Agenda

Advisory Committee on Rules of Appellate Procedure

April 6, 2017

12:00 to 1:30 p.m.

Scott M. Matheson Courthouse

450 South State Street

Judicial Council Room

Administrative Office of the Courts, Suite N31

Welcome and introduction of new committee member, Lisa Collins, Clerk of Court, Utah Court of Appeals	Tab 1	Paul Burke
ACTION - Conforming amendment to Civil Rule 6 – prisoner mailbox rule	Tab 2	Civil Rules Committee
INFORMATION –Logue Subcommittee report	Tab 3	Lori Seppi
DISCUSSION – Suggestions for proposed rules amendments ● FRAP Indicative Rulings	Tab 4	James Ishida

Committee Webpage: http://www.utcourts.gov/committees/appellate_procedure/

Meeting Schedule. All meetings are from 12:00 to 1:30 at the Administrative Office of the Courts in the Matheson Courthouse.

May 4, 2017
June 1, 2017
September 7, 2017
October 5, 2017
November 2, 2017
December 7, 2017

Tab 1

Supreme Court's Advisory Committee on the Rules of Appellate Procedure

Updated April 4, 2017

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Tab 2

Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

Daniel J. Becker
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

TO: Appellate Rules Committee

FROM: James N. Ishida JNI

DATE: April 1, 2017

RE: Conforming Amendment to Proposed Amendment to Civil Rule 6

This Committee has been asked to consider a conforming amendment to Appellate Rule 21, which is consistent with the proposed amendment to Civil Rule 6 regarding the "prisoner mailbox rule."

I. BACKGROUND

A. Preliminary Amendments

On December 5, 2016, the Supreme Court had approved for publication a proposal from the Civil Rules Committee, recommending that Civil Rule 5 be amended to include a new subdivision (g), which has been popularly described as the "prisoner mailbox rule." The proposal was intended to mirror its counterpart in the Utah Rules of Appellate Procedure — Rule 21(f).

The Supreme Court, however, added one wrinkle to the Civil Rules proposal. The Court wanted to clarify when the clock starts to run on filing a responsive document. Therefore, the Court added the following language at the end of proposed new subdivision (g):

"*Response time will be calculated from the date the papers are received by the court.*"

This new language is not in Appellate Rule 21(f). The Court had asked that the Civil Rules proposal be submitted to this Committee for its consideration as to whether conforming changes should be made to Appellate Rule 21(f). At its last meeting on February 2, 2017, this Committee approved the conforming change to Rule 21(f).

B. Subsequent Action by the Civil Rules Committee

Following public comment on its proposed amendment to Civil Rule 5, the Civil Rules Committee made several sound but significantly different changes to its proposed prisoner mailbox rule. The new proposed prisoner mailbox rule is now found in Civil Rule 6 (see attached). Because of the post-comment change, we now have two different versions of the prisoner mailbox rule from the Civil and Appellate Rules Committees.

II. CONCLUSION

This Committee is now being asked to consider whether to make conforming changes to Appellate Rule 21 in light of the prisoner mailbox rule as proposed by the Civil Rules Committee in Rule 6. If this Committee approves the conforming amendment, then it is anticipated that both committees will ask the Supreme Court for approval to publish for public comment its respective prisoner mailbox rule.

Attachments: Proposed amendment to Civil Rule 5
Proposed amendment to Civil Rule 6
Public comments on proposed prisoner mailbox rule
Appellate Rule 21

Rule 5. Service and filing of pleadings and ~~other~~ papers.

(a) When service is required.

(a)(1) Papers that must be served. Except as otherwise provided in these rules or as otherwise directed by the court, the following papers must be served on every party:

(a)(1)(A) a judgment;

(a)(1)(B) an order that states it must be served;

(a)(1)(C) a pleading after the original complaint;

(a)(1)(D) a paper relating to disclosure or discovery;

(a)(1)(E) a paper filed with the court other than a motion that may be heard ex parte; and

(a)(1)(F) a written notice, appearance, demand, offer of judgment, or similar paper.

(a)(2) Serving parties in default. No service is required on a party who is in default except that:

(a)(2)(A) a party in default must be served as ordered by the court;

(a)(2)(B) a party in default for any reason other than for failure to appear must be served as provided in paragraph (a)(1);

(a)(2)(C) a party in default for any reason must be served with notice of any hearing to determine the amount of damages to be entered against the defaulting party;

(a)(2)(D) a party in default for any reason must be served with notice of entry of judgment under Rule 58A(d); and

(a)(2)(E) a party in default for any reason must be served under Rule 4 with pleadings asserting new or additional claims for relief against the party.

