

## COMMITTEE NOTES ON RULES—2009 AMENDMENT

*Subdivision (a)(3)(A).* Subdivision (a)(3)(A) formerly required that a response to a motion be filed “within 8 days after service of the motion unless the court shortens or extends the time.” Prior to the 2002 amendments to Rule 27, subdivision (a)(3)(A) set this period at 10 days rather than 8 days. The period was changed in 2002 to reflect the change from a time-computation approach that counted intermediate weekends and holidays to an approach that did not. (Prior to the 2002 amendments, intermediate weekends and holidays were excluded only if the period was less than 7 days; after those amendments, such days were excluded if the period was less than 11 days.) Under current Rule 26(a), intermediate weekends and holidays are counted for all periods. Accordingly, revised subdivision (a)(3)(A) once again sets the period at 10 days.

*Subdivision (a)(4).* Subdivision (a)(4) formerly required that a reply to a response be filed “within 5 days after service of the response.” Prior to the 2002 amendments, this period was set at 7 days; in 2002 it was shortened in the light of the 2002 change in time-computation approach (discussed above). Under current Rule 26(a), intermediate weekends and holidays are counted for all periods, and revised subdivision (a)(4) once again sets the period at 7 days.

**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;

(2) a table of contents, with page references;

(3) a table of authorities—cases (alphabetically arranged), statutes, and other authorities—with references to the pages of the brief where they are cited;

(4) a jurisdictional statement, including:

(A) the basis for the district court’s or agency’s subject-matter jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

(B) the basis for the court of appeals’ jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

(C) the filing dates establishing the timeliness of the appeal or petition for review; and

(D) an assertion that the appeal is from a final order or judgment that disposes of all parties’ claims, or information establishing the court of appeals’ jurisdiction on some other basis;

(5) a statement of the issues presented for review;

(6) a concise statement of the case setting out the facts relevant to the issues submitted for review, describing the relevant procedural history, and identifying the rulings presented for review, with appropriate references to the record (see Rule 28(e));

(7) a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief, and which must not merely repeat the argument headings;

(8) the argument, which must contain:

(A) appellant’s contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies; and

(B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues);

(9) a short conclusion stating the precise relief sought; and

(10) the certificate of compliance, if required by Rule 32(a)(7).

(b) **APPELLEE’S BRIEF.** The appellee’s brief must conform to the requirements of Rule 28(a)(1)–(8) and (10), except that none of the following need appear unless the appellee is dissatisfied with the appellant’s statement:

(1) the jurisdictional statement;

(2) the statement of the issues;

(3) the statement of the case; and

(4) the statement of the standard of review.

(c) **REPLY BRIEF.** The appellant may file a brief in reply to the appellee’s brief. Unless the court permits, no further briefs may be filed. A reply brief must contain a table of contents, with page references, and a table of authorities—cases (alphabetically arranged), statutes, and other authorities—with references to the pages of the reply brief where they are cited.

(d) **REFERENCES TO PARTIES.** In briefs and at oral argument, counsel should minimize use of the terms “appellant” and “appellee.” To make briefs clear, counsel should use the parties’ actual names or the designations used in the lower court or agency proceeding, or such descriptive terms as “the employee,” “the injured person,” “the taxpayer,” “the ship,” “the stevedore.”

(e) **REFERENCES TO THE RECORD.** References to the parts of the record contained in the appendix filed with the appellant’s brief must be to the pages of the appendix. If the appendix is prepared after the briefs are filed, a party referring to the record must follow one of the methods detailed in Rule 30(c). If the original record is used under Rule 30(f) and is not consecutively paginated, or if the brief refers to an unreproduced part of the record, any reference must be to the page of the original document. For example:

• Answer p. 7;

• Motion for Judgment p. 2;

• Transcript p. 231.

Only clear abbreviations may be used. A party referring to evidence whose admissibility is in controversy must cite the pages of the appendix or of the transcript at which the evidence was identified, offered, and received or rejected.

(f) **REPRODUCTION OF STATUTES, RULES, REGULATIONS, ETC.** If the court’s determination of the issues presented requires the study of statutes, rules, regulations, etc., the relevant parts must be set out in the brief or in an addendum at the end, or may be supplied to the court in pamphlet form.

