114th Congress, 2d Session – – – – – – – – – – – – House Document 114–129

AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

COMMUNICATION

FROM

THE CHIEF JUSTICE, THE SUPREME COURT OF THE UNITED STATES

TRANSMITTING

AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE THAT HAVE BEEN ADOPTED BY THE SUPREME COURT, PURSUANT TO 28 U.S.C. 2075; ADDED BY PUBLIC LAW 88–623, SEC. 1 (AS AMENDED BY PUBLIC LAW 103–394, SEC. 104(f)); (108 STAT. 4110) AND 28 U.S.C. 331; JUNE 25, 1948, CH. 646 (AS AMENDED BY PUBLIC LAW 110–177, SEC. 101(b)); (121 STAT. 2534)

APRIL 29, 2016.—Referred to the Committee on the Judiciary and ordered to be printed

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U.S. GOVERNMENT PUBLISHING OFFICE
59–011 WASHINGTON : 2016

SUPREME COURT OF THE UNITED STATES,
Washington, DC, April 28, 2016.

Hon. PAUL D. RYAN,
Speaker of the House of Representatives,
Washington, DC.

DEAR MR. SPEAKER: I have the honor to submit to the Congress the amendments to the Federal Rules of Appellate Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2075 of Title 28, United States Code.

Accompanying these rules are the following materials submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code: a transmittal letter to the Court dated October 9, 2015; a redline version of the rules with Committee Notes; an excerpt from the September 2015 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and an excerpt from the May 4, 2015 Report of the Advisory Committee on Appellate Rules.

Sincerely,

JOHN G. ROBERTS, Jr.,
Chief Justice.

April 28, 2016

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Appellate Procedure be, and they hereby are, amended by including therein amendments to Appellate Rules 4, 5, 21, 25, 26, 27, 28, 28.1, 29, 32, 35, and 40, and Forms 1, 5, and 6, new Form 7 and new Appendix.

[*See infra* pp. ___ ___ ___.]

2. That the foregoing amendments to the Federal Rules of Appellate Procedure shall take effect on December 1, 2016, and shall govern in all proceedings in appellate cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Appellate Procedure in accordance with the provisions of Section 2075 of Title 28, United States Code.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

Rule 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.

* * * * *

(4) **Effect of a Motion on a Notice of Appeal.**

(A) If a party files in the district court any of the following motions under the Federal Rules of Civil Procedure—and does so within the time allowed by those rules—the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

* * * * *

(c) Appeal by an Inmate Confined in an Institution.

(1) 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 4(c)(1). If an inmate files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing and:

(A) it is accompanied by:

(i) 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

(ii) evidence (such as a postmark or date stamp) showing that the notice was so deposited and that postage was prepaid; or

(B) the court of appeals exercises its discretion to permit the later filing of a declaration or

notarized statement that satisfies Rule 4(c)(1)(A)(i).

* * * * *

Rule 5. Appeal by Permission

* * * * *

(c) Form of Papers; Number of Copies; Length Limits. All papers must conform to Rule 32(c)(2). An original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case. Except by the court's permission, and excluding the accompanying documents required by Rule 5(b)(1)(E):

(1) a paper produced using a computer must not exceed 5,200 words; and

(2) a handwritten or typewritten paper must not exceed 20 pages.

* * * * *

Rule 21. Writs of Mandamus and Prohibition, and Other Extraordinary Writs

* * * * *

(d) Form of Papers; Number of Copies; Length Limits. All papers must conform to Rule 32(c)(2). An original and 3 copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case. Except by the court's permission, and excluding the accompanying documents required by Rule 21(a)(2)(C):

(1) a paper produced using a computer must not exceed 7,800 words; and

(2) a handwritten or typewritten paper must not exceed 30 pages.

Rule 25. Filing and Service

(a) Filing.

* * * * *

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

* * * * *

(C) **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 paper filed 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).

* * * * *

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), and 25(a)(2)(C)—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.

* * * * *

(c) Additional Time after Certain Kinds of Service. When a party may or must act within a specified time after being served, 3 days are added after the period would otherwise expire under Rule 26(a), unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is treated as delivered on the date of service stated in the proof of service.

Rule 27. Motions

* * * * *

(d) Form of Papers; Length Limits; Number of Copies.

* * * * *

(2) **Length Limits.** Except by the court's permission, and excluding the accompanying documents authorized by Rule 27(a)(2)(B):

(A) a motion or response to a motion produced using a computer must not exceed 5,200 words;

(B) a handwritten or typewritten motion or response to a motion must not exceed 20 pages;

(C) a reply produced using a computer must not exceed 2,600 words; and

(D) a handwritten or typewritten reply to a response must not exceed 10 pages.

* * * * *

Rule 28. Briefs

(a) Appellant's Brief. The appellant's brief must contain, under appropriate headings and in the order indicated:

* * * * *

(10) the certificate of compliance, if required by Rule 32(g)(1).

* * * * *

Rule 28.1. Cross-Appeals

* * * * *

(e) Length.

(1) **Page Limitation.** Unless it complies with Rule 28.1(e)(2), the appellant's principal brief must not exceed 30 pages; the appellee's principal and response brief, 35 pages; the appellant's response and reply brief, 30 pages; and the appellee's reply brief, 15 pages.

(2) **Type-Volume Limitation.**

(A) The appellant's principal brief or the appellant's response and reply brief is acceptable if it:

(i) contains no more than 13,000 words; or

(ii) uses a monospaced face and contains no more than 1,300 lines of text.

(B) The appellee's principal and response brief is acceptable if it:

(i) contains no more than 15,300 words; or

(ii) uses a monospaced face and contains no more than 1,500 lines of text.

(C) The appellee's reply brief is acceptable if it contains no more than half of the type volume specified in Rule 28.1(e)(2)(A).

* * * * *

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.

(3) **Motion for Leave to File.** The motion must be accompanied by the proposed brief and state:

(A) the movant's interest; and

(B) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.

(4) **Contents and Form.** An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. An amicus brief need not comply with Rule 28, but must include the following:

(A) if the amicus curiae is a corporation, a disclosure statement like that required of parties by Rule 26.1;

(B) a table of contents, with page references;

(C) a table of authorities—cases (alphabetically arranged), statutes, and other authorities—

with references to the pages of the brief where they are cited;

(D) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;

(E) unless the amicus curiae is one listed in the first sentence of Rule 29(a)(2), a statement that indicates whether:

(i) a party's counsel authored the brief in whole or in part;

(ii) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and

(iii) a person—other than the amicus curiae, its members, or its counsel—contributed money that was intended

to fund preparing or submitting the brief and, if so, identifies each such person;

(F) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review; and

(G) a certificate of compliance under Rule 32(g)(1), if length is computed using a word or line limit.

(5) **Length.** Except by the court's permission, an amicus brief may be no more than one-half the maximum length authorized by these rules for a party's principal brief. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.

(6) **Time for Filing.** An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's or petitioner's principal brief is filed. A court may grant leave for later filing, specifying the time within which an opposing party may answer.

(7) **Reply Brief.** Except by the court's permission, an amicus curiae may not file a reply brief.

(8) **Oral Argument.** An amicus curiae may participate in oral argument only with the court's permission.

(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.

(3) **Motion for Leave to File.** Rule 29(a)(3) applies to a motion for leave.

(4) **Contents, Form, and Length.** Rule 29(a)(4) applies to the amicus brief. The brief must not exceed 2,600 words.

(5) **Time for Filing.** An amicus curiae supporting the petition for rehearing or supporting neither

party must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the petition is filed. An amicus curiae opposing the petition must file its brief, accompanied by a motion for filing when necessary, no later than the date set by the court for the response.

Rule 32. Form of Briefs, Appendices, and Other Papers

(a) Form of a Brief.

* * * * *

(7) **Length.**

(A) **Page Limitation.** A principal brief may not exceed 30 pages, or a reply brief 15 pages, unless it complies with Rule 32(a)(7)(B).

(B) **Type-Volume Limitation.**

(i) A principal brief is acceptable if it:

- contains no more than 13,000 words; or
- uses a monospaced face and contains no more than 1,300 lines of text.

(ii) A reply brief is acceptable if it contains no more than half of the type

volume specified in Rule 32(a)(7)(B)(i).

* * * * *

(e) Local Variation. Every court of appeals must accept documents that comply with the form requirements of this rule and the length limits set by these rules. By local rule or order in a particular case, a court of appeals may accept documents that do not meet all the form requirements of this rule or the length limits set by these rules.

(f) Items Excluded from Length. In computing any length limit, headings, footnotes, and quotations count toward the limit but the following items do not:

- the cover page;
- a corporate disclosure statement;
- a table of contents;
- a table of citations;

- a statement regarding oral argument;
- an addendum containing statutes, rules, or regulations;
- certificates of counsel;
- the signature block;
- the proof of service; and
- any item specifically excluded by these rules or by local rule.

(g) Certificate of Compliance.

(1) **Briefs and Papers That Require a Certificate.** A brief submitted under Rules 28.1(e)(2), 29(b)(4), or 32(a)(7)(B)—and a paper submitted under Rules 5(c)(1), 21(d)(1), 27(d)(2)(A), 27(d)(2)(C), 35(b)(2)(A), or 40(b)(1)—must include a certificate by the attorney, or an unrepresented party, that the document complies with the type-volume limitation. The person

preparing the certificate may rely on the word or line count of the word-processing system used to prepare the document. The certificate must state the number of words—or the number of lines of monospaced type—in the document.

(2) **Acceptable Form.** Form 6 in the Appendix of Forms meets the requirements for a certificate of compliance.

Rule 35. En Banc Determination

* * * * *

(b) Petition for Hearing or Rehearing En Banc. A party may petition for a hearing or rehearing en banc.

* * * * *

(2) Except by the court's permission:

(A) a petition for an en banc hearing or rehearing produced using a computer must not exceed 3,900 words; and

(B) a handwritten or typewritten petition for an en banc hearing or rehearing must not exceed 15 pages.

(3) For purposes of the limits in Rule 35(b)(2), if a party files both a petition for panel rehearing and a petition for rehearing en banc, they are considered a single document even if they are

filed separately, unless separate filing is required by local rule.

* * * * *

Rule 40. Petition for Panel Rehearing

* * * * *

(b) Form of Petition; Length. The petition must comply in form with Rule 32. Copies must be served and filed as Rule 31 prescribes. Except by the court's permission:

(1) a petition for panel rehearing produced using a computer must not exceed 3,900 words; and

(2) a handwritten or typewritten petition for panel rehearing must not exceed 15 pages.

Form 1. Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court

United States District Court for the _____
District of _____
File Number _____

A.B., Plaintiff v. C.D., Defendant	Notice of Appeal

Notice is hereby given that ___(here name all parties taking the appeal)__, (plaintiffs) (defendants) in the above named case,* hereby appeal to the United States Court of Appeals for the _____ Circuit (from the final judgment) (from an order (describing it)) entered in this action on the _____ day of _____, 20___.

(s) _____
Attorney for _____
Address: _____

[***Note to inmate filers:*** *If you are an inmate confined in an institution and you seek the timing benefit of Fed. R. App. P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing) and file that declaration along with this Notice of Appeal.*]

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* See Rule 3(c) for permissible ways of identifying appellants.

