

AMENDMENTS TO THE FEDERAL RULES
OF APPELLATE PROCEDURE

COMMUNICATION

FROM

THE CHIEF JUSTICE, THE SUPREME
COURT OF THE UNITED STATES

TRANSMITTING

AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE THAT HAVE BEEN ADOPTED BY THE COURT, PURSUANT TO 28 U.S.C. 2072



APRIL 24, 1996.—Referred to the Committee on the Judiciary and ordered to be printed.

U.S. GOVERNMENT PRINTING OFFICE

**Supreme Court of the United States
Washington, D. C. 20543**

CHAMBERS OF
THE CHIEF JUSTICE

April 23, 1996

Dear Mr. Speaker:

By direction of the Supreme Court of the United States, 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 excerpts from the report of the Judicial Conference of the United States containing the Advisory Committee notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,



Honorable Newt Gingrich
Speaker of the House of Representatives
Washington, D.C. 20515

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Appellate Procedure be, and they hereby are, amended by including therein amendments to Appellate Rules 21, 25, and 26.

[See infra., pp. _____.]

2. That the foregoing amendments to the Federal Rules of Appellate Procedure shall take effect on December 1, 1996, and shall govern all proceedings in appellate cases thereafter commenced and, insofar as just and practicable, all proceedings in appellate cases then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Appellate Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

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

**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 shall file a petition with the circuit clerk with proof of service on all parties to the proceeding in the trial court. The party shall 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.

(2) (A) The petition shall be titled "In re [name of petitioner]."

(B) The petition shall state:

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- (i) the relief sought;
- (ii) the issues presented;
- (iii) the facts necessary to understand the issues presented by the petition; and
- (iv) the reasons why the writ should issue.

(C) The petition shall include copies of any order or opinion or parts of the record that may be essential to understand the matters set forth in the petition.

(3) When the clerk receives the prescribed docket fee, the clerk shall docket the petition and submit it to the court.

(b) *Denial; Order Directing Answer; Briefs; Precedence.*

(1) The court may deny the petition without an

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answer. Otherwise, it shall order the respondent, if any, to answer within a fixed time.

- (2) The clerk shall serve the order to respond on all persons directed to respond.
- (3) Two or more respondents may answer jointly.
- (4) The court of appeals may invite or order the trial court judge to respond or may invite an amicus curiae to do so. The trial court judge may request permission to respond but may not respond unless invited or ordered to do so by the court of appeals.
- (5) If briefing or oral argument is required, the clerk shall advise the parties, and when appropriate, the trial court judge or amicus curiae.
- (6) The proceeding shall be given preference over

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ordinary civil cases.

- (7) The circuit clerk shall send a copy of the final disposition to the trial court judge.
- (c) *Other Extraordinary Writs.* Application for an extraordinary writ other than one of those provided for in subdivisions (a) and (b) of this rule shall be made by filing a petition with the circuit clerk with proof of service on the respondents. Proceedings on such application shall conform, so far as is practicable, to the procedure prescribed in subdivisions (a) and (b) of this rule.
- (d) *Form of Papers; Number of Copies.* All papers may be typewritten. An original and three copies shall be filed unless the court requires the filing of a different number by local rule or by order in a particular case.

FEDERAL RULES OF APPELLATE PROCEDURE 5**Rule 25. Filing, Proof of Filing, Service, and Proof of Service****(a) Filing.**

(1) *Filing with the Clerk.* A paper required or permitted to be filed in a court of appeals shall be filed with the clerk.

(2) *Filing: Method and Timeliness.*

(A) *In general.* Filing may be accomplished by mail addressed to the clerk, but filing is not timely unless the clerk receives the papers within the time fixed for filing.

(B) *A brief or appendix.* A brief or appendix is timely filed, however, if on or before the last day for filing, it is:

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- (i) mailed to the clerk by First-Class Mail, or other class of mail that is at least as expeditious, postage prepaid;
or
 - (ii) dispatched to the clerk for delivery within 3 calendar days by a third-party commercial carrier.
- (C) *Inmate filing.* A paper filed by an inmate confined in an institution is timely filed if deposited in the institution's internal mail system on or before the last day for filing. Timely filing of a paper by an inmate confined in an institution may be shown by a notarized statement or declaration (in

FEDERAL RULES OF APPELLATE PROCEDURE 7

compliance with 28 U.S.C. § 1746)
setting forth the date of deposit and
stating that first-class postage has been
prepaid.