(a)(3) Service in actions begun by seizing property. If an action is begun by seizing property and no person is or need be named as defendant, any service required before the filing of an answer, claim or appearance must be made upon the person who had custody or possession of the property when it was seized.

(b) How service is made.

(b)(1) Whom to serve. If a party is represented by an attorney, a paper served under this rule must be served upon the attorney unless the court orders service upon the party. Service must be made upon the attorney and the party if

(b)(1)(A) an attorney has filed a Notice of Limited Appearance under Rule 75 and the papers being served relate to a matter within the scope of the Notice; or

(b)(1)(B) a final judgment has been entered in the action and more than 90 days has elapsed from the date a paper was last served on the attorney.

(b)(2) When to serve. If a hearing is scheduled 7 days or less from the date of service, a party must serve a paper related to the hearing by the method most likely to be promptly received. Otherwise, a paper that is filed with the court must be served before or on the same day that it is filed.

(b)(3) Methods of service. A paper is served under this rule by:

(b)(3)(A) except in the juvenile court, submitting it for electronic filing if the person being served has an electronic filing account;

(b)(3)(B) emailing it to the email address provided by the person or to the email address on file with the Utah State Bar, if the person has agreed to accept service by email or has an electronic filing account;

(b)(3)(C) mailing it to the person's last known address;

(b)(3)(D) handing it to the person;

(b)(3)(E) leaving it at the person's office with a person in charge or, if no one is in charge, leaving it in a receptacle intended for receiving deliveries or in a conspicuous place;

(b)(3)(F) leaving it at the person's dwelling house or usual place of abode with a person of suitable age and discretion who resides there; or

(b)(3)(G) any other method agreed to in writing by the parties.

(b)(4) When service is effective. Service by mail or electronic means is complete upon sending.

(b)(5) Who serves. Unless otherwise directed by the court:

(b)(5)(A) every paper required to be served must be served by the party preparing it; and

(b)(5)(B) an order or judgment prepared by the court will be served by the court.

(c) Serving numerous defendants. If an action involves an unusually large number of defendants, the court, upon motion or its own initiative, may order that:

(c)(1) a defendant's pleadings and replies to them do not need to be served on the other defendants;

(c)(2) any cross-claim, counterclaim avoidance or affirmative defense in a defendant's pleadings and replies to them are deemed denied or avoided by all other parties;

(c)(3) filing a defendant's pleadings and serving them on the plaintiff constitutes notice of them to all other parties; and

(c)(4) a copy of the order must be served upon the parties.

(d) Certificate of service. A paper required by this rule to be served, including electronically filed papers, must include a signed certificate of service showing the name of the document served, the date and manner of service and on whom it was served.

(e) Filing. Except as provided in Rule 7(j) and Rule 26(f), all papers after the complaint that are required to be served must be filed with the court. Parties with an electronic filing account must file a paper electronically. A party without an electronic filing account may file a paper by delivering it to the clerk of the court or to a judge of the court. Filing is complete upon the earliest of acceptance by the electronic filing system, the clerk of court or the judge.

(f) Filing an affidavit or declaration. If a person files an affidavit or declaration, the filer may:

(f)(1) electronically file the original affidavit with a notary acknowledgment as provided by Utah Code Section 46-1-16(7);

(f)(2) electronically file a scanned image of the affidavit or declaration;

(f)(3) electronically file the affidavit or declaration with a conformed signature; or

(f)(4) if the filer does not have an electronic filing account, present the original affidavit or declaration to the clerk of the court, and the clerk will electronically file a scanned image and return the original to the filer.

The filer must keep an original affidavit or declaration of anyone other than the filer safe and available for inspection upon request until the action is concluded, including any appeal or until the time in which to appeal has expired.

(g) Filing by inmate. Papers filed by an inmate confined in an institution are timely filed if they are deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a notarized statement or written declaration setting forth the date of deposit and stating that first-class postage has been prepaid. Response time will be calculated from the date the papers are received by the court.

Advisory Committee Notes

Rule 6. Time.

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

(a)(1) When the period is stated in days or a longer unit of time:

(a)(1)(A) exclude the day of the event that triggers the period;

(a)(1)(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(a)(1)(C) 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.

(a)(2) When the period is stated in hours:

(a)(2)(A) begin counting immediately on the occurrence of the event that triggers the period;

(a)(2)(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(a)(2)(C) if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(a)(3) Unless the court orders otherwise, if the clerk's office is inaccessible:

(a)(3)(A) on the last day for filing under Rule 6(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday or legal holiday; or

(a)(3)(B) during the last hour for filing under Rule 6(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

(a)(4) Unless a different time is set by a statute or court order, filing on the last day means:

(a)(4)(A) for electronic filing, before midnight; and

(a)(4)(B) for filing by other means, the filing must be made before the clerk's office is scheduled to close.

