# 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, 2018

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## I. Introduction

The Advisory Committee on the Appellate Rules met on Friday, April 6, 2018, in Philadelphia, Pennsylvania. It approved proposed amendments falling into four categories.

First, it approved proposed amendments previously published for comment for which it seeks final approval. These proposed amendments, discussed in Part II of this report, relate to (1) electronic service (Rules 3 and 13) and (2) disclosure statements (Rules 26.1, 28, and 32).

Second, it approved a proposed amendment that had previously been submitted to the Supreme Court but withdrawn for revision and for which it now seeks final approval. This proposed amendment, discussed in Part III of this report, relates to proof of service (Rule 25(d)).

Third, it approved proposed amendments, not previously published for comment, that it views as conforming and technical amendments for which it seeks final approval. These proposed amendments, discussed in Part IV of this report, relate to proof of service (Rules 5, 21, 26, 32, and 39).

Fourth, it approved proposed amendments for which it seeks approval for publication. These proposed amendments, discussed in Part V of this report, relate to length limits applicable to responses to petitions for rehearing (Rules 35 and 40).

The Committee also considered several other items, removing three of them from its agenda. These items are discussed in Part VI of this report.

## II. Action Item for Final Approval After Public Comment

The Committee seeks final approval for proposed amendments to Rules 3, 13, 26.1, 28, and 32. These amendments were published for public comment in August 2017.

The proposed amendments to Rules 3 and 13—both of which deal with the notice of appeal—are designed to reflect the move to electronic service. Rule 3 currently requires the district court clerk to serve notice of the filing of the notice of appeal by mail to counsel in all cases, and by mail or personal service on a criminal defendant. The proposed amendment changes the words "mailing" and "mails" to "sending" and "sends," and deletes language requiring certain forms of service. Rule 13 currently requires that a notice of appeal from the Tax Court be filed at the clerk's office or mailed to the clerk. The proposed amendment allows the appellant to send a notice of appeal by means other than mail.

There were no public comments on the proposed amendments to Rules 3 and 13, and the Committee seeks final approval for them as published.

**Rule 3. Appeal as of Right—How Taken**

* * * * *

**(d) Serving the Notice of Appeal.**

(1) The district clerk must serve notice of the filing of a notice of appeal by ~~mailing~~sending a copy to each party's counsel of record—excluding the appellant's—or, if a party is proceeding pro se, to the party's last known address. When a defendant in a criminal case appeals, the clerk must also serve a copy of the notice of appeal on the defendant~~, either by personal service or by mail addressed to the defendant~~. The clerk must promptly send a copy of the notice of appeal and of the docket entries—and any later docket entries—to the clerk of the court of appeals named in the notice. The district clerk must note, on each copy, the date when the notice of appeal was filed.

(2) If an inmate confined in an institution files a notice of appeal in the manner provided by Rule 4(c), the district clerk must also note the date when the clerk docketed the notice.

(3) The district clerk's failure to serve notice does not affect the validity of the appeal. The clerk must note on the docket the names of the parties to whom the clerk ~~mails~~sends copies, with the date of

~~mailing~~sending. Service is sufficient despite the death of a party or the party's counsel.

* * * * *

**Rule 13. Appeals From the Tax Court**

**(a) Appeal as of Right.**

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(2) **Notice of Appeal; How Filed.** The notice of appeal may be filed either at the Tax Court clerk's office in the District of Columbia or by ~~mail addressed~~sending it to the clerk. If sent by mail the notice is considered filed on the postmark date, subject to § 7502 of the Internal Revenue Code, as amended, and the applicable regulations.

* * * * *

The proposed amendment to Rule 26.1 would change the disclosure requirements designed to help judges decide if they must recuse themselves. The proposed amendments to Rules 28 and 32 would change the term "corporate disclosure statement" to "disclosure statement."

There were no public comments on the proposed amendments to Rules 28 and 32. The Committee seeks final approval for Rule 28 as published and Rule 32 in a slightly-modified form discussed in Part IV, *infra*.

**Rule 28. Briefs**

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

(1) a ~~corporate~~ disclosure statement if required by Rule 26.1;

* * * * *

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

* * * * *

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

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

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

* * * * *

There were four comments, however, regarding the proposed amendment to Rule 26.1. First, the National Association of Criminal Defense Lawyers (NACDL) suggested that language be added to the Committee Note to help deter overuse of the government exception in the proposed subsection (b) dealing with organizational victims in criminal cases. Second, Charles Ivey suggested that language be added to Rule 26.1(c) to reference involuntary bankruptcy proceedings and that petitioning creditors be identified in disclosure statements. Professor Elizabeth Gibson, the reporter to the Bankruptcy Rules Committee, was consulted in response to this comment. Third, journalist John Hawkinson objected that the meaning of the proposed 26.1(d) was not clear from its text, and that reading the Committee Note was required to understand it. Finally, Aderant CompLaw suggested language changes to eliminate any ambiguity about who must file a disclosure statement.

The Committee revised the proposed amendment to Rule 26.1 and accompanying Committee Note, in response to these comments.

The Committee Note was revised to follow more closely the Committee Note for Criminal Rule 12.4 and account for the NACDL comment.

Professor Gibson suggested that no change was needed in response to the Ivey comment, but did suggest that Rule 26.1(c) be revised to address a potential gap in the proposed amendment, and the Committee agreed. In particular, the published proposal required that certain parties "must file a statement that identifies each debtor not named in the caption. If the debtor is a corporation, the statement must" provide particular information. That language was changed to require that certain parties "must file a statement that (1) identifies each debtor not named in the caption and (2) for each debtor in the bankruptcy case that is a corporation, discloses the information required by Rule 26.1(a)."

In an effort to clarify the proposed amendment in response to the Hawkinson and Aderant CompuLaw comments, the Committee took what in the published version had been a separate subparagraph 26.1(d) dealing with intervenors and folded it into a new last sentence of 26.1(a). In addition, the phrase "wants to intervene" was changed to "seeks to intervene" in recognition of proposed intervenors who may seek intervention because of a need to protect their interests, but not truly "want" to intervene. Other stylistic changes were made as well.

The Committee seeks final approval for Rule 26.1 as revised.

**Rule 26.1 ~~Corporate~~ Disclosure Statement**

**(a) ~~Who Must File~~Nongovernmental Corporations and Intervenors.** Any nongovernmental ~~corporate~~ corporation that is a party to a proceeding in a court of appeals must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation. The same requirement applies to a nongovernmental corporation that seeks to intervene.

**(b) Organizational Victim in a Criminal Case.** In a criminal case, unless the government shows good cause, it must file a statement that identifies any organizational victim of the alleged criminal activity. If the organizational victim is a corporation, the statement must also disclose the information required by Rule 26.1(a) to the extent it can be obtained through due diligence.

**(c) Bankruptcy Cases.** In a bankruptcy case, the debtor, the trustee, or, if neither is a party, the appellant must file a statement that (1) identifies each debtor not named in the caption and (2) for each debtor in the bankruptcy case that is a corporation, discloses the information required by Rule 26.1(a).

**~~(b)~~(d)Time for Filing; Supplemental Filing.** ~~A party must file the~~The Rule 26.1~~(a)~~ statement must:

(1) be filed with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing~~.~~;

(2) ~~Even if the statement has already been filed, the party's principal brief must include the statement~~ be included before the table of contents~~.~~ in the principal brief; and

(3) ~~A party must supplement its statement~~ be supplemented whenever the information ~~that must be disclosed~~ required under Rule 26.1~~(a)~~ changes.