Form 5. Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court or a Bankruptcy Appellate Panel

United States District Court for the _____
District of _____

In re _____, Debtor _____, Plaintiff v. _____, Defendant	File No. _____

Notice of Appeal to United States Court of Appeals for the _____ Circuit

_____, the plaintiff [or defendant or other party] appeals to the United States Court of Appeals for the _____ Circuit from the final judgment [or order or decree] of the district court for the district of _____ [or bankruptcy appellate panel of the _____ circuit], entered in this case on _____, 20__ [here describe the judgment, order, or decree]

_____

The parties to the judgment [or order or decree] appealed from and the names and addresses of their respective attorneys are as follows:

Dated _____

Signed _____

Attorney for Appellant

Address: _____

_____

[***Note to inmate filers:*** *If you are an inmate confined in an institution and you seek the timing benefit of Fed. R. App. P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing) and file that declaration along with this Notice of Appeal.*]

Form 6. Certificate of Compliance With Type-Volume Limit

Certificate of Compliance With Type-Volume Limit, Typeface Requirements, and Type-Style Requirements

1. This document complies with [the type-volume limit of Fed. R. App. P. [*insert Rule citation; e.g., 32(a)(7)(B)*]] [the word limit of Fed. R. App. P. [*insert Rule citation; e.g., 5(c)(1)*]] because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) [and [*insert applicable Rule citation, if any*]]:

☐ this document contains [*state the number of*] words, **or**

☐ this brief uses a monospaced typeface and contains [*state the number of*] lines of text.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because:

☐ this document has been prepared in a proportionally spaced typeface using [*state name and version of word-processing program*] in [*state font size and name of type style*], **or**

☐ this document has been prepared in a monospaced typeface using [*state name and version of word-processing program*] with [*state*

number of characters per inch and name of type style].

(s)_____

Attorney for _____

Dated: _____

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).*]

Appendix:
Length Limits Stated in the
Federal Rules of Appellate Procedure

This chart summarizes the length limits stated in the Federal Rules of Appellate Procedure. Please refer to the rules for precise requirements, and bear in mind the following:

- In computing these limits, you can exclude the items listed in Rule 32(f).
- If you use a word limit or a line limit (other than the word limit in Rule 28(j)), you must file the certificate required by Rule 32(g).
- For the limits in Rules 5, 21, 27, 35, and 40:
  - You must use the word limit if you produce your document on a computer; and
  - You must use the page limit if you handwrite your document or type it on a typewriter.
- For the limits in Rules 28.1, 29(a)(5), and 32:
  - You may use the word limit or page limit, regardless of how you produce the document; or
  - You may use the line limit if you type or print your document with a monospaced typeface. A typeface is monospaced when each character occupies the same amount of horizontal space.

	Rule	Document type	Word limit	Page limit	Line limit
Permission to appeal	5(c)	• Petition for permission to appeal • Answer in opposition • Cross-petition	5,200	20	Not applicable

	Rule	Document type	Word limit	Page limit	Line limit
Extraordinary writs	21(d)	• Petition for writ of mandamus or prohibition or other extraordinary writ • Answer	7,800	30	Not applicable
Motions	27(d)(2)	• Motion • Response to a motion	5,200	20	Not applicable
	27(d)(2)	• Reply to a response to a motion	2,600	10	Not applicable
Parties' briefs (where no cross-appeal)	32(a)(7)	• Principal brief	13,000	30	1,300
	32(a)(7)	• Reply brief	6,500	15	650
Parties' briefs (where cross-appeal)	28.1(e)	• Appellant's principal brief • Appellant's response and reply brief	13,000	30	1,300
	28.1(e)	• Appellee's principal and response brief	15,300	35	1,500
	28.1(e)	• Appellee's reply brief	6,500	15	650
Party's supplemental letter	28(j)	• Letter citing supplemental authorities	350	Not applicable	Not applicable

	Rule	Document type	Word limit	Page limit	Line limit
Amicus briefs	29(a)(5)	• Amicus brief during initial consideration of case on merits	One-half the length set by the Appellate Rules for a party's principal brief	One-half the length set by the Appellate Rules for a party's principal brief	One-half the length set by the Appellate Rules for a party's principal brief
	29(b)(4)	• Amicus brief during consideration of whether to grant rehearing	2,600	Not applicable	Not applicable
Rehearing and en banc filings	35(b)(2) & 40(b)	• Petition for hearing en banc • Petition for panel rehearing; petition for rehearing en banc	3,900	15	Not applicable

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

October 9, 2015

MEMORANDUM

To: The Chief Justice of the United States and
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 4, 5, 21, 25, 26, 27, 28, 28.1, 29, 32, 35, and 40, and Forms 1, 5, and 6 of the Federal Rules of Appellate Procedure, along with proposed new Form 7 and new Appendix, which were approved by the Judicial Conference at its September 2015 session. The Judicial Conference recommends that the amendments be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering the proposed amendments, I am transmitting: (i) "clean" copies 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 2015 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iv) an excerpt from the May 2015 Report of the Advisory Committee on the Federal Rules of Appellate Procedure.

Attachments

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE*

Rule 4. Appeal as of Right—When Taken

* * * * *

(c) Appeal by an Inmate Confined in an Institution.

(1) 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 4(c)(1). If an inmate ~~confined in an institution~~ files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing. ~~If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in~~

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

~~compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.~~ and:

(A) it is accompanied by:

(i) 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

(ii) evidence (such as a postmark or date stamp) showing that the notice was so deposited and that postage was prepaid; or

(B) the court of appeals exercises its discretion to permit the later filing of a declaration or

notarized statement that satisfies Rule 4(c)(1)(A)(i).

* * * * *

Committee Note

Rule 4(c)(1) is revised to streamline and clarify the operation of the inmate-filing rule.

The Rule requires the inmate to show timely deposit and prepayment of postage. The Rule is amended to specify that a notice is timely if it is accompanied by a declaration or notarized statement stating the date the notice was deposited in the institution's mail system and attesting to the prepayment of first-class postage. The declaration must state that first-class postage "is being prepaid," not (as directed by the former Rule) that first-class postage "has been prepaid." This change reflects the fact that inmates may need to rely upon the institution to affix postage after the inmate has deposited the document in the institution's mail system. New Form 7 in the Appendix of Forms sets out a suggested form of the declaration.

The amended rule also provides that a notice is timely without a declaration or notarized statement if other evidence accompanying the notice shows that the notice was deposited on or before the due date and that postage was prepaid. If the notice is not accompanied by evidence that establishes timely deposit and prepayment of postage, then the court of appeals has discretion to accept a declaration or notarized statement at a later date. The Rule

uses the phrase "exercises its discretion to permit"—rather than simply "permits"—to help ensure that pro se inmate litigants are aware that a court will not necessarily forgive a failure to provide the declaration initially.

Rule 25. Filing and Service

(a) Filing.

* * * * *

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

* * * * *

(C) **Inmate Ffiling.** 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 paper filed by an inmate ~~confined in an institution~~ is timely if it is deposited in the institution's internal mail~~ing~~ system on or before the last day for filing. ~~If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in~~

~~compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.~~ 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).

* * * * *

Committee Note

Rule 25(a)(2)(C) is revised to streamline and clarify the operation of the inmate-filing rule.

The Rule requires the inmate to show timely deposit and prepayment of postage. The Rule is amended to specify that a paper is timely if it is accompanied by a declaration or notarized statement stating the date the paper was deposited in the institution's mail system and attesting to the prepayment of first-class postage. The declaration must state that first-class postage "is being prepaid," not (as directed by the former Rule) that first-class postage "has been prepaid." This change reflects the fact that inmates may need to rely upon the institution to affix postage after the inmate has deposited the document in the institution's mail system. New Form 7 in the Appendix of Forms sets out a suggested form of the declaration.

The amended rule also provides that a paper is timely without a declaration or notarized statement if other evidence accompanying the paper shows that the paper was deposited on or before the due date and that postage was prepaid. If the paper is not accompanied by evidence that establishes timely deposit and prepayment of postage, then the court of appeals has discretion to accept a declaration or notarized statement at a later date. The Rule uses the phrase "exercises its discretion to permit"—rather than

simply "permits"—to help ensure that pro se inmate litigants are aware that a court will not necessarily forgive a failure to provide the declaration initially.

Form 1. Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court

United States District Court for the _____
District of _____
File Number _____

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

Notice of Appeal

Notice is hereby given that ___(here name all parties taking the appeal)__, (plaintiffs) (defendants) in the above named case,* hereby appeal to the United States Court of Appeals for the _____ Circuit (from the final judgment) (from an order (describing it)) entered in this action on the _____ day of _____, 20___.

(s) _____
Attorney for _____
Address: _____

[***Note to inmate filers:*** *If you are an inmate confined in an institution and you seek the timing benefit of Fed. R. App. P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing) and file that declaration along with this Notice of Appeal.*]

* See Rule 3(c) for permissible ways of identifying appellants.

Form 5. Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court or a Bankruptcy Appellate Panel

United States District Court for the _____
District of _____

In re _____, Debtor _____, Plaintiff v. _____, Defendant	File No. _____

Notice of Appeal to United States Court of Appeals for the _____ Circuit

_____, the plaintiff [or defendant or other party] appeals to the United States Court of Appeals for the _____ Circuit from the final judgment [or order or decree] of the district court for the district of _____ [or bankruptcy appellate panel of the _____ circuit], entered in this case on _____, 20__ [here describe the judgment, order, or decree] _____

The parties to the judgment [or order or decree] appealed from and the names and addresses of their respective attorneys are as follows:

Dated _____

Signed _____

Attorney for Appellant

Address: _____

_____

[***Note to inmate filers:*** *If you are an inmate confined in an institution and you seek the timing benefit of Fed. R. App. P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing) and file that declaration along with this Notice of Appeal.*]

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).*]

Rule 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.

* * * * *

(4) **Effect of a Motion on a Notice of Appeal.**

(A) If a party ~~timely~~ files in the district court any of the following motions under the Federal Rules of Civil Procedure~~,~~ and does so within the time allowed by those rules—the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

* * * * *

Committee Note

A clarifying amendment is made to subdivision (a)(4). Former Rule 4(a)(4) provided that "[i]f a party timely files in the district court" certain post-judgment motions, "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." Responding to a circuit split concerning the meaning of "timely" in this provision, the amendment adopts the majority approach and rejects the approach taken in

National Ecological Foundation v. Alexander, 496 F.3d 466 (6th Cir. 2007). A motion made after the time allowed by the Civil Rules will not qualify as a motion that, under Rule 4(a)(4)(A), re-starts the appeal time—and that fact is not altered by, for example, a court order that sets a due date that is later than permitted by the Civil Rules, another party's consent or failure to object to the motion's lateness, or the court's disposition of the motion without explicit reliance on untimeliness.

