FEDERAL RULES OF APPELLATE PROCEDURE

NINTH CIRCUIT RULES

CIRCUIT ADVISORY COMMITTEE NOTES

1 December 2016

PREAMBLE

These local rules of the United States Court of Appeals for the Ninth Circuit are promulgated under the authority of Fed. R. App. P. 2 and 47.

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Senior Circuit Judge, Pasadena, California

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FOREWORD

The Advisory Committee on Rules of Practice and Internal Operating Procedures of the United States Court of Appeals for the Ninth Circuit was appointed by the court in 1984, pursuant to 28 U.S.C. § 2077. The committee first undertook a major restructuring of the Ninth Circuit Rules with the objective of updating the rules to reflect current practice, putting the rules into a simpler format and style, and renumbering the rules to conform to the numbering sequence of the Federal Rules of Appellate Procedure. The purpose of this project was to produce a more readable, easily understandable set of rules in handbook form. The handbook contains the Federal Rules of Appellate Procedure, the Ninth Circuit Rules, and, following certain rules, Circuit Advisory Committee Notes. The committee's role in assisting the Court is more fully defined by 9th Cir. R. 47-2.

Circuit Judges Susan P. Graber, William A. Fletcher, and Jay S. Bybee currently serve on the committee.

Lawyers serving on the committee include Susan K. Alexander, John Blakeley, Professor Jennifer Chacon, Kimberly A. Demarchi, Edward DuMont, Gail E. Ivens, Lawrence D. Rohlfing, Matthew J. Sanders, David A. Schlesinger, and Angela W. Woolridge. The committee is chaired by Susan K. Alexander.

The Court encourages members of the bar to make suggestions for improvements to the rules of Court. Such suggestions should be directed to the Clerk of Court.

Sidney R. Thomas
Chief Judge

COURT STRUCTURE AND PROCEDURES

A. Physical Facilities

The headquarters of the Court are located at 95 Seventh Street, San Francisco, California 94103. The mailing address is P.O. Box 193939, San Francisco, California 94119-3939, and the telephone number is (415) 355-8000. There are divisional clerk's offices in Pasadena, Seattle and Portland.

B. Emergency Telephone Number

The Clerk's Office provides 24-hour telephone service for calls placed to the main Clerk's Office number, (415) 355-8000. Messages left at times other than regular office hours are recorded and monitored on a regular basis by staff attorneys.

The emergency telephone service is to be used only for matters of extreme urgency that must be handled by the Court before the next business day. Callers should make clear the nature of the emergency and the reason why next-business-day treatment is not sufficient.

C. Judges and Supporting Personnel

(1) **Judges.** The Court has an authorized complement of 29 judgeships. Upon the attainment of senior status, a judge may continue, within statutory limitations, to function as a member of the Court. There are several senior circuit judges who regularly hear cases before the Court.

Although San Francisco is the Court's headquarters, most of the active and senior judges maintain their residence chambers in other cities within the circuit. The residences and chambers of the Court's judges, including its senior judges, are indicated in the listing of judges within these Rules.

The Court has established three regional administrative units to assist the chief judge of the circuit to discharge his administrative responsibilities. They are the Northern, Middle and Southern units. The senior active judge in each unit is designated the administrative judge of the unit.

- The Northern Unit includes the districts of Alaska, Idaho, Montana, Oregon, and Eastern and Western Washington.
- The Middle Unit includes the districts of Arizona, Nevada, Hawaii, Guam, Northern and Eastern California, and the Northern Mariana Islands.
- The Southern Unit includes the districts of Central and Southern California.

Cases arising from the Northern Unit will normally be calendared in Seattle or Portland, from the Middle Unit in San Francisco, and from the Southern Unit in Pasadena. Cases may also be heard in such other places as the Court may designate.

(2) **Appellate Commissioner.** The Appellate Commissioner is an officer appointed by the Court to rule on and to review and make recommendations on a variety of non-dispositive matters, such as applications by appointed counsel for compensation under the Criminal Justice Act, and to serve as a special master as directed by the Court.

