MEMO

To: All Interested Parties

Date: November 21, 2016

Re: ***Fed. R. App. P. and 10th Circuit Local Rules Changes for 2017***

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Effective December 1, 2016, several important changes to the Federal Rules of Appellate Procedure will take effect. On January 1, 2017, changes to the 10th Circuit local rules will take effect.* All of the changes are outlined below.

*Where the new 10th Circuit Rules complement the Federal Rules they may be invoked any time after December 1, 2016.

Changes to the Federal Rules of Appellate Procedure (effective date December 1, 2016)

For 2017 (to take effect December 1, 2016), there are changes to Federal Rules 4, 5, 21, 25, 26, 27, 28, 28.1, 29, 32, 35, and 40. In addition, changes were made to federal Forms 1, 5, and 6, and a new Form 7 was added. A new Appendix was also added to the Fed. R. App. P. which lists the new word length requirements in table form.

Word Length Requirements

The amendments to Rules 5, 21, 27, 28.1, 32, 35, and 40, and to Form 6, involve word counts in briefs. The amendments to Rules 5, 21, 27, 35, and 40 simply convert existing page limits to word counts (Form 6 is a new version of the certificate-of-compliance for word counts). Rules 28.1 and 32 have been changed to alter word counts in briefs. The changes in these rules reduce the word count limits in both primary and reply briefs**. For cases proceeding on a regular briefing schedule, primary brief limits have been reduced from 14,000 words to 13,000 words. Reply briefs have been reduced from 7,000 to 6,500 words. For cross appeal briefing the word count reductions are similar. New Rule 32(f) sets forth a list of items that can be excluded in the word count, and new Rule 32(g) incorporates a certificate-of-compliance reference. As noted above, a new Appendix to the Fed. R. App. P. collects in one chart all the length limits. *See* Rules at pages 159-161.

**all interested parties should note the 10th Circuit local rules do not include any alteration of these word counts. *See* New Fed. R. App. P. 32(e)

Federal Rule of Appellate Procedure 4
(resolving a circuit split regarding the meaning of "timely" in former Rule 4(a)(4))

The amendment to Rule 4(a)(4) addresses a circuit split concerning whether a motion filed outside a non-extendable deadline under Fed. R. Civ. P. 50(b), 52(b), or 59 is "timely" under the rule if a district court has mistakenly ordered or allowed an "extension" of the deadline for filing that motion. Whether the motion is timely impacts the time allowed for filing a notice of appeal under the rule. The 3rd, 7th, 9th, and 11th Circuits previously held that such a motion does *not* toll the time to appeal. The 6th Circuit, however, held to the contrary. *See Nat'l Ecological Found. v. Alexander*, 496 F.3d 466, 476 (6th Cir. 2007). The new rule adopts the majority approach.

Federal Rule of Appellate Procedure 4 (inmate-filing rule—notice of appeal)

Rule 4(c)(1) has been revised to clarify the operation of the inmate-filing rule. The new rule states that a notice of appeal is timely if a declaration is included and first class postage "is being prepaid." In addition, the rule states a notice will be timely without a declaration or notarized statement if other evidence (such as a postmark) shows the document was deposited in the mail before the due date. In addition, the rule now states a court may "exercise it discretion" to accept a declaration or notarized statement at a later date.

Federal Rule of Appellate Procedure 25 (inmate-filing rule-other pleadings)
(new Form 7 and amendments to Forms 1, 5, and 6)

Rule 25(a)(2)(c) has been revised to apply the clarification on inmate-filing from Rule 4 (with respect to notices of appeal) to all other "papers" filed. In addition, new Form 7 was added to the rules to provide a suggested form for the declaration inmates should provide the court. Forms 1, 5 and 6 were amended to include a reference to the new Form 7.

Federal Rule of Appellate Procedure 26 (amending the "three-day-rule")

In its current form, Rule 26(c) adds 3 days to all deadlines if the period (as found in Fed. R. App. P.) is measured from service, and if service is accomplished by certain methods. The only exception is if the "paper is delivered on the date of service." Until now, the Rule stated specifically that a paper served electronically was *not* treated as delivered on the date of service. The 2017 revision alters that sentence such that filings delivered via ECF will now be treated as delivered on the date of service. As a result the 3-day-rule will not apply to deadlines created when service is through ECF.

