Local Rules Conform to Federal Appellate Rule Amendments

By Paul D. Fogel
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More than a dozen amendments to the Federal Rules of Appellate Procedure took effect on Dec. 1, 2002. To integrate these changes into local practice, many of the Circuit Courts of Appeals promulgated amendments to their local rules that became effective the same day (4th, 5th and D.C. Circuits) or shortly thereafter (amendments effective Jan. 1, 2003 in the 10th and 11th Circuits).

Of particular importance to West Coast practitioners are the amendments to the 9th U.S. Circuit Court of Appeals' local rules, which became effective Dec. 1, 2002. This article highlights several of the more important changes that practitioners handling federal civil appeals immediately should incorporate into their practices.

■ **Rule 4 changes to the 'separate document' requirement.** Rule 4 arguably is the most important of the rules because it sets the deadline for that most critical jurisdictional filing, the notice of appeal. Particularly crucial in appellate calendaring is knowing when the period for filing a notice of appeal begins to run. Under the former rules, that period commenced when the District Court entered a final judgment or appealable order in a "separate document." See former Federal Rule of Appellate Procedure 4; Federal Rule of Civil Procedure 58.

This created an odd situation, because if the court never entered such judgment or order — which happens surprisingly often — the notice-of-appeal period never would begin to run. See *In re Kilgus*, 811 F.2d 1112 (7th Cir. 1987) ("A party safely may defer the appeal until Judgment Day if that is how long it takes to enter the document."); Cf. *Fiore v. Wash. County Comm. Mental Health Ctr.*, 960 F.2d 229 (1st Cir. 1992) (en banc) (filling this gap with three-month waiver rule).

These rules now have been amended to address this problem. Now the notice-of-appeal period begins to run from entry of a judgment or appealable order that is contained in a separate document or 150 days after entry of the judgment or order, whichever occurs first. Similarly making inroads against requiring a separate document, under the amended rules, an order that disposes of a post-judgment motion no longer needs to be set forth in a separate document. The order now is deemed entered when entered on the civil docket sheet under Federal Rule of Civil Procedure 79(a).

■ **Extensions of time for filing notices of appeal.** Formerly, in most circuits, a District Court could extend the time to file a notice of appeal on a showing of excusable neglect or good cause only if the motion seeking the extension was filed within 30 days after the notice of appeal deadline expired. See generally Federal Rule of Appellate Procedure 4(a)(5)(A)(ii); *Pontarelli v. Stone*, 930 F.2d 104 (1st Cir. 1991) (citing cases from seven circuits, including the 9th Circuit, that motions must be filed within 30 days). Rule 4(a)(5)(A)(ii), however, never was intended to have such a time limit, and the amended rule makes clear that a District Court may grant such a motion even if filed more than 30 days after the notice-of-appeal deadline has passed.

■ **Calendaring.** Few topics are more crucial to appellate lawyers than accurate calendaring. For some inexplicable reason, the former Federal Rules of Appellate Procedure contained a different calendaring scheme than the Federal Rules of Civil Procedure. Specifically, the appellate rules excluded Saturdays, Sundays and legal holidays when computing periods of fewer than seven days; in contrast, the civil rules exclude these days when computing periods of fewer than 11 days. Compare former Federal Rule of Appellate Procedure 26(a) with Federal Rule of Civil Procedure 6(a).

To remedy this inconsistency, Rule 26(a) was amended to conform with the civil calendaring rules. As a result, various other appellate deadlines that otherwise would be enlarged by this amendment have been shortened accordingly. For example, under former Federal Rule of Appellate Procedure 27(a)(3)(A), responses to appellate motions were due 10 days after service. Under the new counting formula, this 10-day period otherwise would expand to at least 14 days.

To compensate for the extra time created by the new computation rule, amended Rule 27(a)(3)(A) reduces the period for filing responses to motions from 10 to eight days. See also amended Rule 27(a)(4) (reducing from seven to five days the time for replying to a response to a motion).

The 9th Circuit's local rules contain many periods that will be lengthened by the new calendaring rule. See, for example, 9th Circuit Rules 3-3, 10-3 (transcript designation time limits); 31-2.2(b) (seven-day advance filing period for extension of time requests). These are only a few examples. Prudent practitioners will ensure timely filings by checking and double-checking all calendaring against the new appellate and new local rules.

To avoid this lengthening effect and preserve deliberately tight time frames, the court may convert these deadlines to hard "calendar days," exempting them from the new counting method.