**~~(c)~~(e)Number of Copies.** If the Rule 26.1~~(a)~~ statement is filed before the principal brief, or if a supplemental statement is filed, ~~the party must file~~ an original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case.

**Committee Note**

These amendments are designed to help judges determine whether they must recuse themselves because of an "interest that could be affected substantially by the outcome of the proceeding." Code of Judicial Conduct, Canon 3(C)(1)(c) (2009).

> Subdivision (a) is amended to encompass nongovernmental corporations that seek to intervene on appeal.
>
> New subdivision (b) corresponds to the disclosure requirement in Criminal Rule 12.4(a)(2). Like Criminal Rule 12.4(a)(2), subdivision (b) requires the government to identify organizational victims to help judges comply with their obligations under the Code of Judicial Conduct. In some cases, there are many organizational victims, but the effect of the crime on each one is relatively small. In such cases, the amendment allows the government to show good cause to be relieved of making the disclosure statements because the organizations' interests could not be "affected substantially by the outcome of the proceedings."
>
> New subdivision (c) requires disclosure of the names of all the debtors in bankruptcy cases, because the names of the debtors are not always included in the caption in appeals. Subdivision (c) also imposes disclosure requirements concerning the ownership of corporate debtors.
>
> Subdivisions (d) and (e) (formerly subdivisions (b) and (c)) apply to all the disclosure requirements in Rule 26.1.

Attachment B1 to this report contains the text of the proposed amendments to Rules 3, 13, 26.1, 28, and 32.

## III. Action Item for Final Approval After Withdrawal and Revision

The Committee seeks final approval for a proposed amendment to Rule 25(d). This proposed amendment had previously been approved by the Standing Committee and submitted to the Supreme Court, but after discussion at the January 2018 meeting was withdrawn for revision with the expectation that a revised version would be presented at the June 2018 meeting.

This proposed amendment to Rule 25(d) is designed to eliminate unnecessary proofs of service in light of electronic filing. A prior version was withdrawn in order to take account of the possibility that a document might be filed electronically but still need to be served other than through the court's electronic filing system on a party (e.g., a pro se litigant) who does not participate in electronic filing. The prior version provided, "A paper presented for filing other than through the court's electronic-filing system must contain either of the following: * * * " As revised, the proposed amendment provides, "A paper presented for filing must contain either of the following if it was served other than through the court's electronic filing system: * * * "

**Rule 25. Filing and Service**

* * * * *

**(d) Proof of Service.**

(1) A paper presented for filing must contain either of the following if it was served other than through the court's electronic filing system:

(A) an acknowledgment of service by the person served; or

(B) proof of service consisting of a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) their mail or electronic addresses, facsimile numbers, or the addresses of the places of delivery, as appropriate for the manner of service.

(2) When a brief or appendix is filed by mailing or dispatch in accordance with [Rule 25(a)(2)(A)(ii)][1], 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.

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Attachment B2 to this report contains the text of the proposed amendment to Rule 25(d).

## IV. Action Item for Final Approval Without Public Comment

Rules 5 (appeals by permission), 21 (extraordinary writs), 26 (computing time), Rule 32 (form of papers), and 39 (costs), all currently contain references to "proof of service." If the proposed amendment to Rule 25(d) is approved, proofs of service will frequently be unnecessary. Accordingly, the Committee seeks final approval of what it views as technical and conforming amendments to these Rules. Some stylistic changes are proposed as well.

These amendments were also discussed at the January 2018 meeting of the Standing Committee, and comments were provided by the style consultants at that meeting, with the expectation that revised versions would be presented at the June 2018 meeting.

Rule 5 would no longer require that a petition for permission to appeal "be filed with the circuit clerk with proof of service." Instead, it would provide that "a party must file a petition with the circuit clerk and serve it on all other parties ***."

[1] An amendment to include this corrected citation has been approved by the Supreme Court.

**Rule 5. Appeal by Permission**

**(a) Petition for Permission to Appeal.**

(1) To request permission to appeal when an appeal is within the court of appeals' discretion, a party must file a petition ~~for permission to appeal. The petition must be filed~~ with the circuit clerk ~~with proof of service~~ and serve it on all other parties to the district-court action.

* * * * *

Similarly, the phrase "proof of service" in Rule 21(a) and (c) would be deleted and replaced with the phrase "serve it on" and "serving it."

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

**(a) Mandamus or Prohibition to a Court: Petition, Filing, Service, and Docketing.**

(1) A party petitioning for a writ of mandamus or prohibition directed to a court must file ~~a~~ the petition with the circuit clerk ~~with proof of service on~~ and serve it on all parties to the proceeding in the trial court. The party must also provide a copy to the trial-court judge. All parties to the proceeding in the trial court other than the petitioner are respondents for all purposes.

* * * * *

**(c) Other Extraordinary Writs.** An application for an extraordinary writ other than one provided for in Rule 21(a) must be made by filing a petition with the circuit clerk with proof of service and serving it on the respondents. Proceedings on the application must conform, so far as is practicable, to the procedures prescribed in Rule 21(a) and (b).

* * * * *

The term "proof of service" would also be deleted from Rule 26(c). Stylistically, the expression of the current rules for when three days are added would be simplified: "When a party may or must act within a specified time after being served, and the paper is not served electronically on the party or delivered to the party on the date stated in the proof of service, 3 days are added after the period would otherwise expire under Rule 26(a)."

**Rule 26. Computing and Extending Time**

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

~~Rule 26(c), a paper that is served electronically is treated as delivered on the date of service stated in the proof of service~~.

* * * * *

Rule 32(f) lists the items that are excluded when computing any length limit. One such item is "the proof of service." To take account of the frequent occasions in which there would be no such proof of service, the article "the" is proposed to be deleted. And given that change, the Committee agreed that it made sense to delete all of the articles in the list of items. If both this proposed amendment and the other proposed amendment to Rule 32 (discussed in Part II above) are approved, the two sets of changes should be merged.

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

* * * * *

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

- ~~the~~ cover page;
- ~~a [corporate]~~[2] disclosure statement;
- ~~a~~ table of contents;
- ~~a~~ table of citations;
- ~~a~~ statement regarding oral argument;
- ~~an~~ addendum containing statutes, rules, or regulations;
- certificate~~s~~ of counsel;
- ~~the~~ signature block;
- ~~the~~ proof of service; and
- any item specifically excluded by these rules or by local rule.

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The phrase "with proof of service" would also be deleted from Rule 39 and replaced with the phrase "and serve ***."

**Rule 39. Costs**

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**(d) Bill of Costs: Objections; Insertion in Mandate.**

(1) A party who wants costs taxed must—within 14 days after entry of judgment—file with the circuit clerk~~, with proof of service,~~ and serve an itemized and verified bill of costs.

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[2] The word "corporate" is proposed to be deleted in another amendment submitted concurrently to the Standing Committee.

Attachment B3 to this report contains the text of the proposed amendments to Rules 5, 21, 26, 32, and 39.

## V. Action Item for Approval for Publication

The Committee seeks approval for publication of proposed amendments to Rules 35 and 40. These amendments would create length limits applicable to responses to petitions for rehearing. Under the existing rules, there are length limits applicable to petitions for rehearing, but none stated for responses to those petitions. While some courts of appeals routinely include a length limit in the order permitting the filing, and experienced practitioners understand that in the absence of such an order the length limits for the petitions themselves apply, the Committee believes that it would be good to have the length limit stated in the rules themselves.