- (D) *Electronic filing.* A court of appeals may by local rule permit papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules.
- (3) *Filing a Motion with a Judge.* If a motion requests relief that may be granted by a single judge, the judge may permit the motion to be

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filed with the judge; the judge shall note the filing date on the motion and give it to the clerk.

- (4) *Clerk's Refusal of Documents.* The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rules or practices.

* * * * *

- (c) *Manner of Service.* Service may be personal, by mail, or by third-party commercial carrier for delivery within 3 calendar days. When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, service on a party shall be by a manner at least as expeditious as the manner used to file the paper with the court. Personal service includes delivery of the copy to a responsible person

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at the office of counsel. Service by mail or by commercial carrier is complete on mailing or delivery to the carrier.

- (d) *Proof of Service; Filing.* A paper presented for filing shall contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service, of the name of the person served, and of the addresses to which the papers were mailed or at which they were delivered, certified by the person who made service. Proof of service may appear on or be affixed to the papers filed. When a brief or appendix is filed by mailing or dispatch in accordance with Rule 25(a)(2)(B), the proof of service shall also state the date and manner by which the document was mailed or dispatched to the clerk.

* * * * *

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Rule 26. Computation and Extension of Time

* * * * *

- (c) *Additional Time after Service* . When a party is required or permitted to act within a prescribed period after service of a paper upon that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service.



L. RALPH MECHAM
DIRECTOR

CLARENCE A. LEE, JR.
ASSOCIATE DIRECTOR

October 12, 1995

**MEMORANDUM TO THE CHIEF JUSTICE OF THE UNITED STATES
AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT**

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I have the honor to transmit herewith for the consideration of the Court proposed amendments to Rules 21, 25, and 26 of the Federal Rules of Appellate Procedure. The Judicial Conference recommends that these amendments be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering these proposed amendments, I am also transmitting an excerpt from the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference and the Report of the Advisory Committee on the Federal Rules of Appellate Procedure.



L. Ralph Mecham

Enclosures



**EXCERPT FROM THE
REPORT OF THE JUDICIAL CONFERENCE
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
SEPTEMBER 1995**

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES:

**I. AMENDMENTS TO THE
FEDERAL RULES OF APPELLATE PROCEDURE**

A. Rules Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules submitted proposed amendments to Federal Rules of Appellate Procedure 21, 25, 26, and 27¹ together with Committee Notes explaining their purpose and intent. The proposed amendments had been circulated to the bench and bar for comment in September 1994. A public hearing was scheduled, but later canceled, because no request to appear was received by the committee.

Under the proposed amendments to Rule 21 (*Writ of Mandamus and Prohibition Directed to a Judge or Judges and Other Extraordinary Writs*), the trial judge would not be treated as a respondent nor be named in the petition for the writ. The judge would be permitted to appear to oppose the petition only if invited or ordered to do so by the appellate court. In light of the public comments, the draft amendments were revised by the advisory committee to require: (1) that the petitioning party serve the trial court clerk with a copy of the petition, and (2) that the circuit clerk send to the trial court clerk a copy of the order disposing of the petition. In this way the trial judge should receive timely notice in all instances.

A member of the committee, however, urged that the proposed amendments be modified further to provide the trial judge with the right to respond to the petition. An earlier published proposal would have entitled the trial judge to respond but was altered because of strong opposition in the public comments. Concerns were raised that a judge's neutrality and objectivity might be jeopardized if the judge, after opposing the petition, continued to adjudicate the same case. The committee did not approve the recommendation. But it did revise the proposed amendments in two respects: (1) to require that a copy of the petition be sent directly to the trial judge, and (2) to state explicitly that the trial judge may request permission to respond to the petition.

¹The Standing Committee did not approve the proposed amendments to Rule 27 for submission to the Judicial Conference.

The proposed amendments to Rule 25 (*Filing and Service*) provide that in order to file a brief or appendix using the "mailbox rule," the brief or appendix must be mailed by First-Class Mail or dispatched to the clerk by a commercial carrier for delivery within three calendar days. A party using the mailbox rule must certify in the proof of service that the brief or appendix was mailed or delivered to the commercial carrier on or before the last day for filing. Service on other parties by a commercial carrier would also be permitted.