(a)(5) The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(a)(6) "Legal holiday" means the day for observing:

(a)(6)(A) New Year's Day;

(a)(6)(B) Dr. Martin Luther King, Jr. Day;

(a)(6)(C) Washington and Lincoln Day;

(a)(6)(D) Memorial Day;

(a)(6)(E) Independence Day;

(a)(6)(F) Pioneer Day;

(a)(6)(G) Labor Day;

(a)(6)(H) Columbus Day;

(a)(6)(I) Veterans' Day;

(a)(6)(J) Thanksgiving Day;

(a)(6)(K) Christmas; and

(a)(6)(L) any day designated by the Governor or Legislature as a state holiday.

(b) Extending time.

(b)(1) When an act may or must be done within a specified time, the court may, for good cause, extend the time:

(b)(1)(A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or

(b)(1)(B) on motion made after the time has expired if the party failed to act because of excusable neglect.

(b)(2) A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d) and (e), and 60(c).

(c) Additional time after service by mail. When a party may or must act within a specified time after service and service is made by mail under Rule 5(b)(3)(C), 3 days are added after the period would otherwise expire under paragraph (a).

(d) Filing or service by inmate.

(d)(1) Papers filed or served by an inmate confined in an institution are timely filed or served if they are deposited in the institution's internal mail system on or before the last day for filing or service. Timely filing or service may be shown by a notarized statement or written declaration setting forth the date of deposit and stating that first-class postage has been, or is being, prepaid, and that the inmate has complied with any applicable requirements for legal mail set by the institution. Response time will be calculated from the date the papers are received by the court, or for papers served on parties that do not need to be filed with the court, the postmark date the papers were deposited in U.S. mail, plus any time added under paragraph (b).

(d)(2) The provisions of paragraph (d)(1) do not apply to service of process, which is governed by Rule 4.

URCP 5

Posted by Nathan Phelps

Regarding the suggested amendment to URCP 5:

I have no problem with the substance of the amendment, but I believe logically it fits better under URCP 6. The whole of Rule 6, like the amendment, deals with how to measure time and timeliness, and URCP 6(c), like the amendment, explains that service in certain form extends to act.

> *Nancy's comment:*
>
> *Mr. Phelps raises a good point and it's one that's worth exploring in conjunction with Mr. Kaiser's comment below.*

Posted by Kyle Kaiser

Dear Members of the Rules Committee and the Honorable Justices of the Supreme Court:

I write to comment regarding the proposed amendment to Rule 5. I am the Section Director of the Civil Rights Section of the Litigation Division of the Utah Attorney General's Office. I defend government agents and agencies against claims of civil rights violations, which often includes claims brought by incarcerated persons. I have experience with the issues created when inmates are required to serve and file documents with the court and with opposing parties within a certain period of time. I write to support the suggested rule change, but to also suggest a few changes to make the rule clearer, more manageable, and fairer for all parties involved. Though I have consulted with other Assistant Utah Attorneys General in the preparation of these comments, please note my comments are made from me, have not been approved by the Office of the Attorney General, and may not be the opinion of the Office, the Division, or other employees.

I generally support the codification of the "prison mailbox" rule into the Rules of Civil Procedure. In my experience defending the Utah Department of Corrections and its employees, a prisoner's mail may be delayed as much as five days from the time it is received by the mailroom of the Utah State Prison or the Central Utah Correctional Facility to reach the prisoner for incoming mail, or placed in outgoing mail by the prisoner to reach the Postal Service. This is because the mailroom must review and X-ray all incoming and outgoing mail. And even though the mailroom does not read items marked "Legal Mail," the sheer volume of mail processed by these institutions daily slows the process for all pieces of mail. The process may be delayed even further if the prisoner is indigent and needs to follow required processes for free postage for legal

mail. As a result, prisoners at the Prison may only have a few days to respond to dispositive motions, discovery, or other time-sensitive, litigation-related documents.

Accordingly, the attorneys in the Civil Rights Section generally apply a "de facto" prison mailbox rule. We generally do not seek to strike pleadings for timeliness unless they were not deposited in the prison's internal mail system until well after the due date. We also generally calculate our response times from the U.S. mail postmark date, or on the date docketed by the court. We have not had any serious challenges or issues with such a practice. However, our informal practice does result in ambiguity regarding when documents are actually due, and whether the court has or will properly process them.

Codifying a prison mailbox rule would be beneficial to all parties. It would give both the inmate and those litigating against the inmate the confidence that pleadings and other papers would be timely filed and served and would reduce ambiguity regarding every party's responsibility.