The Committee also observed that Rule 35 (which deals with en banc determinations) uses the term "response," while Rule 40 (which deals with panel rehearing) uses the term "answer." The proposed amendment would change Rule 40 to make it consistent with Rule 35, with both using the term "response."

**Rule 35. En Banc Determination**

* * * * *

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

* * * * *

(2) Except by the court's permission:

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

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

* * * * *

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

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**Rule 40. Petition for Panel Rehearing**

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

* * * * *

(3) **~~Answer~~ Response.** Unless the court requests, no ~~answer~~ response to a petition for panel rehearing is permitted. ~~But o~~ Ordinarily, rehearing will not be granted in the absence of such a request. If a

response is requested, the requirements of Rule 40(b) apply to the response.

* * * * *

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

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

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

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Attachment B4 to this report contains the text of the proposed amendments and the proposed Committee Notes to Rules 35 and 40.

## VI. Information Items

The Committee's consideration of length limits for responses to petitions for rehearing led it to consider a more comprehensive review of Rules 35 and 40, perhaps drawing on the different structure of Rule 21. An appropriate subcommittee has been formed.

A subcommittee has also been formed to consider whether any amendments are appropriate in light of the Supreme Court's decision in *Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13 (2017), which distinguished between the statutory time for appeal (which is jurisdictional) and more stringent time limits in the Federal Rules of Appellate Procedure (which are not jurisdictional). The subcommittee will consider whether it would be appropriate to align the Rule with the statute, correcting for divergence that had occurred over time.

A subcommittee continues to work on Rule 3(c)(1)(B) and the merger rule, focusing on a line of cases in the Eighth Circuit holding that if a notice of appeal specifically mentions some interlocutory orders, in addition to the final judgment, review is limited to the specified orders. Ordinarily, under the merger doctrine, an appeal from a final judgment brings up interlocutory orders supporting that judgment. But under a line of cases in the Eighth Circuit, if a notice of appeal specifically mentions some interlocutory orders, in addition to the final judgment, a negative inference is drawn that other, unmentioned, orders are not being appealed.

A subcommittee also continues to examine Rule 42(b), which provides that a circuit clerk "may" dismiss an appeal on the filing of a stipulation signed by all parties. Some cases, relying on the word "may," hold that the court has discretion to deny the dismissal, particularly if the court fears strategic behavior. The discretion found in Rule 42(b) can make settlement difficult, because the client lacks certainty, and may result in a court improperly issuing an advisory opinion. On the other hand, there may be situations in which judicial approval of settlements is required.

The Committee decided to remove three items from its agenda.

First, a subcommittee had been formed to look into the problem of appendices being too long and including much irrelevant information. But changes in technology, especially with briefs that cite to the electronic record of the district court, will transform how appendices are done and may solve the problem. Therefore, the Committee decided to remove this matter from the agenda, but revisit it in three years.

Second, the Committee considered a proposal, modelled on the Supreme Court rules, to amend Rule 29 to allow parties to file blanket consent to amicus briefs. In light of how few cases in the courts of appeals involve amicus briefs, and the very different amicus practice in the Supreme Court, the Committee decided to take this matter off the agenda.

Third, the Committee had been considering issues involving costs on appeal, and previously asked the Civil Rules Committee for feedback. The Civil Rules Committee asked this Committee to wait to see how the proposed amendment to Fed. R. Civ. P. 23(e)(5) works. Accordingly, the Committee decided to remove the matter from its agenda.

Finally, the Committee considered the recent Supreme Court decision in *Hall v. Hall*, 138 S. Ct. 1118 (2018), which held that cases consolidated under Fed. R. Civ. P. 42(a) retain their separate identities at least to the extent that final decision in one is immediately appealable. While this decision might raise efficiency concerns in the courts of appeals, by permitting separate appeals that deal with the same underlying controversy, and might raise trap-for-the-unwary concerns for parties in consolidated cases who do not appeal when there is a final judgment in one of consolidated cases but instead wait until all of the consolidated cases are resolved, the Committee decided that this matter is appropriately handled by the Civil Rules Committee. The Committee expects to keep an eye on the trap-for-the-unwary concern and may consider whether provisions of the Appellate Rules regarding consolidation of appeals present any similar issues.

A draft of the minutes from the Committee's April 6, 2018 meeting is included at Attachment C.

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# TAB B1

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**Attachment 1**

Proposed Amendments Previously Published for Public Comment

and

Submitted to the Standing Committee for Final Approval

(Rules 3, 13, 26.1, 28, and 32)

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**PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE**[1]

**Rule 3. Appeal as of Right—How Taken**

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**(d) Serving the Notice of Appeal.**

(1) The district clerk must serve notice of the filing of a notice of appeal by ~~mailing~~sending a copy to each party's counsel of record—excluding the appellant's—or, if a party is proceeding pro se, to the party's last known address. When a defendant in a criminal case appeals, the clerk must also serve a copy of the notice of appeal on the defendant~~, either by personal service or by mail addressed to the defendant~~. The clerk must promptly send a copy of the notice of appeal and of the docket entries—and any later docket entries—to the clerk of the court of appeals

[1] New material is underlined in red; matter to be omitted is lined through.

named in the notice. The district clerk must note, on each copy, the date when the notice of appeal was filed.

(2) If an inmate confined in an institution files a notice of appeal in the manner provided by Rule 4(c), the district clerk must also note the date when the clerk docketed the notice.

(3) The district clerk's failure to serve notice does not affect the validity of the appeal. The clerk must note on the docket the names of the parties to whom the clerk ~~mails~~sends copies, with the date of ~~mailing~~sending. Service is sufficient despite the death of a party or the party's counsel.

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**Committee Note**

Amendments to Subdivision (d) change the words "mailing" and "mails" to "sending" and "sends," and delete language requiring certain forms of service, to allow electronic service. Other rules determine when a party or the clerk may or must send a notice electronically or non-electronically.

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**Changes Made After Publication and Comment**

No changes were made after publication and comment.

**Summary of Public Comment**

No comments were submitted.

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**Rule 13. Appeals From the Tax Court**

**(a) Appeal as of Right.**

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(2) **Notice of Appeal; How Filed.** The notice of appeal may be filed either at the Tax Court clerk's office in the District of Columbia or by ~~mail addressed~~sending it to the clerk. If sent by mail the notice is considered filed on the postmark date, subject to § 7502 of the Internal Revenue Code, as amended, and the applicable regulations.

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**Committee Note**

The amendment to subdivision (a)(2) will allow an appellant to send a notice of appeal to the Tax Court clerk by means other than mail. Other rules determine when a party must send a notice electronically or non-electronically.

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**Changes Made After Publication and Comment**

No changes were made after publication and comment.

**Summary of Public Comments**

No comments were submitted.

**Rule 26.1 ~~Corporate~~ Disclosure Statement**

**(a) ~~Who Must File~~Nongovernmental Corporations and Intervenors.** Any nongovernmental ~~corporate~~ corporation that is a party to a proceeding in a court of appeals must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation. The same requirement applies to a nongovernmental corporation that seeks to intervene.

**(b) Organizational Victim in a Criminal Case.** In a criminal case, unless the government shows good cause, it must file a statement that identifies any organizational victim of the alleged criminal activity. If the organizational victim is a corporation, the statement must also disclose the information required

by Rule 26.1(a) to the extent it can be obtained through due diligence.

