



February 16, 2015

Committee on Rules of Practice and Procedure  
Administrative Office of the United States Courts  
Thurgood Marshall Federal Judiciary Building  
One Columbus Circle, N.E., Suite 7-240  
Washington, D.C. 20544

**Re: Proposed Amendments to the Federal Rules of Appellate Procedure**

Dear Sir or Madam:

The Pennsylvania Bar Association, upon the recommendation of its Federal Practice Committee, respectfully submits the following comments in response to the proposal by the Advisory Committee on Appellate Rules.

Respectfully,  
Francis X. O'Connor, President  
Pennsylvania Bar Association



## COMMENTS OF THE PENNSYLVANIA BAR ASSOCIATION ON PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

The Pennsylvania Bar Association makes the following recommendations with respect to some of the proposed Appellate Rule changes:

**Appellate Rules** 4, 5, 21, 25, 26, 27, 28.1, 29, 32, 35, and 40, and Forms 1, 5, 6, and New Form 7.

- The PBA opposes the proposed amendments to Rule 4(a)(4), governing the timeliness of a notice of appeal when a post-judgment motion is filed, because, without providing greater clarification, it simply substitutes a new trap for the unwary in place of the current trap for the unwary.
- The PBA supports proposed amendments to Rule 5, Rule 21, Rule 27, Rule 28.1, Rule 32, Rule 35, and Rule 40, governing page and word limits for filings, and Form 6.
- The PBA opposes the proposed amendments to Rule 26(c), governing time limits to respond to filings.

## **Introduction**

The proposed changes to the Appellate Rules are divided into thematic groups. First are discussed the proposed amendments to rules and forms governing inmate filings: Rule 4(c)(1), Rule 25(a)(2)(C), Form 1, Form 5, and New Form 7. Second are discussed the proposed amendments to Rule 4(a)(4), governing the time to file a notice of appeal when a post-judgment motion is filed. Third are discussed the proposed amendments to the rules and forms governing the length of filings: Rule 5, Rule 21, Rule 27, Rule 28.1, Rule 32, Rule 35, Rule 40, and Form 6. Fourth are discussed the proposed amendments to Rule 29, governing amicus filings in connection with a petition for rehearing. And finally are discussed the proposed amendments to Rule 26(c), governing the time to respond to an electronically-served filing.

### **Tolling the Time to File a Notice of Appeal: Rule 4(a)(4)**

#### Proposed Amendments

Rule 4(a)(4) extends the time in which a party must file a notice of appeal when that party files a “timely” post-judgment motion. The Rules Advisory Committee felt that the Rule should be amended in light of a circuit split on whether a post-judgment motion filed outside the non-extendable deadlines count as “timely” when the district court mistakenly authorized an extension. The proposed amendments delete the word “timely” and add that the post-judgment motion be filed “within the time allowed by those rules.”

#### Comments

The Committee recommends that the PBA oppose this change. This proposed amendment would adopt the position of the Third Circuit in Lizardo v. United States, 619 F.3d 273 (3d Cir. 2010), and three other circuits that the filing of a post-judgment motion beyond the deadlines permitted by the Civil Rules will not toll the time for filing an appeal even where a district court considers and decides the untimely post-judgment motion, thus effectively extending the time for such a post-judgment motion, as the district courts apparently have discretion to do. Although providing greater clarity to Rule 4(a)(4) is highly desirable in light of the consequences of filing a late appeal, the proposed new text may not go as far as it should in making clear that an order extending the time for filing a post-judgment motion will not extend the time for filing an appeal. It is also anomalous that while a post-judgment motion tolls the time for an appeal and a district court has discretion to extend the time for filing a post-judgment motion, such an implicit extension of time does not toll the time for appeal, notwithstanding the district court’s power to enlarge the time for appeal for cause under Rule 4(a). The amendments as drafted should not be approved without greater clarification because they simply substitute a new trap for the unwary in place of the current trap for the unwary.