(g) [RESERVED]

(h) [RESERVED]

(i) **BRIEFS IN A CASE INVOLVING MULTIPLE APPELLANTS OR APPELLEES.** In a case involving more than one appellant or appellee, including consolidated cases, any number of appellants or appellees may join in a brief, and any party may adopt by reference a part of another’s brief. Parties may also join in reply briefs.

(j) CITATION OF SUPPLEMENTAL AUTHORITIES. If pertinent and significant authorities come to a party's attention after the party's brief has been filed—or after oral argument but before decision—a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations. The letter must state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 350 words. Any response must be made promptly and must be similarly limited.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Mar. 10, 1986, eff. July 1, 1986; Apr. 25, 1989, eff. Dec. 1, 1989; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 25, 2005, eff. Dec. 1, 2005; Apr. 16, 2013, eff. Dec. 1, 2013.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

This rule is based upon Supreme Court Rule 40. For variations in present circuit rules on briefs see 2d Cir. Rule 17, 3d Cir. Rule 24, 5th Cir. Rule 24, and 7th Cir. Rule 17. All circuits now limit the number of pages of briefs, a majority limiting the brief to 50 pages of standard typographic printing. Fifty pages of standard typographic printing is the approximate equivalent of 70 pages of typewritten text, given the page sizes required by Rule 32 and the requirement set out there that text produced by a method other than standard typographic must be double spaced.

NOTES OF ADVISORY COMMITTEE ON RULES—1979  
AMENDMENT

The proposed amendment eliminates the distinction appearing in the present rule between the permissible length in pages of printed and typewritten briefs, investigation of the matter having disclosed that the number of words on the printed page is little if any larger than the number on a page typed in standard elite type.

The provision is made subject to local rule to permit the court of appeals to require that typewritten briefs be typed in larger type and permit a correspondingly larger number of pages.

*Subdivision (j).* Proposed new Rule 28(j) makes provision for calling the court's attention to authorities that come to the party's attention after the brief has been filed. It is patterned after the practice under local rule in some of the circuits.

NOTES OF ADVISORY COMMITTEE ON RULES—1986  
AMENDMENT

While Rule 28(g) can be read as requiring that tables of authorities be included in a reply brief, such tables are often not included. Their absence impedes efficient use of the reply brief to ascertain the appellant's response to a particular argument of the appellee or to the appellee's use of a particular authority. The amendment to Rule 28(c) is intended to make it clear that such tables are required in reply briefs.

The amendment to Rule 28(j) is technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1989  
AMENDMENT

The amendment provides that the corporate disclosure statement required by new rule 26.1 shall be treated similarly to tables of contents and tables of citations and shall not be counted for purposes of the number of pages allowed in a brief.

NOTES OF ADVISORY COMMITTEE ON RULES—1991  
AMENDMENT

*Subdivision (a).* The amendment adds a new subparagraph (2) that requires an appellant to include a spe-

cific jurisdictional statement in the appellant's brief to aid the court of appeals in determining whether it has both federal subject matter and appellate jurisdiction.

*Subdivision (b).* The amendment requires the appellee to include a jurisdictional statement in the appellee's brief except that the appellee need not include the statement if the appellee is satisfied with the appellant's jurisdictional statement.

*Subdivision (h).* The amendment provides that when more than one party appeals from a judgment or order, the party filing the first appeal is normally treated as the appellant for purposes of this rule and Rules 30 and 31. The party who first files an appeal usually is the principal appellant and should be treated as such. Parties who file a notice of appeal after the first notice often bring protective appeals and they should be treated as cross appellants. Local rules in the Fourth and Federal Circuits now take that approach. If notices of appeal are filed on the same day, the rule follows the old approach of treating the plaintiff below as the appellant. For purposes of this rule, in criminal cases "the plaintiff" means the United States. In those instances where the designations provided by the rule are inappropriate, they may be altered by agreement of the parties or by an order of the court.