However, a number of changes to the proposed rule should be made in order to meet those goals. First, the rule should be modified to include documents that are served and not filed, and to take into account response times for such documents. Second, the rule should be modified to recognize the legal mail procedures at institutions and the necessity of indigent postage filings.

SUGGESTED CHANGES TO PROPOSED RULE:

(1) The rule should be modified to include documents that are only served and need not be filed.

The current rule mentions only papers "filed" by an inmate confined in an institution. This language comes largely from the pre-December 2016 version of Federal Rule of Appellate Procedure 25(a)(2)(C), the only federal rule that creates any sort of prison mailbox rule.

In the appellate courts, where virtually all documents are filed, this language would be sufficient. However, at the trial level, there are a number of documents that do not need to be filed with the Court that are regularly served upon opposing parties. The most common types of these documents are requests for discovery and responses thereto.

This issue is further exacerbated by the fact that the Committee has suggested that districts, by local rule, may prohibit the filing of discovery with the court, and may even prohibit the filing of certificates of service related to the discovery. If such rules were enacted, either the proposed prison mailbox rule would be ineffective, or calculating deadlines to respond would be virtually impossible. I therefore suggest that the proposed rule be amended to include options for calculating response dates to documents that are served but not filed. My proposal starts the time from when the document is placed in U.S. Mail (the postmark date) rather than the date the inmate places the document in the prison's internal mail system. This provides the most

certainty as postmarks are not manipulable by inmates and avoids the mailroom delay discussed above.

However, by adding a discussion of documents "served," unrepresented inmates may believe that service of process may be effected by mail. Such service on governmental entities is generally not allowed under the Utah Rules of Civil Procedure. E.g., Utah R. Civ. P. 4(d)(1)(J). Accordingly, language should be added to distinguish service of papers from service of process.

(2) The rule should be modified to recognize legal mail requirements at correctional institutions and to adapt to the necessity of indigent postage.

The rule, as currently written, requires an inmate to certify that at the time of deposit in the prison mail system "first-class postage has been prepaid." Additionally, the rule eschews former Federal Rule of Appellate Procedure 25(a)'s requirement that the inmate has used any available internal prison mail systems. The result of this is that the current rule requires inmates to prepay postage. Many, if not most, inmates are indigent, and do not have the means to prepay postage. Following the U.S. Supreme Court's requirement that inmates be provided "at state expense with paper and pen to draft legal documents ... and with stamps to mail them," Bounds v. Smith, 430 U.S. 817, 825 (1977), the Utah Department of Corrections has implemented policies to provide postage to inmates for purposes of legal mail. See, e.g. Utah Department of Corrections, Insitutional Operations Division Manual, FD03 Inmate Mail, available at https://webapps.corrections.utah.gov/webdav_pub/F%20-%20Institutional%20Operations%20Public%20Policy/FD03%20-%20Inmate%20Mail.pdf; Utah Department of Corrections, Institutional Operations Division Manual, FD15/2.02 Indigent Mail, available at https://webapps.corrections.utah.gov/webdav_pub/F%20-%20Institutional%20Operations%20Public%20Policy/FD15%20-%20Indigent%20Status.pdf. However, to qualify, inmates must properly comply with Department of Corrections procedures, including properly requesting indigent postage for legal mail and verifying their indigent status. Id.

Accordingly, the rule, as drafted, is insufficient to describe the process or availability of inmate mail. Inmates will not be able to certify that postage has been prepaid, as currently required by the proposed rule, when indigent. However, inmates should also not have the benefit of the prison mailbox rule if they flout the institution's rules (for example, by not providing an affidavit of indigency in their request for legal mail franking) in an attempt to get free postage. The rule should be modified to both provide inmates the flexibility to receive the benefit of the rule even if they cannot prepay postage, while respecting correctional institution's requirements for free mail. The language provided incorporates some of the new Appellate Rule 25(a)'s requirements, while maintaining a simpler format.

SUGGESTED, AMENDED RULE:

Papers filed or served by an inmate confined in an institution are timely filed or served if they are deposited in the institution's internal mail system on or before the last day for filing or service. Timely filing or service may be shown by a notarized statement or written declaration setting forth the date of deposit and stating that first-class postage has been, or is being, prepaid, and that the inmate has complied with any applicable requirements for legal mail set by the institution. Response time will be calculated from the date the papers are received by the court, or, for papers served on parties that do not need to be filed with the court, the postmark date the papers were deposited in U.S. mail, plus any time added by Utah Rule of Civil Procedure 6.

The provisions in this subsection do not apply to service of process, governed by Utah Rule of Civil Procedure 4.

