

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

1 **TITLE III. ~~REVIEW OF A DECISION OF~~ APPEALS FROM**
2 **THE UNITED STATES TAX COURT**

3 **Rule 13. ~~Review of a Decision of~~ Appeals from the Tax**
4 **Court**

5 **(a) ~~How Obtained; Time for Filing Notice of Appeal~~**
6 **Appeal as of Right.**

7 **(1) How Obtained; Time for Filing a Notice of**
8 **Appeal.**

9 ~~(1) Review of a decision of (A) An appeal as~~
10 of right from the United States Tax Court is
11 commenced by filing a notice of appeal with
12 the Tax Court clerk within 90 days after the
13 entry of the Tax Court's decision. At the
14 time of filing, the appellant must furnish the

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

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15 clerk with enough copies of the notice to
16 enable the clerk to comply with Rule 3(d). If
17 one party files a timely notice of appeal, any
18 other party may file a notice of appeal within
19 120 days after the Tax Court's decision is
20 entered.

21 ~~(2B)~~ If, under Tax Court rules, a party makes a
22 timely motion to vacate or revise the Tax
23 Court's decision, the time to file a notice of
24 appeal runs from the entry of the order
25 disposing of the motion or from the entry of
26 a new decision, whichever is later.

27 ~~(b)(2)~~ **Notice of Appeal; How Filed.** The notice of
28 appeal may be filed either at the Tax Court clerk's
29 office in the District of Columbia or by mail
30 addressed to the clerk. If sent by mail the notice is

31 considered filed on the postmark date, subject to §
32 7502 of the Internal Revenue Code, as amended,
33 and the applicable regulations.

34 ~~(e)~~**(3) Contents of the Notice of Appeal; Service;**
35 **Effect of Filing and Service.** Rule 3 prescribes
36 the contents of a notice of appeal, the manner of
37 service, and the effect of its filing and service.
38 Form 2 in the Appendix of Forms is a suggested
39 form of a notice of appeal.

40 ~~(d)~~**(4) The Record on Appeal; Forwarding; Filing.**
41 ~~(A)~~ Except as otherwise provided under Tax
42 Court rules for the transcript of proceedings,
43 the An appeal from the Tax Court is
44 governed by the parts of Rules 10, 11, and 12
45 regarding the record on appeal from a district
46 court, the time and manner of forwarding and

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47 filing, and the docketing in the court of
48 appeals. ~~References in those rules and in~~
49 ~~Rule 3 to the district court and district clerk~~
50 ~~are to be read as referring to the Tax Court~~
51 ~~and its clerk.~~

52 ~~(2B)~~ If an appeal ~~from a Tax Court decision~~ is
53 taken to more than one court of appeals, the
54 original record must be sent to the court
55 named in the first notice of appeal filed. In
56 an appeal to any other court of appeals, the
57 appellant must apply to that other court to
58 make provision for the record.

59 **(b) Appeal by Permission.** ~~An appeal by permission is~~
60 ~~governed by Rule 5.~~

61 * * * * *

Committee Note

Rules 13 and 14 are amended to address the treatment of permissive interlocutory appeals from the Tax Court under 26 U.S.C. § 7482(a)(2). Rules 13 and 14 do not currently address such appeals; instead, those Rules address only appeals as of right from the Tax Court. The existing Rule 13 – governing appeals as of right – is revised and becomes Rule 13(a). New subdivision (b) provides that Rule 5 governs appeals by permission. The definition of district court and district clerk in current subdivision (d)(1) is deleted; definitions are now addressed in Rule 14. The caption of Title III is amended to reflect the broadened application of this Title.

Changes Made After Publication and Comment

No changes were made after publication and comment.

1 **Rule 14. Applicability of Other Rules to ~~the Review of~~**
 2 **~~a Appeals from the~~ Tax Court ~~Decision~~**

3 All provisions of these rules, except Rules ~~4-94, 6-9,~~
 4 15-20, and 22-23, apply to ~~the review of a~~appeals from the
 5 Tax Court~~decision~~. References in any applicable rule

6 (other than Rule 24(a)) to the district court and district
7 clerk are to be read as referring to the Tax Court and its
8 clerk.

