

Serial: 177766

IN THE SUPREME COURT OF MISSISSIPPI

No. 89-R-99027-SCT

***IN RE: MISSISSIPPI RULES OF
APPELLATE PROCEDURE***

ORDER

This matter is before the Court en banc on the Court's own motion to amend Rules 6, 28, and 46 of the Mississippi Rules of Appellate Procedure. This matter is also before the Court on the Court's own motion to amend citations to these Rules found in Rules 22, 29, 31, and 32 of the Mississippi Rules of Appellate Procedure. After due consideration, the Court finds that the amendments to Rules 6, 28, 46, 22, 29, 31, and 32 as set forth in Exhibit "A" will promote the fair and efficient administration of justice.

IT IS THEREFORE ORDERED that Rules 6, 28, 46, 22, 29, 31, and 32 of the Mississippi Rules of Appellate Procedure are hereby amended as set forth in Exhibit "A" hereto. These amendments are effective on August 2, 2012.

IT IS FURTHER ORDERED that the Clerk of this Court shall spread this Order upon the minutes of the Court and shall forward a true certified copy hereof to West Publishing Company for publication in the next edition of the *Mississippi Rules of Court* and in the

Southern Reporter, Third Series, (Mississippi Edition).

SO ORDERED, this the 24th day of July, 2012.

/s/ Ann H. Lamar

ANN H. LAMAR, JUSTICE
FOR THE COURT

Exhibit "A"

~~RULE 6. PROCEEDINGS IN FORMA PAUPERIS AND APPOINTMENT OF COUNSEL ON APPEAL IN CRIMINAL CASES~~
COUNSEL ON APPEAL IN CRIMINAL CASES AND PROCEEDINGS IN FORMA PAUPERIS IN CRIMINAL CASES

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(b) Appointment of Counsel on Appeal in Criminal Cases.

~~(1) When Counsel Appointed in Trial Court.~~ Appointed trial counsel shall continue as defendant's counsel on appeal unless relieved by order of the trial court, or, if the appeal has been perfected, by order of the Supreme Court or the Court of Appeals. Any motion for such relief filed with the Supreme Court shall be accompanied by a certified copy of a trial court order appointing substitute counsel pending action by the Supreme Court or the Court of Appeals.

Appointed trial counsel may file a motion to substitute the ~~Mississippi Office of Indigent Appeals~~ Division of the Office of the State Public Defender, in accordance with ~~Miss. Code Ann. § Section 99-40-1 of the Mississippi Code.~~ Trial counsel shall remain as the defendant's counsel until relieved by order of the Supreme Court and shall have a continuing duty to cooperate with appellate counsel after relieved by order of the Supreme Court.

(c) Waiver of Counsel in Criminal Appeal.

~~(2)~~ (1) When Appellant Has No Counsel. Where an appeal is taken to the Supreme Court by a person entitled to appointed counsel, and the appellant is not represented by an attorney, and the existing record does not disclose whether appellant intelligently and competently waived the appointment of an attorney the right to counsel in the ~~Supreme Court~~ State appellate courts, the Supreme Court or the Court of Appeals ~~may~~ shall request the trial court to determine:

- i. whether the appellant is indigent and unable to employ counsel;
- ii. if indigent, whether the appellant desires counsel to be appointed; and
- iii. if the appellant does not desire counsel, whether the appellant intelligently and competently waives the appointment of the right to counsel on appeal.

A transcript shall be made by the court reporter of the hearing on these issues before the trial court, and such transcript and the order of the trial court shall be certified to the Supreme Court or the Court of Appeals and shall be made a part of the record on appeal.

If the trial judge or the appellate court determines that appellant is indigent and is entitled to the appointment of counsel on appeal, and that ~~he~~ the appellant has not intelligently and competently waived the same, the trial court shall, except for good cause shown, appoint the ~~Mississippi Office of Indigent Appeals~~ Division of the Office of the State Public Defender to represent the appellant on appeal in accordance with the provisions of ~~Miss. Code Ann. § Section 99-40-1~~ of the Mississippi Code.

If the trial judge or the appellate court determines that appellant is not indigent and that the appellant has not intelligently and competently waived the right to counsel on appeal, the appellate court shall stay the appeal for thirty (30) days so that appellant may hire counsel.

(2) When Appellant Moves to Dismiss Counsel and Proceed Pro Se on Appeal. When a criminal appellant moves to dismiss counsel on appeal and proceed pro se, the appellant shall serve a copy of the motion upon current counsel. The appellate court shall request the trial court to determine:

i. whether the appellant is indigent and unable to employ counsel;

ii. if indigent, whether the appellant desires counsel to be appointed; and

iii. if the appellant does not desire counsel, whether the appellant intelligently and competently waives the right to counsel on appeal.

