

# MEMO

To: Judge Neil Gorsuch  
From: Betsy Shumaker  
Date: September 23, 2016  
Re: Potential Fed. R. App. P. Updates

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When we talked about the Rules, you asked me if there were other rules or sections of the rules that I had identified as needing updating. While I don't know how realistic it might be to review some or all of the provisions noted below, these stand out to me as being particularly outdated given our commitment to and dependence on electronic filing. I have also included the date of the last update as a reference point. Please don't hesitate to let me know if you have any questions.

## **Fed. R. App. P. 10—The Record on Appeal (last updated 2009)**

This rule has not been modified since the advent of the electronic appendix. While every circuit does things differently, and not all courts have electronic records and appendices (or “record excerpts” as many courts call them) the rule clearly contemplates only paper records. For instance, Rule 10(a)(1) states the record on appeal must include “the original papers and exhibits filed in the district court.” It also states the record must include “a certified copy of the docket entries prepared by the district clerk.” While “papers” could certainly be read to include electronic papers, the rule doesn't even reference electronic alternatives. I would also note Rule 10(e)(2) references corrections to the record and directs that it “may be corrected and a supplemental record may be certified and forwarded.” Again—while some of the language could certainly be construed to include electronic transmission, language updates would make that more clear.

## **Fed. R. App. P. 11—Forwarding the Record (last updated 1998)**

This is the rule I referenced when we were talking on the phone. It has not been updated since 1998—a time when no circuit court transmitted anything electronically. In particular, Rule 11(a) states the appellant must “do whatever . . . is necessary to enable the clerk to assemble and forward the record.” Rule 11(b)(2) describes forwarding record

materials “of unusual bulk or weight.” Rule 11(c) discusses “retaining the record temporarily in the district court for use in preparing the appeal.” Again, there may be circuits which receipt some materials in hard copy, but the majority does not, and the rule doesn’t even reference the possibility of electronic transmission.

### **Fed. R. App. P. 27—Motions (last updated 2009)**

The majority of this rule still works well. In part 27(d)(1), however, the Rule references formatting requirements and speaks to “reproduction” and “binding.” Again, there may be courts requiring the submission of paper copies of motions (we do not) but it seems the rule should also acknowledge and speak to electronic submission of motions. At a minimum I think it should include language noting that courts may alter the requirements of this section via local rule or practice.

### **Fed. R. App. P. 30—Appendix to the Briefs (last updated 2009)**

As with Rule 27, much of this rule can still be applied easily in the electronic world. I believe, however, that updates to the language of the Rule to acknowledge electronic filing and the impact of local rules on electronic filing would eliminate confusion. For instance, Rule 30(d) states that when transcripts are included in an appendix “the transcript page numbers must be shown in brackets immediately before the included pages.” In the electronic world pagination is consecutive and automatic (using either the district court’s CM program or pagination features in Adobe Acrobat). Likewise, Rule 30(e) is titled “Reproduction of Exhibits” and states exhibits “may be reproduced in a separate volume . . . [and must be] suitably indexed.” Again, I’m not aware of any circuit which receipts exhibit materials in this manner. Like some of the other rules identified here, I think adding language to reference local alternatives, at a minimum, would be helpful.

### **Conclusion**

I do not think any of these rules require a total overhaul. In particular given how different the circuits are in terms of their practices it is desirable to have rules of general application. The issue is, however, that none of these rules have been updated since all of the courts became electronic. They do not even acknowledge the electronic filing world, and that can be confusing to lawyers and litigants. All of the courts have local rules to address our reality (that is, the electronic filing of most everything) but that seems to me to be one of the concerns—right now in most circuits there is a significant disconnect between the Fed. R. App. P. and the local rules. For instance, our local rule 30.1, which addresses the submission of electronic appendices, is longer than all of Fed. R. App. P. 30. I think with some language tweaks the Fed. R. App. P. could be updated to lessen the confusion.