
14 Federal Rules of Civil Procedure—
15 and does so within the time allowed

¹ New material is underlined; matter to be omitted is lined through.

16 by those rules—the time to file an
17 appeal runs for all parties from the
18 entry of the order disposing of the last
19 such remaining motion:

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

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

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

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

- 33 (v) for a new trial under Rule 59;
34 or
35 (vi) for relief under Rule 60 if the
36 motion is filed ~~no later than 28~~
37 ~~days after the judgment is~~
38 ~~entered—within the time~~
39 ~~allowed for filing a motion~~
40 ~~under Rule 59.~~
41 * * * * *

Committee Note

The amendment is designed to make Rule 4 operate smoothly with Emergency Civil Rule 6(b)(2) if that emergency Civil Rule is ever in effect, while not making any change to the operation of Rule 4 at any other time. It does this by replacing the phrase “no later than 28 days after the judgment is entered” in Rule 4(a)(4)(A)(vi) with the phrase “within the time allowed for filing a motion under Rule 59.”

Certain post-judgment motions—for example, a renewed motion for judgment as a matter of law under Civil Rule 50(b) and a motion for a new trial under Civil Rule 59—may be made in the district court shortly after judgment is entered. Recognizing that it makes sense to await the district court’s decision on these motions before pursuing an appeal, Rule 4(a)(4)(A) resets the time to appeal

from the judgment so that it does not run until entry of an order disposing of the last such motion.

Rule 4 gives this resetting effect only to motions that are filed within the time allowed by the Civil Rules. For most of these motions, the Civil Rules require that the motion be filed within 28 days of the judgment. See Civil Rules 50(b) and (d), 52(b), 59(b), (d), and (e). The time requirements for a Civil Rule 60(b) motion, however, are notably different. It must be filed “within a reasonable time,” and for certain Civil Rule 60(b) motions, no more than a year after judgment. For this reason, Rule 4 does not give resetting effect to all Civil Rule 60(b) motions that are filed within the time allowed by the Civil Rules, but only to those Civil Rule 60(b) motions that are filed within 28 days of the entry of judgment. That is why most of the motions listed in Rule 4(a)(4)(A) are governed simply by the general requirement that they be filed within the time allowed by the Civil Rules, but Rule 4(a)(4)(A)(vi) adds the requirement that a Civil Rule 60(b) motion has resetting effect only if “filed no later than 28 days after the judgment is entered.”

Significantly, Civil Rule 6(b)(2) prohibits the district court from extending the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b). That means that when Rule 4 requires that a motion be filed within the time allowed by the Civil Rules, the time allowed by those Rules for motions under Rules 50(b) and (d), 52(b), 59(b), (d), and (e) will be 28 days—matching the 28-day requirement in Rule 4(a)(4)(A)(vi) applicable to Rule 60(b) motions.

However, Emergency Civil Rule 6(b)(2)—which would be operative only if the Judicial Conference of the United States were to declare a Civil Rules emergency under Civil Rule 87—authorizes district courts to grant extensions that they are otherwise prohibited from granting. If that

emergency Civil Rule is in effect, district courts may grant extensions to file motions under Civil Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b). For all these motions except Civil Rule 60(b) motions, Rule 4 works seamlessly. Rule 4 requires only that those motions be filed “within the time allowed by” the Civil Rules, and a motion filed within a properly granted extension is filed “within the time allowed by” those rules. An emergency Civil Rule is no less a Civil Rule simply because it is operative only in a Civil Rules emergency.

Without amendment, Rule 4 would not work seamlessly with the Emergency Civil Rule for Rule 60(b) motions because the 28-day requirement in Rule 4(a)(4)(A)(vi) would not correspond to the extended time to file other resetting motions. For this reason, the amendment replaces the phrase “if the motion is filed no later than 28 days after the judgment is entered” with the phrase “within the time allowed for filing a motion under Rule 59.”

