

AMENDMENTS TO THE FEDERAL RULES OF  
APPELLATE PROCEDURE

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COMMUNICATION

FROM

THE CHIEF JUSTICE, THE SUPREME COURT  
OF THE UNITED STATES

TRANSMITTING

AMENDMENTS TO THE FEDERAL RULES OF APPELLATE  
PROCEDURE, PURSUANT TO 2072 U.S.C. 28



APRIL 28, 2020.—Referred to the Committee on the Judiciary and ordered  
to be printed

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U.S. GOVERNMENT PUBLISHING OFFICE

★ 99-011

WASHINGTON : 2020



SUPREME COURT OF THE UNITED STATES,  
*Washington, DC, April 27, 2020.*

Hon. NANCY PELOSI,  
*Speaker of the House of Representatives,*  
*Washington, DC.*

DEAR MADAM 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 2072 of Title 28, United States Code.

Accompanying the amended rules are the following materials that were 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 23, 2019; a redline version of the rules with committee notes; an excerpt from the September 2019 report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and an excerpt from the May 2019 report of the Advisory Committee on Appellate Rules.

Sincerely,

JOHN G. ROBERTS, Jr.,  
*Chief Justice.*

April 27, 2020

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. The Federal Rules of Appellate Procedure are amended to include amendments to Rules 35 and 40.

[*See infra* pp. \_\_\_ \_\_\_.]

2. The foregoing amendments to the Federal Rules of Appellate Procedure shall take effect on December 1, 2020, and shall govern in all proceedings in appellate cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. THE CHIEF JUSTICE is authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Appellate Procedure in accordance with the provisions of Section 2074 of Title 28, United States Code.

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

**Rule 35. En Banc Determination**

\* \* \* \* \*

- (e) **Response.** No response may be filed to a petition for an en banc consideration unless the court orders a response. The length limits in Rule 35(b)(2) apply to a response.

\* \* \* \* \*

**Rule 40. Petition for Panel Rehearing**

**(a) Time to File; Contents; Response; Action by the Court if Granted.**

\* \* \* \* \*

- (3) **Response.** Unless the court requests, no response to a petition for panel rehearing is permitted. Ordinarily, rehearing will not be granted in the absence of such a request. If a response is requested, the requirements of Rule 40(b) apply to the response.

\* \* \* \* \*



JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE  
OF THE UNITED STATES  
*Presiding*

JAMES C. DUFF  
*Secretary*

October 23, 2019

MEMORANDUM

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

From: James C. Duff *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 35 and 40 of the Federal Rules of Appellate Procedure, which were approved by the Judicial Conference at its September 2019 session. The Judicial Conference recommends that the amendments be adopted by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering the proposed amendments, I am transmitting: (i) a copy of the affected rules incorporating the proposed amendments and accompanying committee notes; (ii) a redline version of the same; (iii) an excerpt from the September 2019 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iv) an excerpt from the May 2019 Report of the Advisory Committee on Appellate Rules.

Attachments

**PROPOSED AMENDMENTS TO THE  
FEDERAL RULES OF APPELLATE PROCEDURE<sup>1</sup>**

1 **Rule 35. En Banc Determination**

2 \* \* \* \* \*

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

5 \* \* \* \* \*

6 (2) Except by the court's permission:

7 (A) a petition for an en banc hearing or rehearing  
8 produced using a computer must not exceed  
9 3,900 words; and

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

13 \* \* \* \* \*

14 **(e) Response.** No response may be filed to a petition for  
15 an en banc consideration unless the court orders a

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<sup>1</sup> New material is underlined; matter to be omitted is lined through.



2 FEDERAL RULES OF APPELLATE PROCEDURE

16 response. The length limits in Rule 35(b)(2) apply to  
17 a response.

18 \* \* \* \* \*

**Committee Note**

The amendment to Rule 35(e) clarifies that the length limits applicable to a petition for hearing or rehearing en banc also apply to a response to such a petition, if the court orders one.

1 **Rule 40. Petition for Panel Rehearing**

2 **(a) Time to File; Contents; ~~Answer-Response~~; Action**  
3 **by the Court if Granted.**

4 \* \* \* \* \*

5 (3) ~~Answer-Response~~. Unless the court requests, no  
6 ~~answer-response~~ to a petition for panel rehearing  
7 is permitted. ~~But~~ ordinarily, rehearing will not  
8 be granted in the absence of such a request. If a  
9 response is requested, the requirements of  
10 Rule 40(b) apply to the response.

11 \* \* \* \* \*

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

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

4 FEDERAL RULES OF APPELLATE PROCEDURE

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

**Committee Note**

The amendment to Rule 40(a)(3) clarifies that the provisions of Rule 40(b) regarding a petition for panel rehearing also apply to a response to such a petition, if the court orders a response. The amendment also changes the language to refer to a “response,” rather than an “answer,” to make the terminology consistent with Rule 35; this change is intended to be stylistic only.

**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 Recommended for Approval and Transmission***

The Advisory Committee submitted proposed amendments to Rules 35 and 40. The amendments were published for public comment in August 2018.