(3) **Clerk's Office.** Office hours are from 8:30 a.m. to 5:00 p.m., Monday through Friday, except federal holidays. In addition to the San Francisco office, the Court has permanent, but not full service, Clerk's offices in Seattle, Pasadena, and Portland. Court information, including Court rules, the general orders, calendars and opinions are available on the Court's website at www.ca9.uscourts.gov.

Clerk's office personnel are authorized by Circuit Rule 27-7 to act on certain procedural motions (*see* Circuit Advisory Committee Note to Rule 27-7, infra); are authorized by FRAP 42(b) to handle stipulations for dismissal; and are authorized by Circuit Rule 42-1 to dismiss cases for failure to prosecute.

Inquiries concerning rules and procedures may be directed to the San Francisco, Pasadena, Seattle, or Portland Clerk's office. On matters requiring special handling, counsel may contact the Clerk for information and assistance. It should be emphasized, however, that legal advice will not be given by a judge or any member of the Court staff.

(4) **Office of Staff Attorneys.** The staff attorneys perform a variety of tasks for the Court and work for the entire Court rather than for individual judges.

(a) Inventory. After briefing has been completed, the case management attorneys review the briefs and record in each case in order to identify the primary issues raised in the case and to assign a numerical weight to the case reflecting the relative amount of judge time that likely will have to be spent on the matter.

(b) Research. The research attorneys review briefs and records, research legal issues, and prepare memorandum dispositions for oral presentation to three-judge panels, in cases that are not calendared for oral argument.

(c) Motions. The motions attorneys process all motions, except for procedural motions disposed of by the Clerk, filed in a case prior to assignment of a particular panel for disposition on the merits. The motions attorneys also process emergency motions filed pursuant to Circuit Rules 27-3 and 27-4, and motions for reconsideration of orders filed by motions panels.

(5) **Circuit Court Mediators.** Shortly after a new case is docketed, the Circuit Court Mediators will review the Mediation Questionnaire to determine if a case appears suitable for the Court's settlement program. *See* Circuit Rules 3-4 and 15-2. The Circuit Court Mediators are permanent members of the Court staff. They are experienced appellate practitioners who have had extensive mediation and negotiation training.

(6) **Library.** The staff of the Ninth Circuit library system serve circuit, district, bankruptcy and magistrate judges, as well as staff of other Court units. Services provided include reference and other information services, acquisition of publications for Court libraries and judges' chambers, organization and maintenance of library collections and management of the Circuit library system. The Ninth Circuit library system, headed by the Circuit Librarian, consists of 21 staffed libraries including the headquarters library and 20 branch libraries located throughout the Circuit. The administrative office and the headquarters library are located in San Francisco.

Court libraries may make their collections available to members of the bar and the general public depending on local Court rules. Hours for the headquarters library in San Francisco are Monday through Friday, 9:00 p.m. to 5:00 p.m. and 8:00 a.m. to 5:00 p.m. during Court week. Information regarding the location and hours of operation for other branch libraries may be obtained by calling the headquarters library reference desk at (415) 355-8650.

(7) **Circuit Executive's Office.** The Circuit Executive's office is the arm of the Circuit's Judicial Council that provides administrative support to appellate, district and bankruptcy judges in the circuit.

D. The Judicial Council

The Judicial Council, established pursuant to 28 U.S.C. § 332, is currently composed of the Chief Judge, four circuit judges, and four district judges. The Council convenes regularly to consider and take required action upon any matter affecting the administration of its own work and that of all federal courts within the circuit, including the consideration of some complaints of judicial misconduct.

E. Court Procedures for Processing and Hearing of Cases

(1) **Classification of Cases**. After the briefing is completed, the case management attorneys inventory cases in order to weigh them by type, issue, and difficulty. The weight of a case is merely an indication of the relative amount of judicial time that will probably be consumed in disposing of the case. The inventory process enables the Court to balance judges' workloads and hear at a single sitting unrelated appeals involving similar legal issues.