NOTES OF ADVISORY COMMITTEE ON RULES—1993  
AMENDMENT

Note to paragraph (a)(5). The amendment requires an appellant's brief to state the standard of review applicable to each issue on appeal. Five circuits currently require these statements. Experience in those circuits indicates that requiring a statement of the standard of review generally results in arguments that are properly shaped in light of the standard.

NOTES OF ADVISORY COMMITTEE ON RULES—1994  
AMENDMENT

*Subdivision (a).* The amendment adds a requirement that an appellant's brief contain a summary of the argument. A number of circuits have local rules requiring a summary and the courts report that they find the summary useful. *See*, D.C. Cir. R. 11(a)(5); 5th Cir. R. 28.2.2; 8th Cir. R. 28A(i)(6); 11th Cir. R. 28-2(i); and Fed. Cir. R. 28.

*Subdivision (b).* The amendment adds a requirement that an appellee's brief contain a summary of the argument.

*Subdivision (g).* The amendment adds proof of service to the list of items in a brief that do not count for purposes of the page limitation. The concurrent amendment to Rule 25(d) requires a certificate of service to list the addresses to which a paper was mailed or at which it was delivered. When a number of parties must be served, the listing of addresses may run to several pages and those pages should not count for purposes of the page limitation.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Several substantive changes are made in this rule, however. Most of them are necessary to conform Rule 28 with changes recommended in Rule 32.

*Subdivision (a).* The current rule requires a brief to include a statement of the case which includes a description of the nature of the case, the course of proceedings, the disposition of the case—all of which might be described as the procedural history—as well as a statement of the facts. The amendments separate this into two statements: one procedural, called the statement of the case; and one factual, called the statement of the facts. The Advisory Committee believes that the separation will be helpful to the judges. The table of con-

tents and table of authorities have also been separated into two distinct items.

An additional amendment of subdivision (a) is made to conform it with an amendment being made to Rule 32. Rule 32(a)(7) generally requires a brief to include a certificate of compliance with type-volume limitations contained in that rule. (No certificate is required if a brief does not exceed 30 pages, or 15 pages for a reply brief.) Rule 28(a) is amended to include that certificate in the list of items that must be included in a brief whenever it is required by Rule 32.

*Subdivision (g).* The amendments delete subdivision (g) that limited a principal brief to 50 pages and a reply brief to 25 pages. The length limitations have been moved to Rule 32. Rule 32 deals generally with the format for a brief or appendix.

*Subdivision (h).* The amendment requires an appellee's brief to comply with Rule 28(a)(1) through (11) with regard to a cross-appeal. The addition of separate paragraphs requiring a corporate disclosure statement, table of authorities, statement of facts, and certificate of compliance increased the relevant paragraphs of subdivision (a) from (7) to (11). The other changes are stylistic; no substantive changes are intended.

#### COMMITTEE NOTES ON RULES—2002 AMENDMENT

*Subdivision (j).* In the past, Rule 28(j) has required parties to describe supplemental authorities “without argument.” Enforcement of this restriction has been lax, in part because of the difficulty of distinguishing “state[ment] . . . [of] the reasons for the supplemental citations,” which is required, from “argument” about the supplemental citations, which is forbidden.

As amended, Rule 28(j) continues to require parties to state the reasons for supplemental citations, with reference to the part of a brief or oral argument to which the supplemental citations pertain. But Rule 28(j) no longer forbids “argument.” Rather, Rule 28(j) permits parties to decide for themselves what they wish to say about supplemental authorities. The only restriction upon parties is that the body of a Rule 28(j) letter—that is, the part of the letter that begins with the first word after the salutation and ends with the last word before the complimentary close—cannot exceed 350 words. All words found in footnotes will count toward the 350-word limit.

*Changes Made After Publication and Comments.* No changes were made to the text of the proposed amendment or to the Committee Note, except that the word limit was increased from 250 to 350 in response to the complaint of some commentators that parties would have difficulty bringing multiple supplemental authorities to the attention of the court in one 250-word letter.

#### COMMITTEE NOTES ON RULES—2005 AMENDMENT

*Subdivision (c).* Subdivision (c) has been amended to delete a sentence that authorized an appellee who had cross-appealed to file a brief in reply to the appellant's response. All rules regarding briefing in cases involving cross-appeals have been consolidated into new Rule 28.1.