Federal Rule of Appellate Procedure 28
(changing the reference to the certificate-of-compliance rule)

The revision to this rule adds the new "word count" certification reference from Rule 32.

Federal Rule of Appellate Procedure 29
(adding a section to address amicus briefs filed on rehearing)

In its prior form, Rule 29 did not address amicus briefs filed on rehearing. The new revisions to the rule incorporate sections to address when a motion to file an amicus brief on rehearing is required, the length and form of amici briefs on rehearing, and the time for filing.

Please note 10th Circuit Rule 29.1 has been edited to delete the word count references found there (because they now exist in the Federal Rule). That part of local rule 29.1 referencing *when* the court will consider motions to file amici briefs on rehearing has not, however, been changed.

Changes to the 10th Circuit Local Rules

10th Circuit Rule 17.1 (time for filing agency record where a certified list is file)

The former local rule provided that when a "certified list" was filed in an agency proceeding per Fed. R. App. P. 17(b)(1)(B), the actual record (that is, the documents on the certified list) were to be filed "within 21 days after the respondent's brief is filed." The amended rule requires that the record be filed when the respondent's brief is filed.

10th Circuit Rule 26.1
(adding disclosure requirement in appeals based on diversity jurisdiction)

This new rule incorporates an additional disclosure requirement in certain appeals which are based on diversity jurisdiction. *See* 28 U.S.C. §1332**.** The rule requires a statement in the briefs that includes disclosure of 1) the membership of any LLC, partnership or unincorporated entity in the appeal, and 2) the citizenship of those members, entities or partners.

10th Circuit Rule 27.3(B)(3)
(adding word count limit to memo briefs filed under Rule 27.3(B))

Fed. R. App. P. 27 addresses motions generally, and contains limits on motion length. Local rule 27.3(B) addresses this court's authority to direct parties to file memorandum briefs. The Circuit's local rule has never included a limit on the length of

those briefs, however, and this change addresses that omission. The new provision limits memorandum briefs to 5200 words (the same limit placed on motions per Fed. R. App. P. 27(d)(2)(A)). The proposed changed also includes the addition of a word count certification requirement.

10th Circuit Rule 29.1(amicus briefs on rehearing)

This change is also noted in the Federal Rules section above, but Rule 29.1 has been edited to remove the references previously included regarding length and timing because those requirements are now included in the Fed. R. App. P. rule.

10th Circuit Rule 35.4 and 40.2
(reducing the number of hard copies needed when filing a petition for en banc consideration)

This rule is a simple clerical change. Previously, the court required counsel to forward 8 hard copies of any petition for en banc consideration filed. The new rule changes that number to 6.

10th Circuit Rule 46.4(B)(1)
(updating references to *United States v. Cervantes*, 795 F.3d 1189 (10th Cir. 2015))

In 2015, the court issued the decision in *Cervantes*, which requires attorneys filing *Anders* briefs in criminal cases to explain the process and the right to object in a native language if the defendant is a non-English speaker. Last year the court amended Rule 46.4(B)(1) to incorporate this requirement, and the changes this year add additional language to that rule to make clear counsel's obligations.

10th Circuit Rule 46.4(b)(2) and 10th Circuit Form 4
(notice to defendants in *Anders* cases)

The court's current practice in *Anders* cases is to send the defendant a letter via certified mail after the brief is filed which provides notice regarding the opportunity to respond and which explains the timelines and procedures involved. The substance of the letter is currently included in the local rules as Tenth Circuit Form 4. This change makes a small revision to Rule 46.4(b)(2) to identify the notice as a letter, and also makes some formatting edits to Form 4 to reflect that it is a letter rather than an order. In addition, and consistent with the *Cervantes* decision noted above, the Form has been revised to include a short paragraph in Spanish which briefly outlines counsel's duties under that decision.