

AMENDMENTS TO THE FEDERAL RULES OF  
APPELLATE PROCEDURE

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COMMUNICATION

FROM

THE CHIEF JUSTICE, THE SUPREME COURT  
OF THE UNITED STATES

TRANSMITTING

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



SEPTEMBER 20, 2019.—Referred to the Committee on the Judiciary and  
ordered to be printed

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U.S. GOVERNMENT PUBLISHING OFFICE



SUPREME COURT OF THE UNITED STATES,  
*Washington, DC, April 25, 2019.*

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

DEAR MADAM SPEAKER: I have the honor to submit to the Congress the amendments to the Federal Rules of Appellate Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying 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 24, 2018; a redline version of the rules with committee notes; an excerpt from the September 2018 report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and an excerpt from the May 2018 report of the Advisory Committee on Appellate Rules.

Sincerely,

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

April 25, 2019

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. The Federal Rules of Appellate Procedure are amended to include amendments to Rules 3, 5, 13, 21, 25, 26, 26.1, 28, 32, and 39.

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

2. The foregoing amendments to the Federal Rules of Appellate Procedure shall take effect on December 1, 2019, and shall govern in all proceedings in appellate cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

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

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

**Rule 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 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. 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.

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- (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 sends copies, with the date of sending. Service is sufficient despite the death of a party or the party's counsel.

\* \* \* \* \*

**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 with the circuit clerk and serve it on all other parties to the district-court action.

\* \* \* \* \*

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

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

\* \* \* \* \*

(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 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.

\* \* \* \* \*

**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 the petition with the circuit clerk 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 and serving it on the respondents. Proceedings on the application must conform, so far as

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is practicable, to the procedures prescribed in Rule 21(a) and (b).

\* \* \* \* \*

**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.

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- (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.

\* \* \* \* \*

**Rule 26. Computing and Extending Time**

\* \* \* \* \*

**(c) Additional Time After Certain Kinds of Service.**

When a party may or must act within a specified time after 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 26.1. Disclosure Statement**

- (a) Nongovernmental Corporations.** Any nongovernmental 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 Victims in Criminal Cases.** 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 that is a corporation, discloses the information required by Rule 26.1(a).
- (d) **Time for Filing; Supplemental Filing.** The Rule 26.1 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) be included before the table of contents in the principal brief; and
  - (3) be supplemented whenever the information required under Rule 26.1 changes.

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- (e) **Number of Copies.** If the Rule 26.1 statement is filed before the principal brief, or if a supplemental statement is filed, 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.

**Rule 28. Briefs**

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

- (1) a 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:

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

\* \* \* \* \*

**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 and serve an itemized and verified bill of costs.

\* \* \* \* \*



JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE  
OF THE UNITED STATES  
*Presiding*

JAMES C. DUFF  
*Secretary*

October 24, 2018

MEMORANDUM

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

From: James C. Duff *James C. Duff*

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

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit herewith for consideration of the Court proposed amendments to Rules 3, 5, 13, 21, 25, 26, 26.1, 28, 32, and 39 of the Federal Rules of Appellate Procedure, which were approved by the Judicial Conference at its September 2018 session. The Judicial Conference recommends that the amendments be adopted by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering the proposed amendments, I am transmitting: (i) a copy of the affected rules incorporating the proposed amendments and accompanying Committee Notes; (ii) a redline version of the same; (iii) an excerpt from the September 2018 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iv) an excerpt from the May 2018 Report of the Advisory Committee on Appellate Rules.

Attachments



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

2 \* \* \* \* \*

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

4 (1) The district clerk must serve notice of the filing of  
5 a notice of appeal by ~~mailing~~sending a copy to  
6 each party's counsel of record—excluding the  
7 appellant's—or, if a party is proceeding pro se, to  
8 the party's last known address. When a defendant  
9 in a criminal case appeals, the clerk must also  
10 serve a copy of the notice of appeal on the  
11 defendant, ~~either by personal service or by mail~~  
12 ~~addressed to the defendant~~. The clerk must  
13 promptly send a copy of the notice of appeal and

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

## 2 FEDERAL RULES OF APPELLATE PROCEDURE

14 of the docket entries—and any later docket  
15 entries—to the clerk of the court of appeals named  
16 in the notice. The district clerk must note, on each  
17 copy, the date when the notice of appeal was filed.

