

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 PROCE-
DURE THAT HAVE BEEN ADOPTED BY THE SUPREME COURT,
PURSUANT TO 28 U.S.C. 2072



MAY 10, 2018.—Referred to the Committee on the Judiciary and ordered
to be printed

U.S. GOVERNMENT PUBLISHING OFFICE

SUPREME COURT OF THE UNITED STATES,
Washington, DC, April 26, 2018.

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 2072 of Title 28, United States Code.

Accompanying these 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 4, 2017; a redline version of the rules with committee notes; an excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and an excerpt from the May 2017 Report of the Advisory Committee on Appellate Rules.

Sincerely,

JOHN G. ROBERTS, Jr.,
Chief Justice.

April 26, 2018

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 8, 11, 25, 26, 28.1, 29, 31, 39, and 41, and Forms 4 and 7.

[*See infra* pp. __ __ __.]

2. That the foregoing amendments to the Federal Rules of Appellate Procedure shall take effect on December 1, 2018, 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 2074 of Title 28, United States Code.

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

Rule 8. Stay or Injunction Pending Appeal

(a) Motion for Stay.

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

* * * * *

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

* * * * *

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

* * * * *

2 FEDERAL RULES OF APPELLATE PROCEDURE

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

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

* * * * *

Rule 11. Forwarding the Record

* * * * *

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

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

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

4 FEDERAL RULES OF APPELLATE PROCEDURE

Rule 25. Filing and Service

(a) Filing.

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

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

(A) **Nonelectronic Filing.**

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

(ii) **A Brief or Appendix.** A brief or appendix not filed electronically is timely filed, however, if on or before the last day for filing, it is:

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

(iii) **Inmate Filing.** If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 25(a)(2)(A)(iii). A paper not filed electronically by an inmate is timely if it is deposited in the institution's internal mail system on or before the last day for filing and:

6 FEDERAL RULES OF APPELLATE PROCEDURE

- it is accompanied by: a declaration in compliance with 28 U.S.C. § 1746—or a notarized statement—setting out the date of deposit and stating that first-class postage is being prepaid; or evidence (such as a postmark or date stamp) showing that the paper was so deposited and that postage was prepaid; or
- the court of appeals exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies Rule 25(a)(2)(A)(iii).

(B) Electronic Filing and Signing.**(i) By a Represented Person—****Generally Required; Exceptions.** A

person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

(ii) By an Unrepresented Person—**When Allowed or Required.** A

person not represented by an attorney:

- may file electronically only if allowed by court order or by local rule; and
- may be required to file electronically only by court

8 FEDERAL RULES OF APPELLATE PROCEDURE

order, or by a local rule that includes reasonable exceptions.

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

(iv) **Same as a Written Paper.** A paper filed electronically is a written paper for purposes of these rules.

(3) **Filing a Motion with a Judge.** If a motion requests relief that may be granted by a single judge, the judge may permit the motion to be filed with the judge; the judge must note the filing date on the motion and give it to the clerk.

- (4) **Clerk's Refusal of Documents.** The clerk must not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rule or practice.
- (5) **Privacy Protection.** An appeal in a case whose privacy protection was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same rule on appeal. In all other proceedings, privacy protection is governed by Federal Rule of Civil Procedure 5.2, except that Federal Rule of Criminal Procedure 49.1 governs when an extraordinary writ is sought in a criminal case.
- (b) **Service of All Papers Required.** Unless a rule requires service by the clerk, a party must, at or before

10 FEDERAL RULES OF APPELLATE PROCEDURE

the time of filing a paper, serve a copy on the other parties to the appeal or review. Service on a party represented by counsel must be made on the party's counsel.

(c) Manner of Service.

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

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

(B) by mail; or

(C) by third-party commercial carrier for delivery within 3 days.

(2) Electronic service of a paper may be made (A) by sending it to a registered user by filing it with the court's electronic-filing system or (B) by sending it by other electronic means that the person to be served consented to in writing.

- (3) When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, service on a party must be by a manner at least as expeditious as the manner used to file the paper with the court.
- (4) Service by mail or by commercial carrier is complete on mailing or delivery to the carrier. Service by electronic means is complete on filing or sending, unless the party making service is notified that the paper was not received by the party served.

(d) Proof of Service.

- (1) A paper presented for filing must contain either of the following:
 - (A) an acknowledgment of service by the person served; or

12 FEDERAL RULES OF APPELLATE PROCEDURE

(B) proof of service consisting of a statement

by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) their mail or electronic addresses,

facsimile numbers, or the addresses of

the places of delivery, as appropriate

for the manner of service.

(2) When a brief or appendix is filed by mailing or

dispatch in accordance with Rule 25(a)(2)(A)(ii),

the proof of service must also state the date and

manner by which the document was mailed or

dispatched to the clerk.

(3) Proof of service may appear on or be affixed to

the papers filed.

(e) **Number of Copies.** When these rules require the

filing or furnishing of a number of copies, a court may

FEDERAL RULES OF APPELLATE PROCEDURE 13

require a different number by local rule or by order in
a particular case.

14 FEDERAL RULES OF APPELLATE PROCEDURE

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)(A)(ii), and 25(a)(2)(A)(iii)—and filing by mail under Rule 13(a)(2)—at the

latest time for the method chosen for delivery to the post office, third-party commercial carrier, or prison mailing system; and

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

* * * * *

Rule 28.1. Cross-Appeals

* * * * *

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

- (1) the appellant's principal brief, within 40 days after the record is filed;
- (2) the appellee's principal and response brief, within 30 days after the appellant's principal brief is served;
- (3) the appellant's response and reply brief, within 30 days after the appellee's principal and response brief is served; and
- (4) the appellee's reply brief, within 21 days after the appellant's response and reply brief is served, but at least 7 days before argument unless the court, for good cause, allows a later filing.

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 brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing, but a court of appeals may prohibit the filing of or may strike an amicus brief that would result in a judge's disqualification.

* * * * *

18 FEDERAL RULES OF APPELLATE PROCEDURE

(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 brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court.

* * * * *

Rule 31. Serving and Filing Briefs**(a) Time to Serve and File a Brief.**

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

* * * * *

Rule 39. Costs

* * * * *

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

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

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

- (a) **Contents.** Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.
- (b) **When Issued.** The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time by order.
- (c) **Effective Date.** The mandate is effective when issued.
- (d) **Staying the Mandate Pending a Petition for Certiorari.**

22 FEDERAL RULES OF APPELLATE PROCEDURE

- (1) **Motion to Stay.** A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the petition would present a substantial question and that there is good cause for a stay.
- (2) **Duration of Stay; Extensions.** The stay must not exceed 90 days, unless:
 - (A) the period is extended for good cause; or
 - (B) the party who obtained the stay notifies the circuit clerk in writing within the period of the stay:
 - (i) that the time for filing a petition has been extended, in which case the stay continues for the extended period; or

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

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

(4) **Issuance of Mandate.** The court of appeals must issue the mandate immediately on receiving a copy of a Supreme Court order denying the petition, unless extraordinary circumstances exist.

