



**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

717 MADISON PLACE, N.W.
WASHINGTON, D.C. 20439

PETER R. MARKSTEINER
CLERK OF COURT

CLERK'S OFFICE
202-275-8000

September 26, 2018

**NOTICE OF PROPOSED AMENDMENTS TO THE
FEDERAL CIRCUIT RULES OF PRACTICE**

Pursuant to 28 U.S.C. § 2071(b), the United States Court of Appeals for the Federal Circuit gives notice that it proposes to amend Federal Circuit Rules of Practice 25, 28, 29, 30, 31, 32, and 44. The proposed amendments are available on the court's website (<http://www.cafc.uscourts.gov/rules-of-practice/notices>) and in the Clerk's Office. If adopted, the amendments would take effect on December 1, 2018.

Public comments must be submitted on or before **October 31, 2018**, to the Chief Deputy Clerk either by email to chiefdeputyclerk@cafc.uscourts.gov or by mail to Proposed Rules Comments, Clerk's Office, U.S. Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439.

All submitted comments must include the name and either a return email or mailing address for the submitter. Any submitted comments, including the name of the submitter, may be made available to the public unless a submitter requests either the submitter's name or comment not be released to the public.

FOR THE COURT

/s/ Peter R. Marksteiner

Peter R. Marksteiner
Clerk of Court

Proposed Amendments to the Federal Circuit Rules of Practice

September 2018

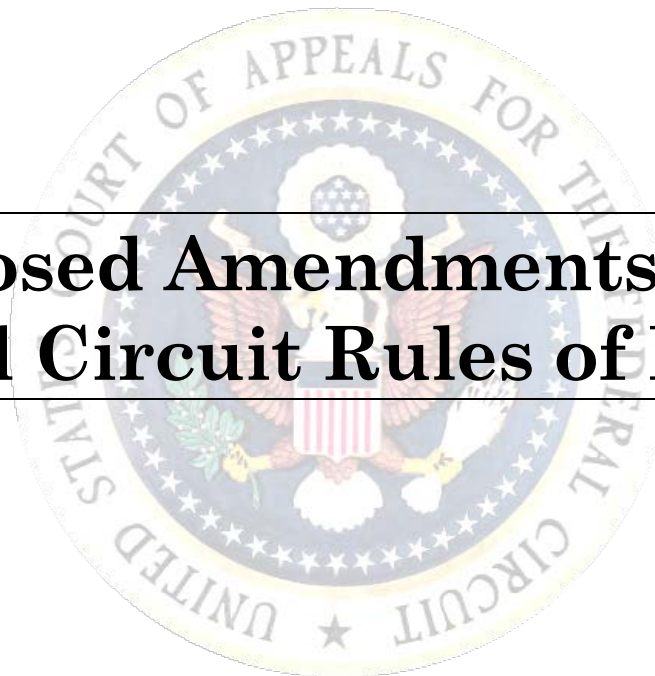


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1. Executive Summary

The following summary was prepared by the Clerk's Office as a guide to the proposed changes and should not substitute for reading the full text of the proposed amendments. This summary is neither intended to serve as legal advice nor as commentary on the changes to the Federal Circuit Rules of Practice. This summary does not include any minor stylistic changes that may also be incorporated into the Federal Circuit Rules of Practice as part of this amendment process.

- The Rule 25 amendments revise some deadline requirements for providing paper copies of electronically-filed documents and clarify both the requirements for filing corrected versions and the Clerk's Office's compliance review process. A new Practice Note explains the new Clerk's Office procedure for filing paper copies of briefs and appendices if these amendments are adopted. Related conforming amendments for Rules 28, 29, 30, and 31 are also proposed.
- The Rule 31 amendment would adopt a 21-day deadline for reply briefs in cross-appeals to align with pending amendments to the Federal Rules of Appellate Procedure 28.1 and 31.
- The Rule 32 amendment would align the Clerk's Office briefing review process with the revised compliance review process proposed in Rule 25.
- A new Practice Notice to Federal Rule of Appellate Procedure 44 would clarify the notice requirements for parties challenging the constitutionality of a statute.

2. Federal Circuit Rule 25

(REDLINED VERSION)

Rule 25. Filing and Service

* * *

(c) **All Other Documents.**

- (1) **Submissions by Counsel.** All other documents must be submitted in PDF through ~~CM/ECF~~ the court's electronic filing system, and ~~except as otherwise provided herein or as ordered by the court, and paper copies are not required to be provided. Paper copies of briefs, appendices, petitions for rehearing, and petitions for hearing en banc must be provided to the court after the filing of the electronic version of the briefs, appendices, or petitions first submitted through CM/ECF.~~ A document filed electronically is deemed filed on the date and time stated on the Notice of Docket Activity from the court. Unless a time for filing is specified by the court, filing must be completed before midnight Eastern Time to be considered timely filed on that day.

