

CHANGES TO THE FEDERAL RULES OF PROCEDURE

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December 1, 2009, brings important changes to the Federal Rules of Criminal and Appellate Procedure, and to the Rules Governing Section 2254 and 2255 Cases in the United States District Courts. Most significantly, the rules governing time computation have changed. Instead of using different computation methods depending on the length of the time period, the new rules adopt a uniform “days are days” approach. Many deadlines throughout the rules have been extended to compensate for this shift. Other changes and additions address forfeiture procedures, warrants for electronically stored information, and matters concerning certificates of appealability in § 2254 and § 2255 cases.

TIME COMPUTATION

In the past, the method for calculating time under the federal rules depended on the length of the period. Time periods of 10 or fewer days used a “business days” method that excluded intermediate Saturdays, Sundays, and legal holidays, whereas periods longer than 10 days used a straight calendar-days approach. As a consequence some shorter periods were actually longer than they appeared. For example, a 10-day business-day period would generally last at least 14 calendar days.

The rules governing time computation have eliminated this distinction in favor of a uniform

“days are days” method.¹ This method is the same as that applicable to periods of more than 10 days under the old rules: “exclude the day of the event that triggers the period;” “count every day, including intermediate Saturdays, Sundays, and legal holidays; and” “include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.”² A similar method governs time periods stated in hours.³ These methods “apply in computing any time period specified in the[] rules, in any local rule or court order, or in any statute that does not specify a method of computing time.”⁴

To reflect the prevalence of electronic filing across the country, the rules explain that the “last day” ends at midnight in the court’s time zone for filing in the district court, and at midnight in the time zone of the circuit clerk’s principal office for filing in the court of appeals.⁵ For filing by mail or third-party carrier in the court of appeals, the last day ends “at the latest time for the method chosen for delivery to the post office, third-party commercial carrier, or prison mailing system[.]”⁶ And for filing by “any other means” in the district and appellate courts, the last day

¹See FED. R. CRIM. P. 45; FED. R. APP. P. 26.

²FED. R. CRIM. P. 45(a)(1)(A)–(C); FED. R. APP. P. 26(a)(1)(A)–(C).

³See FED. R. CRIM. P. 45(a)(2); FED. R. APP. P. 26(a)(2).

⁴FED. R. CRIM. P. 45(a); FED. R. APP. P. 26(a).

⁵FED. R. CRIM. P. 45(a)(4)(A); FED. R. APP. P. 25(a)(4)(A), (B).

⁶FED. R. APP. P. 25(a)(4)(C).

ends “when the clerk’s office is scheduled to close.”⁷ Note, however, that the rules permit “a different time [to be] set by a statute, local rule, or court order[.]”⁸

Because the days-are-days method would effectively reduce the time permitted for certain actions under the time periods found in the old rules, a number of those periods have been extended.

Many motions deadlines have been extended to 14 days,⁹ as have the time periods for appealing magistrate judge findings and recommendations, orders, and judgments.¹⁰ The deadline for filing a notice of appeal to the court of appeals has likewise increased to 14 days.¹¹ Also extended are time periods in the rules concerning alibi and public-authority defenses.¹² Some time periods taken from statutes—such as those for conducting preliminary hearings¹³—have been extended in both the statutes and the rules.¹⁴

⁷FED. R. CRIM. P. 45(a)(4)(B); FED. R. APP. P. 26(a)(4)(D).

⁸FED. R. CRIM. P. 45(a)(4).

⁹FED. R. CRIM. P. 7(f) (bill of particulars), 29(c)(1) (judgment of acquittal), 33(b)(2) (new trial), 34(b) (arrest of judgment), 35(a) (correct sentence).

¹⁰FED. R. CRIM. P. 58(g)(2); 59(a), (b)(2); RULES GOVERNING § 2254 CASES IN THE U.S. DISTRICT COURTS 8(b) (“2254 CASES”); RULES GOVERNING § 2255 CASES IN THE U.S. DISTRICT COURTS 8(b) (“2255 CASES”).

¹¹FED. R. APP. P. 4(b)(1)(A), (b)(3)(A).

¹²FED. R. CRIM. P. 12.1(a)(2), (b)(2); 12.3(a)(3), (4).

¹³FED. R. CRIM. P. 5.1(c).

¹⁴Statutory Time-Periods Technical Amendments Act of 2009, Pub. L. 111-16, 123 Stat. 1607.