24 FEDERAL RULES OF APPELLATE PROCEDURE

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

* * * * *

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

Your daytime phone number: () _____

Your age: _____ Your years of schooling: _____

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.

Case No. _____

C.D., Defendant

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)(A)(iii).]



JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

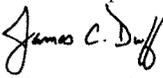
THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

October 4, 2017

MEMORANDUM

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

From: James C. Duff 

RE: TRANSMITTAL OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF
APPELLATE PROCEDURE

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit herewith for consideration of the Court proposed amendments to Rules 8, 11, 25, 26, 28.1, 29, 31, 39, and 41 of the Federal Rules of Appellate Procedure, along with Forms 4 and 7, which were approved by the Judicial Conference at its September 2017 session. The Judicial Conference recommends that the amendments be adopted by the Court and transmitted to the Congress pursuant to law.

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

Attachments

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF APPELLATE PROCEDURE¹**

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

2 **(a) Motion for Stay.**

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

6 * * * * *

7 (B) approval of a ~~supersedeasbond~~ or other
8 security provided to obtain a stay of
9 judgment; or

10 * * * * *

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

¹ New material is underlined; matter to be omitted is lined through.

2 FEDERAL RULES OF APPELLATE PROCEDURE

15

* * * * *

16

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

17

filing a bond or other appropriate security in

18

the district court.

19

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

20

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

21

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

22

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

23

submits to the jurisdiction of the district court and

24

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

25

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

26

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

27

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

28

liability may be enforced in the district court without

29

the necessity of an independent action. The motion

30

and any notice that the district court prescribes may be

31

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

32 send a copy to each suretysecurity
33 provider whose address is known.

34 * * * * *

Committee Note

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

4 FEDERAL RULES OF APPELLATE PROCEDURE

1 **Rule 11. Forwarding the Record**

2 * * * * *

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

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

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

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

Committee Note

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

6 FEDERAL RULES OF APPELLATE PROCEDURE

Rule 25. Filing and Service²**(a) Filing.**

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

(A) Nonelectronic Filing.

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

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

- ~~(B)~~(ii) **A Brief or Appendix.** A brief or appendix not filed electronically is timely filed, however, if on or before the last day for filing, it is:
- ~~(i)~~(i) mailed to the clerk by ~~First-Class Mail~~first-class mail, or other class of mail that is at least as expeditious, postage prepaid; or
 - ~~(ii)~~(ii) dispatched to a third-party commercial carrier for delivery to the clerk within 3 days.
- ~~(C)~~(iii) **Inmate Filing.** If an institution has a system designed for legal mail, an inmate confined there must use that system to receive

8 FEDERAL RULES OF APPELLATE PROCEDURE

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

(i) it is accompanied by: ~~a~~ 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~~ evidence (such as a postmark or date stamp) showing that the

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

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

10 FEDERAL RULES OF APPELLATE PROCEDURE

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

(B) Electronic Filing and Signing.

(i) By a Represented Person—

Generally Required;

Exceptions. A person

represented by an attorney must

file electronically, unless

nonelectronic filing is allowed by

the court for good cause or is

allowed or required by local rule.

(ii) By an Unrepresented Person—

When Allowed or Required. A

person not represented by an

attorney:

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

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

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

12 FEDERAL RULES OF APPELLATE PROCEDURE

written paper for purposes of
these rules.

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

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

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

(c) Manner of Service.

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

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

(B) by mail; or

14 FEDERAL RULES OF APPELLATE PROCEDURE

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

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

- (2) ~~If authorized by local rule, a party may use the court's transmission equipment to make electronic service under Rule 25(c)(1)(D)~~ Electronic service of a paper may be made (A) by sending it to a registered user by filing it with the court's electronic-filing system or (B) by sending it by other electronic means that the person to be served consented to in writing.
- (3) When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, service on a party must be by a manner at least as expeditious as the manner used to file the paper with the court.

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

(d) Proof of Service.

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

16 FEDERAL RULES OF APPELLATE PROCEDURE

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

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

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

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

Committee Note

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

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

1 **Rule 26. Computing and Extending Time**

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

6 * * * * *

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

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

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

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

18 under Rule 13(a)(2)—at the latest time for
19 the method chosen for delivery to the post
20 office, third-party commercial carrier, or
21 prison mailing system; and
22 (D) for filing by other means, when the clerk’s
23 office is scheduled to close.

24

* * * * *

Committee Note

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

1 **Rule 28.1. Cross-Appeals**

2 * * * * *

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

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

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

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

13 (4) the appellee’s reply brief, within ~~42~~421 days after
14 the appellant’s response and reply brief is served,
15 but at least 7 days before argument unless the
16 court, for good cause, allows a later filing.

Committee Note

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

22 FEDERAL RULES OF APPELLATE PROCEDURE

1 **Rule 29. Brief of an Amicus Curiae**2 **(a) During Initial Consideration of a Case on the**
3 **Merits.**4 (1) **Applicability.** This Rule 29(a) governs amicus
5 filings during a court's initial consideration of a
6 case on the merits.7 (2) **When Permitted.** The United States or its
8 officer or agency or a state may file an amicus-
9 curiae brief without the consent of the parties or
10 leave of court. Any other amicus curiae may file
11 a brief only by leave of court or if the brief states
12 that all parties have consented to its filing, but a
13 court of appeals may prohibit the filing of or
14 may strike an amicus brief that would result in a
15 judge's disqualification.

16

* * * * *

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

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

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

29 * * * * *

Committee Note

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

24 FEDERAL RULES OF APPELLATE PROCEDURE

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

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

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

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

12 * * * * *

Committee Note

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

26 FEDERAL RULES OF APPELLATE PROCEDURE

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

1 **Rule 39. Costs**

2 * * * * *

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

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

Committee Note

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

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

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

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

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

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

30 FEDERAL RULES OF APPELLATE PROCEDURE

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

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

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

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

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

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

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

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

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

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

32 FEDERAL RULES OF APPELLATE PROCEDURE

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

Committee Note

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

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

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

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

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

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

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

34 FEDERAL RULES OF APPELLATE PROCEDURE

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

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

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

3 * * * * *

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

5 Your daytime phone number: () _____

6 Your age: _____ Your years of schooling: _____

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

Form 7. Declaration of Inmate Filing

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

A.B., Plaintiff

v.