For documents covered by this subsection (c)(1), counsel must not submit paper copies except as required by court order or by the following provisions.

- (A) **Briefs.** In cases to be heard by a three-judge panel, six paper copies are required to be provided to the court within five business days of the court's ~~acceptance of the electronic brief~~ issuance of a notice requesting paper copies.
- (B) **Appendices.** In cases to be heard by a three-judge panel, six paper copies are required to be provided to the court within five business days of the court's ~~acceptance of the appendices~~ issuance of a notice requesting paper copies.

* * *

- (F) **Briefs in En Banc Cases.** If the court grants a petition for hearing en banc, unless otherwise ordered, 28 paper copies of all briefs and appendices shall be filed within five business days of the court's acceptance of the

electronic brief. If the court grants a petition for rehearing en banc, unless otherwise ordered, 28 paper copies of the original briefs and appendices (in cases where briefs were filed in CM/ECF prior to the court's order granting an en banc rehearing) shall be filed within seven business days of the court's order granting en banc rehearing.

Additionally, if the court grants a petition for rehearing en banc, 28 paper copies of any ordered supplemental briefs, appendices, and amicus briefs must be filed within five business days of the court's acceptance of the electronic brief or appendices. If a brief is accompanied by a motion for leave, paper copies of the motion shall also be submitted in the quantity required of the brief by this subsection.

- (G) **Confidential ~~v~~Versions.** If confidential and nonconfidential versions of the briefs, appendices, or petitions were filed through CM/ECF, paper copies of only the confidential version(s) are required to be submitted to the court. One paper copy of the confidential version of any document submitted to the court through CM/ECF must be served on any party, whether that party is or is not represented by counsel, except if that party or its counsel has not been authorized access to the confidential information under a governing protective order. Electronic access to confidential versions of documents is restricted to the court only.
- (H) **Other ~~d~~Documents.** Exhibits, attachments, or appendices that are not in a format that readily permits electronic filing—such as those which are illegible when scanned or which, because of their odd shape, are unable to be scanned—, may be filed in paper form without leave of court. Counsel must then file electronically a Notice of Paper Filing. ~~Documents—The party must serve documents~~ filed pursuant to this subsection ~~must be served by an alternate method of service~~ by providing two paper copies to all other parties. If such documents are submitted with a brief or appendix, then an original and six copies must be filed within five business days of electronic submission of the Notice of Paper Filing. For all other filings of documents that may not be scanned, an original and three copies must be filed.

(I) **Motion for eExemption.** A motion for exemption from the court's CM/ECF requirements may be submitted in paper form. Only one paper copy is required. Upon a showing of good cause, the court may exempt a party from CM/ECF requirements and authorize filing by means other than use of CM/ECF.

* * *

~~(K) **Review and Correction by the Clerk of Court.** The clerk of court may require a corrected copy of any submission that fails to comply with the court's rules or the CM/ECF User Manual. The clerk of court may edit a CM/ECF filer's docket entry or the clerk of court's own entry to correct or supplement the text, and such a revision will be so identified.~~

(K) **Corrected Versions.** If a party has not yet filed paper copies of a document and that party has electronically filed a corrected version of that document, only paper copies of the corrected version must be provided to the court.

* * *

(4) **Review and Correction by the Clerk of Court.** The clerk of court may require the filing of a corrected copy of any submission that fails to comply with the court's rules or the Electronic Filing Procedures. If a party fails to file a timely corrected copy in response to a notice requiring correction from the clerk of court, the clerk of court may strike the non-compliant document from the docket. The clerk of court may also edit docket entries to correct or add text or attachments and any such revision will be identified on the docket.

Practice Notes

* * *

PAPER COPIES OF BRIEFS AND APPENDICES. Counsel should not submit paper copies of any briefs or appendices required under Federal Circuit Rule 25(c)(1)(A)-(B) until after the court issues a notice indicating that the copies are due and the deadline for filing these copies. In typical, non-expedited cases, the clerk of court issues this notice shortly after briefing concludes. Paper copies for petitions and briefs related to panel rehearing, en banc hearing, or en banc rehearing are due after the filing of the electronic version as required by Federal Circuit Rule 25(c)(1)(C)-(F). Unrepresented parties must provide paper copies at the time for filing of the original brief.

(PROPOSED VERSION)

Rule 25. Filing and Service

* * *

(c) All Other Documents.

- (1) **Submissions by Counsel.** All other documents must be submitted in PDF through the court's electronic filing system. A document filed electronically is deemed filed on the date and time stated on the Notice of Docket Activity from the court. Unless a time for filing is specified by the court, filing must be completed before midnight Eastern Time to be considered timely filed on that day.