Rule 5. Appeal by Permission

* * * * *

(c) Form of Papers; Number of Copies; Length Limits. All papers must conform to Rule 32(c)(2). ~~Except by the court's permission, a paper must not exceed 20 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 5(b)(1)(E).~~ An original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case. Except by the court's permission, and excluding the accompanying documents required by Rule 5(b)(1)(E):

(1) a paper produced using a computer must not exceed 5,200 words; and

(2) a handwritten or typewritten paper must not exceed 20 pages.

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Committee Note

The page limits previously employed in Rules 5, 21, 27, 35, and 40 have been largely overtaken by changes in technology. For papers produced using a computer, those page limits are now replaced by word limits. The word limits were derived from the current page limits using the assumption that one page is equivalent to 260 words. Papers produced using a computer must include the certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms suffices to meet that requirement. Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the word limit and the page limit, the calculation excludes the accompanying documents required by Rule 5(b)(1)(E) and any items listed in Rule 32(f).

Rule 21. Writs of Mandamus and Prohibition, and Other Extraordinary Writs

* * * * *

(d) Form of Papers; Number of Copies; Length Limits. All papers must conform to Rule 32(c)(2). ~~Except by the court's permission, a paper must not exceed 30 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 21(a)(2)(C).~~ An original and 3 copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case. Except by the court's permission, and excluding the accompanying documents required by Rule 21(a)(2)(C):

(1) a paper produced using a computer must not exceed 7,800 words; and

(2) a handwritten or typewritten paper must not exceed 30 pages.

Committee Note

The page limits previously employed in Rules 5, 21, 27, 35, and 40 have been largely overtaken by changes in technology. For papers produced using a computer, those page limits are now replaced by word limits. The word limits were derived from the current page limits using the assumption that one page is equivalent to 260 words. Papers produced using a computer must include the certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms suffices to meet that requirement. Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the word limit and the page limit, the calculation excludes the accompanying documents required by Rule 21(a)(2)(C) and any items listed in Rule 32(f).

Rule 27. Motions

* * * * *

(d) Form of Papers; Length Limits; ~~Page Limits; and~~ Number of Copies.

* * * * *

(2) **~~Page~~ Length Limits.** ~~A motion or a response to a motion must not exceed 20 pages, exclusive of the corporate disclosure statement and accompanying documents authorized by Rule 27(a)(2)(B), unless the court permits or directs otherwise. A reply to a response must not exceed 10 pages.~~Except by the court's permission, and excluding the accompanying documents authorized by Rule 27(a)(2)(B):

(A) a motion or response to a motion produced using a computer must not exceed 5,200 words;

(B) a handwritten or typewritten motion or response to a motion must not exceed 20 pages;

(C) a reply produced using a computer must not exceed 2,600 words; and

(D) a handwritten or typewritten reply to a response must not exceed 10 pages.

* * * * *

Committee Note

The page limits previously employed in Rules 5, 21, 27, 35, and 40 have been largely overtaken by changes in technology. For papers produced using a computer, those page limits are now replaced by word limits. The word limits were derived from the current page limits using the assumption that one page is equivalent to 260 words. Papers produced using a computer must include the certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms suffices to meet that requirement. Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the word limit and the page limit, the calculation excludes the accompanying documents required by Rule 27(a)(2)(B) and any items listed in Rule 32(f).

Rule 28. Briefs

(a) Appellant's Brief. The appellant's brief must contain, under appropriate headings and in the order indicated:

* * * * *

(10) the certificate of compliance, if required by Rule ~~32(a)(7)~~32(g)(1).

* * * * *

Committee Note

Rule 28(a)(10) is revised to refer to Rule 32(g)(1) instead of Rule 32(a)(7), to reflect the relocation of the certificate-of-compliance requirement.

Rule 28.1. Cross-Appeals

* * * * *

(e) Length.

(1) **Page Limitation.** Unless it complies with Rule 28.1(e)(2) ~~and (3)~~, the appellant's principal brief must not exceed 30 pages; the appellee's principal and response brief, 35 pages; the appellant's response and reply brief, 30 pages; and the appellee's reply brief, 15 pages.

(2) **Type-Volume Limitation.**

(A) The appellant's principal brief or the appellant's response and reply brief is acceptable if it:

(i) ~~it~~ contains no more than ~~14,000~~13,000 words; or

(ii) ~~it~~ uses a monospaced face and contains no more than 1,300 lines of text.

(B) The appellee's principal and response brief is acceptable if it:

(i) ~~it~~ contains no more than ~~16,500~~15,300 words; or

(ii) ~~it~~ uses a monospaced face and contains no more than 1,500 lines of text.

(C) The appellee's reply brief is acceptable if it contains no more than half of the type volume specified in Rule 28.1(e)(2)(A).

~~(3) **Certificate of Compliance.** A brief submitted under Rule 28.1(e)(2) must comply with Rule 32(a)(7)(C).~~

* * * * *

Committee Note

When Rule 28.1 was adopted in 2005, it modeled its type-volume limits on those set forth in Rule 32(a)(7) for briefs in cases that did not involve a cross-appeal. At that time, Rule 32(a)(7)(B) set word limits based on an estimate of 280 words per page.

In the course of adopting word limits for the length limits in Rules 5, 21, 27, 35, and 40, and responding to concern about the length of briefs, the Committee has reevaluated the conversion ratio (from pages to words) and decided to apply a conversion ratio of 260 words per page. Rules 28.1 and 32(a)(7)(B) are amended to reduce the word limits accordingly.

In a complex case, a party may need to file a brief that exceeds the type-volume limitations specified in these rules, such as to include unusually voluminous information explaining relevant background or legal provisions or to respond to multiple briefs by opposing parties or amici. The Committee expects that courts will accommodate those situations by granting leave to exceed the type-volume limitations as appropriate.

Rule 32. Form of Briefs, Appendices, and Other Papers

(a) Form of a Brief.

* * * * *

(7) **Length.**

(A) **Page Limitation.** A principal brief may not exceed 30 pages, or a reply brief 15 pages, unless it complies with Rule 32(a)(7)(B) ~~and (C)~~.

(B) **Type-Volume Limitation.**

(i) A principal brief is acceptable if it:

- ~~it~~—contains no more than ~~14,000~~13,000 words; or
- ~~it~~—uses a monospaced face and contains no more than 1,300 lines of text.

(ii) A reply brief is acceptable if it contains no more than half of the type

volume specified in Rule 32(a)(7)(B)(i).

~~(iii) Headings, footnotes, and quotations count toward the word and line limitations. The corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, any addendum containing statutes, rules or regulations, and any certificates of counsel do not count toward the limitation.~~

~~**(C) Certificate of compliance.**~~

~~(i) A brief submitted under Rules 28.1(e)(2) or 32(a)(7)(B) must include a certificate by the attorney, or an unrepresented party, that the brief~~

~~complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the brief. The certificate must state either:~~

- ~~the number of words in the brief;~~

~~or~~

- ~~the number of lines of monospaced type in the brief.~~

~~(ii) Form 6 in the Appendix of Forms is a suggested form of a certificate of compliance. Use of Form 6 must be regarded as sufficient to meet the requirements of Rules 28.1(e)(3) and 32(a)(7)(C)(i).~~

* * * * *

(e) Local Variation. Every court of appeals must accept documents that comply with the form requirements of this rule and the length limits set by these rules. By local rule or order in a particular case, a court of appeals may accept documents that do not meet all ~~of~~ the form requirements of this rule or the length limits set by these rules.

(f) Items Excluded from Length. In computing any length limit, headings, footnotes, and quotations count toward the limit but the following items do not:

- the cover page;
- a corporate disclosure statement;
- a table of contents;
- a table of citations;
- a statement regarding oral argument;
- an addendum containing statutes, rules, or regulations;

- certificates of counsel;
- the signature block;
- the proof of service; and
- any item specifically excluded by these rules or by local rule.

(g) Certificate of Compliance.

(1) **Briefs and Papers That Require a Certificate.** A brief submitted under Rules 28.1(e)(2), 29(b)(4), or 32(a)(7)(B)—and a paper submitted under Rules 5(c)(1), 21(d)(1), 27(d)(2)(A), 27(d)(2)(C), 35(b)(2)(A), or 40(b)(1)—must include a certificate by the attorney, or an unrepresented party, that the document complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the document. The certificate must state

the number of words—or the number of lines of monospaced type—in the document.

(2) **Acceptable Form.** Form 6 in the Appendix of Forms meets the requirements for a certificate of compliance.

Committee Note

When Rule 32(a)(7)(B)'s type-volume limits for briefs were adopted in 1998, the word limits were based on an estimate of 280 words per page. In the course of adopting word limits for the length limits in Rules 5, 21, 27, 35, and 40, and responding to concern about the length of briefs, the Committee has reevaluated the conversion ratio (from pages to words) and decided to apply a conversion ratio of 260 words per page. Rules 28.1 and 32(a)(7)(B) are amended to reduce the word limits accordingly.

In a complex case, a party may need to file a brief that exceeds the type-volume limitations specified in these rules, such as to include unusually voluminous information explaining relevant background or legal provisions or to respond to multiple briefs by opposing parties or amici. The Committee expects that courts will accommodate those situations by granting leave to exceed the type-volume limitations as appropriate.

Subdivision (e) is amended to make clear a court's ability (by local rule or order in a case) to increase the

length limits for briefs and other documents. Subdivision (e) already established this authority as to the length limits in Rule 32(a)(7); the amendment makes clear that this authority extends to all length limits in the Appellate Rules.

A new subdivision (f) is added to set out a global list of items excluded from length computations, and the list of exclusions in former subdivision (a)(7)(B)(iii) is deleted. The certificate-of-compliance provision formerly in Rule 32(a)(7)(C) is relocated to a new Rule 32(g) and now applies to filings under all type-volume limits (other than Rule 28(j)'s word limit)—including the new word limits in Rules 5, 21, 27, 29, 35, and 40. Conforming amendments are made to Form 6.

Rule 35. En Banc Determination

* * * * *

(b) Petition for Hearing or Rehearing En Banc. A party may petition for a hearing or rehearing en banc.

* * * * *

(2) Except by the court's permission~~, a petition for an en banc hearing or rehearing must not exceed 15 pages, excluding material not counted under Rule 32.~~:

(A) a petition for an en banc hearing or rehearing produced using a computer must not exceed 3,900 words; and

(B) a handwritten or typewritten petition for an en banc hearing or rehearing must not exceed 15 pages.

(3) For purposes of the ~~page~~ limits in Rule 35(b)(2), if a party files both a petition for panel rehearing

and a petition for rehearing en banc, they are considered a single document even if they are filed separately, unless separate filing is required by local rule.

* * * * *

Committee Note

The page limits previously employed in Rules 5, 21, 27, 35, and 40 have been largely overtaken by changes in technology. For papers produced using a computer, those page limits are now replaced by word limits. The word limits were derived from the current page limits using the assumption that one page is equivalent to 260 words. Papers produced using a computer must include the certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms suffices to meet that requirement. Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the word limit and the page limit, the calculation excludes any items listed in Rule 32(f).