Thank you for your consideration, and feel free to contact me with any questions.

Kyle Kaiser
Section Director, Civil Rights Section
Litigation Division
Utah Attorney General's Office

Nancy's comment:
I wish more comments looked like this one. It is well thought out and offers a suggested amendment, which saves time. That said, I wonder if the "filed or served" language in the first part of Mr. Kaiser's suggestion is confusing. He does clarify it later in the sentence beginning with "Response time will be calculated...." so perhaps this is a non-issue, but it's one we are grappling with right now in Rules 7 and 101. Having both terms can be confusing to pro se litigants and can lead to uncertainty. His explanation above addresses why both are needed, but this is something the committee should discuss.

URCP 45

None.

URCP 84

None.

Rule 21. Filing and service.

(a) Filing. Papers required or permitted to be filed by these rules shall be filed with the clerk of the appropriate court. Filing may be accomplished by mail addressed to the clerk. Except as provided in subpart (f), filing is not considered timely unless the papers are received by the clerk within the time fixed for filing, except that briefs shall be deemed filed on the date of the postmark if first class mail is utilized. If a motion requests relief which may be granted by a single justice or judge, the justice or judge may accept the motion, note the date of filing, and transmit it to the clerk.

(b) Service of all papers required. Copies of all papers filed with the appellate court shall, at or before the time of filing, be served on all other parties to the appeal or review. Service on a party represented by counsel shall be made on counsel of record, or, if the party is not represented by counsel, upon the party at the last known address. A copy of any paper required by these rules to be served on a party shall be filed with the court and accompanied by proof of service.

(c) Manner of service. Service may be personal or by mail. Personal service includes delivery of the copy to a clerk or other responsible person at the office of counsel. Service by mail is complete on mailing.

(d) Proof of service. Papers presented for filing shall contain an acknowledgment of service by the person served or a certificate of service in the form of a statement of the date and manner of service, the names of the persons served, and the addresses at which they were served. The certificate of service may appear on or be affixed to the papers filed. If counsel of record is served, the certificate of service shall designate the name of the party represented by that counsel.

(e) Signature. All papers filed in the appellate court shall be signed by counsel of record or by a party who is not represented by counsel.

(f) Filing by inmate. Papers filed by an inmate confined in an institution are timely filed if they are deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a notarized statement or written declaration setting forth the date of deposit and stating that first-class postage has been prepaid.

(g) Filings containing other than public information and records. If a filing, including an addendum, contains non-public information, the filer must also file a version with all such information removed. Non-public information means information classified as private, controlled, protected, safeguarded, sealed, juvenile court legal, or juvenile court social, or any other information to which the right of public access is restricted by statute, rule, order, or case law.

Advisory Committee Notes

Paragraph (e) is added to Rule 21 to consolidate various signature provisions formerly found in other sections of the rules.

Records are classified as public, private, controlled, protected, safeguarded, sealed, juvenile court legal, or juvenile court social by Code of Judicial Administration Rule 4-202.02. The right of public access might also be restricted by Title 63G, Chapter 2, Government Records Access and Management Act, by other statutes, rules, or case law, or by court order. If a filing contains information or records that are not public, Rule 21(g) requires the filer to file an unredacted version for the court and a version for the public that does not contain the confidential information.

Effective May 1, 2016

Tab 3

Logue Subcommittee Meeting Notes

March 10, 2017

Present:

Nancy Sylvester (staff-URCP), Jeff Gray (URCrP), Mark Field (URAP), Jensie Anderson (URCrP), Lori Seppi (URAP), Judge Kent Holmberg (URCP)

Notes:

Rules at play: Criminal Rule 24(c), Civil Rule 60(b)(2), (c).

Logue v. Court of Appeals, 2016 UT 44:

"It appears that criminal defendants, like Mr. Logue, who discover new evidence more than ninety days after sentencing must await the conclusion of their appeal before attempting to seek relief based on this evidence, even if it would likely entitle them to a new trial."

"We will direct the appropriate [advisory] committee on the rules of procedure to consider revising them so that they do not act as a categorical bar to motions for new trials in cases like this."

Discussion

Mark and Jeff proposed a change to Criminal Rule 24, which they circulated on February 3, and Jensie and Lori circulated a responsive draft on March 9.

Mark and Jeff disagreed with Jensie's and Lori's edits allowing counsel to file a motion for a new trial up to the date of oral argument. Their proposal had set it at a 28-day deadline after discovering the evidence. They were concerned about counsel holding onto newly discovered evidence when all the time and preparation has gone into preparing for oral argument.