For documents covered by this subsection (c)(1), counsel must not submit paper copies except as required by court order or by the following provisions.

- (A) **Briefs.** In cases to be heard by a three-judge panel, six paper copies are required to be provided to the court within five business days of the court's issuance of a notice requesting paper copies.
- (B) **Appendices.** In cases to be heard by a three-judge panel, six paper copies are required to be provided to the court within five business days of the court's issuance of a notice requesting paper copies.

* * *

- (F) **Briefs in En Banc Cases.** If the court grants a petition for hearing en banc, unless otherwise ordered, 28 paper copies of all briefs and appendices shall be filed within five business days of the court's acceptance of the electronic brief. If the court grants a petition for rehearing en banc, unless otherwise ordered, 28 paper copies of the original briefs and appendices (in cases where briefs were filed in CM/ECF prior to the court's order granting an en banc rehearing) shall be filed within seven business days of the court's order granting en banc rehearing. Additionally, if the court grants a petition for rehearing en banc, 28 paper copies of any ordered supplemental

briefs, appendices, and amicus briefs must be filed within five business days of the court's acceptance of the electronic brief or appendices. If a brief is accompanied by a motion for leave, paper copies of the motion shall also be submitted in the quantity required of the brief by this subsection.

- (G) **Confidential Versions.** If confidential and nonconfidential versions of the briefs, appendices, or petitions were filed through CM/ECF, paper copies of only the confidential version(s) are required to be submitted to the court. One paper copy of the confidential version of any document submitted to the court through CM/ECF must be served on any party, whether that party is or is not represented by counsel, except if that party or its counsel has not been authorized access to the confidential information under a governing protective order. Electronic access to confidential versions of documents is restricted to the court only.
- (H) **Other Documents.** Exhibits, attachments, or appendices that are not in a format that readily permits electronic filing—such as those which are illegible when scanned or which, because of their odd shape, are unable to be scanned—may be filed in paper form without leave of court. Counsel must then file electronically a Notice of Paper Filing. The party must serve documents filed pursuant to this subsection by providing two paper copies to all other parties. If such documents are submitted with a brief or appendix, then an original and six copies must be filed within five business days of electronic submission of the Notice of Paper Filing. For all other filings of documents that may not be scanned, an original and three copies must be filed.
- (I) **Motion for Exemption.** A motion for exemption from the court's CM/ECF requirements may be submitted in paper form. Only one paper copy is required. Upon a showing of good cause, the court may exempt a party from CM/ECF requirements and authorize filing by means other than use of CM/ECF.

* * *

(K) **Corrected Versions.** If a party has not yet filed paper copies of a document and that party has electronically filed a corrected version of that document, only paper copies of the corrected version must be provided to the court.

* * *

(4) **Review and Correction by the Clerk of Court.** The clerk of court may require the filing of a corrected copy of any submission that fails to comply with the court's rules or the Electronic Filing Procedures. If a party fails to file a timely corrected copy in response to a notice requiring correction from the clerk of court, the clerk of court may strike the non-compliant document from the docket. The clerk of court may also edit docket entries to correct or add text or attachments and any such revision will be identified on the docket.

Practice Notes

* * *

PAPER COPIES OF BRIEFS AND APPENDICES. Counsel should not submit paper copies of any briefs or appendices required under Federal Circuit Rule 25(c)(1)(A)-(B) until after the court issues a notice indicating that the copies are due and the deadline for filing these copies. In typical, non-expedited cases, the clerk of court issues this notice shortly after briefing concludes. Paper copies for petitions and briefs related to panel rehearing, en banc hearing, or en banc rehearing are due after the filing of the electronic version as required by Federal Circuit Rule 25(c)(1)(C)-(F). Unrepresented parties must provide paper copies at the time for filing of the original brief.

3. Federal Circuit Rule 28

(REDLINED VERSION)

Rule 28. Briefs

* * *

(d) **Brief Containing Material Subject to a Protective Order.**

(1) **Confidentiality.**

* * *

- (2) **Two Versions of Briefs.** If a party refers in a brief to material subject to confidentiality ~~under as permitted by~~ Federal Circuit Rule 28(d), ~~then~~ two versions of ~~the~~ briefs must be filed. ~~See Federal Circuit Rule 25 for requirements on filing briefs through CM/ECF, with paper copies to follow. The following subsections relate to the paper briefs that are filed after a brief is accepted for filing through CM/ECF.~~

(PROPOSED VERSION)

Rule 28. Briefs

* * *

(d) **Brief Containing Material Subject to a Protective Order.**

(1) **Confidentiality.**

* * *

- (2) **Two Versions of Briefs.** If a party refers in a brief to material subject to confidentiality as permitted by Federal Circuit Rule 28(d), then two versions of the briefs must be filed.