(2) **Designation of Court Calendars.** Under the direction of the Court, the Clerk sets the time and place of court calendars, taking into account, for at least six months in advance, the availability of judges, the number of cases to be calendared, and the places of hearing required or contemplated by statute or policy. The random assignment of judges by computer to particular days or weeks on the calendars is intended to equalize the workload among the judges. At the time of assigning judges to panels, the Clerk does not know which cases ultimately will be allocated to each of the panels.

(3) **Disclosure of Judges on Panels.** The names of the judges on each panel are released to the general public on the Monday of the week preceding argument. At

that time, the calendar of cases scheduled for hearing is posted in the San Francisco, Pasadena, Seattle, and Portland offices of the Clerk of Court and is forwarded for posting to the clerks of the district courts within the circuit. This provision permits the parties to prepare for oral argument before particular judges. Once the calendar is made public, motions for continuances will rarely be granted.

(4) **Allocation of Cases to Calendars.** Direct criminal appeals receive preference pursuant to FRAP 45(b)(2) and are placed on the first available calendar after briefing is completed. Many other cases are accorded priority by statute or rule. *See* Circuit Rule 34-3. Their place on the court's calendar is a function of both the statutory priority and the length of time the cases have been pending. Pursuant to FRAP 2, the Court also may in its discretion order that any individual case receive expedited treatment.

The Court makes every effort to ensure that calendars are prepared objectively and that no case is given unwarranted preference. The only exception to the rule of random assignment of cases to panels is that a case heard by the Court on a prior appeal may be set before the same panel upon a later appeal. If the panel that originally heard the matter does not specify its intent to retain jurisdiction over any further appeal, the parties may file a motion to have the case heard by the original panel. Matters on remand from the United States Supreme Court are referred to the panel that previously heard the matter.

Normally, court calendars are held each year in the following places:

- 12 in San Francisco (usually the second week of each month),
- 12 in Pasadena (usually the first week of each month),
- 12 in Seattle (usually the first week of each month),
- 6 in Portland,
- 3 in Honolulu; and
- 1 in Anchorage.

Each court calendar usually consists of one week of multiple sittings.

(5) **Selection of Panels.** The Clerk of Court sets the time and place of the calendars. The Clerk utilizes a matrix composed of all active judges and those senior judges who have indicated their availability. The aim is to enable each active judge to sit with every other active and senior judge approximately the same number of times over a two-year period and to assign active judges an equal number of times to each of the locations at which the Court holds hearings.

At present, all panels are composed of no fewer than two members of the Court, at least one of whom is an active judge. Every year, each active judge, except the Chief Judge, is expected to sit on 32 days of oral argument calendars; one oral screening panel; one motions panel; and one certificate of appealability panel.

Senior judges are given a choice as to how many cases they desire to hear.

The Court on occasion calls upon district judges to sit on panels when there are insufficient circuit judges to constitute a panel. It is Court policy that district judges not participate in the disposition of appeals from their own districts. In addition, the Court attempts to avoid assigning district judges to appeals of cases over which other judges from their district have presided (either on motions or at trial) as visiting judges in other districts.

All active judges and some senior judges serve on a motions panel, whose membership changes monthly. The identity of the motions panel is posted on the first day of the month on the Court's website at www.ca9.uscourts.gov under *Calendar > Motions Panel*.

(6) **Pre-Argument Preparation.** After the cases have been allocated to the panels, the briefs and excerpts of record in each case are distributed to each of the judges scheduled to hear the case. The documents are usually received in the judges' chambers twelve weeks prior to the scheduled time for hearing, and it is the policy of the Court that each judge read all of the briefs prior to oral argument.

(7) **Oral Argument.** The Clerk sends a master calendar notice to all counsel of record about ten weeks prior to the date of oral argument. If counsel finds it impossible to meet the assigned hearing date, a motion for continuance should be filed immediately. Delay in submitting such a motion will militate against the Court's granting the relief requested. Once the identity of the judges are announced, motions for continuance will rarely be granted.