Case No. _____

C.D., Defendant

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

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

Sign your name here _____

Signed on _____ *[insert date]*

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

Excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure

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 8, 11, 25, 26, 28.1, 29, 31, 39, and 41, and Forms 4 and 7, with a recommendation that they be approved and transmitted to the Judicial Conference.

Proposed amendments to these rules were circulated to the bench, bar, and public for comment in August 2016. The Standing Committee recommended the proposed amendments for final approval at its June 2017 meeting.

Rules 8 (Stay or Injunction Pending Appeal), 11 (Forwarding the Record), and 39 (Costs)

The proposed amendments to Rules 8(a) and (b), 11(g), and 39(e) conform the Appellate Rules to a proposed change to Civil Rule 62(b) that eliminates the antiquated term “supersedeas bond” and makes plain an appellant may provide either “a bond or other security.” One comment was filed in support of the proposed amendment.

The advisory committee recommended no changes to the published proposals to amend Rules 8(a), 11(g), and 39(e), but recommended minor revisions to Rule 8(b). First, to conform proposed amendments with Civil Rule 65.1, the advisory committee recommended rephrasing the heading and the first sentence of Rule 8(b) to refer only to “security” and “security provider” (and not to mention specific types of security, such as a bond, stipulation, or other undertaking). Second, the advisory committee changed the word “mail” to “send” in Rule 8(b) to conform Rule 8(b) to the proposed amendments to Rule 25. The advisory committee modified the

Excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure

Committee Note to explain these revisions. The Standing Committee approved the proposed amendments to Rules 8(a) and (b), 11(g), and 39(e).

Rule 25 (Filing and Service)

The proposed amendments to Rule 25 are part of the inter-advisory committee project to develop coordinated rules for electronic filing and service. The proposed amendment to Rule 25(a)(2)(B)(i) requires a person represented by counsel to file papers electronically, but allows exceptions for good cause and by local rule.

The proposed amendment to subdivision (a)(2)(B)(iii) addresses electronic signatures and, in consultation with other advisory committees, establishes a uniform national signature provision. The proposed amendment to subdivision (c)(2) addresses electronic service through the court's electronic filing system or by using other electronic means that the person to be served consented to in writing.

* * * * *

After receiving public comments and conferring with the other advisory committees, the advisory committee recommended several minor revisions to the proposed amendments as published. First, minor changes were needed to take into consideration amendments to subdivision (a)(2)(C) that became effective in December 2016 and altered the text of that section. Second, public comments criticized the signature provision in the proposed new subdivision (a)(2)(B)(iii). The advisory committee recommended replacing the language published for public comment with a new provision drafted jointly with the other advisory committees. Third, another comment revealed an ambiguity in the clause structure of the proposed Rule 25(c)(2), which was addressed by separating the two methods of service using "(A)" and "(B)."

The advisory committee received several comments arguing that unrepresented parties should have the same right to file electronically as represented parties. These comments noted

Excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure

that electronic filing is easier and less expensive than filing non-electronically. The advisory committee considered these arguments at its October 2016 and May 2017 meetings, but decided against allowing unrepresented parties the same access as represented parties given potential difficulties caused by inexperienced filers and possible abuses of the filing system. Under the proposed amendment, unrepresented parties have access to electronic filing by local rule or court order.

The Standing Committee approved the proposed amendments to Rule 25, as well as the electronic filing rules proposed by the other advisory committees, after making minor stylistic changes.

Rule 26 (Computing and Extending Time)

In light of the proposed changes to Rule 25 approved at the Standing Committee meeting, the advisory committee recognized the need for technical, conforming changes to Rule 26. Rule 26(a)(4)(C) refers to Rules 25(a)(2)(B) and 25(a)(2)(C). The recent amendments to Rule 25 have renumbered these subdivisions to be Rule 25(a)(2)(A)(ii) and 25(a)(2)(A)(iii). Therefore, the references in Rule 26 should be changed accordingly. Upon the recommendation of the advisory committee, the Standing Committee approved the proposed amendments to Rule 26.

Rules 28.1 (Cross-Appeals) and 31 (Serving and Filing Briefs)

The proposed amendments to Rules 28.1(f)(4) and 31(a)(1) respond to the shortened time to file a reply brief effectuated by the elimination of the “three day rule” (JCUS-SEP 15, pp. 28-30). These rules currently provide only 14 days after service of the response brief to file a reply brief. Previously, parties effectively had 17 days because Rule 26(c) formerly gave them three additional days in addition to the 14 days in Rules 28.1(f)(4) and 31(a)(1). The advisory committee concluded that effectively shortening the period for filing from 17 days to 14 days could adversely affect the preparation of useful reply briefs. To maintain consistency in

Excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure

measuring time periods in increments of seven days when possible, the advisory committee proposed that the time period to file a reply should be extended to 21 days.

The advisory committee received two comments in support of the published proposal. The advisory committee recommended approval of the proposed amendments without further changes. The Standing Committee approved the proposed amendments to Rules 28.1(f)(4) and 31(a)(1).

Rule 29 (Brief of an Amicus Curiae)

Rule 29(a) specifies that an amicus curiae may file a brief with leave of the court or without leave of the court “if the brief states that all parties have consented to its filing.” Several courts of appeals, however, have adopted local rules that forbid the filing of a brief by an amicus curiae when the filing could cause the recusal of one or more judges. Given the arguable merit of these local rules, the advisory committee proposed to add an exception to Rule 29(a) providing “that a court of appeals may strike or prohibit the filing of an amicus brief that would result in a judge’s disqualification.”

At its May 2017 meeting, the advisory committee revised its proposed amendment to Rule 29 in two ways. First, amendments that went into effect in December 2016 renumbered Rule 29’s subdivisions and provided new rules for amicus briefs during consideration of whether to grant rehearing. To match the renumbering, the advisory committee moved the exception from the former subdivision (a) to the new subdivision (a)(2) and copied the exception into the new subdivision (b)(2). Second, the advisory committee rephrased the exception authorizing a court of appeals to “prohibit the filing of or strike” an amicus brief (rather than “strike or prohibit the filing of” the brief), making the exception more chronological without changing the meaning or function of the proposed amendment.

Excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure

The advisory committee received six comments in opposition to the proposed amendment. These commenters asserted that the proposed amendment is unnecessary because amicus briefs that require the recusal of a judge are rare. They further asserted that the amendment could prove wasteful if an amicus curiae pays an attorney to write a brief which the court then strikes. The amicus curiae likely would not know the identity of the judges on the appellate panel when filing the brief and would have no options once the court strikes the brief. The advisory committee considered these comments, but concluded that the necessity of the amendment was demonstrated by local rules carving out the exception and that the merits of the amendment outweigh the concerns.

One commenter observed that the proposed amendment should not change “amicus-curiae brief” to “amicus brief.” The advisory committee understands the criticism but recommended the change for consistency with the rest of Rule 29.

The Standing Committee approved the proposed amendment to Rule 29, after making minor revisions to the proposed rule and committee note.

Rule 41 (Mandate; Contents; Issuance and Effective Date; Stay)

In August 2016, the Standing Committee published proposed amendments to Rule 41. Five public comments were received, which prompted the advisory committee to recommend several revisions.

First, in response to commenters’ observations that a court might wish to extend the time for good cause even if exceptional circumstances do not exist, the advisory committee deleted the following sentence: “The court may extend the time only in extraordinary circumstances or under Rule 41(d).” Second, the advisory committee recommended renumbering subdivision (d)(2)(B) to subdivision (d)(2). In response to a comment regarding a potential gap in the rule,

Excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure

the advisory committee added a proposed new clause that will extend a stay automatically if a Justice of the Supreme Court extends the time for filing a petition for certiorari.

The Standing Committee approved the proposed amendments to Rule 41, after making minor revisions to the proposed rule and committee note.

Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis)

In August 2016, the Standing Committee published for public comment a proposed amendment to Appellate Form 4. Litigants seeking permission to proceed *in forma pauperis* must complete Form 4, question 12 of which currently asks litigants to provide the last four digits of their social security numbers. The advisory committee undertook an investigation and determined that no current need exists for this information. Accordingly, the advisory committee recommended deleting this question.

The advisory committee received two comments in support of the proposal and recommended no changes to the proposed amendment. The Standing Committee approved the proposed amendments to Form 4.

Form 7 (Declaration of Inmate Filing)

In light of the proposed changes to Rule 25 approved at the Standing Committee meeting, the advisory committee recognized the need for a technical, conforming change to Form 7. Form 7 contains a note that refers to Rule 25(a)(2)(C). The recent amendments to Rule 25 have renumbered this subdivision as Rule 25(a)(2)(A)(iii). The reference in the note on Form 7 should be changed accordingly. Upon the recommendation of the advisory committee, the Standing Committee approved the proposed amendments to Form 7.

The Standing Committee voted unanimously to support the recommendations of the Advisory Committee on Appellate Rules.

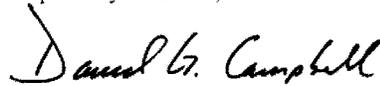
Recommendation: That the Judicial Conference approve the proposed amendments to Appellate Rules 8, 11, 25, 26, 28.1, 29, 31, 39, and 41, and

Excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure

Forms 4 and 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,

A handwritten signature in black ink that reads "David G. Campbell". The signature is written in a cursive style with a large, prominent initial "D".

David G. Campbell, Chair

Jesse M. Furman	William K. Kelley
Gregory G. Garre	Rod J. Rosenstein
Daniel C. Girard	Amy J. St. Eve
Susan P. Graber	Larry D. Thompson
Frank M. Hull	Richard C. Wesley
Peter D. Keisler	Jack Zouhary

Excerpt from the Report of the Advisory Committee on Appellate Rules

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

SANDRA SEGAL IKUTA
BANKRUPTCY RULES

JOHN D. BATES
CIVIL RULES

DONALD W. MOLLOY
CRIMINAL RULES

WILLIAM K. SESSIONS III
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 22, 2017 (revised March 14, 2018)

I. Introduction

The Advisory Committee on the Appellate Rules met on May 2, 2017, in Washington, D.C. At this meeting, the Advisory Committee considered six sets of proposed amendments that the Standing Committee published for public comment in August 2016, decided to propose two new sets of amendments for publication, and considered several additional items on its agenda.

Part II of this memorandum concerns the six sets of proposed amendments published for public comment.

As described below, in light of public comments, the Advisory Committee recommends no changes to the first two of these published proposals and recommends minor revisions of the other proposals.

Excerpt from the Report of the Advisory Committee on Appellate Rules

Report to the Standing Committee
Advisory Committee on Appellate Rules
May 22, 2017 (revised March 14, 2018)

Page 2

II. Action Items: Amendments Previously Published for Public Comment

In August 2016, the Standing Committee published six sets of proposed amendments for public comment. Based on the comments received, the Advisory Committee now makes the following recommendations for amendments to the Appellate Rules.

A. Rules 31(a)(1) & 28.1(f)(4)—Extension of time to file reply briefs

In August 2016, the Standing Committee published proposed amendments to Appellate Rules 31(a)(1) and 28.1(f)(4). These rules currently provide only 14 days after service of the response to file a reply brief in appeals and cross-appeals. Previously, parties effectively had 17 days because Rule 26(c) formerly gave them three additional days in addition to the 14 days in Rules 31(a)(1) and 28.1(f)(4). The Advisory Committee concluded that effectively shortening the period for filing from 17 days to 14 days could adversely affect the preparation of useful reply briefs. Because time periods are best measured in increments of 7 days, the Committee concluded the period should be extended to 21 days.

The Advisory Committee received comments on the published proposal from the Pennsylvania Bar Association and the National Association of Criminal Defense Lawyers. These comments both supported the proposal. The Advisory Committee therefore recommends no changes to the proposed amendments. The proposed amendments (with changes shown in lines 9 and 25) are as follows:

1 **Rule 28.1. Cross-Appeals**

2

* * * * *

3

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

Excerpt from the Report of the Advisory Committee on Appellate Rules

Report to the Standing Committee
Advisory Committee on Appellate Rules
May 22, 2017 (revised March 14, 2018)

Page 3

- 4 (1) the appellant's principal brief, within 40 days after the record is filed;
5 (2) the appellee's principal and response brief, within 30 days after the
6 appellant's principal brief is served;
7 (3) the appellant's response and reply brief, within 30 days after the
8 appellee's principal and response brief is served; and
9 (4) the appellee's reply brief, within ~~14~~21 days after the appellant's
10 response and reply brief is served, but at least 7 days before argument unless
11 the court, for good cause, allows a later filing.

Committee Note

12
13 Subdivision (f)(4) is amended to extend the period for filing a reply brief from
14 14 days to 21 days. Before the elimination of the "three-day rule" in Rule 26(c),
15 attorneys were accustomed to a period of 17 days within which to file a reply
16 brief, and the committee concluded that shortening the period from 17 days to 14
17 days could adversely affect the preparation of useful reply briefs. Because time
18 periods are best measured in increments of 7 days, the period is extended to 21
19 days.