Rule 25 would also be amended to authorize a court to permit, by local rule, the filing of papers by electronic means, provided such means are consistent with technical standards, if any, established by the Judicial Conference. The amendment is part of a package of proposed uniform amendments with the Bankruptcy Rules and Civil Rules.

Rule 26 (*Computation and Extension of Time*) would be amended to provide a party with a three-day extension to act whenever delivery to the party being served occurs later than the date of service stated in the proof of service. After considering some technical difficulties with the draft, the proposed amendments were revised to make clear that the three-day extension is not provided when "the paper is delivered on the date of service." The subdivision's caption was also modified to eliminate reference to "Mail or Commercial Carrier."

* * * * *

The proposed amendments to the Federal Rules of Appellate Procedure, as recommended by your committee, appear in *Appendix A* together with an excerpt from the advisory committee report.

Recommendation: That the Judicial Conference approve proposed amendments to Appellate Rules 21, 25, and 26 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

Agenda F-19
(Appendix A)
Rules
September 1995

ROBERT E. KEETON
CHAIRMAN
PETER G. McCABE
SECRETARY

CHAIRMEN OF ADVISORY COMMITTEES
KENNETH F. RIPPLE
APPELLATE RULES
SAM C. POINTER, JR.
CIVIL RULES
WILLIAM TERRELL HODGES
CRIMINAL RULES
EDWARD LEAVY
BANKRUPTCY RULES

TO: Honorable Alicemarie Stotler, Chair, and Members of the Standing
Committee on Rules of Practice and Procedure
FROM: Honorable James K. Logan, Chair
Advisory Committee on Appellate Rules
DATE: June 5, 1995

The Advisory Committee on Appellate Rules submits the following items to
the Standing Committee on Rules:

I. Action Items

- A. Proposed amendments to Federal Rules of Appellate Procedure 21,
25, 26, and 27,^{*} approved by the Advisory Committee on Appellate
Rules at its April 17 and 18 meeting. The Advisory Committee
requests that the Standing Committee approved these amended rules
and forward them to the Judicial Conference.

The proposed amendments were published in September 1994. A
public hearing was scheduled for January 23, 1995, in Denver,
Colorado. Because there were no requests to appear, the hearing
was canceled. The Advisory Committee has reviewed the written
comments and, in some instances, altered the proposed amendments
in light of the comments.

- Part A(1) of this Report summarizes the proposed amendments.
- Part A(2) includes the text of the amended rules.
- Part A(3) is the Gap Report, indicating the changes that have
been made since publication.
- Part A(4) summarizes the comments.

* * * * *

^{*}The Standing Committee did not approve the proposed amendments to Rule 27
for submission to the Judicial Conference.

Advisory Committee on Appellate Rules
Part I.A(1), Summary - Rules for Judicial Conference

**SUMMARY OF PROPOSED RULE AMENDMENTS
TO BE FORWARDED TO THE JUDICIAL CONFERENCE**

1. Amendments to Rule 21 governing petitions for mandamus are proposed. The rule is amended so that the trial judge is not named in the petition and is not treated as a respondent. The trial court clerk is, however, served with a copy of both the petition and the order disposing of the petition. The judge is permitted to appear to oppose issuance of the writ only if the court of appeals invites or orders the judge to do so. The proposed amendments also permit a court of appeals to invite an amicus curiae to respond to the petition.
2. The proposed amendments to Rule 25 provide that in order to file a brief or appendix using the mailbox rule, the brief or appendix must be mailed by First-Class Mail or dispatched to the clerk by a commercial carrier for delivery within three calendar days. The amendments also require that a party using the mailbox rule must certify in the proof of service that the brief or appendix was mailed or delivered to the commercial carrier on or before the last day for filing. Subdivision (c) is also amended to permit service on other parties by commercial carrier. Amended subdivision (c) further provides that when reasonable, service on other parties should be by a manner at least as expeditious as the manner used to file the paper with the court.
3. The proposed amendment to Rule 26 makes the three-day extension for responding to a document served by mail also applicable whenever the party being served does not receive the document on the date of service recited in the proof of service.