A transcript shall be made by the court reporter of the hearing on these issues before the trial court, and such transcript and the order of the trial court shall be certified to the Supreme Court or the Court of Appeals and shall be made a part of the record on appeal.

If it is determined that appellant has not intelligently and competently waived the right to counsel on appeal, then the motion to dismiss counsel shall be denied. If it is determined that appellant has intelligently and competently waived the right to counsel on appeal, then the motion to dismiss counsel shall be granted.

[Amended August 9, 2007, to provide for appointment of the Mississippi Office of Indigent Appeals; Adopted to govern matters filed on or after January 1, 1995; amended effective August 2, 2012 to include procedural safeguards regarding the waiver of counsel in a criminal appeal.]

Advisory Committee Historical Note

Effective January 1, 1995, ~~Miss.R.App.P. M.R.A.P. 6~~ replaced ~~Miss. Sup. Ct. R. 6~~, embracing proceedings in the Court of Appeals. 644-647 So. 2d XXXIII-XXXIV (West Miss. Cases 1994).

[Adopted August 21, 1996.]

Comment

Rule 6(a) and (b) provides for appeals *in forma pauperis* in criminal appeals. ~~This~~ The rule reflects the salient features of Fed. R. App. P. 24 and Ala. R. App. P. 24. *See* Form 4 for a suggested affidavit to accompany a motion for application to proceed *in forma pauperis*. Rule 6(b)(1) provides that appointed counsel in a criminal case may not be relieved of the responsibility for an appeal absent leave of Court. *Allison v. State*, 436 So. 2d 792 (Miss. 1983).

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Rule 6(b) provides for the appointment of the ~~Mississippi Office of Indigent Appeals~~ Division of the Office of the State Public Defender in accordance with ~~Miss. Code Ann. § Section 99-40-1~~ of the Mississippi Code. An indigent appellant shall be represented by the ~~Mississippi Office of Indigent Appeals~~ Division of the Office of the State Public Defender absent good cause shown.

Rule 6(c) is regarding the waiver of counsel on appeal in criminal cases. The subsection applies regardless of appellant's ability to pay for counsel. The waiver of counsel must be knowingly and intelligently made. The hearing in the trial court mirrors the hearing provided for in Rule 8.05 of the Uniform Rules of Circuit and County Court. If appellant's motion to dismiss counsel is denied, appellant may file a pro se supplemental brief pursuant to Rule 28(b).

[Amended effective August 2, 2012.]

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RULE 28. BRIEFS

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(b) Pro Se Supplemental Brief in Criminal Appeal. An appellant in a criminal appeal may file a pro se supplemental Brief of the Appellant. This pro se brief may address issues not raised by counsel, but such issues must be based on the record. This pro se brief shall conform to the requirements of Rule 28(a), (e), (f), (h) and (l).

(c) Brief of the Appellee. The brief of the appellee shall conform to the requirements of Rule 28(a) except that a statement of the issues or of the case need not be made unless the appellee is dissatisfied with the statement of the appellant.

(c d) Reply Brief. The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross-appeal. No further briefs may be filed except with leave of the Court. All reply briefs shall contain a table of contents, with page references, and a table of cases (alphabetically arranged), statutes, and other authorities cited, with references to the pages of the reply brief where they are cited.

(d e) References in Briefs to Parties. Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee." It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of the parties, or descriptive terms such as "the employee," "the injured person," "the taxpayer," or "plaintiff."

(e f) References in Briefs to the Record and Citations. All briefs shall be keyed by reference to page numbers (1) to the record excerpts filed pursuant to Rule 30 of these Rules, and (2) to the record itself.

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(2) All Mississippi cases shall be cited to either:

(i) the *Southern Reporter* and, in cases decided prior to 1967, the official Mississippi Reports (e.g., *Smith v. Jones*, 699 So.₂d 100 (Miss. 1997); *Thompson v. Clark*, 251 Miss. 555, 170 So.₂d 225 (1965)); or

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(3) Quotations from cases and authorities appearing in the text of the brief shall be cited in one of the following ways:

(i) preceded or followed by a reference to the book and page in the *Southern Reporter* and/or the Mississippi Reports where the quotation appears (e.g., *Smith v. Jones*, 699 So.₂d 100, 102 (Miss. 1997)); or

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(f g) Reproduction of Statutes, Rules, Regulations, etc. If determination of the issues presented requires the study of statutes, rules, or regulations, etc., they shall be reproduced in the brief or in an addendum at the end and they may be supplied to the court in pamphlet form.