20
21 **Rule 31. Serving and Filing Briefs**

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

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

* * * * *

Committee Note

29
30
31 Subdivision (a)(1) is revised to extend the period for filing a reply brief from

Excerpt from the Report of the Advisory Committee on Appellate Rules

Report to the Standing Committee
Advisory Committee on Appellate Rules
May 22, 2017 (revised March 14, 2018)

Page 6

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

15 **(b) Proceeding Against a Surety Security Provider.** If a party gives security
16 ~~in the form of a bond, a stipulation, or other undertaking~~ with one or more sureties
17 ~~security providers~~, each ~~surety provider~~ submits to the jurisdiction of the district
18 court and irrevocably appoints the district clerk as ~~the surety's~~ its agent on whom
19 any papers affecting ~~the surety's~~ its liability on the ~~security bond or undertaking~~
20 may be served.¹ On motion, a ~~surety's security provider's~~ liability may be
21 enforced in the district court without the necessity of an independent action. The
22 motion and any notice that the district court prescribes may be served on the
23 district clerk, who must promptly ~~mail send~~² a copy to each ~~surety security~~
24 ~~provider~~ whose address is known.

Committee Note³

25
26 The amendments to subdivisions (a)(1)(B) and (b) conform this rule with the
27 amendment of Federal Rule of Civil Procedure 62. Rule 62 formerly required a
28 party to provide a "supersedeas bond" to obtain a stay of the judgment and
29 proceedings to enforce the judgment. As amended, Rule 62(b)(2) allows a party
30 to obtain a stay by providing a "bond or other security." The term "security" in
31 the amended subdivision (b) includes but is not limited to the examples of

¹ In the proposed amendments published for public comment, the first sentence of Rule 8(b) said: "If a party gives security in the form of a bond, ~~a stipulation, an undertaking, or other security, a stipulation, or other undertaking~~ with one or more sureties ~~or other security providers~~, each ~~surety provider~~ submits to the jurisdiction of the district court and irrevocably appoints the district clerk as ~~the surety's~~ its agent on whom any papers affecting ~~the surety's~~ its liability on the ~~security bond or undertaking~~ may be served."

² The proposed amendment published for public comment did not change the word "mail."

³ The Committee Note published for public comment included only the first two sentences. The last two sentences are new.

Excerpt from the Report of the Advisory Committee on Appellate Rules

Report to the Standing Committee
Advisory Committee on Appellate Rules
May 22, 2017 (revised March 14, 2018)

Page 7

32 security (i.e., “a bond, a stipulation, or other undertaking”) formerly listed in
33 subdivision (b). The word “mail” is changed to “send” to avoid restricting the
34 method of serving security providers. Other Rules specify the permissible
35 manners of service.

36

37 **Rule 11. Forwarding the Record**

38

* * * * *

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

42

- for dismissal;

43

- for release;

44

- for a stay pending appeal;

45

- for additional security on the bond on appeal or on a ~~supersedeas bond~~ or other security provided to obtain a stay of judgment; or

46

47

- for any other intermediate order—

48

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

50

Committee Note

51

The amendment of subdivision (g) conforms this rule with the amendment of
52 Federal Rule of Civil Procedure 62. Rule 62 formerly required a party to provide
53 a “supersedeas bond” to obtain a stay of the judgment and proceedings to enforce
54 the judgment. As amended, Rule 62(b)(2) allows a party to obtain a stay by
55 providing a “bond or other security.”

56

57

Rule 39. Costs

58

* * * * *

59

(e) Costs on Appeal Taxable in the District Court. The following costs on

Excerpt from the Report of the Advisory Committee on Appellate Rules

Report to the Standing Committee
Advisory Committee on Appellate Rules
May 22, 2017 (revised March 14, 2018)

Page 8

60 appeal are taxable in the district court for the benefit of the party entitled to costs
61 under this rule:

- 62 (1) the preparation and transmission of the record;
63 (2) the reporter’s transcript, if needed to determine the appeal;
64 (3) premiums paid for a ~~supersedeas~~ bond or other ~~bond~~ security to preserve
65 rights pending appeal; and
66 (4) the fee for filing the notice of appeal.

Committee Note

67
68 The amendment of subdivisions (e)(3) conforms this rule with the amendment
69 of Federal Rule of Civil Procedure 62. Rule 62 formerly required a party to
70 provide a “supersedeas bond” to obtain a stay of the judgment and proceedings to
71 enforce the judgment. As amended, Rule 62(b)(2) allows a party to obtain a stay
72 by providing a “bond or other security.”

D. Rule 29(a)—Limitations on Amicus Briefs filed by Party Consent

In August 2016, the Standing Committee published for public comment proposed amendments to Appellate Rule 29(a). Rule 29(a) specifies that an amicus curiae may file a brief with leave of the court or without leave of the court “if the brief states that all parties have consented to its filing.” Several courts of appeals, however, have adopted local rules that forbid the filing of a brief by an amicus curiae when the filing could cause the recusal of one or more judges. These local rules conflict with Rule 29(a) because Rule 29(a) imposes no limit on the filing of a brief with party consent. The Advisory Committee decided that Rule 29(a) should be amended to allow courts to prohibit or strike the filing of an amicus brief. The proposed amendment accomplishes this result by adding an exception providing “that a court of appeals may strike or prohibit the filing of an amicus brief that would result in a judge’s disqualification.”

At its May 2017 meeting, the Advisory Committee decided to revise its proposed amendment to Rule 29 for two reasons. First, other amendments to Rule 29 took effect in December 2016. These other amendments renumbered Rule 29’s subdivisions and provided new rules for amicus briefs during consideration of whether to grant rehearing. As a result, the Advisory Committee now recommends moving the exception from the former subdivision (a) to the new subdivision (a)(2) and copying this exception into the new subdivision (b)(2). These changes do not alter the meaning or function of the exception. Second, the Advisory Committee

Excerpt from the Report of the Advisory Committee on Appellate Rules

Report to the Standing Committee
Advisory Committee on Appellate Rules
May 22, 2017 (revised March 14, 2018)

Page 10

20 would result in a judge's disqualification.⁵

21 * * * * *

22 **Committee Note**

23 The amendment authorizes orders or local rules, such as those previously
24 adopted in some circuits, that prohibit the filing of an amicus brief if the brief
25 would result in a judge's disqualification. The amendment does not alter or
26 address the standards for when an amicus brief requires a judge's disqualification.