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

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

28

\* \* \* \* \*

**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 for electronic service. Other rules determine when a party or the clerk may or must send a notice electronically or non-electronically.

4 FEDERAL RULES OF APPELLATE PROCEDURE

1 **Rule 5. Appeal by Permission**

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

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

9 \* \* \* \* \*

**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 service is completed using a court's electronic filing system.

1 **Rule 13. Appeals from the Tax Court**

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

3 \* \* \* \* \*

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

11 \* \* \* \* \*

**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.

## 6 FEDERAL RULES OF APPELLATE PROCEDURE

1 **Rule 21. Writs of Mandamus and Prohibition, and**  
2 **Other Extraordinary Writs**3 **(a) Mandamus or Prohibition to a Court: Petition,**  
4 **Filing, Service, and Docketing.**

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

13 \* \* \* \* \*

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

19 conform, so far as is practicable, to the procedures  
20 prescribed in Rule 21(a) and (b).

21 \* \* \* \* \*

#### **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 service is completed using a court’s electronic filing system.

1 **Rule 25. Filing and Service**

2 \* \* \* \* \*

3 **(d) Proof of Service.**

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

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

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

11 (i) the date and manner of service;

12 (ii) the names of the persons served; and

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



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

2 \* \* \* \* \*

3 **(c) Additional Time aAfter Certain Kinds of Service.**

4 When a party may or must act within a specified time  
5 after being served, and the paper is not served  
6 electronically on the party or delivered to the party on  
7 the date stated in the proof of service, 3 days are added  
8 after the period would otherwise expire under  
9 Rule 26(a), ~~unless the paper is delivered on the date of~~  
10 ~~service stated in the proof of service.~~ For purposes of  
11 this Rule 26(c), a paper that is served electronically is  
12 ~~treated as delivered on the date of service stated in the~~  
13 ~~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).

1 **Rule 26.1. ~~Corporate~~ Disclosure Statement**

2 **(a) ~~Who Must File~~ Nongovernmental Corporations.**

3 Any nongovernmental ~~corporate~~corporation that is a  
4 party to a proceeding in a court of appeals must file a  
5 statement that identifies any parent corporation and any  
6 publicly held corporation that owns 10% or more of its  
7 stock or states that there is no such corporation. The  
8 same requirement applies to a nongovernmental  
9 corporation that seeks to intervene.

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

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18 **(c) Bankruptcy Cases.** In a bankruptcy case, the debtor,  
19 the trustee, or, if neither is a party, the appellant must  
20 file a statement that:

- 21 (1) identifies each debtor not named in the caption;  
22 and  
23 (2) for each debtor that is a corporation, discloses the  
24 information required by Rule 26.1(a).

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

- 27 (1) be filed with the principal brief or upon filing a  
28 motion, response, petition, or answer in the court  
29 of appeals, whichever occurs first, unless a local  
30 rule requires earlier filing;  
31 (2) Even if the statement has already been filed, the  
32 party's principal brief must include the statement  
33 be included before the table of contents; in the  
34 principal brief; and

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

38       **~~(e)~~(e) Number of Copies.** If the Rule 26.1(a) statement is  
39       filed before the principal brief, or if a supplemental  
40       statement is filed, ~~the party must file~~ an original and 3  
41       copies must be filed unless the court requires a different  
42       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

## 14 FEDERAL RULES OF APPELLATE PROCEDURE

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.

1 **Rule 28. Briefs**

- 2 **(a) Appellant's Brief.** The appellant's brief must contain,  
3 under appropriate headings and in the order indicated:  
4 (1) a ~~corporate~~ disclosure statement if required by  
5 Rule 26.1;

6 \* \* \* \* \*

**Committee Note**

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

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

2 \* \* \* \* \*

3 **(f) Items Excluded from Length.** In computing any

4 length limit, headings, footnotes, and quotations count

5 toward the limit but the following items do not:

- 6 • ~~the~~cover page;
- 7 • ~~a~~corporatedisclosure statement;
- 8 • ~~a~~table of contents;
- 9 • ~~a~~table of citations;
- 10 • ~~a~~statement regarding oral argument;
- 11 • ~~an~~addendum containing statutes, rules, or
- 12 regulations;
- 13 • certificates of counsel;
- 14 • ~~the~~signature block;
- 15 • ~~the~~proof of service; and
- 16 • any item specifically excluded by these rules or
- 17 by local rule.