(g h) Length of Briefs. Except by permission of the court, principal briefs shall not exceed 50 pages, and reply briefs shall not exceed 25 pages, exclusive of pages containing

the statement with respect to oral argument, any certificates of counsel, table of contents, tables of citations, and any addendum containing statutes, rules, or regulations.

(h i) Briefs in Cases Involving Cross-Appeals. If a cross-appeal is filed, the party first filing a notice of appeal shall be deemed the appellant for the purposes of this rule and Rules 30 and 31, unless the parties otherwise agree or the court otherwise orders. The brief for appellee shall contain the issues involved in the appellee's appeal as well as the answer to the brief for appellant.

(i j) Briefs in Cases Involving Multiple Appellants or Appellees. In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

(j k) Citation of Supplemental Authorities. When pertinent and significant authorities come to the attention of counsel after the party's brief has been filed, or after oral argument or decision, the party may promptly advise the clerk of the Supreme Court, by letter with a copy to all counsel, setting forth the citations. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall, without argument, state the reasons for the supplemental citations. Any response shall be made promptly and shall be similarly limited.

(k l) Disrespectful Language Stricken. Any brief containing language showing disrespect or contempt for the trial court will be stricken from the files, and the appropriate appellate court will take such further action as it may deem proper.

(l m) Other Briefs. Any brief submitted other than those listed in Rule 28(a), (b), and (c), and (d) shall conform to Rules 28 (d e), (e f), (g h), and (k l). Any brief filed prior to the filing of the brief of the appellant shall contain a certificate of interested persons as required by Rule 28(a)(1). Any brief exceeding 10 pages in length shall contain tables of contents and authorities in compliance with Rule 28(a)(2).

(m n) Filing of Briefs on Electronic Media. All parties filing a brief on the merits of any case with the Clerk of the Supreme Court shall file with that brief a copy thereof in an electronically formatted medium (such as USB Flash Drive or CD-ROM), and the Clerk shall receive and file such with the papers of that case. All electronic media and electronic files stored thereon must be in an industrial standardized format with the electronic brief stored in the Adobe Portable Document Format (PDF). All electronic media shall be labeled to include the following information:

- (1) the style of the case, and,
- (2) the number of CD-ROMs, i.e., "1 of 2, 2 of 2, etc.,"

[Amended December 28, 1995; December 22, 1997; amended effective May 27, 2004 to make filing of briefs on electronic disks mandatory; amended effective July 1, 2009; amended effective August 2, 2012 to allow pro se supplemental briefs in criminal appeals.]

Advisory Committee Historical Note

Effective December 11, 1997, Rule 28(e) and the Comment were amended to provide a vendor and media neutral citation standard in the public domain. 702-705 So. 2d XLI (West Miss. Cases 1997).

Effective December 28, 1995, Rule 28(m) and a new final paragraph to the Comment were added to encourage the filing of disk copies of briefs. 663-667 So. 2d XXVII (West Miss. Cases 1995).

Effective January 1, 1995, ~~Miss. R. App. P. M.R.A.P. 28~~ replaced Miss. Sup. Ct. R. 28, embracing proceedings in the Court of Appeals. 644-647 So. 2d LXIV-LXVII (West Miss. Cases 1994).

Effective July 1, 1994, the Comment to Miss. Sup. Ct. R. 28 was amended to delete material concerning the transition from statutory procedures to Rule practice. 632-635 So. 2d LII (West Miss. Cases 1994).

Comment

Rule 28 is based upon Fed. R. App. P. 28 and 5th Cir. R. 28.2.1, 28.2.2. If a party states issues under Rule 28(a)(3) not included in a statement required by Rule 10(b)(4), that party will bear responsibility for the cost of preparing any additional portions of the record subsequently designated by any other party in response to the statement of additional issues.

Article 3, section 26 of the Mississippi Constitution states that “[i]n all criminal prosecutions the accused shall have a right to be heard by himself or counsel, or both. . . .” Accordingly, pro se supplemental briefs are permitted under Rule 28(b). See also Lindsey v. State, 939 So. 2d 743 (Miss. 2005).

In cross-appeals, the response of the appellant to the cross-appeal is to be combined with the appellant's reply. The combined brief is treated as a principal brief under Rule 28(g)(h) which governs page lengths.

Rule 28(e)(f) requires parallel citations prior to 1967 because the Southern Reporter is the official reporter only for decisions published since 1966. Any party filing a brief citing an unreported decision from another court should also file a copy of the decision with the clerk of the Supreme Court.