The Advisory Committee received six comments on the proposed amendment. Five of these comments oppose creating an exception that would allow a court of appeals to prohibit the filing of or strike an amicus brief filed by party consent. Associate Dean Alan B. Morrison of the George Washington University Law School, the Pennsylvania Bar Association, the Federal Bar Council, and Heather Dixon, Esq., assert in their comments that the proposed amendment is unnecessary because amicus briefs that require the recusal of a judge are rare. They further assert that the exception could be wasteful. An amicus curiae may pay an attorney to write a brief and a court then might strike the brief. The amicus curiae likely would not know the identity of the judges on the appellate panel when filing the brief and would have no options once the court strikes the brief. The Advisory Committee understands these considerations but has concluded that the exception is necessary given the existence of local rules that currently contradict Rule 29. The Committee has no information suggesting the local rules actually have caused any problems.

Second, Judge Jon O. Newman of the U.S. Court of Appeals for the Second Circuit comments that the proposed amendment should not change "amicus-curiae brief" to "amicus brief." He explains: "It's a 'friend of the court brief,' not a 'friend brief.'" The Committee understands the criticism but recommends the change for consistency. Rule 29, as revised in December 2016, now uses the term "amicus-curiae brief" in two instances and the term "amicus brief" in six instances. The Committee believes that changing the two instances of "amicus-curiae brief" to "amicus brief" is the most straightforward solution to this problem.

E. Rule 25—Electronic Filing, Signatures, Service, and Proof of Service

In August 2016, the Standing Committee published proposed amendments to Appellate Rule 25. The proposed amendment to subdivision (a)(2)(B)(i) addresses electronic filing by

⁵ The proposal published for public comment did not include the amendments to this subdivision because the subdivision did not go into effect until December 2016.

Excerpt from the Report of the Advisory Committee on Appellate Rules

Report to the Standing Committee
 Advisory Committee on Appellate Rules
 May 22, 2017 (revised March 14, 2018)

Page 11

generally requiring a person represented by counsel to file papers electronically. This provision, however, allows everyone else to file papers non-electronically and also provides for exceptions for good cause and by local rule. The proposed amendment to subdivision (a)(2)(B)(iii) addresses electronic signatures. The proposed amendment to subdivision (c)(2) addresses electronic service through the court's electronic-filing system or by using other electronic means that the person to be served consented to in writing. The proposed amendment to subdivision (d)(1) requires proof of service of process only for papers that are not served electronically.

After receiving public comments and conferring with the other Advisory Committees, the Appellate Rules Advisory Committee recommends minor revisions of the proposed amendments for three reasons. First, amendments that became effective in December 2016 altered the text of subdivision (a)(2)(C), which addresses inmate filings. This change requires a slight relocation of the proposed amendment as shown below.

Second, public comments criticized the signature provision in the proposed new subdivision (a)(2)(B)(iii). Reporter Ed Cooper of the Civil Rules Advisory Committee has summarized the three primary concerns as follows:

First, [the provision] might be misread to require that the user name and password appear on the signature block. . . . Second, the ever-changing world of security for electronic communications may mean that courts will move toward means of authentication more advanced than user names and logins. . . . Third, concerns were expressed about the means of becoming an attorney of record before, or with, filing the initial complaint.

The Advisory Committee recommends replacing the language published for public comment with a new provision drafted jointly with the other Advisory Committees. This new provision would provide: "An authorized filing made through a person's electronic-filing account, together with the person's name on a signature block, constitutes the person's signature."

Third, a comment regarding punctuation revealed an ambiguity in the clause-structure of the proposed Appellate Rule 25(c)(2). The intent was to indicate two methods of serving a paper, not three or four. But the language is ambiguous because the proposals use the word "by" four times.

The Advisory Committee recommends addressing this ambiguity by separating the two methods of service using "(A)" and "(B)." The revised provision would provide: "Electronic service of a paper may be made (A) by sending it to a registered user by filing it with the court's electronic-filing system or (B) by sending it by other electronic means that the person to be served consented to in writing.

As revised in these three ways, the proposal to amend Rule 25 is now as follows:

Excerpt from the Report of the Advisory Committee on Appellate Rules

Report to the Standing Committee
 Advisory Committee on Appellate Rules
 May 22, 2017 (revised March 14, 2018)

Page 12

1 **Appellate Rule 25. Filing and Service**2 **(a) Filing.**

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

5 **(2) Filing: Method and Timeliness.**6 **(A) Nonelectronic Filing.**

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

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

13 ~~(i)~~ mailed to the clerk by ~~First-Class Mail~~first-class mail, or other
 14 class of mail that is at least as expeditious, postage prepaid; or

15 ~~(ii)~~ dispatched to a third-party commercial carrier for delivery to
 16 the clerk within 3 days.

17 ~~(C)(iii)~~ **Inmate Filing.**⁶ If an institution has a system designed for legal
 18 mail, an inmate confined there must use that system to receive the benefit
 19 of this Rule 25(a)(2)~~(C)~~(A)(iii). A paper ~~filed~~not filed electronically by an
 20 inmate is timely if it is deposited in the institution's internal mail system on
 21 or before the last day for filing and:

⁶ The amendment to subdivision (a)(2)(C) as proposed for public comment said: "A paper filed not filed electronically by an inmate confined in an institution is timely if deposited in the institution's internal mailing 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." The revision reflects the amendment to subdivision (a)(2)(C) that became effective in December 2016.

Excerpt from the Report of the Advisory Committee on Appellate Rules

Report to the Standing Committee
 Advisory Committee on Appellate Rules
 May 22, 2017 (revised March 14, 2018)

Page 13

- 22 (i) it is accompanied by: • a declaration in compliance with 28
 23 U.S.C. § 1746—or a notarized statement—setting out the date of
 24 deposit and stating that first-class postage is being prepaid; or •
 25 evidence (such as a postmark or date stamp) showing that the
 26 paper was so deposited and that postage was prepaid; or
 27 (ii) the court of appeals exercises its discretion to permit the later
 28 filing of a declaration or notarized statement that satisfies Rule
 29 25(a)(2)(C)(i)(A)(iii).
- 30 ~~(D) **Electronic filing.** A court of appeals may by local rule permit or~~
 31 ~~require papers to be filed, signed, or verified by electronic means that are~~
 32 ~~consistent with technical standards, if any, that the Judicial Conference of~~
 33 ~~the United States establishes. A local rule may require filing by electronic~~
 34 ~~means only if reasonable exceptions are allowed. A paper filed by~~
 35 ~~electronic means in compliance with a local rule constitutes a written paper~~
 36 ~~for the purpose of applying these rules.~~
- 37 (B) **Electronic Filing and Signing.**
- 38 (i) **By a Represented Person—Required; Exceptions.** A person
 39 represented by an attorney must file electronically, unless nonelectronic
 40 filing is allowed by the court for good cause or is allowed or required by
 41 local rule.
- 42 (ii) **Unrepresented Person—When Allowed or Required.** A person
 43 not represented by an attorney:
- 44 • may file electronically only if allowed by court order or by local
 45 rule; and
- 46 • may be required to file electronically only by court order, or by
 47 a local rule that includes reasonable exceptions.
- 48 (iii) **Signing.** An authorized filing made through a person's
 49 electronic-filing account, together with the person's name on a signature