At all times that no Civil Rules emergency has been declared, the amended Rule 4 functions exactly as it did prior to the amendment. A Civil Rule 60(b) motion has resetting effect only if it is filed within the time allowed for filing a motion under Civil Rule 59—which is 28 days.

When a Civil Rules emergency has been declared, however, if a district court grants an extension of time to file a Civil Rule 59 motion and a party files a Civil Rule 60(b) motion, that Civil Rule 60(b) motion has resetting effect so long as it is filed within the extended time set for filing a Civil Rule 59 motion. The Civil Rule 60(b) motion has this resetting effect even if no Civil Rule 59 motion is filed.

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF APPELLATE PROCEDURE¹**

1 **Rule 26. Computing and Extending Time**

2 **(a) Computing Time.** The following rules apply in
3 computing any time period specified in these rules, in any
4 local rule or court order, or in any statute that does not
5 specify a method of computing time.

6 * * * * *

7 **(6) “Legal Holiday” Defined.** “Legal holiday”

8 means:

9 **(A)** the day set aside by statute for
10 observing New Year’s Day, Martin
11 Luther King Jr.’s Birthday,
12 Washington’s Birthday, Memorial
13 Day, Juneteenth National
14 Independence Day, Independence
15 Day, Labor Day, Columbus Day,

¹ New material is underlined.

2 FEDERAL RULES OF APPELLATE PROCEDURE

16 Veterans' Day, Thanksgiving Day,
17 or Christmas Day;
18 * * * * *

Committee Note

The amendment adds "Juneteenth National Independence Day" to the list of legal holidays. See Juneteenth National Independence Day Act, P.L. 117-17 (2021) (amending 5 U.S.C. § 6103(a)).

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF APPELLATE PROCEDURE¹**

1 **Rule 45. Clerk's Duties**

2 **(a) General Provisions.**

3 **(1) Qualifications.** The circuit clerk must take
4 the oath and post any bond required by law. Neither the clerk
5 nor any deputy clerk may practice as an attorney or
6 counselor in any court while in office.

7 **(2) When Court Is Open.** The court of appeals
8 is always open for filing any paper, issuing and returning
9 process, making a motion, and entering an order. The clerk's
10 office with the clerk or a deputy in attendance must be open
11 during business hours on all days except Saturdays, Sundays,
12 and legal holidays. A court may provide by local rule or by
13 order that the clerk's office be open for specified hours on
14 Saturdays or on legal holidays other than New Year's Day,
15 Martin Luther King, Jr.'s Birthday, Washington's Birthday,

¹ New material is underlined; matter to be omitted is
lined through.

2 FEDERAL RULES OF APPELLATE PROCEDURE

16 Memorial Day, Juneteenth National Independence Day,
17 Independence Day, Labor Day, Columbus Day, Veterans’
18 Day, Thanksgiving Day, and Christmas Day.

19 * * * * *

Committee Note

The amendment adds “Juneteenth National Independence Day” to the list of legal holidays. See Juneteenth National Independence Day Act, P.L. 117-17 (2021) (amending 5 U.S.C. § 6103(a)). A stylistic change was made.

Excerpt from the September 2022 Report of the Committee on Rules of Practice and Procedure

Agenda E-19
Rules
September 2022

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:**

* * * * *

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules recommended for final approval proposed amendments to Appellate Rules 2, 4, 26, and 45.

Rule 2 (Suspension of Rules)

The proposed amendment to Appellate Rule 2 is part of the set of proposed rules, mentioned above, that resulted from the CARES Act directive that rules be considered to address future emergencies. The proposal adds a new subdivision (b) to Appellate Rule 2. Existing Rule 2, which would become Rule 2(a), empowers the courts of appeals to suspend the provisions in the Appellate Rules “in a particular case,” except “as otherwise provided in Rule 26(b).” (Rule 26(b) provides that “the court may not extend the time to file: (1) a notice of appeal (except as authorized in Rule 4) or a petition for permission to appeal; or (2) a notice of appeal from or a [petition to review an order of a federal administrative body], unless specifically authorized by law.”) New Rule 2(b) would come into operation when the Judicial Conference declares an Appellate Rules emergency and would empower the court of appeals to “suspend in

NOTICE

NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL CONFERENCE
UNLESS APPROVED BY THE CONFERENCE ITSELF.