* * * * *

GAP REPORT
CHANGES MADE AFTER PUBLICATION

1. RULE 21

Several changes have been made in Rule 21.

- a. A sentence has been added at lines 15 and 16. The new language requires the party petitioning for mandamus to file a copy of the petition with the clerk of the trial court. The Advisory Committee wanted the trial court judge to have notice of the petition. To be consistent with the fact that the judge is not treated as a respondent, the copy is sent to the trial court clerk rather than directly to the judge.
- b. At line 70, language was added authorizing a court of appeals to "invite" the judge's participation as well to order it.
- c. A sentence has been added at lines 72-75. The new language states that the trial judge may not respond unless requested to do so by the court of appeals. In the published rule the judge's inability to participate without court of appeals authorization was implicit but not stated directly except in the Committee Note.
- d. Paragraph (b)(7) is new. It requires the circuit clerk to send a copy of the order disposing of the petition to the clerk of the trial court. This change is a companion to the change requiring the petitioner to file a copy of the petition with the trial court. Filing the petition in the trial court will result in its docketing. Receipt of the order disposing of the petition will notify the trial court that the mandamus proceeding has been completed.
- e. Several stylistic changes were adopted.
 - i. At lines 9 and 43, "must" was changed to "shall".
 - ii. At lines 10 and 11, and line 91, "clerk of the court of appeals" was changed to "circuit clerk".
 - iii. Lines 26 and 27 were combined as subparagraph (A) and the words "The petition must were" were inserted at line 28 before the word "state". At line 37, the words "The petition must" were inserted before the word "include".
 - iv. The numbered paragraphs of subdivision (b) were rearranged. Paragraph (4) of the new draft (beginning at line 70) had been paragraph (2) of the published draft.
 - v. At line 76, the word "briefs" was changed to "briefing" and the

Advisory Committee on Appellate Rules
Part I.A(3) - Gap Report

- Committee believes that this language provides better guidance.
- e. Subdivision (2)(B) of the published rule required a party using the mailbox rule to provide a certificate that it was mailed or delivered to a reliable commercial carrier on or before the last day for filing. That provision has been rewritten and moved to subdivision (d). The certification requirement was moved to subdivision (d) so that it could be combined with the proof of service.
 - f. Stylistic changes were made:
 - i. At line 19, the word "was" was replaced by "is".
 - ii. At lines 20 and 21, initial caps were used for "First-Class Mail".
 - iii. At line 58, the word "must" was changed to "shall".
 - iv. At line 82, the words "clerk or other" were omitted.
 - v. At line 86, the word "Papers" was made singular.
 - vi. At line 90, the word "names" was made singular.

3. RULE 26

Several changes have been made in Rule 26.

- a. The published amendment gave a party who must respond within a specified time after service of a document 3 additional days to respond when service is by "reliable commercial carrier" as well as when service is by mail. Because the distinction between personal service and other kinds of service is not always clear, the words "and the paper is served by mail" were deleted from lines 4 and 5, and new language has been added at lines 6 through 8. These changes make the 3-day extension available whenever a document is not delivered to the party being served on the same day that it is "served." The 3-day extension was created because service by mail is complete on the date of mailing. Since the party being served by mail does not receive the paper on that date, an extension is provided. Making the extension available whenever the party does not receive the document on the date it is served achieves the original objective and avoids the confusion arising from the need to know the type of service.
- b. At line 5, the word "calendar" was added before the word "days." That change makes it clear that weekends and holidays are counted because the 3-day extension period is not covered by the provision in Rule 26(a) that weekends and holidays do not count when a period is less than 7 days.
- c. Stylistic changes were also made:
 - i. At line 2, the word "Whenever" was changed to "When".
 - ii. At line 3, the words "do an" were omitted.

* * * * *

**Advisory Committee on Appellate Rules
Part I.A(3) - Gap Report**

- Committee believes that this language provides better guidance.
- e. Subdivision (2)(B) of the published rule required a party using the mailbox rule to provide a certificate that it was mailed or delivered to a reliable commercial carrier on or before the last day for filing. That provision has been rewritten and moved to subdivision (d). The certification requirement was moved to subdivision (d) so that it could be combined with the proof of service.
 - f. Stylistic changes were made:
 - i. At line 19, the word "was" was replaced by "is".
 - ii. At lines 20 and 21, initial caps were used for "First-Class Mail".
 - iii. At line 58, the word "must" was changed to "shall".
 - iv. At line 82, the words "clerk or other" were omitted.
 - v. At line 86, the word "Papers" was made singular.
 - vi. At line 90, the word "names" was made singular.

