



JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

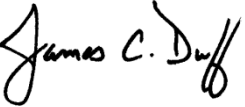
THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

October 4, 2017

MEMORANDUM

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

From: James C. Duff 

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 herewith for consideration of the Court proposed amendments to Rules 8, 11, 25, 26, 28.1, 29, 31, 39, and 41 of the Federal Rules of Appellate Procedure, along with Forms 4 and 7, which were approved by the Judicial Conference at its September 2017 session. The Judicial Conference recommends that the amendments be adopted by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering the proposed amendments, I am transmitting: (i) a copy of the affected rules and forms incorporating the proposed amendments and accompanying Committee Notes; (ii) a redline version of the same; (iii) an excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iv) an excerpt from the May 2017 Report of the Advisory Committee on Appellate Rules.

Attachments

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(E) The court may condition relief on a party's

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filing a bond or other ~~appropriate~~ security in

18

the district court.

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(b) Proceeding Against a ~~Surety~~ Security Provider. If a

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party gives security ~~in the form of a bond or~~

21

~~stipulation or other undertaking~~ with one or more

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~~sureties~~ security providers, each ~~surety~~ provider

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submits to the jurisdiction of the district court and

24

irrevocably appoints the district clerk as ~~the surety's~~

25

its agent on whom any papers affecting ~~the surety's~~ sits

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liability on the ~~security bond or undertaking~~ may be

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served. On motion, a ~~surety's~~ security provider's

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liability may be enforced in the district court without

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the necessity of an independent action. The motion

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and any notice that the district court prescribes may be

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served on the district clerk, who must promptly ~~mail~~

32 send a copy to each ~~surety~~security
33 provider whose address is known.

34 * * * * *

Committee Note

The amendments to subdivisions (a) and (b) conform this rule with the amendment of Federal Rule of Civil Procedure 62. Rule 62 formerly required a party to provide a “supersedeas bond” to obtain a stay of the judgment and proceedings to enforce the judgment. As amended, Rule 62(b) allows a party to obtain a stay by providing a “bond or other security.” The word “mail” is changed to “send” to avoid restricting the method of serving security providers. Other rules specify the permissible manners of service.

1 **Rule 11. Forwarding the Record**

2 * * * * *

3 **(g) Record for a Preliminary Motion in the Court of**

4 **Appeals.** If, before the record is forwarded, a party
5 makes any of the following motions in the court of
6 appeals:

- 7 • for dismissal;
- 8 • for release;
- 9 • for a stay pending appeal;
- 10 • for additional security on the bond on appeal or
- 11 on a supersedeas bond or other security provided
- 12 to obtain a stay of judgment; or
- 13 • for any other intermediate order—

14 the district clerk must send the court of appeals any
15 parts of the record designated by any party.

Committee Note

The amendment of subdivision (g) conforms this rule with the amendment of Federal Rule of Civil Procedure 62. Rule 62 formerly required a party to provide a “supersedeas bond” to obtain a stay of the judgment and proceedings to enforce the judgment. As amended, Rule 62(b) allows a party to obtain a stay by providing a “bond or other security.”

Rule 25. Filing and Service²

(a) Filing.

(1) **Filing with the Clerk.** A paper required or permitted to be filed in a court of appeals must be filed with the clerk.

(2) **Filing: Method and Timeliness.**

(A) Nonelectronic Filing.

~~(A)(i)~~ **In General.** ~~Filing~~For a paper not filed electronically, filing may be accomplished by mail addressed to the clerk, but filing is not timely unless the clerk receives the papers within the time fixed for filing.

² Revised on March 14, 2018 to reflect request by the Standing Committee and the Advisory Committee on Appellate Rules to withdraw a proposed amendment to Appellate Rule 25(d)(1).

- ~~(B)~~(ii) **A Brief or Appendix.** A brief or appendix not filed electronically is timely filed, however, if on or before the last day for filing, it is:
- ~~(i)~~• mailed to the clerk by ~~First-Class Mail~~first-class mail, or other class of mail that is at least as expeditious, postage prepaid; or
 - ~~(ii)~~• dispatched to a third-party commercial carrier for delivery to the clerk within 3 days.