Jensie said they were assuming that newly discovered evidence comes in a neat little package. Counsel has to do discovery and investigation. She gave the example of the Harry Miller case: counsel improperly investigated evidence and that affected the ability to use that evidence later on. The man was convicted of a crime in Utah when he was in nursing care in another state at that time. Unfortunately, he was too poor to bring in the out-of-state witnesses.

Jeff then noted that Jensie was referring to ineffective assistance of counsel (IAC) claims: He said this rule doesn't cover IAC claims, i.e. counsel's failure to discover evidence he could have. He said we should assume competent counsel and that this rule applies to new evidence that could not have been found prior to trial.

Jensie said we didn't talk at the last meeting about putting a time limit on filing the motion.

Mark gave an example of someone who has committed a murder and waits up to the time of oral argument and then files a motion for a new trial. He expressed concerns about a potential tactical strategy behind delaying the case, i.e. in death penalty cases. He thinks not all attorneys are great and are going to give these things considerations. He thought there was potential we could be creating a mechanism for bad attorneys to delay cases. The opportunity to delay is a concern.

The group then discussed how some newly discovered evidence comes wrapped up in a package and some doesn't. They discussed moving for a new trial and then requesting an extension of time to do additional discovery.

Jeff noted that some attorneys get swamped with their own case load.

Lori said realty of the practice in her office is that 28 days is the blink of an eye and Jeff and Mark were assuming it's the same counsel who will be doing the trial and filing the Rule 24 motion. What typically happens is conflict counsel handles the trial, and then it goes back to LDA for appeal.

Mark noted that some claims come in and you'll know right away that they need to be filed, but Jensie and Lori weren't sure that they were comfortable landing on a number of days within which to file.

The group then discussed going to 60 days but with good cause to extend.

Mark then posed the question: if good cause to extend, why not 28 days?

Jensie responded that she knows in every case they are going to ask for extension. 60 days with good cause makes sense.

Jeff continued to express concerns about delay.

The group then discussed the following scenario: A trial attorney discovers new evidence prior to appeal and realizes she can't develop it within the provided time limit and also thinks tactically, we are far enough in this appeal, we may as well go through with it on the chance we could get a new trial. What if the evidence is discovered 5 days before oral argument and she thinks, let's just hold this; we have good arguments. Does that start discovery on post-conviction discovery?

The group then inquired as to what the PCRA says about time frames for bringing newly discovered evidence claims: Mark said within 1 year of later of 6 separate dates. (add 90 days to appeal for cert to SCOTUS).

Utah Code § 78B-9-107. Statute of limitations for post-conviction relief.

> (1) A petitioner is entitled to relief only if the petition is filed within one year after the cause of action has accrued.
> (2) For purposes of this section, the cause of action accrues on the latest of the following dates:

(a) the last day for filing an appeal from the entry of the final judgment of conviction, if no appeal is taken;
(b) the entry of the decision of the appellate court which has jurisdiction over the case, if an appeal is taken;
(c) the last day for filing a petition for writ of certiorari in the Utah Supreme Court or the United States Supreme Court, if no petition for writ of certiorari is filed;
(d) the entry of the denial of the petition for writ of certiorari or the entry of the decision on the petition for certiorari review, if a petition for writ of certiorari is filed;
(e) the date on which petitioner knew or should have known, in the exercise of reasonable diligence, of evidentiary facts on which the petition is based; or
(f) the date on which the new rule described in Subsection 78B-9-104(1)(f) is established.

Jensie noted that if the evidence was discovered pre-appeal, you couldn't argue that you discovered it 3 years later.

Mark then asked, suppose evidence is discovered, but a new trial motion is not filed, is this a procedural bar to raising it post-conviction if you don't raise it under Rule 24?

Jensie asked, could you have a defense of don't have time to investigate? Mark said he would argue against that.

The group then discussed how this could be tactical.

Mark said if you could have raised the issue of newly discovered evidence at trial and don't, that's a procedural bar at appeal and on post-conviction, unless it's ineffective assistance of counsel.

Jeff then asked how you can say it's at the time of trial if you're post-judgment.

Mark said we don't want these claims raised post-conviction where there is no counsel.

Lori then asked about the reasonableness of discovery (the defendant's alibi is he was at a stadium and the cousin who disappears briefly is a witness, as well as the other 20,000 people there?)

Mark said reasonableness goes to what you can discover with reasonable diligence.

Lori noted that we need to give trial attorneys everything that's needed to make sure they do this correctly or don't do this rule at all.

Jensie then proposed saying something in new paragraph (c)(2) about "may raise" but is not required to be raised in 60 days?

Mark said this wouldn't save the defendant under PCRA.