Excerpt from the September 2022 Report of the Committee on Rules of Practice and Procedure

all or part of that circuit any provision of these rules, other than time limits imposed by statute and described in Rule 26(b)(1)-(2).”

In the event of a Judicial Conference declaration of an Appellate Rules emergency, a court of appeals’ authority under Rule 2(b) would be broader in two ways than a court of appeals’ everyday authority under Rule 2(a). First, the suspension power under Rule 2(b) reaches beyond a particular case. Second, the Rule 2(b) suspension power reaches time limits to appeal or petition for review, so long as those time limits are established only by rule. (Rule 2(b) does not purport to empower the court to suspend time limits to appeal or petition for review set by statute.)

Rule 4 (Appeal as of Right—When Taken)

The proposed amendment to Appellate Rule 4 is designed to make Appellate Rule 4 operate smoothly with Emergency Civil Rule 6(b)(2) (discussed below) if that Emergency Civil Rule is ever in effect, while not making any change to the operation of Appellate Rule 4 at any other time.

It does this by replacing the phrase “no later than 28 days after the judgment is entered” in Rule 4(a)(4)(A)(vi) with the phrase “within the time allowed for filing a motion under Rule 59.” When Emergency Civil Rule 6(b)(2) is not in effect, this amendment makes no change at all. But if Emergency Civil Rule 6(b)(2) is ever in effect, a district court might extend the time to file a motion under Rule 59. If that happens, the amendment to Appellate Rule 4(a)(4)(A)(vi) would allow Appellate Rule 4 to properly take that extension into account.

Rule 26 (Computing and Extending Time) and Rule 45 (Clerk’s Duties)

In response to the enactment of the Juneteenth National Independence Day Act (Juneteenth Act), Pub. L. No. 117-17 (2021), the Advisory Committee made technical amendments to Rules 26(a)(6)(A) and 45(a)(2) to insert “Juneteenth National Independence

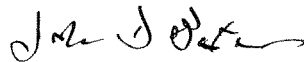
Day” immediately following “Memorial Day” in the Rules’ lists of legal holidays. Because of the technical and conforming nature of the amendments, the Advisory Committee recommended final approval without publication.

The Standing Committee unanimously approved the Advisory Committee’s recommendations, after making a stylistic change to Appellate Rule 2(b)(4) to conform that Rule’s language to the language used in the other Emergency Rules.

Recommendation: That the Judicial Conference approve the proposed amendments to Appellate Rules 2, 4, 26, and 45, as set forth in Appendix A, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

* * * * *

Respectfully submitted,



John D. Bates, Chair

Elizabeth J. Cabraser	Troy A. McKenzie
Jesse M. Furman	Patricia Ann Millett
Robert J. Giuffra, Jr.	Lisa O. Monaco
Frank Mays Hull	Gene E.K. Pratter
William J. Kayatta, Jr.	Kosta Stojilkovic
Peter D. Keisler	Jennifer G. Zipps
Carolyn B. Kuhl	

* * * * *

Excerpt from the May 13, 2022 Report of the Advisory Committee on Appellate Rules

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

JOHN D. BATES
CHAIR

CHAIRS OF ADVISORY COMMITTEES

JAY S. BYBEE
APPELLATE RULES

DENNIS R. DOW
BANKRUPTCY RULES

ROBERT M. DOW, JR.
CIVIL RULES

RAYMOND M. KETHLEDGE
CRIMINAL RULES

PATRICK J. SCHILTZ
EVIDENCE RULES

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Judge Jay Bybee, Chair
Advisory Committee on Appellate Rules

RE: Report of the Advisory Committee on Appellate Rules

DATE: May 13, 2022

I. Introduction

* * * * *

The Advisory Committee seeks final approval of two matters.