- ~~(C)~~(iii) **Inmate Filing.** If an institution has a system designed for legal mail, an inmate confined there must use that system to receive

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the benefit of this Rule 25(a)(2)~~(C)~~(A)(iii). A paper ~~filed~~not filed electronically by an inmate is timely if it is deposited in the institution's internal mail system on or before the last day for filing and:

~~(i)~~(i) it is accompanied by: ~~a~~a declaration in compliance with 28 U.S.C. § 1746—or a notarized statement—setting out the date of deposit and stating that first-class postage is being prepaid; or ~~a~~a evidence (such as a postmark or date stamp) showing that the

paper was so deposited and
that postage was prepaid; or
(ii) the court of appeals
exercises its discretion to
permit the later filing of a
declaration or notarized
statement that satisfies
Rule 25(a)(2)(C)(i)(A)(iii).

~~(D) **Electronic filing.** A court of appeals may
by local rule permit or require papers to be
filed, signed, or verified by electronic
means that are consistent with technical
standards, if any, that the Judicial
Conference of the United States establishes.
A local rule may require filing by electronic
means only if reasonable exceptions are
allowed. A paper filed by electronic means~~

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~~in compliance with a local rule constitutes a written paper for the purpose of applying these rules.~~

(B) Electronic Filing and Signing.

(i) By a Represented Person—

Generally Required;

Exceptions. A person

represented by an attorney must

file electronically, unless

nonelectronic filing is allowed by

the court for good cause or is

allowed or required by local rule.

(ii) By an Unrepresented Person—

When Allowed or Required. A

person not represented by an

attorney:

- may file electronically only if allowed by court order or by local rule; and
- may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

(iii) **Signing.** A filing made through a person's electronic-filing account and authorized by that person, together with that person's name on a signature block, constitutes the person's signature.

(iv) **Same as a Written Paper.** A paper filed electronically is a

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written paper for purposes of
these rules.

- (3) **Filing a Motion with a Judge.** If a motion requests relief that may be granted by a single judge, the judge may permit the motion to be filed with the judge; the judge must note the filing date on the motion and give it to the clerk.
- (4) **Clerk's Refusal of Documents.** The clerk must not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rule or practice.
- (5) **Privacy Protection.** An appeal in a case whose privacy protection was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same rule on

appeal. In all other proceedings, privacy protection is governed by Federal Rule of Civil Procedure 5.2, except that Federal Rule of Criminal Procedure 49.1 governs when an extraordinary writ is sought in a criminal case.

(b) Service of All Papers Required. Unless a rule requires service by the clerk, a party must, at or before the time of filing a paper, serve a copy on the other parties to the appeal or review. Service on a party represented by counsel must be made on the party's counsel.

(c) Manner of Service.

(1) ~~Service~~Nonelectronic service may be any of the following:

(A) personal, including delivery to a responsible person at the office of counsel;

(B) by mail;or

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(C) by third-party commercial carrier for delivery within 3 days; ~~or,~~

~~(D) by electronic means, if the party being served consents in writing.~~

(2) ~~If authorized by local rule, a party may use the court's transmission equipment to make electronic service under Rule 25(e)(1)(D)~~
Electronic service of a paper may be made (A) by sending it to a registered user by filing it with the court's electronic-filing system or (B) by sending it by other electronic means that the person to be served consented to in writing.

(3) When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, service on a party must be by a manner at least as expeditious as the manner used to file the paper with the court.

- (4) Service by mail or by commercial carrier is complete on mailing or delivery to the carrier. Service by electronic means is complete on ~~transmission~~ filing or sending, unless the party making service is notified that the paper was not received by the party served.

(d) Proof of Service.

- (1) A paper presented for filing must contain either of the following:
- (A) an acknowledgment of service by the person served; or
 - (B) proof of service consisting of a statement by the person who made service certifying:
 - (i) the date and manner of service;
 - (ii) the names of the persons served; and
 - (iii) their mail or electronic addresses, facsimile numbers, or the addresses of

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the places of delivery, as appropriate
for the manner of service.

(2) When a brief or appendix is filed by mailing or
dispatch in accordance with
Rule 25(a)(2)~~(B)~~(A)(ii), the proof of service
must also state the date and manner by which the
document was mailed or dispatched to the clerk.

(3) Proof of service may appear on or be affixed to
the papers filed.

(e) **Number of Copies.** When these rules require the
filing or furnishing of a number of copies, a court may
require a different number by local rule or by order in
a particular case.