Rule 40. Petition for Panel Rehearing

* * * * *

(b) Form of Petition; Length. The petition must comply in form with Rule 32. Copies must be served and filed as Rule 31 prescribes. ~~Unless the court permits or a local rule provides otherwise, a petition for panel rehearing must not exceed 15 pages.~~Except by the court's permission:

(1) a petition for panel rehearing produced using a computer must not exceed 3,900 words; and

(2) a handwritten or typewritten petition for panel rehearing must not exceed 15 pages.

Committee Note

The page limits previously employed in Rules 5, 21, 27, 35, and 40 have been largely overtaken by changes in technology. For papers produced using a computer, those page limits are now replaced by word limits. The word limits were derived from the current page limits using the assumption that one page is equivalent to 260 words. Papers produced using a computer must include the

certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms suffices to meet that requirement. Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the word limit and the page limit, the calculation excludes any items listed in Rule 32(f).

Form 6. Certificate of Compliance With ~~Rule 32(a)~~ Type-Volume Limit

Certificate of Compliance With Type-Volume Limit~~ation~~, Typeface Requirements, and Type-Style Requirements

1. This ~~brief~~document complies with [the type-volume limit~~ation~~ of Fed. R. App. P. ~~32(a)(7)(B)~~[*insert Rule citation; e.g., 32(a)(7)(B)*]] [the word limit of Fed. R. App. P. [*insert Rule citation; e.g., 5(c)(1)*]] because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) [and [*insert applicable Rule citation, if any*]]:

☐ this ~~brief~~document contains [*state the number of*] words, ~~excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii),~~ **or**

☐ this brief uses a monospaced typeface and contains [*state the number of*] lines of text, ~~excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)~~.

2. This ~~brief~~document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because:

☐ this ~~brief~~document has been prepared in a proportionally spaced typeface using [*state name and version of word-processing program*] in [*state font size and name of type style*], **or**

☐ this ~~brief~~document has been prepared in a monospaced typeface using [*state name and version of word-processing program*] with [*state number of characters per inch and name of type style*].

(s)_____

Attorney for _____

Dated: _____

Appendix:
Length Limits Stated in the
Federal Rules of Appellate Procedure

This chart summarizes the length limits stated in the Federal Rules of Appellate Procedure. Please refer to the rules for precise requirements, and bear in mind the following:

- In computing these limits, you can exclude the items listed in Rule 32(f).
- If you use a word limit or a line limit (other than the word limit in Rule 28(j)), you must file the certificate required by Rule 32(g).
- For the limits in Rules 5, 21, 27, 35, and 40:
  - You must use the word limit if you produce your document on a computer; and
  - You must use the page limit if you handwrite your document or type it on a typewriter.
- For the limits in Rules 28.1, 29(a)(5), and 32:
  - You may use the word limit or page limit, regardless of how you produce the document; or
  - You may use the line limit if you type or print your document with a monospaced typeface. A typeface is monospaced when each character occupies the same amount of horizontal space.

	Rule	Document type	Word limit	Page limit	Line limit
Permission to appeal	5(c)	• Petition for permission to appeal • Answer in opposition • Cross-petition	5,200	20	Not applicable

	Rule	Document type	Word limit	Page limit	Line limit
Extraordinary writs	21(d)	• Petition for writ of mandamus or prohibition or other extraordinary writ • Answer	7,800	30	Not applicable
Motions	27(d)(2)	• Motion • Response to a motion	5,200	20	Not applicable
	27(d)(2)	• Reply to a response to a motion	2,600	10	Not applicable
Parties' briefs (where no cross-appeal)	32(a)(7)	• Principal brief	13,000	30	1,300
	32(a)(7)	• Reply brief	6,500	15	650
Parties' briefs (where cross-appeal)	28.1(e)	• Appellant's principal brief • Appellant's response and reply brief	13,000	30	1,300
	28.1(e)	• Appellee's principal and response brief	15,300	35	1,500
	28.1(e)	• Appellee's reply brief	6,500	15	650
Party's supplemental letter	28(j)	• Letter citing supplemental authorities	350	Not applicable	Not applicable

	Rule	Document type	Word limit	Page limit	Line limit
Amicus briefs	29(a)(5)	• Amicus brief during initial consideration of case on merits	One-half the length set by the Appellate Rules for a party's principal brief	One-half the length set by the Appellate Rules for a party's principal brief	One-half the length set by the Appellate Rules for a party's principal brief
	29(b)(4)	• Amicus brief during consideration of whether to grant rehearing	2,600	Not applicable	Not applicable
Rehearing and en banc filings	35(b)(2) & 40(b)	• Petition for hearing en banc • Petition for panel rehearing; petition for rehearing en banc	3,900	15	Not applicable

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.

~~(b)~~ (3) **Motion for Leave to File.** The motion must be accompanied by the proposed brief and state:

~~(1)~~ (A) the movant's interest; and

~~(2)~~ (B) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.

~~(c)~~ (4) **Contents and Form.** An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. An amicus brief need not comply with Rule 28, but must include the following:

~~(1)~~ (A) if the amicus curiae is a corporation, a disclosure statement like that required of parties by Rule 26.1;

~~(2)~~ (B) a table of contents, with page references;

~~(3)~~ (C) a table of authorities—cases (alphabetically arranged), statutes, and other authorities—

with references to the pages of the brief where they are cited;

~~(4)~~ (D) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;

~~(5)~~ (E) unless the amicus curiae is one listed in the first sentence of Rule 29(a)(2), a statement that indicates whether:

~~(A)~~ (i) a party's counsel authored the brief in whole or in part;

~~(B)~~ (ii) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and

~~(C)~~ (iii) a person—other than the amicus curiae, its members, or its counsel—contributed money that was intended

to fund preparing or submitting the brief and, if so, identifies each such person;

~~(6)~~ (F) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review; and

~~(7)~~ (G) a certificate of compliance under Rule 32(g)(1), if ~~required by Rule 32(a)(7)~~ length is computed using a word or line limit.

~~(d)~~ (5) **Length.** Except by the court's permission, an amicus brief may be no more than one-half the maximum length authorized by these rules for a party's principal brief. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.

~~(e)~~ (6) **Time for Filing.** An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's or petitioner's principal brief is filed. A court may grant leave for later filing, specifying the time within which an opposing party may answer.

~~(f)~~ (7) **Reply Brief.** Except by the court's permission, an amicus curiae may not file a reply brief.

~~(g)~~ (8) **Oral Argument.** An amicus curiae may participate in oral argument only with the court's permission.

(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.

(3) **Motion for Leave to File.** Rule 29(a)(3) applies to a motion for leave.

(4) **Contents, Form, and Length.** Rule 29(a)(4) applies to the amicus brief. The brief must not exceed 2,600 words.

(5) **Time for Filing.** An amicus curiae supporting the petition for rehearing or supporting neither

party must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the petition is filed. An amicus curiae opposing the petition must file its brief, accompanied by a motion for filing when necessary, no later than the date set by the court for the response.

Committee Note

Rule 29 is amended to address amicus filings in connection with requests for panel rehearing and rehearing en banc.

Existing Rule 29 is renumbered Rule 29(a), and language is added to that subdivision (a) to state that its provisions apply to amicus filings during the court's initial consideration of a case on the merits. Rule 29(c)(7) becomes Rule 29(a)(4)(G) and is revised to accord with the relocation and revision of the certificate-of-compliance requirement. New Rule 32(g)(1) states that "[a] brief submitted under Rules 28.1(e)(2), 29(b)(4), or 32(a)(7)(B) . . . must include" a certificate of compliance. An amicus brief submitted during initial consideration of a case on the merits counts as a "brief submitted under Rule[] . . . 32(a)(7)(B)" if the amicus computes Rule 29(a)(5)'s length limit by taking half of a type-volume limit in

Rule 32(a)(7)(B). Rule 29(a)(4)(G) restates Rule 32(g)(1)'s requirement functionally, by providing that a certificate of compliance is required if an amicus brief's length is computed using a word or line limit.

New subdivision (b) is added to address amicus filings in connection with a petition for panel rehearing or rehearing en banc. Subdivision (b) sets default rules that apply when a court does not provide otherwise by local rule or by order in a case. A court remains free to adopt different rules governing whether amicus filings are permitted in connection with petitions for rehearing, and governing the procedures when such filings are permitted.

Rule 26. Computing and Extending Time

* * * * *

(c) Additional Time after Certain Kinds of Service. When a party may or must act within a specified time after ~~service~~being served, 3 days are added after the period would otherwise expire under Rule 26(a), unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is ~~not~~ treated as delivered on the date of service stated in the proof of service.

Committee Note

Rule 26(c) is amended to remove service by electronic means under Rule 25(c)(1)(D) from the modes of service that allow 3 added days to act after being served.

Rule 25(c) was amended in 2002 to provide for service by electronic means. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow 3 added days to act after being served. There were

concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and widespread skill in using electronic transmission.

A parallel reason for allowing the 3 added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the 3 added days were calculated to alleviate these concerns.

Diminution of the concerns that prompted the decision to allow the 3 added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28- day periods that allow "day-of-the-week" counting. Adding 3 days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

Electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice.

Rule 26(c) has also been amended to refer to instances when a party "may or must act . . . after being served" rather than to instances when a party "may or must act . . . after service." If, in future, an Appellate Rule sets a

deadline for a party to act after *that party itself effects service* on another person, this change in language will clarify that Rule 26(c)'s three added days are not accorded to the party who effected service.

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), and 25(a)(2)(C)—and filing by mail under Rule ~~13(b)~~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

Subdivision (a)(4)(C). The reference to Rule 13(b) is revised to refer to Rule 13(a)(2) in light of a 2013 amendment to Rule 13. The amendment to subdivision (a)(4)(C) is technical and no substantive change is intended.

EXCERPT FROM THE SEPTEMBER 2015
REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

* * * * *

FEDERAL RULES OF APPELLATE PROCEDURE

Rules and Forms Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules submitted proposed amendments to Rules 4, 5, 21, 25, 26, 27, 28.1, 29, 32, 35, and 40, and Forms 1, 5, and 6, and a proposed new Form 7, with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments were circulated to the bench, bar, and public for comment in August 2014, and were offered for approval as published except as noted below.

Inmate-Filing Rules

Rules 4(c)(1) and 25(a)(2)(C), Forms 1 and 5, and new Form 7. Proposed amendments to Rules 4(c)(1) and 25(a)(2)(C), and Forms 1 and 5, and proposed new Form 7, are designed to clarify and improve the inmate-filing rules. Proposed amendments to Rules 4(c)(1) and 25(a)(2)(C) make clear that prepayment of postage is required for an inmate to benefit from the inmate-filing provisions. The amendments further clarify that a document is timely filed if it is accompanied by evidence—a declaration, notarized statement, or other evidence such as postmark and date stamp—showing that the document was deposited on or before the due date and that postage was prepaid. New Form 7 is a suggested form of declaration. Forms 1 and 5, which are suggested forms of notices of appeal, are revised to include a reference alerting inmate filers to the existence of new Form 7. The amendments also clarify that if sufficient evidence

does not accompany the initial filing, then the court of appeals may permit the later filing of a declaration or notarized statement to establish timely deposit.

