

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

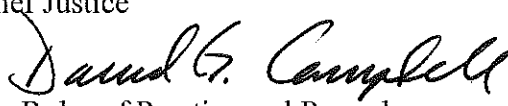
DAVID G. CAMPBELL
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MICHAEL A. CHAGARES
Chair
APPELLATE RULES

To: Honorable John G. Roberts, Jr.
Chief Justice

Jeffrey P. Minear, Esq.
Counselor to the Chief Justice

From: David G. Campbell 
Chair, Committee on Rules of Practice and Procedure

Michael A. Chagares
Chair, Advisory Committee on Appellate Rules

Date: March 14, 2018

Re: Request to Withdraw Proposed Amendment to Appellate Rule 25(d)(1)

Pending before the Court is a proposed amendment to Appellate Rule 25(d)(1) that eliminates the requirement of proof of service when a party files a paper using the court's electronic filing system. The Judicial Conference approved this amendment at its September 2017 session (JCUS-SEP 17, p. 3), and the proposal was submitted to the Court on October 4, 2017, along with other proposed rule changes that, if approved by the Court and not altered by Congress, would become effective December 1, 2018.

We write to respectfully withdraw the proposed amendment to Appellate Rule 25(d)(1), and ask that the Court exclude it from the rules package forwarded to Congress on or before May 1, 2018. The version of Appellate Rule 25(d)(1) now before the Court states that "[a] paper presented for filing other than through the court's electronic-filing system must contain" proof of service or an acknowledgment of service. The amendment is part of a larger effort to focus all of the rules of procedure on electronic filing and eliminate unnecessary proofs of service. We recently realized, however, that this version fails to account for the fact that litigants who do not use a court's electronic filing system, such as many pro se litigants, will not receive a copy of a filing through that system and should be served separately, supported by a proof of service. The fix is relatively simple and not controversial, but we thought it best to address this issue before the pending change to Rule 25(d)(1) becomes effective. A revised amendment to Rule 25(d)(1) will be submitted next year in corrected form, along with some additional amendments that continue to refine the treatment of electronic filing in the appellate rules. We do not think that a

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one-year delay in amending Rule 25(d)(1) will create any difficulty for litigants or the courts. The Advisory Committee and Standing Committee unanimously support withdrawing the proposed amendment and submitting a corrected version next year.

To be clear, we ask to withdraw only the proposed amendment to Appellate Rule 25(d)(1); our request leaves unchanged all other proposed rule amendments submitted to the Court on October 4, 2017, including proposed changes to Appellate Rule 25(a), 25(c), and 25(d)(2). Attached to this memorandum are clean and redline versions of Appellate Rule 25 with the proposed Committee Note that show pending amendments we ask the Court to consider and, if approved, forward to Congress by May 1, 2018.

We apologize to the Court for the inconvenience occasioned by this matter. Please let us know if you have any questions.

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF APPELLATE PROCEDURE**

Rule 25. Filing and Service

(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.

(i) **In general.** 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.

(ii) **A brief or appendix.** A brief or appendix not filed electronically is

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timely filed, however, if on or before the last day for filing, it is:

- mailed to the clerk by first-class mail, or other class of mail that is at least as expeditious, postage prepaid; or
- dispatched to a third-party commercial carrier for delivery to the clerk within 3 days.

(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)(A)(iii). A paper not filed electronically by an inmate is timely if it is deposited in the institution's

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internal mail system on or before the last day for filing and:

- 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
- the court of appeals exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies Rule 25(a)(2)(A)(iii).

(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.

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- (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) 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.

(2) 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.

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- (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 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

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(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)(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

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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).

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

7 **(A) Nonelectronic Filing.**

8 (A)(i) **In general.** ~~Filing~~For a paper not
9 filed electronically, filing may be
10 accomplished by mail addressed
11 to the clerk, but filing is not
12 timely unless the clerk receives

* New material is underlined; matter to be omitted is lined through.

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13 the papers within the time fixed
14 for filing.

15 ~~(B)~~(ii) **A brief or appendix.** A brief or
16 appendix not filed electronically
17 is timely filed, however, if on or
18 before the last day for filing, it is:

19 ~~(i)~~• mailed to the clerk by ~~First-~~
20 ~~Class Mail~~first-class mail, or
21 other class of mail that is at
22 least as expeditious, postage
23 prepaid; or

24 ~~(ii)~~• dispatched to a third-party
25 commercial carrier for
26 delivery to the clerk within 3
27 days.

28 ~~(C)~~(iii) **Inmate filing.** If an institution
29 has a system designed for legal

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31 must use that system to receive
32 the benefit of this
33 Rule 25(a)(2)(~~C~~)(A)(iii). A paper
34 ~~filed~~not filed electronically by an
35 inmate is timely if it is deposited
36 in the institution's internal mail
37 system on or before the last day
38 for filing and:
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40 declaration in compliance
41 with 28 U.S.C. § 1746—or a
42 notarized statement—
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44 deposit and stating that first-
45 class postage is being
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47 as a postmark or date stamp)
48 showing that the paper was
49 so deposited and that
50 postage was prepaid; or
51 (ii) the court of appeals
52 exercises its discretion to
53 permit the later filing of a
54 declaration or notarized
55 statement that satisfies
56 Rule 25(a)(2)(C)(i)(A)(iii).

57 ~~(D) **Electronic filing.** A court of appeals may by~~
58 ~~local rule permit or require papers to be filed,~~
59 ~~signed, or verified by electronic means that~~
60 ~~are consistent with technical standards, if~~
61 ~~any, that the Judicial Conference of the~~
62 ~~United States establishes. A local rule may~~
63 ~~require filing by electronic means only if~~

64 ~~reasonable exceptions are allowed. A paper~~
65 ~~filed by electronic means in compliance with~~
66 ~~a local rule constitutes a written paper for the~~
67 ~~purpose of applying these rules.~~

68 **(B) Electronic Filing and Signing.**

69 **(i) By a Represented Person—**

70 **Generally Required;**

71 **Exceptions.** A person

72 represented by an attorney must

73 file electronically, unless

74 nonelectronic filing is allowed by

75 the court for good cause or is

76 allowed or required by local rule.

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78 **When Allowed or Required. A**

79 person not represented by an

80 attorney:

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83 local rule; and
- 84 • may be required to file
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86 order, or by a local rule that
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123 represented by counsel must be made on the party's
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125 **(c) Manner of Service.**

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

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

130 (B) by mail; or

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

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

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

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