The group then discussed whether we really want to do this rule at all given the PCRA issue. We found a middle ground on timing, especially with ability to extend based on good cause, but there are concerns about being caught between a rock and a hard place with the tactical and PCRA issues.

The subcommittee members said they would discuss this more with the trial attorneys in their respective groups and reconvene in another month or so.

Judge Holmberg then said he had discussed the proposal with Judge Blanch who made a couple good points: what if no oral argument—i.e. requested and then denied. If no oral argument scheduled, would the time period go to disposition of the appeal?

The group will need to work on adding language to address the no oral argument situation.

Next Meeting:

April 21, 2017 at 9 a.m. in the Judicial Council Room of the Matheson Courthouse.

Tab 4

Federal Rules of Appellate Procedure Rule 12.1, 28 U.S.C.A.

Rule 12.1 Remand After an Indicative Ruling by the District Court on a Motion for Relief That Is Barred by a Pending Appeal

Currentness

(a) Notice to the Court of Appeals. If 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, 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 issue.

(b) Remand After an Indicative Ruling. If the district court states that it would grant the motion or that the motion raises a substantial issue, the court of appeals may remand for further proceedings but retains jurisdiction unless it expressly dismisses the appeal. If the court of appeals remands but retains jurisdiction, the parties must promptly notify the circuit clerk when the district court has decided the motion on remand.

CREDIT(S)

(Added Mar. 26, 2009, eff. Dec. 1, 2009.)

ADVISORY COMMITTEE NOTES

2009 Adoption

This new rule corresponds to Federal Rule of Civil Procedure 62.1, which adopts for any motion that the district court cannot grant because of a pending appeal the practice that most courts follow when a party moves under Civil Rule 60(b) to vacate a judgment that is pending on appeal. After an appeal has been docketed and while it remains pending, the district court cannot grant relief under a rule such as Civil Rule 60(b) without a remand. But it can entertain the motion and deny it, defer consideration, state that it would grant the motion if the court of appeals remands for that purpose, or state that the motion raises a substantial issue. Experienced lawyers often refer to the suggestion for remand as an "indicative ruling." (Appellate Rule 4(a)(4) lists six motions that, if filed within the relevant time limit, suspend the effect of a notice of appeal filed before or after the motion is filed until the last such motion is disposed of. The district court has authority to grant the motion without resorting to the indicative ruling procedure.)

The procedure formalized by Rule 12.1 is helpful when relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal. In the criminal context, the Committee anticipates that Rule 12.1 will be used primarily if not exclusively for newly discovered evidence motions under Criminal Rule 33(b)(1) (*see United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984)), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. § 3582(c).

Rule 12.1 does not attempt to define the circumstances in which an appeal limits or defeats the district court's authority to act in the face of a pending appeal. The rules that govern the relationship between trial courts and appellate courts may be complex, depending in part on the nature of the order and the source of appeal jurisdiction. Appellate Rule 12.1 applies only when those rules deprive the district court of authority to grant relief without appellate permission.

To ensure proper coordination of proceedings in the district court and in the court of appeals, the movant must notify the circuit clerk if the district court states that it would grant the motion or that the motion raises a substantial issue. The "substantial issue" standard may be illustrated by the following hypothetical: The district court grants summary judgment dismissing a case. While the plaintiff's appeal is pending, the plaintiff moves for relief from the judgment, claiming newly discovered evidence and also possible fraud by the defendant during the discovery process. If the district court reviews the motion and indicates that the motion "raises a substantial issue," the court of appeals may well wish to remand rather than proceed to determine the appeal.

If the district court states that it would grant the motion or that the motion raises a substantial issue, the movant may ask the court of appeals to remand so that the district court can make its final ruling on the motion. In accordance with Rule 47(a)(1), a local rule may prescribe the format for the litigants' notifications and the district court's statement.

Remand is in the court of appeals' discretion. The court of appeals may remand all proceedings, terminating the initial appeal. In the context of postjudgment motions, however, that procedure should be followed only when the appellant has stated clearly its intention to abandon the appeal. The danger is that if the initial appeal is terminated and the district court then denies the requested relief, the time for appealing the initial judgment will have run out and a court might rule that the appellant is limited to appealing the denial of the postjudgment motion. The latter appeal may well not provide the appellant with the opportunity to raise all the challenges that could have been raised on appeal from the underlying judgment. *See, e.g., Browder v. Dir., Dep't of Corrections of Ill.*, 434 U.S. 257, 263 n.7 (1978) ("[A]n appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review."). The Committee does not endorse the notion that a court of appeals should decide that the initial appeal was abandoned--despite the absence of any clear statement of intent to abandon the appeal--merely because an unlimited remand occurred, but the possibility that a court might take that troubling view underscores the need for caution in delimiting the scope of the remand.