The Advisory Committee received seven comments on this proposal. Commentators were divided on the published proposal to delete the requirement in Rules 4(c)(1) and 25(a)(2)(C) that an inmate use the institution's legal mail system (if one is available) in order to receive the benefit of the inmate-filing rules. After considering the comments and conducting further research, the Advisory Committee decided to abandon its proposal to delete the legal-mail-system requirement from Rules 4(c)(1) and 25(a)(2)(C). The Advisory Committee also made several post-publication technical improvements to the Forms.

Appeal Time After Post-judgment Motions

Rule 4(a)(4). A circuit split exists regarding whether a motion filed within a purported extension of a non-extendable deadline under Civil Rules 50, 52, or 59 counts as timely filed under Appellate Rule 4(a)(4). Rule 4(a)(4) provides that certain "timely" post-judgment motions restart the time to take a civil appeal. The proposed amendment addresses the split by adopting the majority view. Under the proposed rule, a motion restarts the time for taking an appeal only if it is filed within the time allowed by the Rules of Civil Procedure.

Rule 4(a)(4) provides that "[i]f a party timely files in the district court" certain post-judgment motions, "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." Five circuits have held that a motion is "timely" only if it is filed within the deadline set by the rules. One circuit, however, ruled that if a district court mistakenly extends the time for filing a post-judgment motion (contrary to the prohibition in Civil Rule 6(b)), then the motion is "timely" for purposes of Rule 4(a)(4).

Given the conflict in authority, the Advisory Committee determined to clarify the meaning of Rule 4(a)(4). The proposed amendment adopts the majority view that post-judgment motions made outside the deadlines set by the Civil Rules do not restart the appeal time under Rule 4(a)(4). This rule ensures a uniform deadline for post-judgment motions and sets a definite point in time when litigation will end. The Advisory Committee also was concerned that the minority approach taken by one circuit was "uncomfortably close" to the "unique circumstances" doctrine that the Supreme Court disapproved in *Bowles v. Russell*, 551 U.S. 205, 214 (2007). *See Blue v. Int'l Bhd. of Elec. Workers Local Union 159*, 676 F.3d 579, 583 (7th Cir. 2012).

Five of six comments received on this proposal were supportive. The Advisory Committee discussed the concerns raised by the one objector, but ultimately adhered to its initial determination to amend the rule to adopt the majority view. No changes were made following publication.

Length Limits

Rules 5, 21, 27, 28, 28.1, 32, 35, and 40, and Form 6. The proposed amendments affect length limits set by the Appellate Rules for briefs and other documents. The Advisory Committee first addressed length limits that are expressed in page limits. The committee believed that these limits have been overtaken by technology and are vulnerable to manipulation. While considering how to convert page limits to word limits, the committee also examined the present length limit for briefs. The length limit for principal briefs was converted from 50 pages to 14,000 words in 1998. Members of the judiciary have expressed concern that briefs filed under the current limit are too long. Others have questioned whether the 14,000-word limit (which reflects a conversion ratio of 280 words per page) is an accurate translation of the traditional fifty-page limit.

The proposal amends Rules 5, 21, 27, 35, and 40 to convert the existing page limits to word limits for documents, other than briefs, that are prepared using a computer. The amendment uses a conversion ratio of 260 words per page in order to approximate traditional volume and to avoid increasing the length of documents such as motions, petitions for rehearing, and petitions for permission to appeal. For documents prepared without a computer, the proposed amendments retain the current page limits.

The proposed amendment to Rule 32 amends the word limits for briefs to reflect the pre-1998 page limits multiplied by 260 words per page. As a result, the current 14,000-word limit for a party's principal brief would become a 13,000-word limit; the word limit for a reply brief would change from 7,000 to 6,500 words. The proposal correspondingly reduces the word limits set by Rule 28.1 for cross-appeals.

New Rule 32(f) sets out a uniform list of the items that can be excluded when computing a document's length. A new appendix collects in one chart all length limits stated in the Appellate Rules. Form 6 concerning certificates of compliance is amended to account for the proposed amendments to length limits.

Under the proposal, a court of appeals that wants to retain the existing word limits for briefs may do so by local rule or by order in a case. The local variation provision of existing Rule 32(e) is amended to highlight a court's authority to do so. Unlike the present rule, however, the proposal does not require a court of appeals that prefers the amended limits to accept longer briefs that judges believe are burdensome and unnecessary.

The Advisory Committee received a large number of public comments in response to the proposed amendments. The committee also received testimony from four appellate lawyers during a public hearing. As published, the proposal would have employed a conversion ratio of

250 words per page and reduced the limit for principal briefs to 12,500 words. In an effort to accommodate views expressed by appellate lawyers who opposed the change, while still recognizing the validity of concerns voiced by judges and others with the length of briefs under the current rules, the Advisory Committee made changes to the amendments as published for comment. The proposal as forwarded employs a conversion ratio of 260 words per page, rather than 250 words per page as published. Accordingly, the length limit for a principal brief is set at 13,000 words, rather than 12,500. The committee note also acknowledges that in a complex case, a party may need to file a brief that exceeds the type-volume limitations specified in the rules.[1]

Amicus Filings in Connection with Rehearing

Rule 29. Proposed new Rule 29(b) establishes default rules for the treatment of amicus filings in connection with petitions for rehearing. There is no national rule that establishes a filing deadline or a length limit for amicus briefs in connection with petitions for rehearing. Most circuits have no local rule on point. Attorneys reported confusion caused by the lack of guidance. The proposal developed by the Advisory Committee does not require acceptance of amicus briefs, but establishes guidelines for the filing of briefs when permitted. Most of the features of current Rule 29 are incorporated for the rehearing stage, including the authorization for certain governmental entities to file amicus briefs without party consent or court permission. Under the proposal, a circuit may alter the default federal rules on timing, length, and other matters by local rule or by order in a case.

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[1]The proposed amendments to Rule 32, as revised for style after the public comment period, required a corresponding change to Rule 28(a)(10) to reflect the relocation of the certificate-of-compliance requirement from Rule 32(a)(7) to Rule 32(g)(1).

Overall, commentators expressed support for amending Rule 29 to address amicus filings in connection with rehearing petitions and offered varying suggestions as to length and timing. Based on the comments, the Advisory Committee changed the length limit under Rule 29(b) from 2,000 words to 2,600 words, and revised the deadline for amicus filings in support of a rehearing petition from three to seven days after the filing of the petition.

3-Day Rule

Rule 26(c). A proposed amendment to Rule 26(c) eliminates the so-called "3-day rule" in cases of electronic service. The 3-day rule adds three days to a given period if that period is measured after service and service is accomplished by certain methods. A subcommittee charged with overseeing an integrated approach to issues arising from electronic filing recommended that the "3-day rule" be amended to exclude electronic service. The proposed amendment to Appellate Rule 26(c) parallels proposed amendments to Civil Rule 6(d), Criminal Rule 45(c), and Bankruptcy Rule 9006(f) as part of a "3-day rule package."

Under current Appellate Rule 26(c), applicability of the 3-day rule depends on whether the paper in question is delivered on the date of service stated in the proof of service; if so, then the 3-day rule is inapplicable. The proposed amendment to Rule 26(c) excludes electronic service from the 3-day rule by deeming a paper served electronically as delivered on the date of service stated in the proof of service.

The Advisory Committee voted to approve the amendment as published. But in response to concerns expressed by commentators about whether the 14 days allowed by Appellate Rule 31(a)(1) is sufficient time for the preparation of a reply brief, the Advisory Committee agreed to study whether that deadline should be adjusted.

The Department of Justice proposed adding language to the Committee Note accompanying each rule in the 3-day rule package to recognize that extensions of time may be warranted to prevent prejudice in certain circumstances. In the interest of uniformity, each Advisory Committee approved adding such language to the published Committee Notes. The Standing Committee concurred, with a minor modification.

Technical Amendment

Rule 26(a)(4)(C). In 2013, then-existing Rule 13 governing appeals as of right from the Tax Court became Rule 13(a). A new Rule 13(b)—providing that Rule 5 governs permissive appeals from the Tax Court—was added. Rule 26(a)(4)(C)'s reference to "filing by mail under Rule 13(b)" should have been amended to refer to "filing by mail under Rule 13(a)(2)." The proposed amendment to Rule 26(a)(4)(C) updates the cross-reference. Because the proposed amendment is technical in nature, publication for public comment is not required.

The Standing Committee concurred with the Advisory Committee's recommendation as follows:

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Appellate Rules 4, 5, 21, 25, 26, 27, 28, 28.1, 29, 32, 35, and 40, and Forms 1, 5, and 6, and proposed new Form 7, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

* * * * *

Respectfully submitted,

Jeffrey S. Sutton, Chair

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Sally Yates
Jack Zouhary

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

MEMORANDUM

DATE: May 4, 2015

TO: Judge Jeffrey S. Sutton, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Judge Steven M. Colloton, Chair
Advisory Committee on Appellate Rules

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on April 23 and 24 in Philadelphia, Pennsylvania. The Committee gave final approval to six sets of proposed amendments, relating to (1) the inmate-filing provisions under Rules 4(c) and 25(a); (2) tolling motions under Rule 4(a)(4); (3) length limits for appellate filings; (4) amicus briefs in connection with rehearing; (5) Rule 26(c)'s "three-day rule"; and (6) a technical amendment to Rule 26(a)(4)(C). The Committee discussed a number of other items and added one issue to its study agenda.

Part II of this report discusses the proposals for which the Committee seeks final approval.

* * * * *

II. Action Items—for Final Approval

The Committee seeks final approval of six sets of proposed amendments.

A. Inmate filings: Rules 4(c)(1) and 25(a)(2)(C), Forms 1 and 5, and new Form 7

Under the Federal Rules of Appellate Procedure, documents are timely filed if they are received by the court on or before the due date. Rules 4(c)(1) and 25(a)(2)(C) offer an alternative way for inmates to establish timely filing of documents. If the requirements of the relevant rule are met, then the filing date is deemed to be the date the inmate deposited the document in the institution's mail system rather than the date the court received the document. *See generally Houston v. Lack*, 487 U.S. 266 (1988).

The Committee has studied the workings of the inmate-filing rules since 2007, in light of concerns expressed about conflicts in the case law, unintended consequences of the current language, and ambiguity in the current text. Must an inmate prepay postage to benefit from the rule? There are decisions saying that an inmate need not prepay postage if he uses a prison's system designed for legal mail, but must prepay postage if he does not use that system. Must an inmate file a declaration or notarized statement averring the date of filing to benefit from the rule? One court held, over a dissent from denial of rehearing en banc, that a document is untimely if there is no declaration or notarized statement, even when other evidence such as a postmark shows that the document was timely deposited in the prison mail system. When must an inmate submit a declaration designed to demonstrate timeliness? One circuit has published inconsistent decisions, holding in one case that the declaration must accompany the notice and in another that the declaration may be filed at a later date.