3. RULE 26

Several changes have been made in Rule 26.

- a. The published amendment gave a party who must respond within a specified time after service of a document 3 additional days to respond when service is by "reliable commercial carrier" as well as when service is by mail. Because the distinction between personal service and other kinds of service is not always clear, the words "and the paper is served by mail" were deleted from lines 4 and 5, and new language has been added at lines 6 through 8. These changes make the 3-day extension available whenever a document is not delivered to the party being served on the same day that it is "served." The 3-day extension was created because service by mail is complete on the date of mailing. Since the party being served by mail does not receive the paper on that date, an extension is provided. Making the extension available whenever the party does not receive the document on the date it is served achieves the original objective and avoids the confusion arising from the need to know the type of service.
- b. At line 5, the word "calendar" was added before the word "days." That change makes it clear that weekends and holidays are counted because the 3-day extension period is not covered by the provision in Rule 26(a) that weekends and holidays do not count when a period is less than 7 days.
- c. Stylistic changes were also made:
 - i. At line 2, the word "Whenever" was changed to "When".
 - ii. At line 3, the words "do an" were omitted.

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**Rule 21. Writs of Mandamus and Prohibition, Directed
to a Judge or Judges and Other Extraordinary Writs***

- 1 (a) ~~Mandamus or prohibition to a judge or judges;~~
2 ~~petition for writ; service and filing.~~ Mandamus or
3 Prohibition to a Court: Petition, Filing, Service, and
4 Docketing.
- 5 (1) ~~Application for a writ of mandamus or of~~
6 ~~prohibition directed to a judge or judges~~
7 ~~shall be made by filing~~ A party
8 petitioning for a writ of mandamus or
9 prohibition directed to a court shall file a
10 ~~petition therefor with the circuit clerk of~~
11 ~~the court of appeals with proof of service~~
12 ~~on the respondent judge or judges and on~~
13 ~~all parties to the action proceeding in the~~

* New matter is underlined; matter to be omitted is lined through.

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14 trial court. The party shall also provide a
15 copy to the trial court judge. All parties
16 to the proceeding in the trial court other
17 than the petitioner are respondents for all
18 purposes.

19 ~~(2) The petition shall contain a statement of~~
20 ~~the facts necessary to an understanding of~~
21 ~~the issues presented by the application; a~~
22 ~~statement of the issues presented and of~~
23 ~~the relief sought; a statement of the~~
24 ~~reasons why the writ should issue; and~~

25 ~~(A) The petition shall be titled "In re~~
26 ~~[name of petitioner]."~~

27 ~~(B) The petition shall state:~~

28 ~~(i) the relief sought;~~

29 ~~(ii) the issues presented;~~

30 ~~(iii) the facts necessary to~~

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31 understand the issues
32 presented by the petition;
33 and
34 (iv) the reasons why the writ
35 should issue.

36 (C) The petition shall include copies of
37 any order or opinion or parts of
38 the record ~~which~~ that may be
39 essential to ~~an~~ understanding of
40 the matters set forth in the
41 petition.

42 (3) ~~Upon receipt of~~ When the clerk receives
43 the prescribed docket fee, the clerk shall
44 docket the petition and submit it to the
45 court.

46 (b) *Denial; Order Directing Answer; Briefs; Precedence.*
47 ~~If the court is of the opinion that the writ should~~

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48 ~~not be granted, it shall deny the petition.~~
49 ~~Otherwise, it shall order that an answer to the~~
50 ~~petition be filed by the respondents within the~~
51 ~~time fixed by the order. The order shall be~~
52 ~~served by the clerk on the judge or judges named~~
53 ~~respondents and on all other parties to the action~~
54 ~~in the trial court. All parties below other than~~
55 ~~the petitioner shall also be deemed respondents~~
56 ~~for all purposes. Two or more respondents may~~
57 ~~answer jointly. If the judge or judges named~~
58 ~~respondents do not desire to appear in the~~
59 ~~proceeding, they may so advise the clerk and all~~
60 ~~parties by letter, but the petition shall not thereby~~
61 ~~be taken as admitted.~~