Counsel should inform the Court promptly if the case has become moot, settlement discussions are pending, or relevant precedent has been decided since the briefs were filed.

The Location of Hearing Notice indicates how much time will be allotted to each side for oral argument. If oral argument is allowed, the amount of time, which is within the Court's discretion, generally ranges between 10 and 20 minutes per side. If counsel wishes more time, a motion to that effect must be filed as soon as possible after the notice is received.

Daily court calendars usually commence at 9:00 a.m., Monday through Friday. Counsel are expected to check in with the courtroom deputy at least 30 minutes prior to the start of the calendar. Most arguments are broadcast live via the Court's website at www.ca9.uscourts.gov. Recordings will be available under the Audio and Video heading the day following argument. These recordings do not represent an official record of the proceedings.

(8) **Case Conferences.** At the conclusion of each day's argument, the judges on each panel confer on the cases they have heard. Each judge expresses his or her tentative views and votes in reverse order of seniority. The judges reach a

tentative decision regarding the disposition of each case and whether it should be in the form of a published opinion. The presiding judge then assigns each case to a judge for the preparation and submission of a disposition.

TITLE I. Applicability of Rules

FRAP 1. SCOPE OF RULES; DEFINITION; TITLE

(a) **Scope of Rules.**

(1) These rules govern procedure in the United States courts of appeals.

(2) When these rules provide for filing a motion or other document in the district court, the procedure must comply with the practice of the district court.

(b) **Definition.** In these rules, 'state'[1] includes the District of Columbia and any United States commonwealth or territory.

(c) **Title.** These rules are to be known as the Federal Rules of Appellate Procedure.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Apr. 25, 1989, eff. Dec. 1, 1989; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 28, 2010, eff. Dec. 1, 2010.)

CIRCUIT RULE 1-1. TITLE

The rules of the United States Court of Appeals for the Ninth Circuit are to be known as Circuit Rules. *(Rev. 7/95)*

CIRCUIT RULE 1-2. SCOPE OF CIRCUIT RULES

In cases where the Federal Rules of Appellate Procedure (FRAP) and the Rules of the United States Court of Appeals for the Ninth Circuit (Circuit Rules) are silent as to a particular matter of appellate practice, any relevant rule of the Supreme Court of the United States shall be applied.

[1] So in original.

FRAP 2. SUSPENSION OF RULES

On its own or a party's motion, a court of appeals may—to expedite its decision or for other good cause—suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b).

(As amended Apr. 24, 1998, eff. Dec. 1, 1998.)

TITLE II. Appeal from a Judgment or Order of a District Court

FRAP 3. APPEAL AS OF RIGHT—HOW TAKEN

(a) Filing the Notice of Appeal.

(1) An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4. At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d).

(2) An appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the court of appeals to act as it considers appropriate, including dismissing the appeal.

(3) An appeal from a judgment by a magistrate judge in a civil case is taken in the same way as an appeal from any other district court judgment.

(4) An appeal by permission under 28 U.S.C. § 1292(b) or an appeal in a bankruptcy case may be taken only in the manner prescribed by Rules 5 and 6, respectively.

(b) Joint or Consolidated Appeals.

(1) When two or more parties are entitled to appeal from a district-court judgment or order, and their interests make joinder practicable, they may file a joint notice of appeal. They may then proceed on appeal as a single appellant.

(2) When the parties have filed separate timely notices of appeal, the appeals may be joined or consolidated by the court of appeals.

(c) Contents of the Notice of Appeal.

(1) The notice of appeal must:

(A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X";

(B) designate the judgment, order, or part thereof being appealed; and

(C) name the court to which the appeal is taken.

(2) A pro se notice of appeal is considered filed on behalf of the signer and the signer's spouse and minor children (if they are parties), unless the notice clearly indicates otherwise.

(3) In a class action, whether or not the class has been certified, the notice of appeal is sufficient if it names one person qualified to bring the appeal as representative of the class.

(4) An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice.