Committee Note

The amendments conform Rule 25 to the amendments
to Federal Rule of Civil Procedure 5 on electronic filing,
signature, and service. They establish, in Rule 25(a)(2)(B),
a new national rule that generally makes electronic filing
mandatory. The rule recognizes exceptions for persons

proceeding without an attorney, exceptions for good cause, and variations established by local rule. The amendments establish national rules regarding the methods of signing and serving electronic documents in Rule 25(a)(2)(B)(iii) and (c)(2).

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
4 any local rule or court order, or in any statute that
5 does not specify a method of computing time.

6 * * * * *

7 (4) **“Last Day” Defined.** Unless a different time is
8 set by a statute, local rule, or court order, the last
9 day ends:

10 (A) for electronic filing in the district court, at
11 midnight in the court’s time zone;

12 (B) for electronic filing in the court of appeals,
13 at midnight in the time zone of the circuit
14 clerk’s principal office;

15 (C) for filing under Rules 4(c)(1),
16 25(a)(2)~~(B)~~(A)(ii), and
17 25(a)(2)~~(C)~~(A)(iii)—and filing by mail

18 under Rule 13(a)(2)—at the latest time for
19 the method chosen for delivery to the post
20 office, third-party commercial carrier, or
21 prison mailing system; and

22 (D) for filing by other means, when the clerk’s
23 office is scheduled to close.

24 * * * * *

Committee Note

The amendments adjust references to subdivisions of Rule 25 that have been renumbered.

1 **Rule 28.1. Cross-Appeals**

2 * * * * *

3 **(f) Time to Serve and File a Brief.** Briefs must be
4 served and filed as follows:

5 (1) the appellant's principal brief, within 40 days
6 after the record is filed;

7 (2) the appellee's principal and response brief,
8 within 30 days after the appellant's principal
9 brief is served;

10 (3) the appellant's response and reply brief, within
11 30 days after the appellee's principal and
12 response brief is served; and

13 (4) the appellee's reply brief, within ~~14~~21 days after
14 the appellant's response and reply brief is served,
15 but at least 7 days before argument unless the
16 court, for good cause, allows a later filing.

Committee Note

Subdivision (f)(4) is amended to extend the period for filing a reply brief from 14 days to 21 days. Before the elimination of the “three-day rule” in Rule 26(c), attorneys were accustomed to a period of 17 days within which to file a reply brief, and the committee concluded that shortening the period from 17 days to 14 days could adversely affect the preparation of useful reply briefs. Because time periods are best measured in increments of 7 days, the period is extended to 21 days.

1 **Rule 29. Brief of an Amicus Curiae**

2 **(a) During Initial Consideration of a Case on the**
3 **Merits.**

4 (1) **Applicability.** This Rule 29(a) governs amicus
5 filings during a court's initial consideration of a
6 case on the merits.

7 (2) **When Permitted.** The United States or its
8 officer or agency or a state may file an amicus-
9 ~~curiae~~ brief without the consent of the parties or
10 leave of court. Any other amicus curiae may file
11 a brief only by leave of court or if the brief states
12 that all parties have consented to its filing, but a
13 court of appeals may prohibit the filing of or
14 may strike an amicus brief that would result in a
15 judge's disqualification.

16 * * * * *

17 **(b) During Consideration of Whether to Grant**
18 **Rehearing.**

19 (1) **Applicability.** This Rule 29(b) governs amicus
20 filings during a court's consideration of whether
21 to grant panel rehearing or rehearing en banc,
22 unless a local rule or order in a case provides
23 otherwise.

24 (2) **When Permitted.** The United States or its
25 officer or agency or a state may file an amicus-
26 ~~curiae~~ brief without the consent of the parties or
27 leave of court. Any other amicus curiae may file
28 a brief only by leave of court.

29 * * * * *

Committee Note

The amendment to subdivision (a)(2) authorizes orders or local rules that prohibit the filing of or permit the striking of an amicus brief if the brief would result in a judge's disqualification. The amendment does not alter or address the standards for when an amicus brief requires a judge's disqualification. A comparable amendment to

subdivision (b) is not necessary. Subdivision (b)(1) currently authorizes local rules and orders governing filings during a court's consideration of whether to grant panel rehearing or rehearing en banc. These local rules or orders may prohibit the filing of or permit the striking of an amicus brief that would result in a judge's disqualification. In addition, under subdivision (b)(2), a court may deny leave to file an amicus brief that would result in a judge's disqualification.