Rule 28~~(e)~~(f) adopts a citation standard which is in the public domain. The new citation standard is both vendor neutral and media neutral. A vendor neutral citation is one which does not contain vendor-specific information, and a media neutral citation is one which is not tied to a particular format. The citation *Smith v. Jones*, 699 So.2d 100 (Miss. 1997), for example, is neither vendor neutral nor media neutral. However, the citation *Smith v. Jones*, 95-KA-01234-SCT (Miss. 1997) is both vendor neutral and media neutral. The basis for the adoption of a new citation standard is to allow citation of cases which appear in electronic format in addition to citation of cases which appear in print.

An original Rule 28~~(j)~~(k) letter should be submitted with three copies. Rule 28~~(l)~~(m) governs briefs other than briefs on the merits controlled by Rules 28(a), (b), ~~and~~(c), and (d).

The provisions of Rule 28~~(m)~~(n) apply only to briefs on the merits of an appeal and not to memoranda and briefs filed in support of or in opposition to motions and petitions seeking less than relief on the merits of appeals.

[Amended December 28, 1995; December 22, 1997; amended effective May 27,2004; amended effective July 1, 2009; amended effective August 2, 2012.]

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RULE 46. ADMISSION, WITHDRAWAL, AND DISCIPLINE OF ATTORNEYS

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(c) Withdrawal. An attorney who appears before the Supreme Court or the Court of Appeals in an appeal or other proceeding may withdraw from the representation only with the approval of the appropriate court. If an attorney desires to withdraw, the attorney shall file a motion giving the attorney's reasons for desiring to withdraw and requesting approval of the appropriate court. Such motion shall be served upon the attorney's client and upon all parties. The motion shall be accompanied by an appearance form of substitute counsel or a signed statement by the client indicating that the client agrees to proceed *pro se*, or shall explain why neither can be obtained. If the motion is accompanied by a signed statement by a client in a criminal appeal, then pursuant to Rule 6(c), the appellate court shall request that the trial court determine whether the appellant knowingly and intelligently waives counsel on appeal.

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[Amended effective January 16, 2003; amended effective May 27, 2004 to place the responsibility of obtaining, filing and serving the statement of the Clerk of the Supreme Court with the foreign attorney seeking leave to appear pro hac vice; amended effective January 27, 2005 to provide legal assistance to certain military personnel and their families;

amended effective March 24, 2005 to make technical corrections in references to federal laws; amended effective December 14, 2006, to delete the 21-day waiting period for proceedings on application of foreign attorney to appear pro hac vice; amended effective October 18, 2007, to provide for *pro bono publicus* attorneys; amended effective July 1, 2009; amended effective August 2, 2012.]

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Comment

Rule 46 is based on Fed. R. App. P. 46(c) and the former rules of the Supreme Court. If the verified application required by Rule 46(b)(5) for admission pro hac vice is filed in a trial court or administrative agency, the application should be included in the record on appeal. In such cases, it is not necessary to file a separate application in the Supreme Court. Withdrawal from a criminal case is governed additionally by Rule 6(b)(1) of these Rules. The Supreme Court has general disciplinary authority over attorneys practicing in this State. See Miss. Code Ann. § 73-3-301 (Supp.1994). Rule 46(d) recognizes the Court's power to impose sanctions for frivolous pleadings. Cf. M.R.C.P. 11 (sanctions in trial court).

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[Comment amended effective January 16, 2003; amended effective May 27, 2004, to place the responsibility of obtaining, filing and serving the statement of the Clerk of the Supreme Court with the foreign attorney seeking leave to appear pro hac vice; amended effective October 18, 2007; amended effective August 2, 2012.]

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RULE 22. APPLICATION FOR POST-CONVICTION COLLATERAL RELIEF IN CRIMINAL CASES

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Comment

Rule 22 incorporates the comprehensive procedure reflected in the Mississippi Uniform Post-Conviction Collateral Relief Act, codified at ~~Miss. Code Ann. § Section~~ 99-39-1, et seq. ~~(1994)~~ of the Mississippi Code. Passed in 1984, the Act requires that when a prisoner's conviction and sentence have been appealed to the Supreme Court, and the appeal is either affirmed or dismissed, the prisoner is to seek leave from that Court before filing a motion for post-conviction collateral relief in the trial court, § Section 99-39-7. The motion for leave is governed by § Section 99-39-27, and the provisions of these rules that are consistent with that statute. *See, e.g.*, Rules 25, filing and service; 26, computation and

extension of time; 27, motions; 28(g)(h), length of briefs; 31(c), number of briefs.