First, it seeks final approval of proposed amendments to Appellate Rule 2 and Appellate Rule 4. These proposed amendments are discussed in a separate memo contained in the agenda book as part of the package of CARES Act amendments.

Second, it seeks final approval of proposed amendments to Appellate Rule 26 and Appellate Rule 45 to reflect a new federal holiday, Juneteenth National

Excerpt from the May 13, 2022 Report of the Advisory Committee on Appellate Rules

Independence Day, June 19. These proposed amendments have not been published for public notice and comment. The Advisory Committee does not believe that publication and comment are necessary, because these amendments simply conform to a new statute. (Part II of this report.)

* * * * *

II. Action Item for Final Approval

Juneteenth

On June 17, 2021, President Biden signed into law the Juneteenth National Independence Day Act, P.L. 117-17 (2021) which amends 5 U.S.C. § 6103(a) to add to the list of public legal holidays “Juneteenth National Independence Day, June 19.”

To reflect the new public legal holiday, the Advisory Committee approved an amendment to Federal Rule of Appellate Procedure 26(a)(6)(A) to insert the words “Juneteenth National Independence Day,” immediately following the words “Memorial Day.” The Advisory Committee further recommends that this amendment be given final approval without publication. See Procedures for Committees on Rules of Practice and Procedure § 440.20.40 (“The Standing Committee may also eliminate public notice and comment for a technical or conforming amendment if the Committee determines that they are unnecessary.”).

After the meeting, the Advisory Committee noticed that the list of holidays is repeated in Federal Rule of Appellate Procedure 45(a)(2) and voted by email to add Juneteenth to that Rule as well.

Other Advisory Committees have considered parallel amendments. Here is the proposed amended text of Rule 26(a)(6):

Rule 26. Computing and Extending Time

(a) Computing Time. * * *

* * * * *

(6) “Legal Holiday” Defined. “Legal holiday” means:

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

Excerpt from the May 13, 2022 Report of the Advisory Committee on Appellate Rules

- (B) any day declared a holiday by the President or Congress; and
- (C) for periods that are measured after an event, any other day declared a holiday by the state where either of the following is located: the district court that rendered the challenged judgment or order, or the circuit clerk's principal office.

* * * * *

Committee Note

The amendment adds "Juneteenth National Independence Day" to the list of legal holidays. See Juneteenth National Independence Day Act, P.L. 117-17 (2021) (amending 5 U.S.C. § 6103(a)).

And here is the proposed amended text of Rule 45(a)(2):

Rule 45. Clerk's Duties

(a) General Provisions.

* * * * *

- (2) **When Court Is Open.** The court of appeals is always open for filing any paper, issuing and returning process, making a motion, and entering an order. The clerk's office with the clerk or a deputy in attendance must be open during business hours on all days except Saturdays, Sundays, and legal holidays. A court may provide by local rule or by order that the clerk's office be open for specified hours on Saturdays or on legal holidays other than New Year's Day, Martin Luther King, Jr.'s Birthday, Washington's Birthday, Memorial Day, Juneteenth National Independence Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day.

* * * * *

Committee Note

The amendment adds "Juneteenth National Independence Day" to the list of legal holidays. See Juneteenth National Independence Day Act, P.L. 117-17 (2021) (amending 5 U.S.C. § 6103(a)). A stylistic change was made.

* * * * *

May 13, 2022 Report of the Advisory Committee on Appellate Rules

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

JOHN D. BATES
CHAIR

CHAIRS OF ADVISORY COMMITTEES

JAY S. BYBEE
APPELLATE RULES

DENNIS R. DOW
BANKRUPTCY RULES

ROBERT M. DOW, JR.
CIVIL RULES

RAYMOND M. KETHLEDGE
CRIMINAL RULES

PATRICK J. SCHULTZ
EVIDENCE RULES

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Judge Jay Bybee, Chair
Advisory Committee on Appellate Rules

RE: Appellate Rule 2 and Appellate Rule 4 (CARES Act)

DATE: May 13, 2022

At its June 2021 meeting, the Standing Committee approved for publication proposed amendments to Appellate Rule 2 and Appellate Rule 4. The text of each of those proposed amendments as published with accompanying Committee Note is attached to this report.