1 **Rule 31. Serving and Filing Briefs**

2 **(a) Time to Serve and File a Brief.**

3 (1) The appellant must serve and file a brief within
4 40 days after the record is filed. The appellee
5 must serve and file a brief within 30 days after
6 the appellant's brief is served. The appellant
7 may serve and file a reply brief within ~~14~~21 days
8 after service of the appellee's brief but a reply
9 brief must be filed at least 7 days before
10 argument, unless the court, for good cause,
11 allows a later filing.

12 * * * * *

Committee Note

Subdivision (a)(1) is revised to extend the period for filing a reply brief from 14 days to 21 days. Before the elimination of the "three-day rule" in Rule 26(c), attorneys were accustomed to a period of 17 days within which to file a reply brief, and the committee concluded that shortening the period from 17 days to 14 days could adversely affect the preparation of useful reply briefs. Because time periods

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are best measured in increments of 7 days, the period is extended to 21 days.

1 **Rule 39. Costs**

2 * * * * *

3 (e) **Costs on Appeal Taxable in the District Court.** The
4 following costs on appeal are taxable in the district
5 court for the benefit of the party entitled to costs under
6 this rule:

- 7 (1) the preparation and transmission of the record;
- 8 (2) the reporter's transcript, if needed to determine
9 the appeal;
- 10 (3) premiums paid for a ~~supersedeas~~ bond or other
11 ~~bond~~security to preserve rights pending appeal;
- 12 and
- 13 (4) the fee for filing the notice of appeal.

Committee Note

The amendment of subdivision (e)(3) conforms this rule with the amendment of Federal Rule of Civil Procedure 62. Rule 62 formerly required a party to provide a “supersedeas bond” to obtain a stay of the judgment and proceedings to enforce the judgment. As amended, Rule 62(b) allows a party to obtain a stay by providing a “bond or other security.”

1 **Rule 41. Mandate: Contents; Issuance and Effective**
2 **Date; Stay**

3 **(a) Contents.** Unless the court directs that a formal
4 mandate issue, the mandate consists of a certified
5 copy of the judgment, a copy of the court's opinion, if
6 any, and any direction about costs.

7 **(b) When Issued.** The court's mandate must issue 7 days
8 after the time to file a petition for rehearing expires, or
9 7 days after entry of an order denying a timely petition
10 for panel rehearing, petition for rehearing en banc, or
11 motion for stay of mandate, whichever is later. The
12 court may shorten or extend the time by order.

13 **(c) Effective Date.** The mandate is effective when
14 issued.

15 **(d) Staying the Mandate Pending a Petition for**
16 **Certiorari.**

17 ~~(1) **On Petition for Rehearing or Motion.** The~~
18 ~~timely filing of a petition for panel rehearing,~~
19 ~~petition for rehearing en banc, or motion for stay~~
20 ~~of mandate, stays the mandate until disposition~~
21 ~~of the petition or motion, unless the court orders~~
22 ~~otherwise.~~

23 ~~(2) **Pending Petition for Certiorari.**~~

24 ~~(A)~~ ~~(1)~~ **Motion to Stay.** A party may move to stay the
25 mandate pending the filing of a petition for a writ
26 of certiorari in the Supreme Court. The motion
27 must be served on all parties and must show that
28 the ~~certiorari~~ petition would present a substantial
29 question and that there is good cause for a stay.

30 ~~(B)~~ ~~(2)~~ **Duration of Stay; Extensions.** The stay must
31 not exceed 90 days, unless:

32 (A) the period is extended for good cause; or

33 ~~(B) unless~~ the party who obtained the stay files
34 a ~~petition for the writ and so~~ notifies the
35 circuit clerk in writing within the period of
36 the stay:

37 (i) that the time for filing a petition has
38 been extended, in which case the stay
39 continues for the extended period; or

40 (ii) that the petition has been filed. ~~In that~~
41 ~~case,~~ in which case the stay continues
42 until the Supreme Court's final
43 disposition.

44 ~~(C)~~ (3) **Security.** The court may require a bond or other
45 security as a condition to granting or continuing
46 a stay of the mandate.

47 ~~(D)~~ (4) **Issuance of Mandate.** The court of appeals must
48 issue the mandate immediately ~~when~~ on receiving
49 a copy of a Supreme Court order denying the

50 ~~petition for writ of certiorari is filed, unless~~
51 extraordinary circumstances exist.