62 (1) The court may deny the petition without
63 an answer. Otherwise, it shall order the
64 respondent, if any, to answer within a

FEDERAL RULES OF APPELLATE PROCEDURE 5

- 65 fixed time.
- 66 (2) The clerk shall serve the order to respond
67 on all persons directed to respond.
- 68 (3) Two or more respondents may answer
69 jointly.
- 70 (4) The court of appeals may invite or order
71 the trial court judge to respond or may
72 invite an amicus curiae to do so. The trial
73 court judge may request permission to
74 respond but may not respond unless
75 invited or ordered to do so by the court of
76 appeals.
- 77 (5) If briefing or oral argument is required, F
78 the clerk shall advise the parties, and
79 when appropriate, the trial court judge or
80 amicus curiae, of the dates on which briefs
81 are to be filed, if briefs are required, and

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82 ~~of the date of oral argument.~~

83 ~~(6)~~ The proceeding shall be given preference
84 over ordinary civil cases.

85 ~~(7)~~ The circuit clerk shall send a copy of the
86 final disposition to the trial court judge.

87 (c) *Other Extraordinary Writs.* Application for an
88 extraordinary writs other than one of those
89 provided for in subdivisions (a) and (b) of this
90 rule shall be made by filing a petition filed with
91 the circuit clerk ~~of the court of appeals~~ with
92 proof of service on the ~~parties named as~~
93 respondents. Proceedings on such application
94 shall conform, so far as is practicable, to the
95 procedure prescribed in subdivisions (a) and (b)
96 of this rule.

97 (d) *Form of Papers; Number of Copies.* All papers
98 may be typewritten. An original and three copies

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99 shall ~~must~~ be filed unless the court requires the
100 filing of a different number by local rule or by
101 order in a particular case.

Committee Note

In most instances, a writ of mandamus or prohibition is not actually directed to a judge in any more personal way than is an order reversing a court's judgment. Most often a petition for a writ of mandamus seeks review of the intrinsic merits of a judge's action and is in reality an adversary proceeding between the parties. See, e.g., *Walker v. Columbia Broadcasting System, Inc.*, 443 F.2d 33 (7th Cir. 1971). In order to change the tone of the rule and of mandamus proceedings generally, the rule is amended so that the judge is not treated as a respondent. The caption and subdivision (a) are amended by deleting the reference to the writs as being "directed to a judge or judges."

Subdivision (a). Subdivision (a) applies to writs of mandamus or prohibition directed to a court, but it is amended so that a petition for a writ of mandamus or prohibition does not bear the name of the judge. The amendments to subdivision (a) speak, however, about mandamus or prohibition "directed to a court." This language is inserted to distinguish subdivision (a) from subdivision (c). Subdivision (c) governs all other extraordinary writs, including a writ of mandamus or prohibition directed to an administrative agency rather than to a court and a writ of habeas corpus.

The amendments require the petitioner to provide a

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copy of the petition to the trial court judge. This will alert the judge to the filing of the petition. This is necessary because the trial court judge is not treated as a respondent and, as a result, is not served. A companion amendment is made in subdivision (b). It requires the circuit clerk to send a copy of the disposition of the petition to the trial court judge.

Subdivision (b). The amendment provides that even if relief is requested of a particular judge, although the judge may request permission to respond, the judge may not do so unless the court invites or orders a response.

The court of appeals ordinarily will be adequately informed not only by the opinions or statements made by the trial court judge contemporaneously with the entry of the challenged order but also by the arguments made on behalf of the party opposing the relief. The latter does not create an attorney-client relationship between the party's attorney and the judge whose action is challenged, nor does it give rise to any right to compensation from the judge.

If the court of appeals desires to hear from the trial court judge, however, the court may invite or order the judge to respond. In some instances, especially those involving court administration or the failure of a judge to act, it may be that no one other than the judge can provide a thorough explanation of the matters at issue. Because it is ordinarily undesirable to place the trial court judge, even temporarily, in an adversarial posture with a litigant, the rule permits a court of appeals to invite an *amicus curiae* to provide a response to the petition. In those instances in which the respondent does not oppose issuance of the writ or does not have sufficient perspective on the issue to provide an adequate response, participation of an *amicus* may avoid the need for the trial judge to participate.