9 * * * * *

Committee Note

Rule 13 currently addresses appeals as of right from the Tax Court, and Rule 14 currently addresses the applicability of the Appellate Rules to such appeals. Rule 13 is amended to add a new subdivision (b) treating permissive interlocutory appeals from the Tax Court under 26 U.S.C. § 7482(a)(2). Rule 14 is amended to address the applicability of the Appellate Rules to both appeals as of right and appeals by permission. Because the latter are governed by Rule 5, that rule is deleted from Rule 14's list of inapplicable provisions. Rule 14 is amended to define the terms "district court" and "district clerk" in applicable rules (excluding Rule 24(a)) to include the Tax Court and its clerk. Rule 24(a) is excluded from this definition because motions to appeal from the Tax Court in forma pauperis are governed by Rule 24(b), not Rule 24(a).

Changes Made After Publication and Comment

No changes were made after publication and comment.

1 **Rule 24. Proceeding in Forma Pauperis**

2 **(a) Leave to Proceed in Forma Pauperis.**

3 (1) **Motion in the District Court.** Except as stated in
4 Rule 24(a)(3), a party to a district-court action who
5 desires to appeal in forma pauperis must file a
6 motion in the district court. The party must attach
7 an affidavit that:

8 (A) shows in the detail prescribed by Form 4 of
9 the Appendix of Forms the party's inability
10 to pay or to give security for fees and costs;

11 (B) claims an entitlement to redress; and

12 (C) states the issues that the party intends to
13 present on appeal.

14 (2) **Action on the Motion.** If the district court grants
15 the motion, the party may proceed on appeal
16 without prepaying or giving security for fees and

17 costs, unless a statute provides otherwise. If the
18 district court denies the motion, it must state its
19 reasons in writing.

20 (3) **Prior Approval.** A party who was permitted to
21 proceed in forma pauperis in the district-court
22 action, or who was determined to be financially
23 unable to obtain an adequate defense in a criminal
24 case, may proceed on appeal in forma pauperis
25 without further authorization, unless:

26 (A) the district court — before or after the notice
27 of appeal is filed — certifies that the appeal
28 is not taken in good faith or finds that the
29 party is not otherwise entitled to proceed in
30 forma pauperis and states in writing its
31 reasons for the certification or finding; or

32 (B) a statute provides otherwise.

33 (4) **Notice of District Court’s Denial.** The district
34 clerk must immediately notify the parties and the
35 court of appeals when the district court does any of
36 the following:

37 (A) denies a motion to proceed on appeal in
38 forma pauperis;

39 (B) certifies that the appeal is not taken in good
40 faith; or

41 (C) finds that the party is not otherwise entitled
42 to proceed in forma pauperis.

43 (5) **Motion in the Court of Appeals.** A party may
44 file a motion to proceed on appeal in forma
45 pauperis in the court of appeals within 30 days
46 after service of the notice prescribed in Rule
47 24(a)(4). The motion must include a copy of the
48 affidavit filed in the district court and the district

49 court's statement of reasons for its action. If no
50 affidavit was filed in the district court, the party
51 must include the affidavit prescribed by Rule
52 24(a)(1).

53 (b) **Leave to Proceed in Forma Pauperis on Appeal from**
54 **the United States Tax Court or on Appeal or Review**
55 **of an Administrative-Agency Proceeding. ~~When an~~**
56 ~~appeal or review of a proceeding before an~~
57 ~~administrative agency, board, commission, or officer~~
58 ~~(including for the purpose of this rule the United States~~
59 ~~Tax Court) proceeds directly in a court of appeals, a~~
60 party may file in the court of appeals a motion for leave
61 to proceed on appeal in forma pauperis with an affidavit
62 prescribed by Rule 24(a)(1):

63 (1) in an appeal from the United States Tax Court; and

64 (2) when an appeal or review of a proceeding before

65 an administrative agency, board, commission, or

66 officer proceeds directly in the court of appeals.

67 (c) **Leave to Use Original Record.** A party allowed to
68 proceed on appeal in forma pauperis may request that
69 the appeal be heard on the original record without
70 reproducing any part.

71 * * * * *

Committee Note

Rule 24(b) currently refers to review of proceedings “before an administrative agency, board, commission, or officer (including for the purpose of this rule the United States Tax Court).” Experience suggests that Rule 24(b) contributes to confusion by fostering the impression that the Tax Court is an executive branch agency rather than a court. (As a general example of that confusion, appellate courts have returned Tax Court records to the Internal Revenue Service, believing the Tax Court to be part of that agency.) To remove this possible source of confusion, the quoted parenthetical is deleted from subdivision (b) and appeals from the Tax Court are separately listed in subdivision (b)’s heading and in new subdivision (b)(1).

Changes Made After Publication and Comment

No changes were made after publication and comment.