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[Adopted to govern matters filed on or after January 1, 1995; amended effective January 1, 1999; June 24, 1999; amended effective July 27, 2000; amended effective February 10, 2005; amended effective August 2, 2012.]

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RULE 27. MOTIONS

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Comment

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Examples of the power conferred on a single justice by Rule 27(c) are: to determine any matter which, if unopposed, may be decided by the clerk under subdivision (b); to grant enlargements of time for any period beyond the 60 days granted by the clerk, except that the time period for filing a notice of appeal may not be extended, *see* Rules 2(c), 26(b); to permit an appeal *in forma pauperis* and to appoint counsel under Rule 6; to consider release in criminal cases under Rule 9; to expedite or to consolidate appeals under Rule 23; to permit the filing of further reply or supplemental briefs under Rule 28(c)(d) or briefs of extraordinary length under Rule 28(g)(h); to grant leave to file an *amicus* brief under Rule 29; to postpone oral argument under Rule 34(a) or grant additional time for oral argument under Rule 34(b); or to substitute parties under Rule 43.

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[Comment amended June 21, 1996; October 15, 1998, effective January 1, 1999; August 26, 1999; amended effective May 29, 2003; amended May 18, 2006; amended effective August 2, 2012.]

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RULE 29. BRIEF OF AN *AMICUS CURIAE*

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(c) Response to Motion. An opposing party who does not object to the motion for leave may respond to the *amicus* brief in the opposing party's response or reply brief pursuant to Rule 28(b)(c) or 28(c)(d). An opposing party who objects to the motion for leave shall file

a response in opposition within seven (7) days pursuant to Rule 27 stating why the requirements of Rule 29(a) have not been met. For the purpose of Rule 31(a), the time for filing the next brief will run from the date the appropriate court enters an order on the motion for leave.

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[Adopted to govern matters filed on or after January 1, 1995; amended effective June 27, 2002; amended effective August 2, 2012.]

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Comment

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The rule follows federal practice by integrating *amicus curiae* briefs into the schedule for filing briefs on the merits. The motion with attached *amicus* brief need not be filed, however, until seven days after the initial brief of the party whose position the *amicus* brief will support. This delay permits the *amicus* to take advantage of Rule 28(~~i~~)(j) and adopt by reference portions of the brief of that party. It also ensures the *amicus* will know what the party's brief contains. It is designed to discourage the filing of repetitive briefs that cannot satisfy Rule 29(a).

The opposing party may choose not to oppose the motion and may respond to the *amicus* brief in the party's next brief. If the opposing party files a response in opposition within seven days as required by Rule 27, the time for filing the next brief is rescheduled and does not begin to run until the date the court enters an order on the motion for leave. The response in opposition is to address only whether leave should be granted under Rule 29(a). The party opposing the motion will respond to the merits of the *amicus* brief in that party's next brief only if the motion for leave is granted. The former practice of a separate brief in response to the *amicus* brief is abolished. If the court grants leave to file, however, it may condition leave by extending the number of pages permitted under Rule 28(~~g~~)(h) for the opposing party's next brief.

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[Amended effective August 2, 2012.]

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RULE 31. FILING AND SERVICE OF BRIEFS

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(b) Time For Filing and Service of Briefs. The appellant shall serve and file the appellant's brief within 40 days after the date on which the record is filed. The appellee shall serve and file the appellee's brief within 30 days after service of the brief of the appellant. The appellant may serve and file a reply brief within 14 days after service of the brief of the appellee. In cross-appeals, the appellant and cross-appellee may serve and file a combined responsive brief within 30 days after service of the combined brief of the appellee and cross-appellant. The cross-appellant's reply under Rule 28(~~c~~)(d) may then be served within 14 days after service of the appellant's combined responsive brief.

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[Adopted to govern matters filed on or after January 1, 1995; amended effective August 2, 2012.]

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RULE 32. FORM OF BRIEFS, RECORD EXCERPTS AND OTHER PAPERS

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(b) Form of Other Papers. Motions for rehearing shall be produced in a manner prescribed by Rule 32(a) and Rule 28(~~f~~)(m), and motions and other papers may be produced in like manner, or they may be typewritten upon opaque, unglazed paper, 8 ½ by 11 inches in size. Lines of typewritten text shall be double spaced except for quotations and footnotes. Consecutive sheets shall be attached at the top left corner.

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[Amended effective May 27, 2004 to revise the size of fonts in the text of briefs; amended effective April 19, 2007; amended effective August 2, 2012.]