The court of appeals may instead choose to remand for the sole purpose of ruling on the motion while retaining jurisdiction to proceed with the appeal after the district court rules on the motion (if the appeal is not moot at that point and if any party wishes to proceed). This will often be the preferred course in the light of the concerns expressed above. It is also possible that the court of appeals may wish to proceed to hear the appeal even after the district court has granted relief on remand; thus, even when the district court indicates that it would grant relief, the court of appeals may in appropriate circumstances choose a limited rather than unlimited remand.

If the court of appeals remands but retains jurisdiction, subdivision (b) requires the parties to notify the circuit clerk when the district court has decided the motion on remand. This is a joint obligation that is discharged when the required notice is given by any litigant involved in the motion in the district court.

When relief is sought in the district court during the pendency of an appeal, litigants should bear in mind the likelihood that a new or amended notice of appeal will be necessary in order to challenge the district court's disposition of the motion. *See, e.g., Jordan v. Bowen*, 808 F.2d 733, 736-37 (10th Cir. 1987) (viewing district court's response to appellant's motion for indicative ruling as a denial of appellant's request for relief under Rule 60(b), and refusing to review that denial because appellant had failed to take an appeal from the denial); *TAAG Linhas Aereas de Angola v. Transamerica Airlines, Inc.*, 915 F.2d 1351, 1354 (9th Cir. 1990) ("[W]here a 60(b) motion is filed subsequent to the notice of appeal and considered by the district court after a limited remand, an appeal specifically from the ruling on the motion must be taken if the issues raised in that motion are to be considered by the Court of Appeals.").

Notes of Decisions (1)

F. R. A. P. Rule 12.1, 28 U.S.C.A., FRAP Rule 12.1

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title VII. Judgment

Federal Rules of Civil Procedure Rule 62.1

Rule 62.1. Indicative Ruling on a Motion for Relief That Is Barred by a Pending Appeal

Currentness

(a) Relief Pending Appeal. If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:

(1) defer considering the motion;

(2) deny the motion; or

(3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.

(b) Notice to the Court of Appeals. The movant must promptly notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court states that it would grant the motion or that the motion raises a substantial issue.

(c) Remand. The district court may decide the motion if the court of appeals remands for that purpose.

CREDIT(S)
(Added March 26, 2009, effective December 1, 2009.)

ADVISORY COMMITTEE NOTES
2009 Adoption

This new rule adopts for any motion that the district court cannot grant because of a pending appeal the practice that most courts follow when a party makes a Rule 60(b) motion to vacate a judgment that is pending on appeal. After an appeal has been docketed and while it remains pending, the district court cannot grant a Rule 60(b) motion without a remand. But it can entertain the motion and deny it, defer consideration, or state that it would grant the motion if the court of appeals remands for that purpose or state that the motion raises a substantial issue. Experienced lawyers often refer to the suggestion for remand as an "indicative ruling." (Appellate Rule 4(a)(4) lists six motions that, if filed within the relevant time limit, suspend the effect of a notice of appeal filed before or after the motion is filed until the last such motion is disposed of. The district court has authority to grant the motion without resorting to the indicative ruling procedure.)

This clear procedure is helpful whenever relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal. Rule 62.1 does not attempt to define the circumstances in which an appeal limits or defeats the district court's authority to act in the face of a pending appeal. The rules that govern the relationship

between trial courts and appellate courts may be complex, depending in part on the nature of the order and the source of appeal jurisdiction. Rule 62.1 applies only when those rules deprive the district court of authority to grant relief without appellate permission. If the district court concludes that it has authority to grant relief without appellate permission, it can act without falling back on the indicative ruling procedure.

To ensure proper coordination of proceedings in the district court and in the appellate court, the movant must notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court states that it would grant the motion or that the motion raises a substantial issue. Remand is in the court of appeals' discretion under Appellate Rule 12.1.

Often it will be wise for the district court to determine whether it in fact would grant the motion if the court of appeals remands for that purpose. But a motion may present complex issues that require extensive litigation and that may either be mooted or be presented in a different context by decision of the issues raised on appeal. In such circumstances the district court may prefer to state that the motion raises a substantial issue, and to state the reasons why it prefers to decide only if the court of appeals agrees that it would be useful to decide the motion before decision of the pending appeal. The district court is not bound to grant the motion after stating that the motion raises a substantial issue; further proceedings on remand may show that the motion ought not be granted.

Notes of Decisions (6)

Fed. Rules Civ. Proc. Rule 62.1, 28 U.S.C.A., FRCP Rule 62.1
Including Amendments Received Through 3-1-17

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