The Advisory Committee now seeks final approval of these proposed amendments without change.

Appellate Rule 2. Existing Appellate Rule 2 broadly empowers a court of appeals to suspend virtually any provision of the Appellate Rules in a particular case and order proceedings as it directs. This power does not reach the time to file a notice of appeal or petition for review. *See* Appellate Rule 26(b).

May 13, 2022 Report of the Advisory Committee on Appellate Rules

The proposed amendment to Appellate Rule 2 would modestly broaden this power when the Judicial Conference declares an Appellate Rules emergency. In such a declared emergency, the court of appeals would be empowered to “suspend in all or part of that circuit any provision of these rules, other than time limits imposed by statute and described in Rule 26(b)(1)-(2).”

The power is broadened in two ways. First, the suspension power reaches beyond a particular case. Second, the suspension power reaches time limits to appeal or petition for review that are established only by rule. It does not purport to empower the court to suspend time limits to appeal or petition for review set by statute.

As detailed in the cover memo by Professors Capra and Struve, the standards and process for declaring an Appellate Rules emergency parallel that proposed by other Advisory Committees.

Appellate Rule 4. The proposed amendment to Appellate Rule 4 is designed to make Appellate Rule 4 operate smoothly with Emergency Civil Rule 6(b)(2) if that Emergency Civil Rule is ever in effect, while not making any change to the operation of Appellate Rule 4 at any other time.

It does this by replacing the phrase “no later than 28 days after the judgment is entered” in Rule 4(a)(4)(A)(vi) with the phrase “within the time allowed for filing a motion under Rule 59.”

When Emergency Civil Rule 6(b)(2) is not in effect, this amendment makes no change at all. That’s because the time allowed for filing a motion under Rule 59 is 28 days after the judgment is entered.

But if Emergency Civil Rule 6(b)(2) is ever in effect, a district court might extend the time to file a motion under Rule 59. If that happens, the amendment to Appellate Rule 4(a)(4)(A)(vi) would allow Appellate Rule 4 to properly take that extension into account.

As a refresher on how that works, here is the relevant passage from the Advisory Committee’s June 2021 report:

Certain post-judgment motions—for example, a renewed motion for judgment as a matter of law under Civil Rule 50(b) and a motion for a new trial under Civil Rule 59—may be made in the district court shortly after judgment is entered. Recognizing that it makes sense to await the district court’s decision on these motions before pursuing an appeal, Appellate Rule 4(a)(4)(A) resets the time to appeal from the judgment so that it does not run until entry of an order disposing of the last such motion.

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Appellate Rule 4 gives this resetting effect only to motions that are filed within the time allowed by the Civil Rules. For most of these motions, the Civil Rules require that the motion be filed within 28 days of the judgment. See Civil Rules 50(b) and (d); 52(b); and 59(b), (d), and (e). The time requirements for a Civil Rule 60(b) motion, however, are notably different. It must be filed “within a reasonable time,” and for certain Civil Rule 60(b) motions, no more than a year after judgment. See Civil Rule 60(c)(1) (“A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.”).

For this reason, Appellate Rule 4 does not give resetting effect to all Civil Rule 60(b) motions that are filed within the time allowed by the Civil Rules, but only to those Civil Rule 60(b) motions that are filed within 28 days of the entry of judgment. That is why most of the motions listed in Appellate Rule 4(a)(4)(A) are governed simply by the general requirement that they be filed within the time allowed by the Civil Rules, but Appellate Rule 4(a)(4)(A)(vi) adds the requirement that a Civil Rule 60(b) motion has resetting effect only if “filed no later than 28 days after the judgment is entered.”

