

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
FEDERAL RULES UPDATE

(December 1, 2009)

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As of December 1, 2009, the complex rules for interpreting time limits and deadlines in federal criminal proceedings, with which we have all become (more or less) familiar, are abolished in favor of new, uniform, straightforward periods of time in which all days count, one for one, including weekends and holidays. The sole proviso is that if the last day of the period falls on a Saturday, Sunday or holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday or holiday. Fed.R.Crim.P. 45(a)(1), Fed.R.App.P. 26(a)(1) (eff. 12/1/09). The same system must be applied in the interpretation of any and all local rules, and under any statute that does not expressly provide otherwise. Crim.R. 45(a); App.R. 26(a) (eff. 12/1/09). The last day ends, for electronic filing purposes, at midnight, but for hand-filing it ends at the time the Clerk's Office "is scheduled" to close. When the time to act in response to another party's filing is measured in days from service, and service is not accomplished by hand, three days will continue to be added to the period. Crim.R. 45(c); App.R. 26(c) (eff. 12/1/09). Note that any time limit for action specified in the Criminal or Appellate Rules -- except the time for acting under Crim. Rule 35 and the time to file a Notice of Appeal -- can be extended by the Court before the time expires (for "good cause"), as well as after expiration (but only for "excusable neglect," under Crim. Rule). Rule 45(b); App.R. 26(b) ("good cause" for either advance or after-the-fact extensions).

Some important examples of the newly redefined time periods, to be interpreted as just stated, are:

Criminal Rules:

| | <u>Present Provision</u> | <u>New Time Period</u> |
|---|---|------------------------|
| 5.1: prelim. hrg. | ~10 days aft init appear if in cust, 20 if not | ~14/21 |
| 7: move for bill of partic. | 10 days | 14 days |
| 12.1: ntc of alibi, govt discl of witn. | 10 days | 14 days |
| 29: motion for jmt of acquittal | 7 days aft verdict | 14 days |
| 32: from final PSI to sentencing | ~7 working days | ~7 calendar days |
| 33: motion for new trial | 7 days aft verd | 14 days |
| 35: motion to correct sentence | 7 days aft sentencing | 14 days |
| 41: execution of search warrant | w/in 10 days | 14 days |
| 47: srvc of motion and hrg ntc | ~5 days bef. hrg. | 7 days |

| | <u>Present Provision</u> | <u>New Time Period</u> |
|---------------------------------|--------------------------|------------------------|
| 58: app to USDC of USMJ ord/jmt | 10 days | 14 days |
| 59: obj to USMJ R&R/ord | 10 days aft srvc | 14 days |

NOTE: that in real terms, most of these "changes" result in the period staying the same (except when there are federal holidays during the period being counted), but in some instances (such as under Rules 29/33 and 35) the new time period is longer than before, and in a few instances (such as under Rule 32) is shorter.

Habeas & 2255 Rules:

| | | |
|---------------------------|------------------|---------|
| 8: objections to USMJ R&R | 10 days aft srvc | 14 days |
|---------------------------|------------------|---------|

| | <u>Present Provision</u> | <u>New Time Period</u> |
|--|--------------------------|------------------------|
| <u>Appellate Rules:</u> | | |
| 4(b): dft's NoA in crim case | 10 aft entry of jdgmt | 14 days |
| 10: aplt to order transcripts | 10 days aft NoA | 14 days |
| 12: entry of appearance in ct of app | 10 days aft NoA | 14 days |
| 27(a)(3): time to respond to mtn | 8 days | 10 days |
| 28.1: latest d/l to fil final rep in x-app | 3 days bef arg | 7 days before |
| 30: time to confer re: jt. appx. | 10 days aft record filed | 14 days aft |
| 31(a)(1): latest d/l to fil rep br | 3 days bef arg | 7 days before |

Conforming Amendments to Statutes (Pub.L. No. 111-16):

| | <u>Present Provision</u> | <u>New Time Period</u> |
|---|---|------------------------|
| 18 U.S.C. | | |
| § 1963(d)(2): duration of TRO in RICO forfeiture | ~10 days until hg | ~14 days |
| § 2252A(c): pretrial notice of affirm def that alleged CP was actually produced using adults | ~10 days bef. trial | ~14 days bef |
| § 3060(b)(1): "prelim exam" | ~10 days aft init appear if in cust, 20 if not | ~14/21 |
| § 3432: names of veniremen in cap case | ~3 days bef trial | ~3 working days |
| § 3509(b): mtn to offer testim of child victim via CCTV | ~5 days bef. trial | ~7 days |
| § 3771(d)(5): file CVRA mandamus from denial of mtn to "re-open a plea or sentence" | w/in 10 days | 14 days |
| 21 U.S.C. | | |
| § 853(e): duration of TRO in drug forfeiture | ~10 days until hg | ~14 days |
| 28 U.S.C. | | |
| § 636(b): obj to USMJ R&R/ord | 10 days aft srvc | 14 days |

Other Changes in the Federal Rules, effective Dec. 1, 2009

Criminal:

7: reference to allegation of forfeiture in indictment deleted

32: PSI to mention whether forfeiture is sought

32.2: ct must not order crim forf unless indictment contains notice of forfeiture, but notice need only specify statutory basis, need not identify property or defendant's alleged interest, nor "amount of any forfeiture money judgment" that govt seeks (requests for bills of particulars may now be more necessary)

Habeas:

11: attempts to clarify procedures regarding certificates of appealability and filing of notices of appeal; motion to reconsider denial of habeas, per FRCP 59(e), tolls time to appeal, but motion to reconsider denial of COA does not.

Appellate:

12.1: creates a new procedure governing motions made in the district court while an appeal is pending, but which the court lacks authority to grant without at least a remand by the court of appeals. (As under existing case law, dist ct apparently retains power to deny motion while appeal is pending.) In criminal cases, this refers mainly to motions under Rule 33(b)(1) (newly discovered evidence, filed within 3 yrs of verdict), 28 U.S.C. § 2255, Crim. Rule 35(b) (reduction for post-sentence substantial assistance), and 18 U.S.C. § 3582(c) (retroactive favorable guideline amendments). If dist ct is inclined to grant the motion, or "states" that the motion "raises a substantial issue," movant "must promptly notify" ct of app. Circuit may then either dismiss appeal or remand while retaining jurisdiction. In either event, full authority is thereby conferred on dist ct to act on motion.

22: Coordinates with new Habeas/2255 rule 11 re: certif of appealability and appeals from final decisions on post-conviction challenges