4. Federal Circuit Rule 29

(REDLINED VERSION)

Rule 29. Brief of an Amicus Curiae

- (a) **Content; Form; ~~Copies~~.** In addition to the contents required by Federal Rule of Appellate Procedure 29, the brief of an amicus curiae must include a certificate of interest (see Federal Circuit Rule 47.4) in front of the table of contents. ~~Amicus curiae must file six paper copies of the brief within five business days of the clerk of court's acceptance of the electronic version of the brief.~~

(PROPOSED VERSION)

Rule 29. Brief of an Amicus Curiae

- (a) **Content; Form.** In addition to the contents required by Federal Rule of Appellate Procedure 29, the brief of an amicus curiae must include a certificate of interest (see Federal Circuit Rule 47.4) in front of the table of contents.

5. Federal Circuit Rule 30

(REDLINED VERSION)

Rule 30. Appendix to the Briefs

- (a) **Purpose; Content of Appendix; Time for Filing; Number of Copies; Cover; Service.**

* * *

- (5) **Number of Copies.** Six paper copies of the appendix must be filed with the court in accordance with Federal Circuit Rule 25(c).

(PROPOSED VERSION)

Rule 30. Appendix to the Briefs

- (a) **Purpose; Content of Appendix; Time for Filing; Number of Copies; Cover; Service.**

* * *

- (5) **Number of Copies.** Six paper copies of the appendix must be filed with the court in accordance with Federal Circuit Rule 25(c).

6. Federal Circuit Rule 31

REDLINED VERSION

Rule 31. Serving and Filing Briefs

(a) Time for Service and Filing.

* * *

(3) Cross-Appeal. In a cross-appeal:

(A) the appellant must serve and file its reply brief within 40 days after cross-appellant's brief is served; and

(B) the cross-appellant must serve and file its reply brief within 14-21 days after appellant's reply brief is served.

* * *

(b) Number of Copies. ~~Except for briefs containing material subject to a protective order (see Federal Circuit Rule 28(d)), six Six paper copies of each brief, or three paper copies if filing an informal brief, shall be provided to the court in accordance with Federal Circuit Rule 25(c). - must be filed with the court. Counsel will be directed by the clerk's office to file the paper copies after the copy submitted through CM/ECF is accepted for filing. If the brief is filed by a pro se party, then three paper copies are required to be filed with the court.~~

(PROPOSED VERSION)

Rule 31. Serving and Filing Briefs

(a) Time for Service and Filing.

* * *

(3) Cross-Appeal. In a cross-appeal:

- (A) the appellant must serve and file its reply brief within 40 days after cross-appellant's brief is served; and
- (B) the cross-appellant must serve and file its reply brief within 21 days after appellant's reply brief is served.

* * *

(b) Number of Copies. Six paper copies of each brief, or three paper copies if filing an informal brief, shall be provided to the court in accordance with Federal Circuit Rule 25(c).

7. Federal Circuit Rule 32

(REDLINED VERSION)

Rule 32. Form of Briefs, Appendices, and Other Papers; Length

- (a) **Nonconforming Brief.** The clerk of court may ~~refuse to file~~ require corrections to any brief that has not been prepared in conformity with Federal Rule of Appellate Procedure 32, ~~except that, as to word count,~~ an appellant's and appellee's opening brief is acceptable if it contains no more than 14,000 words or uses a monospaced face and contains no more than 1,300 lines of text, and an appellant's reply brief is acceptable if it contains no more than 7,000 words.

(PROPOSED VERSION)

Rule 32. Form of Briefs, Appendices, and Other Papers; Length

- (a) **Nonconforming Brief.** The clerk of court may require corrections to any brief that has not been prepared in conformity with Federal Rule of Appellate Procedure 32; as to word count, an appellant's and appellee's opening brief is acceptable if it contains no more than 14,000 words or uses a monospaced face and contains no more than 1,300 lines of text, and an appellant's reply brief is acceptable if it contains no more than 7,000 words.

8. Federal Circuit Rule 44

(REDLINED VERSION)

Practice Note

RAISING A CONSTITUTIONAL QUESTION IN A BRIEF OR MOTION. Inclusion of a constitutional challenge in a brief or motion is insufficient to satisfy the written notice requirements of Federal Rule of Appellate Procedure 44. Parties must file a separate notice before the clerk of court will certify a matter to the Attorney General of the United States or the attorney general of a State.

(PROPOSED VERSION)

Practice Note

RAISING A CONSTITUTIONAL QUESTION IN A BRIEF OR MOTION. Inclusion of a constitutional challenge in a brief or motion is insufficient to satisfy the written notice requirements of Federal Rule of Appellate Procedure 44. Parties must file a separate notice before the clerk of court will certify a matter to the Attorney General of the United States or the attorney general of a State.