**(c) Bankruptcy Cases.** In a bankruptcy case, the debtor, the trustee, or, if neither is a party, the appellant must file a statement that (1) identifies each debtor not named in the caption and (2) for each debtor in the bankruptcy case that is a corporation, discloses the information required by Rule 26.1(a).

**~~(b)~~(d)Time for Filing; Supplemental Filing.** ~~A party must file the~~The Rule 26.1~~(a)~~ statement must:

(1) be filed with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing~~.~~;

(2) ~~Even if the statement has already been filed, the party's principal brief must include the statement~~

be included before the table of contents~~.~~ in the principal brief; and

(3) ~~A party must supplement its statement~~be supplemented whenever the information ~~that must be disclosed~~required under Rule 26.1~~(a)~~ changes.

~~(c)~~(e) **Number of Copies.** If the Rule 26.1~~(a)~~ statement is filed before the principal brief, or if a supplemental statement is filed, ~~the party must file~~an original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case.

**Committee Note**

These amendments are designed to help judges determine whether they must recuse themselves because of an "interest that could be affected substantially by the outcome of the proceeding." Code of Judicial Conduct, Canon 3(C)(1)(c) (2009).

Subdivision (a) is amended to encompass nongovernmental corporations that seek to intervene on appeal.

New subdivision (b) corresponds to the disclosure requirement in Criminal Rule 12.4(a)(2). Like Criminal Rule 12.4(a)(2), subdivision (b) requires the government to identify organizational victims to help judges comply with their obligations under the Code of Judicial Conduct. In some cases, there are many organizational victims, but the effect of the crime on each one is relatively small. In such cases, the amendment allows the government to show good cause to be relieved of making the disclosure statements because the organizations' interests could not be "affected substantially by the outcome of the proceedings."

New subdivision (c) requires disclosure of the names of all the debtors in bankruptcy cases, because the names of the debtors are not always included in the caption in appeals. Subdivision (c) also imposes disclosure requirements concerning the ownership of corporate debtors.

Subdivisions (d) and (e) (formerly subdivisions (b) and (c)) apply to all the disclosure requirements in Rule 26.1.

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**Changes Made After Publication and Comment**

- Instead of adding a separate subsection (d) to deal with intervenors, a sentence dealing with intervenors is added to the end of subsection (a) stating that the requirement of subsection (a) applies to a

nongovernmental corporation that seeks to intervene. The title of subsection (a) is changed accordingly, and "corporate party" is changed to "corporation that is a party." The phrase "wants to intervene" is changed to "seeks to intervene."

- The term "bankruptcy proceeding" is changed to "bankruptcy case" in subsection (c). The requirements of identifying debtors not named in the caption and providing information about corporate debtors are separately numbered. A cross-reference to the information required by subsection (a) is added, and the material that repeated the information required in subsection (a) is deleted.
- The timing requirements for filing the disclosure statement are broken out into separately-numbered subsections and the language simplified.
- The Committee Note is reorganized to reflect that the provision dealing with intervenors is no longer in a separate subsection, to include an overview paragraph, and to align with the Committee Note to the proposed 2018 amendment to Criminal Rule 12.4(a)(2).

**Summary of Public Comment**

**Peter Goldberger, National Association of Criminal Defense Lawyers (AP-2017-0002-0007)—**Language be added to the Committee Note to help deter overuse of the "good cause" exception regarding identification of organizational victims.

**Charles Ivey (AP-2017-0002-0005)—**Language should be added to Rule 26.1(c) to reference involuntary bankruptcy proceedings under 11 U.S.C. § 303 and petitioning creditors be identified.

**John Hawkinson, freelance journalist (AP-2017-0002-0008)—**The requirements imposed on an intervenor should be clear from the text of the rule itself without having to read the Committee Notes.

**Ellie Bertwell, Aderant CompuLaw (AP-2017-0002-0006)—** Language should be added to eliminate any ambiguity about who must file a disclosure statement.

**Rule 28. Briefs**

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

(1) a ~~corporate~~disclosure statement if required by Rule 26.1;

* * * * *

**Committee Note**

The phrase "corporate disclosure statement" is changed to "disclosure statement" to reflect the revision of Rule 26.1.

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**Changes Made After Publication and Comment**

No changes were made after publication and comment.

**Summary of Public Comment**

No comments were submitted.

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

* * * * *

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

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

* * * * *

**Committee Note**

The phrase "corporate disclosure statement" is changed to "disclosure statement" to reflect the revision of Rule 26.1.

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**Changes Made After Publication and Comment**

No changes were made after publication and comment.

**Summary of Public Comment**

No comments were submitted.

# TAB B2

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**Attachment 2**

Proposed Amendment Previously Submitted

to the

Supreme Court but Withdrawn for Revision

and

Submitted After Revision

to the

Standing Committee For Final Approval

(Rule 25(d)[*])

[*] This amendment proposed to Rule 25(d) is drafted on the assumption that the proposed amendment to Rule 25(d) promulgated by the Supreme Court in April of 2018, which corrects a citation in Rule 25(d)(2), is not rejected by Congress.

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

**Rule 25. Filing and Service**

* * * * *

**(d) Proof of Service.**

(1) A paper presented for filing must contain either of the following if it was served other than through the court's electronic filing system:

(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

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

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.

* * * * *

**Committee Note**

The amendment conforms Rule 25 to other federal rules regarding proof of service. As amended, subdivision (d) eliminates the requirement of proof of service or acknowledgment of service when filing and service is made through a court's electronic-filing system. The notice of electronic filing generated by the court's system serves that purpose.

[*] An amendment to include this corrected citation has been approved by the Supreme Court.

# TAB B3

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**Attachment 3**

Proposed Conforming and Technical Amendments

Not Previously Published for Public Comment

and

Submitted to the Standing Committee for

Final Approval

(Rules 5, 21, 26, 32*, and 39)

* This amendment proposed to Rule 32 is drafted on the assumption that the other proposed amendment to Rule 32, concurrently being submitted to the Standing Committee, is adopted.

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**PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE**[1]

**Rule 5. Appeal by Permission**

**(a) Petition for Permission to Appeal.**

(1) To request permission to appeal when an appeal is within the court of appeals' discretion, a party must file a petition ~~for permission to appeal. The petition must be filed~~ with the circuit clerk ~~with proof of service~~and serve it on all other parties to the district-court action.

* * * * *

**Committee Note**

Subdivision (a)(1) is amended to delete the reference to "proof of service" to reflect amendments to Rule 25(d) that eliminate the requirement of a proof of service when filing and service are completed using a court's electronic filing system.

[1] New material is underlined in red; matter to be omitted is lined through.

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

**(a) Mandamus or Prohibition to a Court: Petition, Filing, Service, and Docketing.**

(1) A party petitioning for a writ of mandamus or prohibition directed to a court must file ~~a~~the petition with the circuit clerk ~~with proof of service on~~and serve it on all parties to the proceeding in the trial court. The party must also provide a copy to the trial-court judge. All parties to the proceeding in the trial court other than the petitioner are respondents for all purposes.

* * * * *

**(c) Other Extraordinary Writs.** An application for an extraordinary writ other than one provided for in Rule 21(a) must be made by filing a petition with the circuit clerk ~~with proof of service~~and serving it on the

respondents. Proceedings on the application must conform, so far as is practicable, to the procedures prescribed in Rule 21(a) and (b).

* * * * *

**Committee Note**

The term "proof of service" in subdivisions (a)(1) and (c) is deleted to reflect amendments to Rule 25(d) that eliminate the requirement of a proof of service when filing and service are completed using a court's electronic filing system.