Committee Note

Subdivision (b). Subdivision (b) is revised to clarify that an order is required for a stay of the mandate.

Before 1998, the rule referred to a court’s ability to shorten or enlarge the time for the mandate’s issuance “by order.” The phrase “by order” was deleted as part of the 1998 restyling of the rule. Though the change appears to have been intended as merely stylistic, it has caused uncertainty concerning whether a court of appeals can stay its mandate through mere inaction or whether such a stay requires an order. There are good reasons to require an affirmative act by the court. Litigants—particularly those not well versed in appellate procedure—may overlook the need to check that the court of appeals has issued its mandate in due course after handing down a decision. And, in *Bell v. Thompson*, 545 U.S. 794, 804 (2005), the lack of notice of a stay was one of the factors that contributed to the Court’s holding that staying the mandate was an abuse of discretion. Requiring stays of the mandate to be accomplished by court order will provide notice to litigants and can also facilitate review of the stay.

Subdivision (d). Three changes are made in subdivision (d).

Subdivision (d)(1)—which formerly addressed stays of the mandate upon the timely filing of a motion to stay

the mandate or a petition for panel or en banc rehearing—has been deleted and the rest of subdivision (d) has been renumbered and renamed accordingly. In instances where such a petition or motion is timely filed, subdivision (b) sets the presumptive date for issuance of the mandate at 7 days after entry of an order denying the petition or motion. Thus, it seems redundant to state (as subdivision (d)(1) did) that timely filing of such a petition or motion stays the mandate until disposition of the petition or motion. The deletion of subdivision (d)(1) is intended to streamline the rule; no substantive change is intended.

Under the new subdivision (d)(2)(B), if the court of appeals issues a stay of the mandate for a party to file a petition for certiorari, and a Justice of the Supreme Court subsequently extends the time for filing the petition, the stay automatically continues for the extended period.

Subdivision (d)(4)—i.e., former subdivision (d)(2)(D)—is amended to specify that a mandate stayed pending a petition for certiorari must issue immediately once the court of appeals receives a copy of the Supreme Court’s order denying certiorari, unless the court of appeals finds that extraordinary circumstances justify a further stay. Without deciding whether the prior version of Rule 41 provided authority for a further stay of the mandate after denial of certiorari, the Supreme Court ruled that any such authority could be exercised only in “extraordinary circumstances.” *Ryan v. Schad*, 570 U.S. 521, 525 (2013) (per curiam). The amendment to subdivision (d)(4) makes explicit that the court may stay the mandate after the denial of certiorari, and also makes explicit that such a stay is permissible only

in extraordinary circumstances. Such a stay cannot occur through mere inaction but rather requires an order.

The reference in prior subdivision (d)(2)(D) to the *filing* of a copy of the Supreme Court's order is replaced by a reference to the court of appeals' *receipt* of a copy of the Supreme Court's order. The filing of the copy and its receipt by the court of appeals amount to the same thing (*cf.* Rule 25(a)(2)(A)(i), setting a general rule that "filing is not timely unless the clerk receives the papers within the time fixed for filing"), but "on receiving a copy" is more specific and, hence, clearer.

1 **Form 4. Affidavit Accompanying Motion for**
2 **Permission to Appeal in Forma Pauperis**

3 * * * * *

4 12. State the city and state of your legal residence.

5 Your daytime phone number: (____) _____

6 Your age: _____ Your years of schooling: _____

7 ~~Last four digits of your social security number: _____~~

Form 7. Declaration of Inmate Filing

[insert name of court; for example,
United States District Court for the District of Minnesota]

A.B., Plaintiff
v.
C.D., Defendant

Case No. _____

I am an inmate confined in an institution. Today, _____ [insert date], I am depositing the _____ [insert title of document; for example, "notice of appeal"] in this case in the institution's internal mail system. First-class postage is being prepaid either by me or by the institution on my behalf.

I declare under penalty of perjury that the foregoing is true and correct (see 28 U.S.C. § 1746; 18 U.S.C. § 1621).

Sign your name here _____

Signed on _____ [insert date]

[Note to inmate filers: If your institution has a system designed for legal mail, you must use that system in order to receive the timing benefit of Fed. R. App. P. 4(c)(1) or Fed. R. App. P. 25(a)(2)(~~C~~)(A)(iii).]