Excerpt from the Report of the Advisory Committee on Appellate Rules

Report to the Standing Committee
Advisory Committee on Appellate Rules
May 22, 2017 (revised March 14, 2018)

Page 14

- 50 block, constitutes the person's signature.⁷
- 51 (iv) Same as Written Paper. A paper filed electronically is a written
- 52 paper for purposes of these rules.
- 53 (3) **Filing a Motion with a Judge.** If a motion requests relief that may be
- 54 granted by a single judge, the judge may permit the motion to be filed with the
- 55 judge; the judge must note the filing date on the motion and give it to the clerk.
- 56 (4) **Clerk's Refusal of Documents.** The clerk must not refuse to accept for
- 57 filing any paper presented for that purpose solely because it is not presented
- 58 in proper form as required by these rules or by any local rule or practice.
- 59 (5) **Privacy Protection.** An appeal in a case whose privacy protection was
- 60 governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of
- 61 Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed
- 62 by the same rule on appeal. In all other proceedings, privacy protection is
- 63 governed by Federal Rule of Civil Procedure 5.2, except that Federal Rule of
- 64 Criminal Procedure 49.1 governs when an extraordinary writ is sought in a
- 65 criminal case.
- 66 (b) **Service of All Papers Required.** Unless a rule requires service by the
- 67 clerk, a party must, at or before the time of filing a paper, serve a copy on the
- 68 other parties to the appeal or review. Service on a party represented by counsel
- 69 must be made on the party's counsel.
- 70 (c) **Manner of Service.**
- 71 (1) **Service** Nonelectronic service may be any of the following:
- 72 (A) personal, including delivery to a responsible person at the office of
- 73 counsel;
- 74 (B) by mail; or

⁷ The proposed amendment published for public comment said: "The user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature."

Excerpt from the Report of the Advisory Committee on Appellate Rules

Report to the Standing Committee
Advisory Committee on Appellate Rules
May 22, 2017 (revised March 14, 2018)

Page 15

75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99

(C) by third-party commercial carrier for delivery within 3 days; ~~or,~~
(D) by electronic means, if the party being served consents in writing.
(2) ~~If authorized by local rule, a party may use the court's transmission equipment to make electronic service under Rule 25(c)(1)(D)~~ Electronic service of a paper may be made (A) by sending it to a registered user by filing it with the court's electronic-filing system or (B) by sending it by other electronic means that the person to be served consented to in writing.⁸
(3) When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, service on a partyperson must be by a manner at least as expeditious as the manner used to file the paper with the court.
(4) Service by mail or by commercial carrier is complete on mailing or delivery to the carrier. Service by electronic means is complete on ~~transmission~~ filing or sending, unless the partyperson making service is notified that the paper was not received by the partyperson served.
(d) Proof of Service.

* * * * *

⁸ The proposed amendment published for public comment said: "Electronic service may be made by sending a paper to a registered user by filing it with the court's electronic-filing system or by using other electronic means that the person consented to in writing."

Excerpt from the Report of the Advisory Committee on Appellate Rules

Report to the Standing Committee
 Advisory Committee on Appellate Rules
 May 22, 2017 (revised March 14, 2018)

Page 16

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

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

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

107 **Committee Note**

108 The amendments conform Rule 25 to the amendments to Federal Rule of Civil
 109 Procedure 5 on electronic filing, and signature. They establish, in Rule 25(a)(2)
 110 (B), a new national rule that generally makes electronic filing mandatory. The rule
 111 recognizes exceptions for persons proceeding without an attorney, exceptions for
 112 good cause, and variations established by local rule. The amendments establish
 113 national rules regarding the methods of signing and serving electronic documents
 114 in Rule 25(a)(2)(B)(iii) and 25(c)(2).
 115
 116

The Advisory Committee received public comments that criticized the published version of Rule 25(a)(2)(B)(ii), which concerns filing by unrepresented parties. These comments argued that unrepresented parties generally should have the right to file electronically, which is much less expensive than filing non-electronically. The Advisory Committee considered these arguments at its October 2016 and Spring 2017 meetings but decided not to change the proposed amendment. The Advisory Committee remains concerned about possible difficulties that unrepresented parties might have in using electronic filing and about the difficulty of holding them accountable for abusing the filing system.

One public comment recommended adding a provision to Rule 25 that is similar to Criminal Rule 49(d), which addresses filings by non-parties. The Advisory Committee decided that this proposal went beyond the scope of the amendments to Rule 25 published for public comment. The Committee will study the proposal as a new matter.

F. Rule 41—Stays of the mandate

In August 2016, the Standing Committee published proposed amendments to

Excerpt from the Report of the Advisory Committee on Appellate Rules

Report to the Standing Committee
 Advisory Committee on Appellate Rules
 May 22, 2017 (revised March 14, 2018)

Page 17

Appellate Rule 41, which concerns the content, issuance, effective date, and stays of the mandate. The Standing Committee received five public comments about the proposed amendments to Rule 41. In light of these comments, the Advisory Committee recommends two revisions.

First, the Advisory Committee recommends revising subdivision (b) by deleting the previously proposed sentence: “The court may extend the time only in extraordinary circumstances or under Rule 41(d).” Comments submitted by Judge Jon O. Newman and Chief Judge Robert A. Katzmann of the U.S. Court of Appeals for the Second Circuit argue that the sentence is problematic because courts might wish to extend the time for good cause even if exceptional circumstances do not exist. For example, a court might wish to poll members about rehearing a case en banc. The Advisory Committee agrees with these comments. The Advisory Committee believes that the new requirement that a court can extend a stay only “by order” provides sufficient protection against improper extensions.