Significantly, Civil Rule 6(b)(2) prohibits the district court from extending the time to act under Rules 50(b) and (d); 52(b); 59(b), (d), and (e); and 60(b). That means that when Appellate Rule 4 requires that a motion be filed within the time allowed by the Civil Rules, the time allowed by those Rules for motions under Rules 50(b) and (d); 52(b); and 59(b), (d), and (e) will be 28 days—matching the 28-day requirement in Appellate Rule 4(a)(4)(A)(vi) applicable to Rule 60(b) motions.

Enter proposed Emergency Civil Rule 6(b)(2). That emergency rule would authorize district courts to grant extensions that they are otherwise prohibited from granting. Under it, district courts would be able to grant extensions to file motions under Civil Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b). For all these motions except Civil Rule 60(b) motions, Appellate Rule 4 would continue to work seamlessly. Appellate Rule 4 requires only that those motions be filed “within the time allowed by” the Civil Rules, and a motion filed within a properly granted extension is filed “within the time allowed by” those rules. An emergency Civil Rule is no less a Civil Rule simply because it is operative only in a Civil Rules emergency.

But if Appellate Rule 4 were not amended, Appellate Rule 4 would not work seamlessly with the Emergency Civil Rule for Rule 60(b) motions because the 28-day requirement in Rule 4(a)(4)(A)(vi) would not correspond to the extended time to file other resetting motions. For this

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reason, the proposed amendment to Appellate Rule 4 replaces the phrase “if the motion is filed no later than 28 days after the judgment is entered” with the phrase “within the time allowed for filing a motion under Rule 59.”

Significantly, this proposed amendment to Appellate Rule 4 is not itself an emergency rule, but instead would be a regular, ordinary part of the Appellate Rules. At all times that no Civil Rules Emergency has been declared, the amended Rule 4 would function exactly as it has without the proposed amendment. A Civil Rule 60(b) motion would have resetting effect only if it were filed within the time allowed for filing a motion under Civil Rule 59—which is 28 days.

When a Civil Rules Emergency has been declared, however, if a district court grants an extension of time to file a Civil Rule 59 motion and a party files a Civil Rule 60(b) motion, that Civil Rule 60(b) motion has resetting effect so long as it is filed within the extended time set for filing a Civil Rule 59 motion. The Civil Rule 60(b) motion has this resetting effect even if no Civil Rule 59 motion is filed. It does this by replacing the phrase “no later than 28 days after the judgment is entered” in Rule 4(a)(4)(A)(vi) with the phrase “within the time allowed for filing a motion under Rule 59.”

Discussion of Comments Received

The Advisory Committee received a total of six comments. Two were fully supportive. Two were broadly critical. One was irrelevant. One raised issues that the Advisory Committee had considered. The Advisory Committee did not make any changes in response to the public comment.

Fully supportive

The Federal Bar Association (comment 0009) “supports each of the revised and new rules developed . . . in response to . . . the CARES Act,” noting that they “provide important flexibility . . . in future unforeseen situations.” The Federal Bar Association “agrees that the Judicial Conference exclusively, rather than specific circuits, districts, or judges, should be permitted to declare a rules emergency. Conferring this authority to the Judicial Conference alone should help prevent a disjointed or balkanized response to unusual circumstances, including emergencies affecting only particular regions or other subsets of federal courts.” It also “applauds the Rules Committee’s success in achieving relative uniformity across all four emergency rules.”

Louis Koerner (comment 0003) thinks the proposed amendments are “entirely appropriate, well drafted, and even overdue.”

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Broadly critical

Irvan Moritzky (comment 0004) opposes the emergency rules as impractical, complex, and centralized. He urges that issues be left to local district judges, noting that if large retailers are open, local judges should run their courts. He included the Supreme Court's decision in *Duncan v Kahanamoku*, 327 U.S. 304 (1946), which held that Congress had not authorized the supplanting of courts in Hawaii with military tribunals.