*Subdivision (h).* Subdivision (h)—regarding briefing in cases involving cross-appeals—has been deleted. All rules regarding such briefing have been consolidated into new Rule 28.1.

#### COMMITTEE NOTES ON RULES—2013 AMENDMENT

*Subdivision (a).* Rule 28(a) is amended to remove the requirement of separate statements of the case and of the facts. Currently Rule 28(a)(6) provides that the statement of the case must “indicat[e] the nature of the case, the course of proceedings, and the disposition below,” and it precedes Rule 28(a)(7)'s requirement that the brief include “a statement of facts.” Experience has shown that these requirements have generated confusion and redundancy. Rule 28(a) is amended to consolidate subdivisions (a)(6) and (a)(7) into a new subdivision (a)(6) that provides for one “statement,” much like Supreme Court Rule 24.1(g) (which requires “[a]

concise statement of the case, setting out the facts material to the consideration of the questions presented, with appropriate references to the joint appendix. . . .”). This permits but does not require the lawyer to present the factual and procedural history chronologically. Conforming changes are made by renumbering Rules 28(a)(8) through (11) as Rules 28(a)(7) through (10).

The statement of the case should describe the nature of the case, which includes (1) the facts relevant to the issues submitted for review; (2) those aspects of the case's procedural history that are necessary to understand the posture of the appeal or are relevant to the issues submitted for review; and (3) the rulings presented for review. The statement should be concise, and can include subheadings, particularly for the purpose of highlighting the rulings presented for review.

*Subdivision (b).* Rule 28(b) is amended to accord with the amendment to Rule 28(a). Current Rules 28(b)(3) and (4) are consolidated into new Rule 28(b)(3), which refers to “the statement of the case.” Rule 28(b)(5) becomes Rule 28(b)(4). And Rule 28(b)'s reference to certain subdivisions of Rule 28(a) is updated to reflect the renumbering of those subdivisions.

*Changes Made After Publication and Comment.* After publication and comment, the Committee made one change to the text of the proposal and two changes to the Committee Note.

During the comment period, concerns were raised that the deletion of current Rule 28(a)(6)'s reference to “the nature of the case, the course of proceedings, and the disposition below” might lead readers to conclude that those items may no longer be included in the statement of the case. The Committee rejected that concern with respect to the “nature of the case” and the “disposition below,” because the Rule as published would naturally be read to permit continued inclusion of those items in the statement of the case. The Committee adhered to its view that the deletion of “course of proceedings” is useful because that phrase tends to elicit unnecessary detail; but to address the commenters' concerns, the Committee added, to the revised Rule text, the phrase “describing the relevant procedural history.”

The Committee augmented the Note to Rule 28(a) in two respects. It added a reference to Supreme Court Rule 24.1(g), upon which the proposed revision to Rule 28(a)(6) is modeled. And it added—as a second paragraph in the Note—a discussion of the contents of the statement of the case.

### Rule 28.1. Cross-Appeals

(a) **APPLICABILITY.** This rule applies to a case in which a cross-appeal is filed. Rules 28(a)–(c), 31(a)(1), 32(a)(2), and 32(a)(7)(A)–(B) do not apply to such a case, except as otherwise provided in this rule.

(b) **DESIGNATION OF APPELLANT.** The party who files a notice of appeal first is the appellant for the purposes of this rule and Rules 30 and 34. If notices are filed on the same day, the plaintiff in the proceeding below is the appellant. These designations may be modified by the parties' agreement or by court order.

(c) **BRIEFS.** In a case involving a cross-appeal:

(1) *Appellant's Principal Brief.* The appellant must file a principal brief in the appeal. That brief must comply with Rule 28(a).

(2) *Appellee's Principal and Response Brief.* The appellee must file a principal brief in the cross-appeal and must, in the same brief, respond to the principal brief in the appeal. That appellee's brief must comply with Rule 28(a), except that the brief need not include a statement of the case unless the appellee is dissatisfied with the appellant's statement.