The proposed amendments to Rules 35 (En Banc Determination) and 40 (Petition for Panel Rehearing) would create length limits for responses to petitions for rehearing. The existing rules limit the length of petitions for rehearing, but do not restrict the length of responses to those petitions. The proposed amendments would also change the term “answer” in Rule 40(a)(3) to the term “response,” making it consistent with Rule 35.

There was only one comment submitted. That comment, submitted by Aderant Compulaw, agreed with the proposed amendment to Rule 40(a)(3), noting that “it will promote consistency and avoid confusion if Appellate Rule 35 and Appellate Rule 40 utilize the same terminology.” The Advisory Committee sought final approval for the proposed amendments as published.

The Standing Committee voted unanimously to adopt the recommendations of the Advisory Committee.

\* \* \* \* \*

**Recommendation:** That the Judicial Conference approve the proposed amendments to Appellate Rules 35 and 40 \* \* \* 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,



David G. Campbell, Chair

Jesse M. Furman	Peter D. Keisler
Daniel C. Girard	William K. Kelley
Robert J. Giuffra Jr.	Carolyn B. Kuhl
Susan P. Graber	Jeffrey A. Rosen
Frank M. Hull	Srikanth Srinivasan
William J. Kayatta Jr.	Amy J. St. Eve

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

DAVID G. CAMPBELL  
CHAIR  
REBECCA A. WOMELDORF  
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

MICHAEL A. CHAGARES  
APPELLATE RULES

DENNIS R. DOW  
BANKRUPTCY RULES

JOHN D. BATES  
CIVIL RULES

DONALD W. MOLLOY  
CRIMINAL RULES

DEBRA ANN LIVINGSTON  
EVIDENCE RULES

MEMORANDUM

**TO:** Hon. David G. Campbell, Chair  
Committee on Rules of Practice and Procedure  
**FROM:** Hon. Michael A. Chagares, Chair  
Advisory Committee on Appellate Rules  
**RE:** Report of the Advisory Committee on Appellate Rules  
**DATE:** May 31, 2019

1 **I. Introduction**

2 The Advisory Committee on the Appellate Rules met on Friday, April 5, 2019, in San Antonio,  
3 Texas.

\* \* \* \* \*

4 It approved proposed amendments previously published for comment for which it seeks  
5 final approval. These proposed amendments, discussed in Part II of this report, relate to length  
6 limits for responses to petitions for rehearing (Rules 35 and 40).

\* \* \* \* \*

7 **II. Action Item for Final Approval After Public Comment**

8 The Committee seeks final approval for proposed amendments to Rules 35 and 40. These  
9 amendments were published for public comment in August 2018.

10 The proposed amendments to Rules 35 and 40 would create length limits applicable to  
11 responses to petitions for rehearing. Under the existing rules, there are length limits applicable to  
12 petitions for rehearing, but none for responses to those petitions. In addition, the proposed  
13 amendment would change the term “answer” in Rule 40 (which deals with petitions for panel  
14 rehearing) to the term “response,” making it consistent with Rule 35 (which deals with petitions  
15 for rehearing en banc).

16 There was only one comment submitted. That comment, submitted by Aderant Compulaw,  
17 agreed with the proposed amendment to Rule 40(a)(3), noting that “it will promote consistency  
18 and avoid confusion if Appellate Rule 35 and Appellate Rule 40 utilize the same terminology.”

19 The Committee seeks final approval for the proposed amendments as published.

20 **Rule 35. En Banc Determination**

\* \* \* \* \*

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

\* \* \* \* \*

23 (2) Except by the court’s permission:

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

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

\* \* \* \* \*

28 **(e) Response.** No response may be filed to a petition for an en banc  
29 consideration unless the court orders a response. The length limits in Rule  
30 35(b)(2) apply to a response.

\* \* \* \* \*

31 **Committee Note**

32 The amendment to Rule 35(e) clarifies that the length limits applicable to a  
33 petition for hearing or rehearing en banc also apply to a response to such a petition,  
34 if the court orders one.

35 **Rule 40. Petition for Panel Rehearing**

\* \* \* \* \*

36 (a) **Time to File; Contents; ~~Answer~~Response; Action by the Court if**  
37 **Granted.**

\* \* \* \* \*

38 (3) ~~Answer~~**Response.** Unless the court requests, no ~~answer~~response  
39 to a petition for panel rehearing is permitted. ~~But~~Ordinarily, rehearing will not  
40 be granted in the absence of such a request. If a response is requested, the  
41 requirements of Rule 40(b) apply to the response.

\* \* \* \* \*

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

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

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

**Committee Note**

49 The amendment to Rule 40(a)(3) clarifies that the provisions of Rule 40(b)  
50 regarding a petition for panel rehearing also apply to a response to such a petition, if the  
51 court orders a response. The amendment also changes the language to refer to a "response,"  
52 rather than an "answer," to make the terminology consistent with Rule 35; this change is  
53 intended to be stylistic only.

\* \* \* \* \*