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Subdivision (c). The changes are stylistic only. No substantive changes are intended.

Rule 25. Filing, Proof of Filing, and Service, and Proof of Service

1 (a) *Filing.*

2 (1) *Filing with the Clerk.* A paper required or
3 permitted to be filed in a court of appeals
4 shall ~~must~~ be filed with the clerk.

5 (2) *Filing: Method and Timeliness.*

6 (A) *In general.* Filing may be
7 accomplished by mail addressed to
8 the clerk, but filing is not timely
9 unless the clerk receives the papers
10 within the time fixed for filing, ;
11 ~~except that~~

12 (B) *A brief or appendix.* ~~briefs and~~
13 ~~appendices are treated as filed on~~
14 ~~the day of mailing if the most~~

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15 ~~expeditious form of delivery by~~
16 ~~mail, except special delivery, is~~
17 ~~used~~ A brief or appendix is timely
18 filed, however, if on or before the
19 last day for filing, it is:

20 (i) mailed to the clerk by First-
21 Class Mail, or other class of
22 mail that is at least as
23 expeditious, postage
24 prepaid; or

25 (ii) dispatched to the clerk for
26 delivery within 3 calendar
27 days by a third-party
28 commercial carrier.

29 (C) Inmate filing. ~~Papers~~ A paper filed
30 by an inmate confined in an
31 institution ~~are~~ is timely filed if

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32 deposited in the institution's
33 internal mail system on or before
34 the last day for filing. Timely filing
35 of papers a paper by an inmate
36 confined in an institution may be
37 shown by a notarized statement or
38 declaration (in compliance with 28
39 U.S.C. § 1746) setting forth the
40 date of deposit and stating that
41 first-class postage has been
42 prepaid.

43 **(D)** Electronic filing. A court of
44 appeals may by local rule permit
45 papers to be filed, signed, or
46 verified by electronic means that
47 are consistent with technical
48 standards, if any, that the Judicial

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49 Conference of the United States
50 establishes. A paper filed by
51 electronic means in compliance
52 with a local rule constitutes a
53 written paper for the purpose of
54 applying these rules.

55 (3) Filing a Motion with a Judge. If a motion
56 requests relief that may be granted by a
57 single judge, the judge may permit the
58 motion to be filed with the judge; ~~in~~
59 ~~which event~~ the judge shall note ~~thereon~~
60 the filing date on the motion and
61 thereafter give it to the clerk. ~~A court of~~
62 ~~appeals may, by local rule, permit papers~~
63 ~~to be filed by facsimile or other electronic~~
64 ~~means, provided such means are~~
65 ~~authorized by and consistent with~~

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66 standards established by the Judicial
67 Conference of the United States.

68 (4) Clerk's Refusal of Documents. The clerk
69 shall ~~must~~ not refuse to accept for filing
70 any paper presented for that purpose
71 solely because it is not presented in
72 proper form as required by these rules or
73 by any local rules or practices.

74 * * * * *

75 (c) Manner of Service. Service may be personal, ~~or~~
76 by mail, or by third-party commercial carrier for
77 delivery within 3 calendar days. When
78 reasonable considering such factors as the
79 immediacy of the relief sought, distance, and cost,
80 service on a party shall be by a manner at least
81 as expeditious as the manner used to file the
82 paper with the court. Personal service includes

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83 delivery of the copy to a ~~clerk or other~~
84 responsible person at the office of counsel.
85 Service by mail or by commercial carrier is
86 complete on mailing or delivery to the carrier.

87 (d) *Proof of Service; Filing.* A paper Papers
88 presented for filing shall ~~must~~ contain an
89 acknowledgment of service by the person served
90 or proof of service in the form of a statement of
91 the date and manner of service, of the names of
92 the persons served, and of the addresses to which
93 the papers were mailed or at which they were
94 delivered, certified by the person who made
95 service. Proof of service may appear on or be
96 affixed to the papers filed. When a brief or
97 appendix is filed by mailing or dispatch in
98 accordance with Rule 25(a)(2)(B), the proof of
99 service shall also state the date and manner by

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100 which the document was mailed or dispatched to

101 the clerk.