**Rule 26. Computing and Extending Time**

* * * * *

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

* * * * *

**Committee Note**

The amendment in subdivision (c) simplifies the expression of the current rules for when three days are added. In addition, the amendment revises the subdivision to conform to the amendments to Rule 25(d).

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

* * * * *

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

- ~~the~~ cover page;
- ~~a [corporate]~~[*] disclosure statement;
- ~~a~~ table of contents;
- ~~a~~ table of citations;
- ~~a~~ statement regarding oral argument;
- ~~an~~ addendum containing statutes, rules, or regulations;
- certificate~~s~~ of counsel;
- ~~the~~ signature block;
- ~~the~~ proof of service; and

[*] The word "corporate" is proposed to be deleted in another amendment submitted concurrently to the Standing Committee.

- any item specifically excluded by these rules or by local rule.

* * * * *

**Committee Note**

The amendment to subdivision (f) does not change the substance of the current rule, but removes the articles before each item because a document will not always include these items.

**Rule 39. Costs**

* * * * *

**(d) Bill of Costs: Objections; Insertion in Mandate.**

(1) A party who wants costs taxed must—within 14 days after entry of judgment—file with the circuit clerk~~, with proof of service,~~ and serve an itemized and verified bill of costs.

* * * * *

**Committee Note**

In subdivision (d)(1) the words "with proof of service" are deleted and replaced with "and serve" to conform with amendments to Rule 25(d) regarding when proof of service or acknowledgement of service is required for filed papers.

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# TAB B4

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**PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE**[1]

**Rule 35. En Banc Determination**

* * * * *

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

* * * * *

(2) Except by the court's permission:

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

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

* * * * *

[1] New material is underlined in red; matter to be omitted is lined through.

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

* * * * *

**Committee Note**

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

**Rule 40. Petition for Panel Rehearing**

* * * * *

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

* * * * *

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

* * * * *

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

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

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

* * * * *

**Committee Note**

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

# TAB 2C

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| FRAP Item | Proposal | Source | Current Status |
|---|---|---|---|
| 11-AP-B | Consider amending FRAP Form 4's directive concerning institutional-account statements for IFP applicants | Peter Goldberger, Esq., on behalf of the National Association of Criminal Defense Lawyers (NACDL) | Discussed and retained on agenda 09/12 Discussed and retained on agenda 10/15<br>Draft approved 04/16 for submission to Standing Committee<br>Approved for publication by Standing Committee 06/16<br>Draft approved 05/17 for resubmission to Standing Committee following public comments<br>Revised draft approved by the Standing Committee 06/17<br>Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17<br>Approved by the Supreme Court 5/18 |
| 12-AP-D | Consider the treatment of appeal bonds under Civil Rule 62 and Appellate Rule 8 | Kevin C. Newsom, Esq. | Discussed and retained on agenda 09/12<br>Discussed and retained on agenda 04/15<br>Discussed and retained on agenda 10/15<br>Draft approved 04/16 for submission to Standing Committee<br>Approved for publication by Standing Committee 06/16<br>Revised draft approved 05/17 for resubmission to Standing Committee following public comments<br>Revised draft approved by the Standing Committee 06/17<br>Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17<br>Approved by the Supreme Court 5/18 |
| 13-AP-H | Consider possible amendments to FRAP 41 in light of *Bell v. Thompson*, 545 U.S. 794 (2005), and *Ryan v. Schad*, 133 S. Ct. 2548 (2013) | Hon. Steven M. Colloton | Discussed and retained on agenda 04/14<br>Discussed and retained on agenda 10/14<br>Discussed and retained on agenda 04/15<br>Draft approved 10/15 for submission to Standing Committee<br>Approved for publication by Standing Committee 01/16<br>Revised draft approved 05/17 for resubmission to Standing Committee following public comments<br>Revised draft approved by the Standing Committee 06/17<br>Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17<br>Approved by the Supreme Court 5/18 |

| FRAP Item | Proposal | Source | Current Status |
|---|---|---|---|
| 14-AP-D | Consider possible changes to Rule 29's authorization of amicus filings based on party consent | Standing Committee | Draft approved 10/15 for submission to Standing Committee<br>Discussed by Standing Committee 1/16 but not approved<br>Draft approved 04/16 for submission to Standing Committee<br>Approved for publication by Standing Committee 06/16<br>Revised draft approved 05/17 for resubmission to Standing Committee following public comments<br>Revised draft approved by the Standing Committee 06/17<br>Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17<br>Approved by the Supreme Court 5/18 |
| 15-AP-A/H | Consider adopting rule presumptively permitting pro se litigants to use CM/ECF | Robert M. Miller, Ph.D. | Discussed and retained on agenda 10/15<br>Draft approved 04/16 for submission to Standing Committee<br>Approved for publication by Standing Committee 06/16<br>Revised draft approved 05/17 for resubmission to Standing Committee following public comments<br>Revised draft approved by the Standing Committee 06/17<br>Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17<br>Approved by the Supreme Court 5/18 |
| 15-AP-C | Consider amendment to Rule 31(a)(1)'s deadline for reply briefs | Appellate Rules Committee | Draft approved 10/15 for submission to Standing Committee<br>Approved for publication by Standing Committee 01/16<br>Draft approved 05/17 for resubmission to Standing Committee following public comments<br>Revised draft approved by the Standing Committee 06/17<br>Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17<br>Approved by the Supreme Court 5/18 |

| FRAP Item | Proposal | Source | Current Status |
|---|---|---|---|
| 15-AP-E | Amend the FRAP (and other sets of rules) to address concerns relating to social security numbers; sealing of affidavits on motions under 28 U.S.C. § 1915 or 18 U.S.C. § 3006A; provision of authorities to pro se litigants; and electronic filing by pro se litigants | Sai | Discussed and retained on agenda 10/15<br>Partially removed from Agenda and draft approved for submission to Standing Committee 4/16<br>Approved for publication by Standing Committee 06/16<br>Revised draft approved 05/17 for resubmission to Standing Committee following public comments<br>Revised draft approved by the Standing Committee 06/17<br>Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17<br>Approved by the Supreme Court 5/18 |
| | | | |
| 08-AP-A | Amend FRAP 3(d) concerning service of notices of appeal | Hon. Mark R. Kravitz | Discussed and retained on agenda 11/08<br>Discussed and retained on agenda 10/15<br>Discussed and retained on agenda 04/16<br>Discussed and retained on agenda 10/16<br>Draft approved for submission to Standing Committee 05/17<br>Draft approved for publication by Standing Committee 06/17<br>Draft published for public comment 08/17<br>Final approval for submission to Standing Committee 4/18 |
| 08-AP-R | Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c) | Hon. Frank H. Easterbrook | Discussed and retained on agenda 04/09<br>Discussed and retained on agenda 04/14<br>Discussed and retained on agenda 10/14<br>Discussed and retained on agenda 04/15<br>Discussed and retained on agenda 10/15<br>Discussed and retained on agenda 04/16<br>Discussed and retained on agenda 10/16<br>Discussed and retained on agenda 10/16<br>Draft approved for submission to Standing Committee 05/17<br>Draft approved for publication by Standing Committee 06/17<br>Draft published for public comment 08/17<br>Final approval for submission to Standing Committee 4/18 |