1 **Rule 28. Briefs**

2 **(a) Appellant’s Brief.** The appellant’s brief must contain,

3 under appropriate headings and in the order indicated:

4 (1) a corporate disclosure statement if required by
5 Rule 26.1;

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

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

11 (4) a jurisdictional statement, including:

12 (A) the basis for the district court’s or agency’s

- 13 subject-matter jurisdiction, with citations to
14 applicable statutory provisions and stating
15 relevant facts establishing jurisdiction;
- 16 (B) the basis for the court of appeals’
17 jurisdiction, with citations to applicable
18 statutory provisions and stating relevant facts
19 establishing jurisdiction;
- 20 (C) the filing dates establishing the timeliness of
21 the appeal or petition for review; and
- 22 (D) an assertion that the appeal is from a final
23 order or judgment that disposes of all parties’
24 claims, or information establishing the court
25 of appeals’ jurisdiction on some other basis;
- 26 (5) a statement of the issues presented for review;
- 27 (6) a concise statement of the case ~~briefly indicating~~
28 ~~the nature of the case, the course of proceedings,~~

- 29 ~~and the disposition below;~~
- 30 ~~(7)~~ a statement of setting out the facts relevant to the
- 31 issues submitted for review, describing the relevant
- 32 procedural history, and identifying the rulings
- 33 presented for review, with appropriate references
- 34 to the record (see Rule 28(e));
- 35 ~~(87)~~ a summary of the argument, which must contain a
- 36 succinct, clear, and accurate statement of the
- 37 arguments made in the body of the brief, and
- 38 which must not merely repeat the argument
- 39 headings;
- 40 ~~(98)~~ the argument, which must contain:
- 41 (A) appellant's contentions and the reasons for
- 42 them, with citations to the authorities and
- 43 parts of the record on which the appellant
- 44 relies; and

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

50 ~~(+99)~~ a short conclusion stating the precise relief sought;

51 and

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

54 **(b) Appellee's Brief.** The appellee's brief must conform
55 to the requirements of Rule 28(a)(1)-~~(98)~~ and ~~(+10)~~,
56 except that none of the following need appear unless the
57 appellee is dissatisfied with the appellant's statement:

58 (1) the jurisdictional statement;

59 (2) the statement of the issues;

60 (3) the statement of the case;

- 61 ~~(4) the statement of the facts;~~and
62 ~~(54)~~the statement of the standard of review.

Committee Note

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.

1 **Rule 28.1. Cross-Appeals**

2 * * * * *

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

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

7 (2) **Appellee’s Principal and Response Brief.** The
8 appellee must file a principal brief in the
9 cross-appeal and must, in the same brief, respond
10 to the principal brief in the appeal. That appellee’s
11 brief must comply with Rule 28(a), except that the

12 brief need not include a statement of the case ~~or a~~
13 ~~statement of the facts~~ unless the appellee is
14 dissatisfied with the appellant's statement.

15 (3) **Appellant's Response and Reply Brief.** The
16 appellant must file a brief that responds to the
17 principal brief in the cross-appeal and may, in the
18 same brief, reply to the response in the appeal.
19 That brief must comply with Rule
20 28(a)(2)-~~(9)~~(8) and ~~(11)~~(10), except that none of
21 the following need appear unless the appellant is
22 dissatisfied with the appellee's statement in the
23 cross-appeal:

- 24 (A) the jurisdictional statement;
- 25 (B) the statement of the issues;
- 26 (C) the statement of the case;
- 27 ~~(D) the statement of the facts;~~ and

28 (~~ED~~) the statement of the standard of review.
29 (4) **Appellee’s Reply Brief.** The appellee may file a
30 brief in reply to the response in the cross-appeal.
31 That brief must comply with Rule 28(a)(2)-(3) and
32 (~~11~~)(10) and must be limited to the issues
33 presented by the cross-appeal.

34 * * * * *

Committee Note

Subdivision (c). Subdivision (c) is amended to accord with the amendments to Rule 28(a). Rule 28(a) is amended to consolidate subdivisions (a)(6) and (a)(7) into a new subdivision (a)(6) that provides for one “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. . . .” Rule 28.1(c) is amended to refer to that consolidated “statement of the case,” and references to subdivisions of Rule 28(a) are revised to reflect the re-numbering of those subdivisions.

Changes Made After Publication and Comment

No changes were made to the text of the proposed

amendment to Rule 28.1 after publication and comment. The Committee revised a quotation in the Committee Note to Rule 28.1(c) to conform to the changes (described above) to the text of proposed Rule 28(a)(6).