FORFEITURE

There are a number of changes addressing forfeiture procedures, many involving matters of notice. The government’s notice that it will seek forfeiture “should not be designated as a count of an indictment or information[.]”¹⁵ but the presentence report must “specify whether the government seeks forfeiture under Rule 32.2 and any other provision of law.”¹⁶ Also, “[u]nless doing so is impractical, the court must enter the preliminary order [of forfeiture] sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications before the order becomes final as to the defendant[.]”¹⁷ Furthermore, the court must make the defendant aware of the forfeiture at sentencing, and include the order—either directly or by reference—in the judgment.¹⁸

Other changes address evidence and forfeiture hearings, seizing property, the contents of a forfeiture order, appeal, jury determination, public notice of the order, and interlocutory sale.¹⁹ Counsel handling forfeiture matters should examine these changes carefully, a more detailed discussion of which is beyond the scope of this article.

WARRANTS FOR ELECTRONICALLY STORED INFORMATION

¹⁵FED. R. CRIM. P. 32.2(a).

¹⁶FED. R. CRIM. P. 32(d)(2)(G).

¹⁷FED. R. CRIM. P. 32.2(b)(2)(B).

¹⁸FED. R. CRIM. P. 32.2(b)(4)(B).

¹⁹FED. R. CRIM. P. 32.2(b).

Rule 41 receives two changes addressing electronically stored information, in light of the increased importance of such evidence in federal criminal prosecutions. Both changes recognize the two-step process by which law enforcement agents often seize and search for such evidence.

The first change expressly authorizes a seize-now-search-later procedure, allowing “the seizure of electronic storage media or copying of electronically stored information”—such as a computer hard drive—and “later review of the media or information consistent with the warrant.”²⁰

The second change concerns inventory procedures: “In a case involving the seizure of electronic storage media or the seizure or copying of electronically stored information, the inventory may be limited to describing the physical storage media that were seized or copied. The officer may retain a copy of the electronically stored information that was seized or copied.”²¹

RULES GOVERNING 2254 AND 2255 PROCEEDINGS

In addition to the extended time period for objection to a magistrate judge’s proposed findings and recommendations, there is a new rule addressing certificates of appealability. It requires the district court to issue the certificate “when it enters a final order adverse to the applicant.”²² It also clarifies matters concerning the relationship between a certificate of appealability and a notice of appeal: “If the court denies a certificate, the parties may not appeal the denial but may

²⁰FED. R. CRIM. P. 41(e)(2)(B).

²¹FED. R. CRIM. P. 41(f)(1)(B).

²²2254 Rules 11(a); 2255 Rules 11(a).

seek a certificate from the court of appeals A motion to reconsider a denial does not extend the time to appeal.”²³ Also, “[a] timely motion to appeal must be filed even if a district court issues a certificate of appealability.”²⁴

APPELLATE RULES

Just as in the Criminal Rules, a number of time periods in the Appellate Rules have been extended to compensate for what would otherwise be an effective reduction in time caused by the shift to a uniform days-are-days time-computation method.²⁵ In a related time-computation tweak, Rule 26 has been amended to clarify that the 3-day rule for “additional time after service” is “added after the period would otherwise expire[.]”²⁶

A new Rule 12.1 addresses the tangle that arises when “a timely motion is made in the district court for relief that it lacks authority to grant because of an appeal that has been docketed and is pending[.]”²⁷ In such an instance, “the movant must promptly notify the circuit clerk if the district court states either that it would grant the motion or that the motion raises a substantial

²³2254 CASES R. 11(a); 2255 CASES R. 11(a).

²⁴2254 CASES R. 11(b); 2255 CASES R. 11(b).

²⁵FED. R. APP. P. 10(b)(1), (b)(3), (c) (transcript orders); 12(b) (representation statement); 27(a)(3)(A), (a)(4) (motion response and reply); 28.1(f)(4) (service and filing of reply brief in cross-appeal); 31(a)(1) (service and filing of reply brief); 39(d)(2) (objections to bill of costs).

²⁶FED. R. APP. P. 26(c).

²⁷FED. R. APP. P. 12.1(a).

issue.”²⁸ The court of appeals may then, as a matter of discretion, remand the case for further proceedings in the district court, while nevertheless retaining jurisdiction.²⁹ If the court of appeals exercises that discretion, “the parties must promptly notify the circuit clerk when the district court has decided the motion on remand.” The Advisory Committee anticipates that, in criminal cases, this rule “will be used primarily if not exclusively for newly discovered evidence motions under Criminal Rule 33(b)(1) . . . , reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. § 3582(c).”

LOCAL RULES

The time-computation changes in the federal rules will likely require changes to the local rules for the Western District of Texas. In particular, some time periods may be extended, for the same reason as in the federal rules. A committee is working on the project, and the revisions should be complete shortly.

For a more detailed discussion of the rules changes, including comments from the advisory committees, visit the rules page of the U.S. Courts website at www.uscourts.gov/rules/.

²⁸*Id.*

²⁹FED. R. APP. P. 12.1(b).