| FRAP Item | Proposal | Source | Current Status |
|---|---|---|---|
| 11- AP-C | Amend FRAP 3(d)(1) to take account of electronic filing | Harvey D. Ellis, Jr., Esq. | Discussed and retained on agenda 04/13<br>Discussed and retained on agenda 10/15<br>Discussed and retained on agenda 04/16<br>Discussed and retained on agenda 10/16<br>Discussed and retained on agenda 10/16<br>Draft approved for submission to Standing Committee 05/17<br>Draft approved for publication by Standing Committee 06/17<br>Draft published for public comment 08/17<br>Final approval for submission to Standing Committee 4/18 |
| 11-AP-D | Consider changes to FRAP in light of CM/ECF | Hon. Jeffrey S. Sutton | Discussed and retained on agenda 10/11<br>Discussed and retained on agenda 09/12<br>Discussed and retained on agenda 04/13<br>Discussed and retained on agenda 04/14<br>Discussed and retained on agenda 10/14<br>Discussed and retained on agenda 04/15<br>Discussed and retained on agenda 10/15<br>Draft approved 04/16 for submission to Standing Committee<br>Approved for publication by Standing Committee 06/16<br>Revised draft approved 05/17 for resubmission to Standing Committee following public comments<br>Revised draft approved by the Standing Committee 06/17<br>Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17<br>Post Standing Committee 1/18, Rule 25(d)(1) amendment removed from Supreme Court package for reconsideration in spring 2018<br>Final approval of subsection (d)(1) for submission to Standing Committee 4/18 |
| 15-AP-D | Amend FRAP 3(a)(1) (copies of notice of appeal) and 3(d)(1) (service of notice of appeal) | Paul Ramshaw, Esq. | Discussed and retained on agenda 10/15<br>Discussed and retained on agenda 04/16<br>Discussed and retained on agenda 10/16<br>Draft approved 05/17 for submission to Standing Committee<br>Draft approved for submission to Standing Committee 05/17<br>Draft approved for publication by Standing Committee 06/17<br>Draft published for public comment 08/17<br>Final approval for submission to Standing Committee 4/18 |
| | | | |

| FRAP Item | Proposal | Source | Current Status |
|---|---|---|---|
| 18-AP-B | Rules 35 and 40 – regarding length of responses to petitions for rehearing | Department of Justice | Discussed at 4/18 meeting.<br>Proposed draft for publication approved for submission to Standing Committee 4/18. |
| | | | |
| 16-AP-D | Rule 3(c)(1)(B) and the Merger Rule | Neal Katyal | Discussed at 11/17 meeting and a subcommittee formed to consider issue.<br>Discussed at 4/18 meeting, and continued review. |
| 17-AP-G | Rule 42(b)–discretionary "may" dismissal of appeal on consent of all parties | Christopher Landau | Discussed at 11/17 meeting and a subcommittee was formed to review.<br>Discussed at 4/18 meeting and continued review. |
| 18-AP-A | Rules 35 and 40 – Comprehensive review | Department of Justice | Discussed at 4/18 meeting. Subcommittee formed. |
| | | | |
| 17-AP-F | Rule 29 – letters of blanket consent | Stephen E. Sachs | Discussed at 4/18 meeting and removed from agenda. |
| Costs on appeal suggestion | Whether Rule 7 needs to be amended to deal with whether attorneys' fees are included in costs on appeal. | Committee | Discussed at 11/17 meeting. Referred to the Civil Rules Committee. Note this issue was previously discussed at the 10/16 meeting.<br>Discussed at 4/18 meeting and removed from agenda. |
| Review of rules regarding appendices | New business from 11/17 meeting | Committee | Discussed at 11/17 meeting and a subcommittee was formed to review.<br>Discussed at 4/18 meeting and removed from agenda.<br>Will reconsider in three years. |

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# TAB 2D

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Minutes of the Spring 2018 Meeting of the

Advisory Committee on the Appellate Rules

April 6, 2018

Philadelphia, Pennsylvania

Judge Michael A. Chagares, Chair, Advisory Committee on the Appellate Rules, called the meeting of the Advisory Committee on the Appellate Rules to order on Friday, April 6, 2018, at approximately 9:00 a.m., at the James A. Byrne United States Courthouse in Philadelphia, Pennsylvania.

In addition to Judge Chagares, the following members of the Advisory Committee on the Appellate Rules were present: Judge Jay S. Bybee, Justice Judith L. French, Judge Brett M. Kavanaugh, Christopher Landau, Judge Stephen Joseph Murphy III, Professor Stephen E. Sachs, and Danielle Spinelli. Solicitor General Noel Francisco was represented by H. Thomas Byron III.

Also present were Judge David G. Campbell, Chair, Standing Committee on the Rules of Practice and Procedure; Professor Daniel R. Coquillette, Reporter, Standing Committee on the Rules of Practice and Procedure; Shelly Cox, Administrative Specialist, Rules Committee Support Office of the Administrative Office of the U.S. Courts (RCSO); Patricia S. Dodszuweit, Clerk of Court Representative, Advisory Committee on the Appellate Rules; Professor Edward A. Hartnett, Reporter, Advisory Committee on the Appellate Rules; Bridget M. Healy, Attorney Advisor, RCSO; Marie Leary, Research Associate, Advisory Committee on the Appellate Rules; Professor Catherine T. Struve, Associate Reporter, Standing Committee on the Rules of Practice and Procedure; Patrick Tighe, Rules Law Clerk, RCSO; Rebecca A. Womeldorf, Secretary, Standing Committee on the Rules of Practice and Procedure and Rules Committee Officer.

Judge Pamela Pepper, Member, Advisory Committee on the Bankruptcy Rules and Liaison Member, Advisory Committee on the Appellate Rules, participated in part of the meeting by telephone.

## I. Introduction

Judge Chagares opened the meeting and greeted everyone. He introduced Edward Hartnett, the new Reporter, and Patricia S. Dodszuweit, the former chief deputy clerk and now the Clerk of United States Court of Appeals for the Third Circuit and Clerk of Court Representative. He thanked Bridget Healy, Shelly Cox, and Rebecca Womeldorf for organizing the meeting. He then briefly reminded everyone of the rule making process under the Rules Enabling Act, and noted that

the only amendment to the Federal Rules of Appellate Procedure that took effect on December 1, 2017, was an amendment to FRAP 4(a)(4)(B) that restored subsection (iii).

## II. Approval of the Minutes

The draft minutes of the November 8, 2017, Advisory Committee meeting were corrected to reflect that Kevin Newsome was appointed to the United States Court of Appeals for the Eleventh Circuit, and approved as amended.

## III. Discussion Items

### A. Proposed Amendments to Rules 3, 13, 26.1, 28, and 32, Published for Public Comment in August 2017, Particularly Proposal to Amend Rule 26.1 to Provide More Information Relevant to Recusal (08-AP-A; 08-AP-R; 11-AP-C)

Judge Chagares noted that there were no public comments on the proposed amendments to Rules 3, 13, 28, and 32, and no member of the Committee had any objection to them. He then opened discussion of the proposed amendment of Rule 26.1, dealing with disclosures designed to help judges decide if they must recuse themselves. This proposed amendment had been published for public comment, and was being considered in light of those comments.

Before turning to the particular proposals, an attorney member asked whether information about third-party funding of litigation showed up anywhere to inform recusal decisions. Judge Campbell noted that this issue was under active consideration by the Civil Rules Committee. Mr. Coquillette noted that the issue was also under consideration by state legislatures and bar associations. Those who oppose requiring disclosure observe that judges would not invest in third-party litigation funders, but a judge member pointed out that their relatives might.