102 * * * * *

Committee Note

Subdivision (a). The amendment deletes the language requiring a party to use "the most expeditious form of delivery by mail, except special delivery" in order to file a brief using the mailbox rule. That language was adopted before the Postal Service offered Express Mail and other expedited delivery services. The amendment makes it clear that it is sufficient to use First-Class Mail. Other equally or more expeditious classes of mail service, such as Express Mail, also may be used. In addition, the amendment permits the use of commercial carriers. The use of private, overnight courier services has become commonplace in law practice. Expedited services offered by commercial carriers often provide faster delivery than First-Class Mail; therefore, there should be no objection to the use of commercial carriers as long as they are reliable. In order to make use of the mailbox rule when using a commercial carrier, the amendment requires that the filer employ a carrier who undertakes to deliver the document in no more than three calendar days. The three-calendar-day period coordinates with the three-day extension provided by Rule 26(c).

Subdivision (c). The amendment permits service by commercial carrier if the carrier is to deliver the paper to the party being served within three days of the carrier's receipt of

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the paper. The amendment also expresses a desire that when reasonable, service on a party be accomplished by a manner as expeditious as the manner used to file the paper with the court. When a brief or motion is filed with the court by hand delivering the paper to the clerk's office, or by overnight courier, the copies should be served on the other parties by an equally expeditious manner -- meaning either by personal service, if distance permits, or by overnight courier, if mail delivery to the party is not ordinarily accomplished overnight. The reasonableness standard is included so that if a paper is hand delivered to the clerk's office for filing but the other parties must be served in a different city, state, or region, personal service on them ordinarily will not be expected. If use of an equally expeditious manner of service is not reasonable, use of the next most expeditious manner may be. For example, if the paper is filed by hand delivery to the clerk's office but the other parties reside in distant cities, service on them need not be personal but in most instances should be by overnight courier. Even that may not be required, however, if the number of parties that must be served would make the use of overnight service too costly. A factor that bears upon the reasonableness of serving parties expeditiously is the immediacy of the relief requested.

Subdivision (d). The amendment adds a requirement that when a brief or appendix is filed by mail or commercial carrier, the certificate of service state the date and manner by which the document was mailed or dispatched to the clerk. Including that information in the certificate of service avoids the necessity for a separate certificate concerning the date and manner of filing.

FEDERAL RULES OF APPELLATE PROCEDURE 17**Rule 26. Computation and Extension of Time**

* * * * *

1 (c) *Additional Time after Service* . Whenever a
2 party is required or permitted to ~~do an~~ act within a
3 prescribed period after service of a paper upon that
4 party, ~~and the paper is served by mail,~~ 3 calendar days
5 ~~shall be~~ are added to the prescribed period unless the
6 paper is delivered on the date of service stated in the
7 proof of service.

Committee Note

The amendment is a companion to the proposed amendments to Rule 25 that permit service on a party by commercial carrier. The amendments to subdivision (c) of this rule make the three-day extension applicable not only when service is accomplished by mail, but whenever delivery to the party being served occurs later than the date of service stated in the proof of service. When service is by mail or commercial carrier, the proof of service recites the date of mailing or delivery to the commercial carrier. If the party being served receives the paper on a later date, the three-day extension applies. If the party being served receives the paper on the same date as the date of service recited in the proof of service,

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the three-day extension is not available.

The amendment also states that the three-day extension is three calendar days. Rule 26(a) states that when a period prescribed or allowed by the rules is less than seven days, intermediate Saturdays, Sundays, and legal holidays do not count. Whether the three-day extension in Rule 26(c) is such a period, meaning that three-days could actually be five or even six days, is unclear. The D.C. Circuit recently held that the parallel three-day extension provided in the Civil Rules is not such a period and that weekends and legal holidays do count. *CNPq v. Inter-Trade*, 50 F.3d 56 (D.C.Cir. 1995). The Committee believes that is the right result and that the issue should be resolved. Providing that the extension is three calendar days means that if a period would otherwise end on Thursday but the three-day extension applies, the paper must be filed on Monday. Friday, Saturday, and Sunday are the extension days. Because the last day of the period as extended is Sunday, the paper must be filed the next day, Monday.