Second, the Advisory Committee recommends revising subdivision (d)(2)(B), which will become subdivision (d)(2) under the proposed amendment. The National Association of Criminal Defense Lawyers (NACDL) has argued that the proposed amendments do not address a gap in the current rules. The comment explains: “Where a Justice [of the Supreme Court] has deemed an extension of the certiorari period to be appropriate, it should not be necessary also to move the Court of Appeals for an extension of the stay of mandate. Rather, the stay should automatically continue for the same period for which the time to file a timely cert. petition has been extended.” The Advisory Committee agrees with this suggestion and has added new clause in subdivision (d)(2) that will extend a stay automatically if a Justice of the Supreme Court extends the time for filing a petition for certiorari.

As revised in these two ways, the proposal to amend Rule 41 is now as follows:

- 1 **Rule 41. Mandate: Contents; Issuance and Effective Date; Stay**
 2 (a) **Contents.** Unless the court directs that a formal mandate issue, the mandate
 3 consists of a certified copy of the judgment, a copy of the court’s opinion, if any, and
 4 any direction about costs.
 5 (b) **When Issued.** The court’s mandate must issue 7 days after the time to file a
 6 petition for rehearing expires, or 7 days after entry of an order denying a timely
 7 petition for panel rehearing, petition for rehearing en banc, or motion for stay of

Excerpt from the Report of the Advisory Committee on Appellate Rules

Report to the Standing Committee
 Advisory Committee on Appellate Rules
 May 22, 2017 (revised March 14, 2018)

Page 18

- 8 mandate, whichever is later. The court may shorten or extend the time by order.⁹
- 9 (c) **Effective Date.** The mandate is effective when issued.
- 10 (d) **Staying the Mandate Pending a Petition for Certiorari.**
- 11 ~~(1) On Petition for Rehearing or Motion.~~ The timely filing of a petition
 12 for panel rehearing, petition for rehearing en banc, or motion for stay of
 13 mandate, stays the mandate until disposition of the petition or motion, unless
 14 the court orders otherwise.
- 15 ~~(2) Pending Petition for Certiorari.~~
- 16 ~~(A) (1)~~ A party may move to stay the mandate pending the filing of a
 17 petition for a writ of certiorari in the Supreme Court. The motion must be
 18 served on all parties and must show that the certiorari petition would present
 19 a substantial question and that there is good cause for a stay.
- 20 ~~(B) (2)~~ The stay must not exceed 90 days, unless
- 21 (i) the period is extended for good cause;
- 22 (ii) the period for filing a timely petition is extended, in which case the
 23 stay will continue for the extended period,¹⁰ or
- 24 (iii) ~~unless~~ the party who obtained the stay files a petition for the writ
 25 and so notifies the circuit clerk in writing within the period of the stay. ~~In~~
 26 ~~that case, in which case~~ the stay continues until the Supreme Court's final
 27 disposition.
- 28 ~~(C) (3)~~ The court may require a bond or other security as a condition to
 29 granting or continuing a stay of the mandate.
- 30 ~~(D) (4)~~ The court of appeals must issue the mandate immediately on

⁹ The amendment published for public comment contained this additional sentence: "The court may extend the time only in extraordinary circumstances or under Rule 41(d)."

¹⁰ This clause is new. It was not part of the proposed amendments published for public comment.

Excerpt from the Report of the Advisory Committee on Appellate Rules

Report to the Standing Committee
 Advisory Committee on Appellate Rules
 May 22, 2017 (revised March 14, 2018)

Page 19

31 receiving when a copy of a Supreme Court order denying the petition for writ
 32 of certiorari is filed, unless extraordinary circumstances exist.

Committee Note

33
 34 **Subdivision (b).**¹¹ Subdivision (b) is revised to clarify that an order is required
 35 for a stay of the mandate and to specify the standard for such stays.

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

49 **Subdivision (d).** Two changes are made in subdivision (d).

50 Subdivision (d)(1)—which formerly addressed stays of the mandate upon the
 51 timely filing of a motion to stay the mandate or a petition for panel or en banc
 52 rehearing—has been deleted and the rest of subdivision (d) has been renumbered
 53 accordingly. In instances where such a petition or motion is timely filed, subdivision
 54 (b) sets the presumptive date for issuance of the mandate at 7 days after entry of an
 55 order denying the petition or motion. Thus, it seems redundant to state (as

¹¹ This portion of the Committee Note has been revised to remove discussion of the formerly proposed sentence allowing a court to delay issuance of the mandate only in exceptional circumstances.

Excerpt from the Report of the Advisory Committee on Appellate Rules

Report to the Standing Committee
 Advisory Committee on Appellate Rules
 May 22, 2017 (revised March 14, 2018)

Page 20

56 subdivision (d)(1) did) that timely filing of such a petition or motion stays the
 57 mandate until disposition of the petition or motion. The deletion of subdivision
 58 (d)(1) is intended to streamline the Rule; no substantive change is intended.

59 Subdivision (d)(4)—i.e., former subdivision (d)(2)(D)—is amended to specify
 60 that a mandate stayed pending a petition for certiorari must issue immediately once
 61 the court of appeals receives a copy of the Supreme Court’s order denying certiorari,
 62 unless the court of appeals finds that extraordinary circumstances justify a further
 63 stay. Without deciding whether the prior version of Rule 41 provided authority for
 64 a further stay of the mandate after denial of certiorari, the Supreme Court ruled that
 65 any such authority could be exercised only in “extraordinary circumstances.” *Ryan*
 66 *v. Schad*, 133 S. Ct. 2548, 2551 (2013) (per curiam). The amendment to subdivision
 67 (d)(4) makes explicit that the court may stay the mandate after the denial of
 68 certiorari, and also makes explicit that such a stay is permissible only in
 69 extraordinary circumstances. Such a stay cannot occur through mere inaction but
 70 rather requires an order.

71 The reference in prior subdivision (d)(2)(D) to the *filing* of a copy of the Supreme
 72 Court’s order is replaced by a reference to the court of appeals’ *receipt* of a copy of
 73 the Supreme Court’s order. The filing of the copy and its receipt by the court of
 74 appeals amount to the same thing (*cf.* Rule 25(a)(2), setting a general rule that “filing
 75 is not timely unless the clerk receives the papers within the time fixed for filing”),
 76 but “upon receiving a copy” is more specific and, hence, clearer.

77 Under subdivision (d)(2)(ii), if the court of appeals issues a stay of the mandate
 78 for a party to file a petition for certiorari, and a Justice of the Supreme Court
 79 subsequently extends the time for filing the petition, the stay automatically continues

Excerpt from the Report of the Advisory Committee on Appellate Rules

Report to the Standing Committee
Advisory Committee on Appellate Rules
May 22, 2017 (revised March 14, 2018)

Page 21

80 for the extended period.¹²

¹² This sentence is new. It was not included Committee Note published for public comment in August 2016.