Judge Chagares then turned to 26.1, noting that the version before the Committee had been revised in light of the comments and the input of Ms. Struve and the style consultants. In particular, the published version had a separate subparagraph 26.1(d) dealing with intervenors; for clarity that was folded into a new last sentence of 26.1(a).

Judge Chagares identified a glitch in the version of 26.1(a) in the agenda book (page 125). It refers to any "nongovernmental corporation to a proceeding." The glitch could be fixed by adding the word "party," so that it would read "nongovernmental corporate party to a proceeding." Judge Campbell noted that it

could also be fixed by adding the phrase "that is a party," so that it would read "nongovernmental corporation that is a party to a proceeding." The Committee was content with either phrasing, leaving the matter to coordination with the Committee on Bankruptcy Rules.

An attorney member questioned whether the word "proceeding" should be changed to "case," for consistency with Rule 26.1(c). Judge Pepper stated that the Bankruptcy Committee wanted to be sure that the 26.1(c) provision dealing with bankruptcy refer to "case" rather than "proceeding," but that "proceeding" was appropriate for 26.1(a), because there may be proceedings in the courts of appeals that are not cases. Judge Campbell advocated not changing things that don't need changing, and the Committee decided to leave the word "proceeding."

An academic member observed that a proposed intervenor may seek intervention because of a need to protect its interests, but not truly "want" to intervene, and therefore suggested changing the word "wants" to "seeks" in the final sentence of 26.1(a). The Committee agreed, so that the final sentence would read, "The same requirement applied to a nongovernmental corporation that seeks to intervene."

Turning to 26.1(b), dealing with organizational victims in criminal cases, Judge Chagares noted that the only proposed change from the published version was stylistic. Rule 26.1(c), dealing with bankruptcy cases, had a stylistic change from the published version that replaced redundant language with a cross-reference to 26.1(a). In keeping with the wishes of the Bankruptcy Committee, "proceeding" in this subsection was changed to "case," to avoid confusion with the term "adversary proceeding" in bankruptcy cases.

The reporter pointed out that the phrasing of the version of 26.1(d) before the Committee was problematic in that 26.1(d)(3) provided that the "statement must . . . supplement the statement," and suggested it be changed to the "statement must . . . be supplemented." An attorney member noted that a 26.1(d)(2) had a similar problem, in that it provided that the "statement must . . . include the statement," and suggested that it be changed to the "statement must . . . be included."

Turning to the Committee Note, a judge member asked if the word "mainly" was needed, and another judge member suggested striking it. An attorney member pointed to the need to restore the word "of" to the phrase "disclosure of the names of all the debtors." Another attorney member suggested that the phrase "the names of the debtors" should be restored, because the pronoun "they" might be read to refer to "bankruptcy cases," rather than the intendent referent "the names of the debtors." Invoking the rule of the last antecedent, a judge member agreed.

As so amended, the Committee agreed to forward the proposed amendment to Rule 26.1 to the Standing Committee.

**B. Proposal to Amend Rule 25(d) to Eliminate Unnecessary Proofs of Service in Light of Electronic Filing (and Technical Conforming Amendments to Rules 5, 21, 26, 32, and 39) (11-AP-D)**

Judge Chagares explained that this proposal was designed to eliminate unnecessary proofs of service in light of electronic filing. A prior version of this amendment to Rule 25(d) was approved by the Standing Committee and sent to the Supreme Court, but withdrawn in order to take account of the possibility that a document might be filed electronically but still need to be served other than through the court's electronic filing system on a party (e.g., a pro se litigant) who does not participate in electronic filing. The version before the Committee (page 137 of the agenda book) is designed to be consistent with other Rules. It requires that a paper presented for filing must have an acknowledgement or proof of service "if it was served other than through the court's electronic filing system." In response to a question from Judge Campbell, it was confirmed that this version is consistent with the Bankruptcy Rule.

The Committee had no concern with conforming amendments to Rules 5, 21, 39 eliminating references to "proof of service." Judge Campbell raised a concern about the conforming amendment to Rule 26, asking whether the three-day rule should apply to all papers served electronically or only those served through the court's electronic filing system, given that a party might not serve until several days after filing. After several members of the Committee observed that the clock under Rule 26(c) starts upon service, not filing, the Committee agreed that there was no need to change the version of Rule 26(c) as proposed on page 155 of the agenda book. At the suggestion of an academic member of the Committee, the last clause of the Committee Note—which refers to a court's electronic filing system—was deleted.

The Committee approved the elimination of the articles from the list of items in Rule 32(f), and also eliminated the first sentence of the Committee Note referring to proof of service.

Judge Chagares confirmed that the prior reporter had done a global search for "proof of service," so that these are the only needed conforming amendments.

The Committee agreed that these were technical amendments, so that, in its view, there was no need for further public comment.

**C. Rule 3(c)(1)(B) and the Merger Rule (16-AP-D)**

Professor Sachs reported on behalf of the subcommittee formed to study the designation of the judgment or order appealed from in a notice of appeal. Under the merger doctrine, an appeal from a final judgment brings up interlocutory orders supporting that judgment. But there is a line of cases in the Eighth Circuit holding that if a notice of appeal specifically mentions some interlocutory orders, in addition to the final judgment, review is limited to the specified orders. That is, a negative inference is drawn that other, unmentioned, orders are not being appealed.

The subcommittee's work led it to other adjacent issues, including the proper handling of a notice of appeal when the district court did not enter a separate judgment. The subcommittee sought to get a sense of the Committee as to the extent of the problem, and whether the focus should be on the narrow issue that prompted the agenda item or on these broader issues.

Professor Struve pointed out that there is a great deal of confusion in this area, including the proper handling of appeals from post-judgment orders where the party is really seeking review of the underlying prior order, and appeals from an initial order but not an order denying reconsideration (or vice versa). It is nonetheless quite challenging to draft a rule that fixes these problems without creating new ones.

An attorney member stated that the line of cases in the Eighth Circuit is problematic and somewhat terrifying, because clients often question whether a simple notice of appeal from a final judgment is enough, and seek to have particular orders mentioned to make sure they are covered. Looking under this rock, however, revealed lots of other problems. Judge Chagares noted that in all his years on the bench, he had seen a problem regarding the order designated only once.

A judge member asked whether this was a jurisdictional matter that could only be handled by Congress. Several members of the Committee responded that issues involving the content of the notice of appeal, as opposed to the time for appeal, were not jurisdictional. Professor Sachs suggested that one approach might be to broadly authorize amendments to notices of appeal, but that allowing amendments out of time might raise jurisdictional and supersession issues.

An attorney member stated that the current Rule, which tells the reader to "designate the judgment, order, or part thereof being appealed," is very ambiguous. It is written to cover both appeals from final judgments and appeals from interlocutory orders, and gives no indication that an appeal from a final judgment brings up prior interlocutory orders. It invites the inexperienced lawyer to list everything. But a rule cannot explain the entire merger doctrine. A different attorney member suggested that a Rule could state that an appeal from a final judgment brings up the final judgment and all interlocutory orders, but Professor Struve noted that the merger doctrine doesn't cover all prior orders. Professor Sachs

raised the question of whether the merger doctrine also applies when an appeal is properly taken from an interlocutory order.

A judge member suggested that, from the appellee's perspective, it would be good to know what is actually being appealed. Attorney members noted that the question of what issues will be raised on appeal is addressed in subsequent filings.

The reporter suggested that perhaps the Rule should call on the appellant to designate simply the *appealable* judgment or order, leaving to the merger doctrine the question of what issues are *reviewable* on appeal from that appealable judgment or order.