Matthew Deinhardt (comment 0006) believes that the proposed amendments create an unequal playing field and lean heavily towards the government side. He urges notice to any defendant who is adversely affected by a suspension of the rules and the opportunity to postpone the proceeding. He also urges that the Judicial Conference not be empowered to terminate an emergency without input from the judge "presiding over that specific court."

Neither of these critical comments convinced the Advisory Committee to make any changes. The Advisory Committee is confident that the Judicial Conference (or its executive committee) will consult as appropriate with the courts affected by any declaration of a rules emergency.

Irrelevant

Andrew Straw (comment 0005) states that no court of appeals should "hire an appellee who is before a panel of the Court to be a federal bankruptcy judge."

Raised issues

Jane Castro, Chief Deputy Clerk, United States Court of Appeals for the Tenth Circuit (comment 0010) raised several thoughtful issues.

FRAP 2. Ms. Castro suggests that the proposed amendment to Rule 2 is "largely unnecessary" because courts, under the current rules, can enter form orders suspending a rule in individual cases. There is some power to the critique; the proposed amendment to Rule 2 does not add a lot. But it would provide clear authority for across-the-board actions. Some might question whether current Rule 2, which limits the suspension authority to "a particular case," permits identical orders entered in every case.

She also suggests that perhaps "the circuits should be authorized to extend nonstatutory deadlines for good cause even without a declared emergency." This suggestion is sufficiently broader than the current proposal that it would require republication. And current Rule 26(b) already imposes few limits on the court's power to extend nonstatutory deadlines.

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FRAP 4. Ms. Castro questions how the proposed amendment to Rule 4 will work in the context of Civil Rule 60 motions, noting that the proposed amendment “pegs the suspending effect of a Rule 60 motion to the time allowed for filing a motion under Rule 59.” She is concerned that if a party seeks, and the district court grants, a motion to extend only the time to file a Civil Rule 60(b) motion, the party will not get the benefit of the Rules Emergency declaration.

The reason for drafting the proposed amendment this way is that the non-emergency deadlines for Civil Rule 59 and Civil Rule 60(b) motions are quite different. A Rule 59 motion must be filed within 28 days of the judgment. FRCP 59(b). A Rule 60(b) motion, on the other hand, must be made “within a reasonable time.” FRCP 60(c)(1). It would seem unnecessary to allow an extension beyond a “reasonable time”; any emergency circumstances can be considered in determining what is reasonable. Motions made under FRCP 60(b)(1), (2), and (3) face the additional requirement that they must be brought no more than one year after judgment, FRCP 60(c)(1), so it is possible that an extension of this one-year deadline might be necessary in an emergency. But if the one-year deadline is the one that needs to be relaxed, the time to appeal the underlying judgment should not be reset.

FRCP 6. Finally, Ms. Castro noted that it is odd for a Civil Rule, rather than an Appellate Rule, to state the effect of an extension on the time to appeal. She added that “consistency and clarity for the public, courts, and practitioners” would seem to call for this to be included in FRAP 4, not FRCP 6.

In the abstract, there is much to be said for this critique. But drafting in this area proved daunting, and the placement in Emergency Civil Rule 6 resulted in the clearest drafting that could be found.

The provision is applicable only in a declared rules emergency, so all should know to look to the emergency rules. In addition, the effect on time to appeal in such an emergency arises in the context of extensions that are available only under Emergency Civil Rule 6, so anyone dealing with such an extension must already engage with Emergency Civil Rule 6. Having the relevant provisions in a single emergency rule—rather than spread over two sets of emergency rules—should promote ease of use.

In the end, the Advisory Committee was reassured by Ms. Castro’s careful submission. That is because such a thoughtful comment did not reveal that the Advisory Committee had overlooked important concerns, but instead pointed to issues that the Advisory Committee had grappled with earlier.