The Committee seeks final approval of proposed amendments that are designed to clarify and improve the inmate-filing rules. The amendments to Rules 4(c)(1) and 25(a)(2)(C) would make clear that prepayment of postage is required for an inmate to benefit from the inmate-filing provisions. The amendments clarify that a document is timely filed if it is accompanied by evidence—a declaration, notarized statement, or other evidence such as postmark and date stamp—showing that the document was deposited on or before the due date and that postage was prepaid. New Form 7 is a suggested form of declaration that would satisfy the Rule. Forms 1 and 5 (which are suggested forms of notices of appeal) are revised to include a reference alerting inmate filers to the existence of Form 7. The amendments also clarify that if sufficient evidence does not accompany the initial filing, then the court of appeals has discretion to permit the later filing of a declaration or notarized statement to establish timely deposit.

1. Text of proposed amendments and Committee Note

The Committee recommends final approval of the proposed amendments to Rules 4(c)(1) and 25(a)(2)(C) and Forms 1 and 5, and proposed new Form 7, as revised after publication and set out in the enclosure to this report.

2. Changes made after publication and comment

After publication, the Committee decided to abandon its proposal to delete the legal-mail-system requirement from Rules 4(c)(1) and 25(c)(2)(C). The Committee also made several improvements to the Forms.

Rules 4(c)(1) and 25(a)(2)(C), as published, would have deleted the requirement that an inmate use a system designed for legal mail (if one is available) in order to receive the benefit of

the inmate-filing rules. The Committee proposed deleting that requirement because it perceived no purpose for it. The Committee had learned from the Deputy General Counsel of the U.S. Bureau of Prisons that the distinction between legal and non-legal mail systems, in BOP facilities, had more to do with privacy concerns than other reasons. And an inquiry to the Chief Deputy Clerk of the U.S. Supreme Court had likewise disclosed no reason to retain the legal-mail-system requirement.

Commentators were divided on the question of the legal-mail-system requirement. One commentator specifically expressed support for the published amendments' deletion of the requirement. Another commentator, however, pointed out that correctional institutions in the State of Florida log the date of deposit of inmates' legal mail but do not log the date of deposit of inmates' non-legal mail, and argued that the legal-mail-system requirement provided the State with an important way to provide evidence of the date of inmates' legal mail. The Committee's Reporter, with the assistance of the Director and Chief Counsel of the National Association of Attorneys General Center for Supreme Court Advocacy, investigated whether correctional institutions in jurisdictions other than Florida make a similar distinction (date-logging legal but not non-legal mail). The responses—from 21 states and the District of Columbia—disclosed that an appreciable number of the states do make such a distinction.[1] Further inquiry also determined that the federal Bureau of Prisons date-stamps legal mail, but does not log non-legal mail.

This new information, in the view of the Committee, provides reason to retain the legal-mail-system requirement. Requiring an inmate to use a legal mail system where available continues to serve a useful purpose by ensuring that mail is logged or date-stamped and avoiding unnecessary litigation over the timing of deposits. Accordingly, the Committee decided to restore that requirement to proposed Rules 4(c)(1) and 25(a)(2)(C). The Committee also revised proposed new Form 7, and the proposed amendments to Forms 1 and 5, to make all three forms more user-friendly and to make the new form more accurate. In particular, the Committee revised Form 7 to use the present tense ("Today ... I am depositing") rather than the past tense ("I deposited ..."), to reflect that the inmate will fill out the declaration before depositing both the declaration and the underlying filing in the institution's mail system.

The Committee decided not to implement other proposed changes to the amendments. The Committee did not adopt a suggestion that the Rules should *authorize* the later filing of the declaration (as opposed to giving the court the discretion to permit its later filing). Members considered it important to encourage the inmate to provide the declaration contemporaneously, while recollections are fresh. The Committee gave careful consideration to style comments advocating deletion of the Rules' reference to a court's ability to "exercise[] its discretion to permit the later filing" of the declaration (the style suggestion was to say simply "permit[]"). But Committee members were swayed by substantive concerns about the desire to ensure that inmates understand that later filing will not necessarily be permitted. The Committee also did

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[1] Four states—Colorado, North Carolina, Tennessee, and Washington State—have systems that (like Florida's) log the date of legal mail but not non-legal mail. Two additional states—Alaska and Delaware—have such systems in at least some of their facilities. And though Pennsylvania does not currently date-log any outgoing mail, the Deputy Chief Counsel for Litigation at the Pennsylvania Department of Corrections reports that Pennsylvania is considering date-logging outgoing legal mail in order to provide evidence of the date of filing.

not adopt suggestions that the Rules should authorize courts to excuse an inmate's failure to prepay postage, as courts already have adequate authority to act if an institution refuses to provide postage when it is constitutionally required. The Committee considered whether to delete the Rules' reference to a notarized statement (as an alternative to a declaration), and decided to retain that reference because notaries are available in a number of correctional institutions, and similar language appears in the inmate-filing provisions in the Supreme Court Rules and the rules for habeas and Section 2255 proceedings. There was no opposition to the notarized statement option during the comment period.

B. Tolling motions: Rule 4(a)(4)

The proposed amendment to Appellate Rule 4(a)(4) addresses a circuit split concerning whether a motion filed outside a non-extendable deadline under Civil Rules 50, 52, or 59 counts as "timely" under Rule 4(a)(4) if a court has mistakenly ordered an "extension" of the deadline for filing the motion.

Caselaw in the wake of *Bowles v. Russell*, 551 U.S. 205 (2007), holds that statutory appeal deadlines are jurisdictional but that nonstatutory appeal deadlines are nonjurisdictional claim-processing rules. The statutory appeal deadline for civil appeals is set by 28 U.S.C. § 2107. The statute does not mention so-called "tolling motions" filed in the district court that have the effect of extending the appeal deadline, but "§ 2107 was enacted against a doctrinal backdrop in which the role of tolling motions had long been clear." 16A Wright et al., Federal Practice & Procedure § 3950.4. At the time of enactment, "caselaw stated that certain postjudgment motions tolled the time for taking a civil appeal." *Id.* Commentators have presumed, therefore, that Congress incorporated the preexisting caselaw into § 2107, and that appeals filed within a recognized tolling period may be considered timely consistent with *Bowles*.

The federal rule on tolling motions, Appellate Rule 4(a)(4), provides that "[i]f a party timely files in the district court" certain post-judgment motions, "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." A number of circuits have ruled that the Civil Rules' deadlines for post-judgment motions are nonjurisdictional claim-processing rules. On this view, where a district court mistakenly "extends" the time for making such a motion, and no party objects to that extension, the district court has authority to decide the motion on its merits. But does the motion count as a "timely" one that, under Rule 4(a)(4), tolls the time to appeal? The Third, Seventh, Ninth, and Eleventh Circuits have issued post-*Bowles* rulings stating that such a motion does not toll the appeal time. *E.g.*, *Blue v. Int'l Bhd. of Elec. Workers Local Union 159*, 676 F.3d 579, 582-84 (7th Cir. 2012); *Lizardo v. United States*, 619 F.3d 273, 278-80 (3d Cir. 2010). Pre-*Bowles* caselaw from the Second Circuit accords with this position. The Sixth Circuit, however, has held to the contrary. *Nat'l Ecological Found. v. Alexander*, 496 F.3d 466, 476 (6th Cir. 2007).

The Committee feels it is important to clarify the meaning of "timely" in Rule 4(a)(4), because the conflict in authority arises from arguable ambiguity in the current Rule, and timely filing of a notice of appeal is a jurisdictional requirement. The proposed amendment would adopt the majority view—i.e., that postjudgment motions made outside the deadlines set by the Civil Rules are not "timely" under Rule 4(a)(4). Such an amendment would work the least change in current law. And, as the court noted in *Blue*, 676 F.3d at 583, the majority approach

tracks the spirit of the Court's decision in *Bowles*, which held that the Court has "no authority to create equitable exceptions to jurisdictional requirements." 551 U.S. at 214.

1. Text of proposed amendment and Committee Note

The Committee recommends final approval of the proposed amendment to Rule 4(a)(4) as set out in the enclosure to this report.

2. Changes made after publication and comment

No changes were made after publication and comment.

All but one of the commentators who addressed this proposal voiced support for it. The sole opponent argued that both the current Rule and the proposed amended Rule set a trap for unwary litigants. That commentator also argued that it is incongruous that a district court has power to rule on the merits of an untimely postjudgment motion if the opposing party fails to object to the untimeliness but that same motion lacks tolling effect under Rule 4(a)(4).

The commentator's objections tracked concerns that had already been discussed by the Committee in its prior deliberations. After noting the comment, the Committee adhered to its substantive judgment that the Rule should be amended to adopt the majority view. Committee members discussed whether the amendment, as published, could be revised to make its meaning clearer. Specifically, the Committee discussed the possibility of adding rule text specifying that a motion made outside the time permitted by the relevant Civil Rule "is not rendered timely by, for instance: (i) a court order setting a due date that is later than allowed by the Federal Rules of Civil Procedure; (ii) another party's consent or failure to object; or (iii) the court's disposition of the motion." Committee members, however, expressed concern that this addition would distend an already long and complex Rule and that a list of this nature could be read to exclude other possible scenarios. Committee members observed, moreover, that these examples are stated in the Committee Note, so lawyers and litigants should have adequate notice to avoid a "trap."

C. Length limits: Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6

The proposed amendments to Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6—approved unanimously by the Advisory Committee after post-publication changes—would affect length limits set by the Appellate Rules for briefs and other documents. The proposal would amend Rules 5, 21, 27, 35, and 40 to convert the existing page limits to word limits for documents prepared using a computer. For documents prepared without the aid of a computer, the proposed amendments would retain the page limits currently set out in those rules. The proposed amendments employ a conversion ratio of 260 words per page for Rules 5, 21, 27, 35, and 40.

The amendments would also reduce Rule 32's word limits for briefs so as to reflect the pre-1998 page limits multiplied by 260 words per page. The 14,000-word limit for a party's principal brief would become a 13,000-word limit; the limit for a reply brief would change from 7,000 to 6,500 words. The proposals correspondingly reduce the word limits set by Rule 28.1 for cross-appeals. New Rule 32(f) sets out a uniform list of the items that can be excluded when

computing a document's length. A new appendix collects in one chart all the length limits stated in the Appellate Rules.

Any court of appeals that wishes to retain the existing limits, including 14,000 words for a principal brief, may do so under the proposed amendments. The local variation provision of existing Rule 32(e) would be amended to highlight a court's ability (by order or local rule) to set length limits that exceed those in the Appellate Rules.

* * *

The genesis of this project was the suggestion that length limits set in terms of pages have been overtaken by advances in technology, and that use of page limits rather than word limits invites gamesmanship by attorneys. As noted, the proposal would amend Rules 5, 21, 27, 35, and 40 to address that concern.

Drafting those amendments required the Committee to select a conversion ratio from pages to words. The 1998 amendments transmuted the prior 50-page limit for briefs into a 14,000-word limit—that is, the 1998 amendments used a conversion ratio of 280 words per page. In formulating the published proposal, the Committee relied upon two studies indicating that a traditional 50-page brief filed in the courts of appeals under the pre-1998 rules contained fewer than 280 words per page. A study in 1993 by the D.C. Circuit Advisory Committee recommended a conversion ratio of 250 words per page; based on this study, the D.C. Circuit applied a length limit of 12,500 words for principal briefs from 1993 to 1998. A 2013 study by the Committee's clerk representative found an average of 259 words per page (or 12,950 per fifty pages) in 210 randomly-selected appellate briefs filed by counsel in the Eighth Circuit from 1995 through 1998. The 1998 Advisory Committee Note to Rule 32 did not explain the reason for the selection of the 280 words per page conversion ratio, and the published proposal said that the basis for the estimate was unknown.