As for the question of whether to address the broader issues or only the narrow issues, and even whether a rogue line of cases in one circuit justifies a Rule change, Judge Chagares reminded the Committee that upending an established Rule, at times, can cause more confusion than clarity. Justice French agreed to join the subcommittee.

**D. Improving Appendices**

Judges Chagares observed that a subcommittee had been formed to look into the problem of appendices being too long and including much irrelevant information. But changes in technology may solve the problem.

Ms. Dodszuweit stated that the Clerks recommend waiting. The technology is changing quickly, and electronic appendices, with briefs that cite to the electronic record of the district court, will make for a great shift in how appendices are done.

A judge member noted that the biggest problem is duplication. An attorney member reminisced about appendices that ran 20,000 pages, but that current practice of a proof brief, with an appendix that includes what is actually cited, avoids that problem.

Judge Campbell stated that trial exhibits are not placed on the electronic docket, but are frequently put in electronic form for use of the jury. Perhaps they should be put on the electronic docket.

The Committee decided to remove this matter from the agenda, but revisit it in three years.

**E. Dismissals under Rule 42(b) (17-AP-G)**

Mr. Landau reported for the subcommittee examining Rule 42(b), which provides that a circuit clerk "may" dismiss an appeal on the filing of a stipulation

signed by all parties. Some cases, relying on the word "may," hold that the court has discretion to deny the dismissal, particularly if the court fears strategic behavior. The parallel Supreme Court Rule (Rule 46.1), by contrast, uses the word "will" rather than "may." The discretion found in Rule 42(b) can make settlement difficult, because the client lacks certainty, and may result in a court improperly issuing an advisory opinion.

A judge member asked whether there was ever a legitimate reason to not dismiss. The reporter asked whether laws that require judicial approval of settlements, such as the Tunney Act, apply to settlements on appeal. Others raised the possibility of class actions. Judge Campbell stated that class actions are dealt with in forthcoming Civil Rules.

An attorney member stated that some judges are concerned with what appear to be conflicts of interest between attorneys with institutional interests who want to flush a case after oral argument and the client who is being sold out. Mr. Coquillette stated that such a lawyer would be violating lots of rules of professional conduct, and that there are other remedies for such behavior. Judge Kozinski once wrote a dissent contending that an attorney with an institutional interest was giving up on a case with no gain to the client in return, prompting an attorney member to ask how the judge could know that there was no gain in return.

The subcommittee will continue its examination.

**F. Rule 29 Blanket Consent to Amicus Briefs (17-AP-F)**

Professor Sachs presented a proposal, modelled on the Supreme Court rules, to amend Rule 29 to allow parties to file blanket consent to amicus briefs. A blanket consent procedure would reduce the burden on amici and parties in seeking and providing individualized consent, and perhaps on the court deciding motions if consent is not obtained in time. Mr. Byron noted that there are some cases in which the Department of Justice has to respond to many emails seeking consent, and this amendment would help a little, but that the emails are not much of a burden so that it isn't really needed.

Ms. Dodszuweit reported that there were about 100 cases in that past five years in the Court of Appeals for the Third Circuit with even one amicus brief. She also reported that, under current practice, if the Clerk were to receive a blanket consent letter, it would be noted on the docket and the Clerk would act in accordance with it.

In light of the very different amicus practice in the Supreme Court compared to the courts of appeals, the Committee decided to take this matter off the agenda, with thanks to Professor Sachs for raising the issue.

### G. Costs on Appeal

This matter had previously been referred to the Civil Rules Committee for feedback. Judge Chagares reported that the Civil Rules Committee asked this Committee to wait to see how the proposed amendment to Fed. R. Civ. P. 23(e)(5) works.

Accordingly, the Committee decided to remove the matter from its agenda.

### H. Supreme Court Decision in *Hall v. Hall*

The reporter presented a discussion of the recent Supreme Court decision in *Hall v. Hall*, 138 S. Ct. 1118 (2018), which held that cases consolidated under Fed. R. Civ. P. 42(a) retain their separate identities at least to the extent that final decision in one is immediately appealable. The reporter noted that this decision might raise efficiency concerns in the courts of appeals, by permitting separate appeals that deal with the same underlying controversy, and might raise trap-for-the-unwary concerns for parties in consolidated cases who do not appeal when there is a final judgment in one of consolidated cases but instead wait until all of the consolidated cases are resolved.

The Committee decided that this matter is appropriately handled by the Civil Rules Committee, while some members suggested keeping an eye on the trap-for the-unwary concern and looking to see if the provisions of the Appellate Rules regarding consolidation of appeals present any similar issues.

### I. Length of Answers/Responses to Petitions Under Rules 35 and 40 (18-AP-A and 18-AP-B)

Mr. Byron presented a proposal to add length limitations to the answers/responses to petitions for rehearing and rehearing en banc under Rules 35 and 40. He noted that experienced practitioners understand that the length limitations for the petitions themselves apply, but that it would be good to have this stated in the Rules themselves.

Judge Chagares noted that the draft before the Committee offered two alternative phrasings. As for Rule 35, the Committee opted for "The length

limitations in Rule 35(b)(2) apply to a response." As for Rule 40, the Committee opted for "The requirements of Rule 40(b) apply to a response to a petition for panel rehearing."

A judge member noted that his court always puts a length limitation in the order permitting the filing. Mr. Byron responded that not all courts of appeals do so.

Mr. Byron added that it might be appropriate to undertake a more comprehensive review of Rules 35 and 40, perhaps drawing on the different structure of Rule 21.

The reporter presented a second issue. Rule 35 uses the term "response," while Rule 40 uses the term "answer." He suggested that Rule 40 be changed to "response," pointing to Black's Law Dictionary definitions of the two terms. Ms. Dodszuweit suggested that Rule 35 be changed to "answer," pointing to the use of "answer" in other Rules to designate a document filed only with the Court's permission in response to a petition. The reporter noted that the Supreme Court Rules use the term "response" for a document filed only with the Court's permission in response to a petition, and that Fed. R. App. P. 32(c)(2) refers to "a petition for panel rehearing and a petition for hearing or rehearing en banc, and any response to such a petition."

The Committee opted for the word "response" in both the Rule and the Committee Note, and deleted some unnecessary words in the proposed Note. Despite some concerns about the proposed Note stating that the Advisory Committee changed the language for stylistic reasons, the Committee decided to leave in that language—which was modelled on language from the Restyling Project—pending review by the style consultants. (18-AP-A).

The Committee also decided to pursue a more general study of Rules 35 and 40, and Danielle Spinelli was added to the subcommittee. (18-AP-B).

**IV. New Matters**

Judge Chagares invited discussion of possible new matters for the Committee's consideration, and, in particular, matters that would increase efficiency and promote the just, speedy, and inexpensive resolution of cases. Mr. Landau noted that the Supreme Court had distinguished between the statutory time for appeal (which is jurisdictional) and more stringent time limits in the Federal Rules of Appellate Procedure (which are not jurisdictional). *Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13 (2017). He suggested that the Committee might want to align the Rule with the statute, correcting for divergence that had occurred over time.

A subcommittee was formed, consisting of Mr. Landau, Judge Kavanaugh, and Judge Chagares.

**V. Adjournment**

Judge Chagares thanked Ms. Womeldorf and her staff for organizing the dinner and the meeting. He announced that the next meeting would be held on October 26, 2018, in Washington, DC.

The Committee adjourned at approximately 12:30 p.m.