

MEMORANDUM

DATE: October 14, 2017

TO: The Advisory Committee on Appellate Rules

FROM: Gregory E. Maggs, Reporter

RE: New discussion item regarding electronic records and Appellate Rules 10, 11, and 12

I. Introduction

Advisory Committee members Thomas Byron and Douglas Letter have forwarded a suggestion from within the Department of Justice that the Advisory Committee consider whether Appellate Rules 10, 11, and 12 require amendment in light of increased electronic filing. These three rules concern the content, the forwarding, and the filing of the record on appeals from a district court in non-bankruptcy cases.

If the Committee decides to add this item to its agenda, it would not have to begin with a clean slate. Instead, the Committee could rely heavily on amendments made to Rule 6 in 2014. The Committee Note accompanying the 2014 amendments to Rule 6 explained in relevant part: "Due to the shift to electronic filing, in some appeals the record will no longer be transmitted in paper form. Subdivisions (b)(2)(B)(i), (b)(2)(C), and (b)(2)(D) [of Rule 6] are amended to reflect the fact that the record sometimes will be made available electronically." The three cited subdivisions of Rule 6 correspond to provisions of Rules 10, 11, and 12 respectively. This memorandum provides discussion drafts of possible amendments to Rules 10, 11, and 12.

II. Suggested Amendments to Rules 10, 11, and 12**A. The Record on Appeal under Rule 10**

Rule 10 concerns the content of records on appeal from the district court in non-bankruptcy cases. As shown in line 77 of attachment 1, the 2014 amendments to Rule 6(b)(2)(B)(i) changed the word "send" to "make available." And as shown in lines 95-135 of attachment 1, changes to Rule 6(b)(2)(C) similarly changed the word "forward" to "make available." The changes reflected the possibility that an electronic record might not be "sent" or

24 (2) If anything material to either party is omitted from or misstated in the
25 record by error or accident, the omission or misstatement may be corrected
26 and a supplemental record may be certified and ~~forwarded~~ **made available**:
27 (A) on stipulation of the parties;
28 (B) by the district court before or after the record has been ~~forwarded~~
29 **made available**; or
30 (C) by the court of appeals.
31 (3) All other questions as to the form and content of the record must be
32 presented to the court of appeals.

33 Committee Note

34 Due to the shift to electronic filing, in some appeals the record will no longer
35 be transmitted in paper form. Subdivisions (d) and (e)(2) are amended to reflect
36 the fact that the record sometimes will be made available electronically. The
37 amendments conform with the 2014 amendments to Rules (6)(b)(2)(B)(i) and
38 (b)(2)(C).

b. Forwarding the Record under Rule 11

Rule 11 concerns forwarding the record from the district court to the court of appeals. The 2014 amendments to Rule 6, as shown in line 95-135 of attachment 1, changed the terms "forward" and "send" to "make available" in several places and limited some of the pre-existing rules so that they would apply only "when the record is made available in paper form." The discussion draft below suggests possible similar amendments to various parts of Rule 11.

1 **Rule 11. Forwarding ~~Forwarding~~ **Making** the Record ~~Available~~**

2 (a) **Appellant's Duty.** An appellant filing a notice of appeal must comply with
3 Rule 10(b) and must do whatever else is necessary to enable the clerk to assemble
4 and ~~forward~~ **make available** the record. If there are multiple appeals from a
5 judgment or order, the clerk must ~~forward~~ **make available** a single record.

6 (b) **Duties of Reporter and District Clerk.**

7 * * * * *

8 **(2) District Clerk's Duty to Forward Make Available.** When the record
9 is complete, the district clerk must number the documents constituting the
10 record and ~~send them~~ promptly **make them available** to the circuit clerk
11 together with a list of the documents correspondingly numbered and
12 reasonably identified.² ~~Unless directed to do so by a party or the circuit clerk,~~
13 ~~the district~~ **If the district clerk makes the record available in paper form,**
14 the clerk will not send to the court of appeals documents of unusual bulk or
15 weight, physical exhibits other than documents, or other parts of the record
16 designated for omission by local rule of the court of appeals, **unless directed**
17 **to do so by a party or the circuit clerk.** ~~If the exhibits are unusually bulky or~~
18 heavy **exhibits are to be made available in paper form,** a party must arrange
19 with the clerks in advance for their transportation and receipt.

20 **(c) Retaining the Record Temporarily in the District Court for Use in**
21 **Preparing the Appeal.** The parties may stipulate, or the district court on motion
22 may order, that the district clerk retain the record temporarily for the parties to use
23 in preparing the papers on appeal. In that event the district clerk must certify to the
24 circuit clerk that the record on appeal is complete. Upon receipt of the appellee's
25 brief, or earlier if the court orders or the parties agree, the appellant must request
26 the district clerk to forward **make** the record **available.**

27 **(d) [Abrogated.]**

28 **(e) Retaining the Record by Court Order.**

29 (1) The court of appeals may, by order or local rule, provide that a certified
30 copy of the docket entries be forwarded **made available** instead of the entire
31 record. But a party may at any time during the appeal request that designated
32 parts of the record be forwarded **made available.**

² The 2014 Amendment to Rule 6(b)(2)(C)(i) deletes the phrase "together with a list of the documents correspondingly numbered and reasonably identified." I did not delete this phrase from this discussion draft of Rule 11 because I was unsure of the purpose of the deletion.

33 (2) The district court may order the record or some part of it retained if the
34 court needs it while the appeal is pending, subject, however, to call by the
35 court of appeals.

36 (3) If part or all of the record is ordered retained, the district clerk must
37 send to the court of appeals a copy of the order and the docket entries together
38 with the parts of the original record allowed by the district court and copies of
39 any parts of the record designated by the parties.

40 * * * * *

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

- 44 • for dismissal;
- 45 • for release;
- 46 • for a stay pending appeal;
- 47 • for additional security on the bond on appeal or on a supersedeas bond;³ or
- 48 • for any other intermediate order—

49 the district clerk must ~~send~~ **make available to** the court of appeals any parts of the
50 record designated by any party.

51 Committee Note

52 Due to the shift to electronic filing, in some appeals the record will no longer
53 be transmitted in paper form. The Rule is amended to reflect the fact that the
54 record sometimes will be made available electronically. The amendments
55 conform with the 2014 amendments to Rule 6(b)(2)(C).

C. Filing the Record under Rule 12

Rule 12(c) concerns filing the record in appeals from district courts in non-bankruptcy cases. As shown in line 136-47 of attachment 1, the 2014 amendment to Rule 6(b)(2)(D)

³ A proposed change of the term "supersedeas bond" is now before the Supreme Court.

1 **Rule 10. The Record on Appeal**

2 **(a) Composition of the Record on Appeal.** The following items constitute
3 the record on appeal:

- 4 (1) the original papers and exhibits filed in the district court or **copies of**
5 **the papers and exhibits if the record is not made available in paper form;**
6 (2) the transcript of proceedings, if any; and
7 (3) a certified copy of the docket entries prepared by the district clerk.

Second, the proposed amendments discussed above do not address the basic question of when the district court may or must forward the record electronically. The Advisory Committee may wish to address this question or may wish, at least for the time being, to have clerks of court work out the answer on the basis of practical considerations.

Third, the Advisory Committee may wish to postpone action on Rules 10, 11, and 12 until the courts of appeals have more experience with electronic filing. Although these rules use arguably outdated or imprecise words such as "send" and "forward," no actual disputes have arisen about their meaning in the context of electronic records. Changing the terms now might create unforeseen issues that are worse than any current ambiguities.

Attachment

Redline version Rule 6 showing the 2014 amendments