As published for comment, the proposed amendments employed a conversion ratio of 250 words per page for Rules 5, 21, 27, 35, and 40. The published proposal also reduced Rule 32's word limits for briefs so as to reflect the pre-1998 page limits multiplied by 250 words per page—that is, 12,500 words for a principal brief. The proposals correspondingly reduced the word limits set by Rule 28.1 for cross-appeals. The published proposed amendments were subject to the local variation provision of Rule 32(e), which permits a court to increase the length limit by order or local rule.

During consideration of the proposed shift to type-volume limits, the Committee also observed that the rules do not provide a uniform list of the items that can be excluded when computing a document's length. The published proposals would add a new Rule 32(f) setting forth such a list.

1. Text of proposed amendment and Committee Note

The Committee recommends final approval of the proposed amendments to Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6, as revised after publication and set out in the enclosure to this report.

2. Changes made after publication and comment

The Committee received a large number of public comments on these proposed amendments. The Committee also received testimony from four appellate lawyers at a public hearing.

For documents other than briefs, a number of commentators voiced support for converting page limits to word limits. Two professional associations expressed support for the proposed amendments to Rules 5, 21, 27, 35, and 40 as published, but several commentators disagreed with the choice of word limits in some or all of those rules. Several of those commentators argued that the page-to-word conversion ratio should be 280 words per page or more, rather than the 250 words per page employed in formulating the published proposals. Commentators advocating a conversion ratio greater than 250 words per page noted that the issues addressed by these documents can be complex and important.

The Committee was not convinced to use a conversion ratio of 280 words per page. The principal basis for that ratio is the 1998 conversion of the limit for principal briefs from 50 pages to 14,000 words. The Committee was advised during the comment period that the 1998 conversion ratio was based on a word count in commercially printed briefs filed at the Supreme Court of the United States. The Committee was not persuaded that it should use the number of words in a commercially printed Supreme Court brief as the measure of equivalence for motions, petitions for rehearing, and other documents filed in the courts of appeals.

Other data informed the Committee's deliberations. Before publication, the Committee received the studies described above, which showed average length of 251 and 259 words per page, respectively, in appellate briefs filed before the conversion from page limits to word counts in 1998. One commentator submitted anecdotal reports that briefs filed under the current Appellate Rules (with 14-point font) average 240 words per page. The clerk's representative sampled twenty-eight rehearing petitions filed in late 2014 in the Eighth Circuit and found that selected pages in those filings averaged 255 words per page, with most pages containing between 245 and 260 words. In sum, the available data suggest that a conversion ratio of 280 words per page would not accurately reflect the number of words that naturally fit on a page. The Committee ultimately determined to employ a conversion ratio of 260 words per page.

On the length of briefs, many appellate lawyers opposed a reduction in the length limit, arguing principally that some complex appeals require 14,000 words. On the other hand, judges of two courts of appeals formally favored the proposal. Judges submitted public comments stating that unnecessarily long briefs interfere with the efficient and expeditious administration of justice. Appellate judges on the Committee shared those concerns and reported informal input from judicial colleagues who expressed similar views. In considering the suggestion of commentators to withdraw the proposal, therefore, the Committee was required to ask whether the federal rule should continue to require some courts of appeals to accept lengthy briefs that the courts say they do not need and do not want.

During committee deliberations and in public comments, there were two principal reasons advanced for amending the length limit for appellate briefs: (1) concern that the conversion from pages to words in 1998 effectively increased the length limit above the length of traditional briefs filed in the courts of appeals, and (2) concern that regardless of the history,

briefs filed under the current rules are too long, and that courts of appeals that wish to apply a shorter limit should be permitted to do so. The Committee received comment and gathered additional data on both points.

Judge Frank Easterbrook submitted a comment explaining that he, as a member of the Standing Committee, drafted the 1998 amendments to Rule 32. According to Judge Easterbrook, the 14,000 word limit came from a Seventh Circuit rule, which in turn was based on a word count of printed briefs filed in the Supreme Court. Judge Easterbrook reported that a similar study of briefs filed by law firms without printing showed an average of about 13,000 words for fifty pages. He wrote that the Advisory Committee selected a limit of 14,000 words, "thinking it best to err on the side of generosity if only because that would curtail the number of motions that counsel would file seeking permission to go longer." Judge Easterbrook reported that "[m]embers of the Advisory Committee (and in turn the Standing Committee) thought it more important to adopt a simple rule that would prevent cheating (by using tracking controls, smaller type, moving text to footnotes, and so on) than to clamp down on the maximum size of a brief."

The Committee also studied the official records of the Advisory Committee and the Standing Committee regarding the 1998 amendments. The 1998 Advisory Committee Note to Rule 32 states that the 14,000 word limit "approximate[s] the current 50-page limit." After hearing testimony that a 50-page brief prepared with an office typewriter would have contained approximately 12,500 words, the Committee in 1994 published a proposal to convert the 50-page limit to 12,500 words. Commentators objected on the ground that the 12,500 limit "reduces the length below the traditional 50 page limit." The Committee then published a new proposal setting a limit of 14,000 words. There was discussion in April 1997 "about reducing the word count from 14,000 to 13,000 because 14,000 is not a good equivalent to the old 50-page brief," and that 14,000 words "is closer to the length of a professionally printed brief." But the minutes of the Advisory Committee reflect that "[i]n order to avoid reopening the controversy" over the length of briefs, "several members spoke in favor of retaining the 14,000 word limit," and "[a] majority favored staying with 14,000." When the chair of the Advisory Committee presented the proposal to the Standing Committee, "[h]e pointed out that a 50-page brief would include about 14,000 words." When the Standing Committee forwarded the 1998 amendment to the Judicial Conference, the Standing Committee's report said that the rule "establishes length limitations of 14,000 words . . . (which equates roughly to the traditional fifty pages)."

Among the commentators supporting the proposed reduction in brief length limits were the judges of the D.C. Circuit; all non-recused active judges of the Tenth Circuit and a majority of the senior judges of the Tenth Circuit; two professional associations; and three individual lawyers. The Department of Justice supported the proposed reduction, while urging the Committee to include language in rule text or a committee note concerning the need for extra length in certain cases. The Solicitor General "agree[d] that in most appeals the parties can and should submit briefs substantially shorter than the current word limits permit," but noted that "in some cases parties will justifiably need to file longer briefs."

Commentators supporting a word-limit reduction asserted that the current word limits allow more length than is needed to brief most appeals. In cases where the full length is unneeded, the 14,000-word limit allows lawyers to avoid pruning away extraneous facts and tenuous arguments. A tighter word limit will drive lawyers to focus on the key facts and dispositive law. Overlong, loosely written briefs divert scarce judicial time. These

commentators noted that courts retain authority to grant leave to file overlength briefs in rare cases where 12,500 words are truly inadequate. A circuit that prefers longer limits also may enlarge the limits by local rule.

Among the commentators opposing the reduction in length limits for briefs were one judge; 22 law firms (or practice groups within law firms) or public interest groups; 10 professional associations; 19 non-government lawyers; and two government lawyers. Commentators opposing the reduction in word limits asserted that the current word limit has been unproblematic since its adoption in 1998. They asserted that in simple appeals where even 12,500 words is longer than necessary, the proposed reduction will not address prolixity. These commentators expressed concern that the full 14,000-word length is necessary to brief a complex, important appeal. They noted that inadequately-briefed issues are waived, and stated that it can be difficult to predict which arguments will persuade the court. They warned that motions for extra length will not be an adequate safety valve because a number of circuits strongly discourage such motions. A number of circuits require or instruct that motions for extra length be made a stated time in advance of the brief's due date, and the Fifth Circuit adds the requirement that a draft brief be included with the motion. A summary of all comments is included with this report, and the comments are available for review at Regulations.gov.

One commentator submitted two studies showing that lawyers could fit 300 words (or more) on a page under the pre-1998 Appellate Rules or a similar state-court framework. This information was not surprising, however, given the Standing Committee's conclusion in 1997 that "computer software programs make it possible . . . to create briefs that comply with a limitation stated in a number of pages, but that contain up to 40% more material than a normal brief."

Professor Gregory Sisk submitted a study in which he and his coauthor examined briefs filed in the Ninth Circuit. The Sisk and Heise study reports a correlation between appellant brief length and reversal. But correlation does not show causation, and the authors caution that it would be "absurd to suggest that greater brief length in itself could have a direct causal link to success on appeal."

In collecting more recent data, the Committee's clerk representative found that only two circuits had readily available data on length of briefs. In the Eighth Circuit, approximately 19 percent of briefs in argued cases contained between 12,500 and 14,000 words; another 4 percent contained more than 14,000. In the D.C. Circuit, 23 percent of all briefs contained between 12,500 and 14,000 words, and 4 percent included more than 14,000; data for argued cases only were unavailable in that circuit.

The Committee members carefully discussed the concerns raised during the public comment period, and decided to revise the published length limits to reflect a conversion ratio of 260 words per page, rather than 250 words per page as published. The length limit for a principal brief (14,000 words under the current rule) is adjusted to 13,000 words from 12,500 in the published proposal. This change addresses to some extent the points raised by commentators while still meaningfully recognizing the validity of the concerns expressed by judges and others about the current rule. For those moved by the historical data, the ratio selected also best approximates the average length of fifty-page briefs filed in courts of appeals governed by a page limit in the years immediately preceding the 1998 amendment. The Committee voted to amend

Rule 32(e) to highlight a circuit court's ability to increase any or all of the Appellate Rules' length limits by local rule. The Committee added language to the Committee Notes to Rules 28.1 and 32 to recognize the need for extra length in appropriate cases. The Committee adopted style changes proposed by Professor Kimble. As an aid to users of the Appellate Rules, the Committee endorsed an appendix collecting the length limits stated in the Appellate Rules.

The Committee deleted as unnecessary the alternative line limits from the length limits for documents other than briefs. The Committee retained line limits for briefs, because the length limits for briefs work differently than the proposed length limits for other documents. The 1998 amendments put in place page limits that were significantly more stringent than the new type-volume limits for briefs: For litigants who do not use Rule 32(a)(7)(B)'s type-volume limits, the 1998 amendments reduced the page limits by 40 percent. By including line limits in the type-volume limits for briefs, the 1998 amendments assured that the more generous type-volume limits would be available to litigants who prepared their briefs without the aid of a computer.

A majority of Committee members voiced support for some version of the proposal to reduce the length limit for briefs, while two attorney members spoke in opposition. As noted, the Committee made several changes in an effort to address concerns, and the ultimate vote was unanimous in favor of the proposal as shown in the attachment to this report.

