**PROPOSED AMENDMENTS TO THE**

**FEDERAL RULES OF APPELLATE PROCEDURE**[[1]](#footnote-1)

**Rule 8. Stay or Injunction Pending Appeal**

**(a) Motion for Stay.**

(1) **Initial Motion in the District Court.** A party must ordinarily move first in the district court for the following relief:

\* \* \* \* \*

(B) approval of a ~~supersedeas~~bond or other security provided to obtain a stay of judgment; or

\* \* \* \* \*

(2) **Motion in the Court of Appeals; Conditions on Relief.** A motion for the relief mentioned in Rule 8(a)(1) may be made to the court of appeals or to one of its judges.

\* \* \* \* \*

(E) The court may condition relief on a party’s filing a bond or other ~~appropriate~~security in the district court.

**(b) Proceeding Against a ~~Surety~~Security Provider.** If a party gives security ~~in the form of a bond or stipulation or other undertaking~~ with one or more ~~sureties~~security providers, each ~~surety~~provider submits to the jurisdiction of the district court and irrevocably appoints the district clerk as ~~the surety’s~~ its agent on whom any papers affecting ~~the surety’s~~its liability on the security~~bond or undertaking~~ may be served. On motion, a ~~surety’s~~security provider’s liability may be enforced in the district court without the necessity of an independent action. The motion and any notice that the district court prescribes may be served on the district clerk, who must promptly ~~mail~~ send a copy to each ~~surety~~security provider whose address is known.

\* \* \* \* \*

**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.

**Rule 11. Forwarding the Record**

\* \* \* \* \*

**(g) Record for a Preliminary Motion in the Court of Appeals.** If, before the record is forwarded, a party makes any of the following motions in the court of appeals:

* for dismissal;
* for release;
* for a stay pending appeal;
* for additional security on the bond on appeal or on a ~~supersedeas~~bond or other security provided to obtain a stay of judgment; or
* for any other intermediate order—

the district clerk must send the court of appeals any 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 Service[[2]](#footnote-2)**

**(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.

~~(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 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)~~• it is accompanied by: ~~•~~ 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 ~~•~~ 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 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 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

(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(c)(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 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).

**Rule 26. Computing and Extending Time**

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

\* \* \* \* \*

(4) **‘‘Last Day’’ Defined.** Unless a different time is set by a statute, local rule, or court order, the last day ends:

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

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

(C) for filing under Rules 4(c)(1), 25(a)(2)~~(B)~~(A)(ii), and 25(a)(2)~~(C)~~(A)(iii)—and filing by mail under Rule 13(a)(2)—at the latest time for the method chosen for delivery to the post office, third-party commercial carrier, or prison mailing system; and

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

\* \* \* \* \*

**Committee Note**

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

**Rule 28.1. Cross-Appeals**

\* \* \* \* \*

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

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

(2) the appellee’s principal and response brief, within 30 days after the appellant’s principal brief is served;

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

(4) the appellee’s reply brief, within ~~14~~21 days after the appellant’s response and reply brief is served, but at least 7 days before argument unless the 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.

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

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

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

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

\* \* \* \* \*

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

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

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

\* \* \* \* \*

**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.

**Rule 31. Serving and Filing Briefs**

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

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

\* \* \* \* \*

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

**Rule 39. Costs**

\* \* \* \* \*

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

(1) the preparation and transmission of the record;

(2) the reporter’s transcript, if needed to determine the appeal;

(3) premiums paid for a ~~supersedeas~~bond or other ~~bond~~security to preserve rights pending appeal; and

(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.”

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

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

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

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

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

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

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

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

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

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

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

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

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

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

~~(D)~~ (4) **Issuance of Mandate.** The court of appeals must issue the mandate immediately ~~when~~on receiving a copy of a Supreme Court order denying the petition ~~for writ of certiorari is filed~~, unless 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.

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

\* \* \* \* \*

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

Your daytime phone number: (\_\_\_) \_\_\_\_\_\_\_\_\_\_\_\_

Your age: \_\_\_\_\_\_\_ Your years of schooling: \_\_\_\_\_\_

~~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).*]

1. New material is underlined; matter to be omitted is lined through. [↑](#footnote-ref-1)
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). [↑](#footnote-ref-2)