## **Length Limits: Rule 5, Rule 21, Rule 27, Rule 28.1, Rule 32, Rule 35, Rule 40, and Form 6**

### Proposed Amendments

The Rules Advisory Committee believed that the current length limits have been overtaken by technological advances and invite gamesmanship by attorneys. Therefore, the Rules Advisory Committee has proposed amending the rules and forms governing the length of filings when those filings are prepared by computer. The proposed amendments do not change length limits for filings prepared without the aid of a computer. The proposed amendments assume that one page should contain approximately 250 words and 26 lines of text. The Rules Advisory Committee also amended Form 6 as part of a new length certification requirement. Additionally, the proposed amendments contain a list of items that can be excluded when computing a document's length. The proposed changes are as follows:

- Rule 5 (Appeal by Permission):
- not more than 5,000 words or 520 lines of monospaced text
- Rule 21 (Writs):
- previously 20 pages
  - not more than 7,500 words or 780 lines of monospaced text
- Rule 27 (Motions):
- previously 30 pages
  - a motion or response must not exceed 5,000 words or 520 lines of monospaced text
  - previously 20 pages
  - a reply must not exceed 2,500 words or 260 lines of monospaced text
- Rule 28.1 (Cross-Appeals):
- previously 10 pages
  - appellant's principal brief and response and reply brief must not exceed 12,500 words or 1,300 lines of monospaced text
  - previously 14,000 words
  - appellee's principal and response brief must not exceed 14,700 words or 1,500 lines of monospaced text
  - previously 16,500 words
  - appellee's reply brief must not exceed 6,250 words or 650 lines of monospaced text
  - previously 7,000 words
- Rule 32 (Form of Briefs):
- principal briefs must not exceed 12,500 words or 1,300 lines of monospaced text
  - previously 14,000 words
  - reply briefs must not exceed 6,250 words or 650 lines of monospaced text
  - previously 7,000 words
- Rule 35 (En Banc):
- not more than 3,750 words or 390 lines of monospaced text
  - previously 15 pages
- Rule 40 (Panel Rehearing):
- not more than 3,750 words or 390 lines of monospaced text
  - previously 15 pages

## Comments

The Committee recommends seeking the views of the judges of the Third Circuit before deciding on a position. No one would dispute the goal of encouraging greater precision and brevity in appellate filings, but the current limits may work well and seem not to be a problem. In addition, shortening these limits is likely to result in a greater number of motions for enlargement. These amendments may fall into the category of fixing something that is not broken. However, the views of the judges of the Third Circuit would be helpful.

The Committee did not dispute the goal of encouraging greater precision and brevity in appellate filings. They felt the current limits work well and shortening them is likely to result in a greater number of motions for enlargement. It was suggested that the views of judges on the Third Circuit should be solicited and the Chair of the FPC did so. Judge Michael Chagares is a member of the Advisory Committee on Appellate Rules and indicated his strong support for the changes. Comments were received from almost half of the court and two judges expressed strong concern in shortening briefs as less words may ultimately reduce the quality of the product.

The Chair of the FPC is also a member of the Third Circuit standing panel to review requests for excess pagination. In 2013-2014 motions were received on 65 cases and relief was denied on 13 cases. This is a relatively small percentage of the court caseload and experienced counsel have learned that excess pagination requests are disfavored.

The consensus of the court was that the proposed changes will not impact the frequency of requests. The FPC chair believes the Committee should support the proposed amendments based on the assurance of Judge Chagares that the recommendation was made only after all the issues were carefully and fully considered by the Advisory Committee on Appellate Rules.

### **Extension for Electronic Filings: Rule 26(c)**

#### Proposed Amendments

As currently worded, Rule 26(c) allows a party who must respond to a filing that has been electronically served three more days in addition to the response time prescribed by the Rules. Under the current version of Rule 26(c), a document that is delivered on the date listed in the proof of service does not get the three-day additional period. However, the Rule assumes that documents that are electronically served are not delivered on the date listed in the proof of service, thereby entitling electronically-served documents to the additional three days. The proposed amendments remove that assumption. The Rules Advisory Committee suggests that the original wording of Rule 26(c) was due to fears that electronic service would be delayed, and that those concerns have abated.

#### Comments

The Committee recommends that this amendment be opposed. The Committee is concerned that electronic service may happen at any time of day or any day of the week. Therefore, the additional three days serves a useful purpose in alleviating the burdens that can arise if a filing is electronically served at extremely inconvenient times.