■ **Supplemental authority letters.** In sometimes taking years to resolve, federal appeals prove the aphorism that "the wheels of justice grind fine, but slow." Civil appeals in the 9th Circuit, for instance, take an average of 18 months from notice of appeal until disposition, with many cases taking two years or longer. See "Ninth Circuit Civil Appellate Practice" Section 1:51 (The Rutter Group 2002). Approximately nine to 12 months of this time occurs between the completion of briefing and oral argument — a period in which there may be new developments in the law relevant to the issues presented.

To alert the court to "significant authorities" that come to a litigant's attention during this period (or even between oral argument and disposition), Federal Rule of Appellate Procedure 28(j) allows the filing of a letter setting forth new citations.

Former Rule 28(j) severely limited the scope of such letters by precluding "argument" in supplemental authority letters. Thus, such letters typically were short and, in some advocates' view, inef-

fective missives saying little more than, "Appellants wish to draw the court's attention to the new opinion of *Smith v. Jones*, which supports arguments made at page X in Appellants' Opening Brief."

The good news for advocates is that amended Rule 28(j) removes the prohibition against "argument." Take heed, however, that the amended rule will not open the door to extensive letter-briefs, because although Rule 28(j) now permits argument, it restricts the body of such letters to 350 words (about the length of the first three paragraphs of this article).

■ **New colored covers.** On the topic of supplemental briefing, the Federal Rules of Appellate Procedure now require tan covers for supplemental briefs; previously, the rules contained no color requirement and did not designate tan to any particular filing. Federal Rule of Appellate Procedure 32(a)(2).

This otherwise minor change prompts a change in 9th Circuit practice, which previously had designated tan covers for the Excerpts of Record. Record excerpts in the 9th Circuit now must have white covers. 9th Circuit Rule 30-1.5.

■ **Supplemental corporate disclosure statements.** Former Federal Rule of Appellate Procedure 26.1 required corporate litigants to include corporate ownership disclosure statements when filing an initial brief or motion; this information enables judges to determine the need for recusal. Amended Rule 26.1(b) now requires what always was sound practice: that corporate disclosure statements be updated during the course of an appeal whenever corporate ownership information changes (e.g., a corporate party is acquired by another corporation).

■ **Mandamus petitions limited to 30 pages.** The former Federal Rules of Appellate Procedure contained no limit on the length of mandamus petitions. Now, amended Rule 21(d) places a 30-page limit on the length of such petitions. This rule's imposition of a page limit is somewhat puzzling, given that the modern trend has been to impose a word limit.

■ **Signing briefs.** Under new Federal Rule of Appellate Procedure 32(d), every brief, motion or other paper (except appendices) filed with a Court of Appeals must be signed by the attorney or party. Under the former rules, documents did not need to be signed, although most practitioners did so anyway. This new requirement ensures ready identification of the attorney or party responsible for every document, presumably making it easier for a court to name individuals subject to sanctions.

■ **Electronic service and notification.** Under new Federal Rule of Appellate Procedure 25(c)(1)(D), parties now may serve each other electronically (for example, by fax or e-mail) if prior written consent for such service exists. Proofs of service for such transmissions must indicate the fax number or e-mail address where the document was sent. Rule 25(d)(1)(B)(iii). To encourage parties to consent to such service, response times are increased by three days after electronic service. Rule 26(c).

Similarly, amended Federal Rules of Appellate Procedure 36(b) and 45(c) now allow court clerks to provide electronic notification to parties who have consented to such notification.

In the 9th Circuit, electronic service will be allowed only when the parties sign the court's "Consent To Electronic Service" form, which appears in the appendix to the local rules and on the court's Web site (www.ca9.uscourts.gov) as Form 9. 9th Circuit Rule 24-3.3.

Moreover, a copy of the signed consent form must accompany all filings electronically served. The 9th Circuit rule also explains that consent may be revoked by letter served on opposing counsel and filed with the court and that a substitution of counsel automatically revokes consent.

The new and amended Federal Rules of Appellate Procedure and local rules now require added vigilance by counsel to ensure that filings are properly formatted and timely filed. Practitioners immediately should incorporate these new rules into their appellate practice to avoid potentially embarrassing mistakes or, even far worse, negative consequences to their clients' federal appeals.

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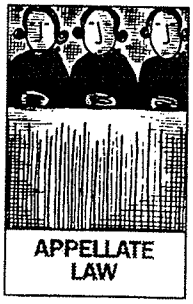

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