D. Amicus filings in connection with rehearing: Rule 29

The proposed amendments to Rule 29 would re-number the existing Rule as Rule 29(a) and would add a new Rule 29(b) to set default rules for the treatment of amicus filings in connection with petitions for rehearing. The proposed amendment would not require any circuit to accept amicus briefs, but would establish guidelines for the filing of briefs when they are permitted.

Attorneys who file amicus briefs in connection with petitions for rehearing understandably seek clear guidance about the filing deadlines for, and permitted length of, such briefs. There is no federal rule on the topic. *See Fry v. Exelon Corp. Cash Balance Pension Plan*, 576 F.3d 723, 725 (7th Cir. 2009) (Easterbrook, C.J., in chambers). Most circuits have no local rule on point, and attorneys have reported frustration with their inability to obtain accurate guidance.

The proposed amendments would establish default rules concerning timing and length of amicus briefs in connection with petitions for rehearing. They also would incorporate (for the rehearing stage) most of the features of current Rule 29. A circuit could alter the default federal rules on timing, length, and other matters by local rule or by order in a case, but the new federal rule would ensure that some rule governs the filings in every circuit.

1. Text of proposed amendment and Committee Note

The Committee recommends final approval of the proposed amendment to Rule 29, as revised after publication and set out in the enclosure to this report.

2. Changes made after publication and comment

A number of commentators expressed general support for the idea of amending Rule 29 to address amicus filings in connection with rehearing petitions. Objections and suggestions focused mainly on the issues of length and timing; a third suggestion concerned amicus filings in connection with merits briefing at times other than the initial briefing of an appeal. In response to the public comments, the Committee decided to change the length limit under Rule 29(b) from 2,000 words to 2,600 words and to change the deadline for amicus filings in support of a rehearing petition (or in support of neither party) from three days after the petition's filing to seven days after the petition's filing. The Committee also deleted the alternative line limit from the length limit as unnecessary.

The published proposal's 2,000-word limit had been derived by taking half of the 15-page limit for the party's petition, rounding up (to eight pages), and multiplying by 250 words per page. The published proposal drew from current Rule 29(d), which provides that amicus filings in connection with the merits briefing of an appeal are limited to half the length of "a party's principal brief."

The ten commentators who specifically addressed this feature of the proposal advocated setting a longer limit. Not all of these commentators stated a preferred alternative, but proposals ranged from 2,240 words to 4,200 words. The arguments in favor of a longer limit related to the nature of the cases, the nature of the issues, the quality of the party's petition, and the required contents of the amicus's brief. Rehearing petitions tend to be filed in difficult cases. Issues may include late-breaking developments in the law. The party's petition may be poorly drafted. The party may neglect the larger implications of a ruling and might not focus on ways that a ruling might usefully be narrowed while preserving the result in the case at hand. Amicus filings must include the statement of the amicus's identity, interest, and authority to file and (usually) the authorship and funding disclosure.

The Committee considered this input and examined the local rules in the four circuits that address the question of length: Two give amici essentially the same length limit as parties, and two give amici more than one-half the length limit for parties but less than the full amount. The Committee then opted to increase the proposed length limit for the federal rule from one-half of the length allowed for a party's petition to two-thirds of that length. Applying the 260-words-per-page conversion ratio noted in Part II.C.2 of this report, the Committee arrived at a revised length limit of 2,600 words.

The published proposal would set a time lag of three days between the filing of the petition and the due date of any amicus filings in support of the petition (or in support of neither party). It would give an amicus curiae opposing the petition the same due date as that set by the court for the response. Two commentators expressed support for the proposed timing rules; eight commentators believed that one or both of the periods would be too short.

Seven of those commentators proposed lengthening the period for amicus filings in support of a rehearing petition and four proposed lengthening the deadline for amicus filings in opposition. Commentators argued that the published proposal's deadlines would generate motions for extensions of time and decrease the quality of amicus filings. They noted that it may not be practicable for an amicus to coordinate with the party whose position it supports. One

commentator observed that government lawyers may need time to seek relevant approvals before filing an amicus brief. One commentator advocated adoption of a two-step process, under which the rule would set a three-day deadline by which the amicus must file a notice of intent to file a brief and a further seven- or ten-day deadline for the actual brief.

The Committee noted that in four circuits that have local provisions addressing the timing of amicus filings in support of rehearing petitions, the time allowed ranges from seven to 14 days after the filing of the party's petition. The Committee also recognized that any circuit could shorten the time period by local rule if it were concerned, for example, about inefficiencies resulting from an amicus brief arriving after a responding party has drafted a response to a petition. The Committee thus decided to adopt a deadline of seven days after the petition's filing for amicus filings in support of the petition (or in support of neither party). The Committee did not alter the deadline for amicus filings in opposition. It is rare for a court to request a response to a rehearing petition, and when the court does so, the order requesting a response can readily alter the due date for amicus filings if such an alteration is desirable.

One commentator suggested adopting a rule to govern amicus filings after the grant of rehearing en banc or after a remand from the Supreme Court. The proposed rule that was published for comment did not address those topics. In deciding not to address them, the Committee took into account three considerations. First, any new provision addressing those contexts would need to be published for comment, and it would not be worthwhile to hold up the already-published proposal for that purpose. Second, amicus filings in those contexts occur only rarely, giving reason to doubt the need for a national rule on the subject. Third, it seems likely that the courts of appeals take flexible approaches to the procedure in those contexts, suggesting that the wiser course might be to leave those topics for treatment in local provisions and orders in particular cases.

E. Amending the "three-day rule": Rule 26(c)

The proposed amendment to Rule 26(c) implements a recommendation by the Standing Committee's CM/ECF Subcommittee that the "three-day rule" in each set of national Rules be amended to exclude electronic service. The three-day rule adds three days to a given period if that period is measured after service and service is accomplished by certain methods. Now that electronic service is well-established, it no longer makes sense to include that method of service among the types of service that trigger application of the three-day rule.

The proposed amendment to Rule 26(c) accomplishes the same result as the proposed amendments to Civil Rule 6, Criminal Rule 45, and Bankruptcy Rule 9006, but does so using different wording in light of Appellate Rule 26(c)'s current structure. Under that structure, the applicability of the three-day rule depends on whether the paper in question is delivered on the date of service stated in the proof of service; if so, then the three-day rule is inapplicable. The change is thus accomplished by amending the rule to state that a paper served electronically is deemed (for this purpose) to have been delivered on the date of service stated in the proof of service.

1. Text of proposed amendment and Committee Note

The Committee recommends final approval of the proposed amendment to Rule 26(c), as revised after publication and set out in the enclosure to this report.

2. Changes made after publication and comment

The Committee voted to approve the amendment as published. But recognizing that the Criminal Rules Committee had voted to add certain language to the Committee Note accompanying the proposed amendment to Rule 45, the Committee gave the chair discretion to accede to the addition of the same language to Rule 26(c)'s Committee Note depending on discussions with the Standing Committee. It now appears that the Bankruptcy and Civil Rules Committees are prepared to accommodate the strongly-held preference of the Criminal Rules Committee. Under those circumstances, the Appellate Rules Committee would not object to including the same language in the Committee Note.

A number of commentators supported the proposal to exclude electronic service from the three-day rule. Others conceded its appeal, but proposed changes to offset its anticipated consequences. Still others opposed the proposal altogether.

Commentators' concerns fall into four basic categories: unfair behavior by opponents, hardship for the party being served, the need for time to draft reply briefs and/or motion papers, and inefficiency that would result from motions for extensions of time. Electronic service, unlike personal service, can occur outside of business hours. For example, it may be made late at night on a Friday before a holiday weekend in a different time zone. Some commentators worried that electronically served papers are more likely to be overlooked. Hardships might fall more heavily on lawyers who operate in small offices or as solo practitioners, and on lawyers who must draft complex response papers. Commentators stated that the three extra days are especially important to provide extra time to draft reply briefs, responses to motions, and replies to such responses. They state that, with the prevalence of electronic filing and service, the extra three days have become a "de facto" part of the time periods for such documents. The Department of Justice notes that government lawyers need time to confer with relevant personnel. Other commentators say that lawyers need time to deal with the competing demands of other cases and to communicate with clients who are incarcerated. Acknowledging that an extension of time could address the problems noted above, commentators argued that such motions do not provide a good solution, because making and adjudicating those motions consume lawyer and court time.

A number of commentators suggested modifications to the proposal or additional amendments that would offset some effects of the proposal. Some of the suggested revisions applied equally to the three-day rules in the Civil, Criminal, and Bankruptcy Rules. Others were specific to the Appellate Rules.

The Department of Justice proposed the addition, to each Committee Note, of language encouraging the grant of extensions when appropriate. After some discussion, the Department circulated a revised proposal that read: "The ease of making electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice." The

Criminal Rules Committee voted to add the proposed language to the Committee Note to Criminal Rule 45, and noted the importance of taking a flexible approach and resolving issues on their merits in criminal cases. The other Advisory Committees now are prepared to acquiesce in that language.

Other commentators made a variety of suggestions. Two commentators proposed that although electronic service should not give rise to an automatic three-day extension, a more limited automatic extension (of one or two days) would be appropriate. One commentator proposed the adoption of a provision that would address the computation of response time when a document "is submitted with a motion for leave to file or is not accepted for filing." Two sets of comments suggested lengthening the deadline for reply briefs.

The Committee did not adopt the proposals for a one-or-two-day extension or for a provision addressing documents that are not immediately accepted for filing. Some committee members, however, were sympathetic to the concerns about the timing for reply briefs. As the commentators pointed out, the "de facto" deadline for reply briefs is now 17 days (14 day under Rule 31(a)(1), plus three days under Rule 26(c)). Before the advent of electronic service, the three-day rule existed to offset transit time in the mail; if the mail took three days, then the de facto response time would be the same as the nominal deadline, namely, 14 days. But in 2002, Rule 25 was amended to permit electronic service, and as electronic service has become more widespread, lawyers have become accustomed to a period of 17 days for filing a reply brief. A number of Committee members expressed concern that a 14-day deadline is very short and that it can be difficult to seek extensions of time.

Committee members concluded that the amendment to Rule 26(c) should proceed together with the amendments to the three-day rules in the other sets of rules. But the Committee added to its study agenda a new item concerning the deadline for reply briefs. The Committee also discussed that before the amendment to the three-day rule takes effect on December 1, 2016, the chair could alert the chief judges of the courts of appeals about the Committee's work relating to the filing deadline for reply briefs. Such notice would permit local courts to consider whether to extend the deadline for reply briefs by local rule, especially if the Committee is considering a national rule amendment on that topic.

F. Updating a cross-reference in Rule 26(a)(4)(C)

In 2013, Rule 13—governing appeals as of right from the Tax Court—was revised and became Rule 13(a). A new Rule 13(b)—providing that Rule 5 governs permissive appeals from the Tax Court—was added. At that time, Rule 26(a)(4)(C)'s reference to "filing by mail under Rule 13(b)" should have been updated to refer to "filing by mail under Rule 13(a)(2)."

The Committee voted to give final approval to an amendment to Rule 26(a)(4)(C) to update this cross-reference. The Committee noted that the change is a technical amendment that can proceed without publication.

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