\* \* \* \* \*

**Committee Note**

The phrase “corporate disclosure statement” is changed to “disclosure statement” to reflect the revision of Rule 26.1. The other 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.

1 **Rule 39. Costs**

2 \* \* \* \* \*

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

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

8 \* \* \* \* \*

**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.

Excerpt from the September 2018 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 Recommended for Approval and Transmission*

The Advisory Committee on Appellate Rules submitted proposed amendments to Rules 3, 5, 13, 21, 25, 26, 26.1, 28, 32, and 39, with a recommendation that they be approved and transmitted to the Judicial Conference.

Rule 25 (Filing and Service)

The proposed amendment to Rule 25(d)(1) eliminates unnecessary proofs of service when electronic filing is used. Because electronic filing of a document results in a copy of the document being sent to all parties who use the court's electronic filing system, separate service of the document on those parties, and accompanying proofs of service, are not necessary. A previous version of the Rule 25(d)(1) amendment was approved by the Judicial Conference and submitted to the Supreme Court but was withdrawn by the Standing Committee to allow for minor revisions. The revised amendment approved at the Committee's June 2018 meeting includes changes previously approved, but also covers the possibility that a document might be filed electronically and yet still need to be served on a party (such as a pro se litigant) who does not participate in the court's electronic-filing system.

Under the proposed amendment to Rule 25(d)(1), proofs of service will frequently be unnecessary. Accordingly, the Advisory Committee proposed technical amendments to certain rules that reference proof of service requirements, including Rules 5, 21, 25, 26, 26.1, 32, and 39, to conform those rules to the proposed amendment to Rule 25(d)(1). Rule 25(d)(1) was

**Excerpt from the September 2018 Report of the Committee on Rules of Practice and Procedure**

originally published for comment; the Advisory Committee did not seek additional public comment on the technical and conforming amendments.

**Rule 5 (Appeal by Permission)**

The proposed amendments to Rule 5(a)(1) revise the rule to no longer require that a petition for permission to appeal “be filed with the circuit clerk with proof of service.” Instead, it provides that “a party must file a petition with the circuit clerk and serve it on all other parties.”

**Rule 21 (Writs of Mandamus and Prohibition, and Other Extraordinary Writs)**

Under the proposed amendment to Rule 21, in addition to various stylistic changes, the phrase “with proof of service” in Rule 21(a) and (c) is deleted and replaced with the phrases “serve it” and “serving it.”

**Rule 26 (Computing and Extending Time)**

The proposed amendment to Rule 26 deletes the term “proof of service” from Rule 26(c). A stylistic change was also made to simplify the rule’s description for when three days are added to the time computation: “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 39 (Costs)**

The proposed amendment to Rule 39(d)(1) deletes the phrase “with proof of service” and replaces it with the phrase “and serve.”

**Excerpt from the September 2018 Report of the Committee on Rules of Practice and Procedure**Rule 3 (Appeal as of Right—How Taken) and Rule 13 (Appeals from the Tax Court)

The proposed amendments to Rules 3 and 13 – both of which deal with the notice of appeal – are also designed to reflect the move to electronic service. Rules 3(d)(1) and (d)(3) currently require 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(a)(2) 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.

Rule 26.1 (Corporate Disclosure Statement)

The proposed amendments to Rule 26.1 revise disclosure requirements designed to help judges decide if they must recuse themselves: subdivision (a) is amended to encompass nongovernmental corporations that seek to intervene on appeal; new subdivision (b) corresponds to the amended disclosure requirement in Criminal Rule 12.4(a)(2) and requires the government to identify, except on a showing of good cause, organizational victims of the alleged criminal activity; 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, and also imposes disclosure requirements concerning the ownership of corporate debtors.

There were four comments filed regarding the proposed amendments. One comment suggested that language be added to the committee note to help deter overuse of the government exception in the proposed subdivision (b) dealing with organizational victims in criminal cases.

**Excerpt from the September 2018 Report of the Committee on Rules of Practice and Procedure**

In response, the Advisory Committee revised the committee note to follow more closely the committee note for Criminal Rule 12.4.

Another comment suggested that language be added to Rule 26.1(c) to reference involuntary bankruptcy proceedings and that petitioning creditors be identified in disclosure statements. The Advisory Committee on Appellate Rules consulted with the reporter for the Advisory Committee on Bankruptcy Rules and ultimately determined to not make any changes in response to the comment. In response to a potential gap in the operation of Rule 26.1 identified by the reporter to the Advisory Committee on Bankruptcy Rules, however, the Advisory Committee on Appellate Rules revised Rule 26.1(c) 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).”

A third comment 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. The final comment suggested language changes to eliminate any ambiguity about who must file a disclosure statement. In response to these comments and to clarify the proposed amendment, the Advisory Committee folded subparagraph 26.1(d) dealing with intervenors 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 who may not truly “want” to intervene. Other stylistic changes were made as well.

**Excerpt from the September 2018 Report of the Committee on Rules of Practice and Procedure**

**Rule 28 (Briefs) and Rule 32 (Form of Briefs, Appendices, and Other Papers)**

The proposed amendments to Rules 28 and 32 change the term “corporate disclosure statement” to “disclosure statement” to conform with proposed amendments to Rule 26.1, as described above.

There were no public comments on the proposed amendments to Rules 28(a)(1) and 32(f). The Advisory Committee sought approval of Rule 28 as published. The Advisory Committee sought approval of Rule 32 as published, with additional technical edits to conform subsection (f) with the proposed amendment to Rule 25(d)(1) regarding references to proofs of service. Rule 32(f) lists the items that are excluded when computing length limits, and one such item is “the proof of service.” To account for the frequent occasions in which there would be no such proof of service, the article “the” should be deleted. Given this change, the Advisory Committee agreed to delete all the articles in the list of items.

The Standing Committee voted unanimously to adopt the recommendations of the Advisory Committee. The proposed amendments to the Federal Rules of Appellate Procedure and committee notes are set forth in Appendix A, with an excerpt from the Advisory Committee’s report.

**Recommendation:** That the Judicial Conference approve the proposed amendments to Appellate Rules 3, 5, 13, 21, 25, 26, 26.1, 28, 32, and 39 as set forth in Appendix A 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.

\* \* \* \* \*

**Excerpt from the September 2018 Report of the Committee on Rules of Practice and Procedure**

Respectfully submitted,

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

David G. Campbell, Chair

Jesse M. Furman	William K. Kelley
Daniel C. Girard	Carolyn B. Kuhl
Robert J. Giuffra Jr.	Rod J. Rosenstein
Susan P. Graber	Amy J. St. Eve
Frank M. Hull	Srikanth Srinivasan
Peter D. Keisler	Jack Zouhary

Excerpt from the May 22, 2018 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  
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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

**I. Introduction**

The Advisory Committee on the Appellate Rules met on Friday, April 6, 2018, in Philadelphia, Pennsylvania. \* \* \* \* \*

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).

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\* \* \* \* \*

**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 ~~mail~~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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**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 to the clerk.~~ ~~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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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.

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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 CompuLaw 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.

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**Rule 26.1 Corporate Disclosure Statement**

**(a) ~~Who Must File~~ Nongovernmental Corporations and Intervenor.** 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)~~ **(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.

~~(e)~~ **(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.

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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: \* \* \*"

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**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)]<sup>1</sup>, 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.

\* \* \* \* \*

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 \*\*\*."

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<sup>1</sup> An amendment to include this corrected citation has been approved by the Supreme Court.

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**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 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**

\* \* \* \* \*

**(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

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~~is served electronically is treated as delivered on the date of service stated in the proof of service.~~

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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**

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**(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~~<sup>2</sup> 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.

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

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<sup>2</sup> The word “corporate” is proposed to be deleted in another amendment submitted concurrently to the Standing Committee.

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