(5) Form 1 in the Appendix of Forms is a suggested form of a notice of appeal.

(d) Serving the Notice of Appeal.

(1) (1) The district clerk must serve notice of the filing of a notice of appeal by mailing a copy to each party's counsel of record—excluding the appellant's—or, if a party is proceeding pro se, to the party's last known address. When a defendant in a criminal case appeals, the clerk must also serve a copy of the notice of appeal on the defendant, either by personal service or by mail addressed to the defendant. The clerk must promptly send a copy of the notice of appeal and of the docket entries—and any later docket entries—to the clerk of the court of appeals named in the notice. The district clerk must note, on each copy, the date when the notice of appeal was filed.

(2) If an inmate confined in an institution files a notice of appeal in the manner provided by Rule 4(c), the district clerk must also note the date when the clerk docketed the notice.

(3) The district clerk's failure to serve notice does not affect the validity of the appeal. The clerk must note on the docket the names of the parties to whom the clerk mails copies, with the date of mailing. Service is sufficient despite the death of a party or the party's counsel.

(e) Payment of Fees. Upon filing a notice of appeal, the appellant must pay the district clerk all required fees. The district clerk receives the appellate docket fee on behalf of the court of appeals.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Mar. 10, 1986, eff. July 1, 1986; Apr. 25, 1989, eff. Dec. 1, 1989; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998.)

CIRCUIT RULE 3-1. FILING THE APPEAL

In appeals from the district court, appellant's counsel shall simultaneously submit to the clerk of the district court the notice of appeal, the filing fee, and the appellate docket fee. In appeals from the bankruptcy appellate panel and the Tax Court, the notice of appeal and fees shall be submitted to the Clerk of the court from which the appeal is taken. Petitions for review and applications to enforce federal agency orders, and fees for those petitions and applications, shall be submitted to the Clerk of the Court of Appeals. If the fees are not paid promptly, the Court of Appeals Clerk will dismiss the case after transmitting a warning notice. *(Rev. 12/1/09)*

The above rules are subject to several exceptions. The docket fee need not be paid upon filing the notice of appeal when: (a) the district court or this Court has granted in forma pauperis or Criminal Justice Act status; (b) an application for in forma pauperis relief or for a certificate of appealability is pending; or (c) the appellant, e.g., the Government, is exempt by statute from paying the fee. Counsel shall advise the Clerk at the time the notice of appeal is filed if one of these conditions exists. (*See* FRAP 24 regarding appeals in forma pauperis.) If a party has filed a petition for permission to appeal pursuant to FRAP 5, the filing fee and docket fee will become due in the district court upon an order of this Court granting permission to appeal. A notice of appeal need not be filed. (*See* FRAP 5.) *(Rev. 12/1/09)*

CIRCUIT RULE 3-2. REPRESENTATION STATEMENT

(a) No FRAP 12(b) Representation Statement is required in: (1) criminal cases; (2) appeals arising from actions filed pursuant to 28 U. S. C. §§ 2241, 2254, and 2255; and (3) appeals filed by pro se appellants.

(b) In all other cases, a party filing an appeal shall attach to the notice a Representation Statement that identifies all parties to the action along with the names, addresses and telephone numbers of their respective counsel, if any. *(Rev. 7/94)*

Cross Reference:

- FRAP 12. Docketing the Appeal; Filing a Representation Statement; Filing the Record on page 42, specifically, FRAP 12(b), Filing a Representation Statement.

CIRCUIT RULE 3-3. PRELIMINARY INJUNCTION APPEALS

(a) Every notice of appeal from an interlocutory order (i) granting, continuing, modifying, refusing or dissolving a preliminary injunction or (ii) refusing to dissolve or modify a preliminary injunction shall bear the caption "PRELIMINARY INJUNCTION APPEAL." Immediately upon filing, the notice of appeal must be transmitted by the district court clerk's office to the Court of Appeals clerk's office. *(Rev. 12/1/09)*

(b) Within 7 days of filing a notice of appeal from an order specified in subparagraph (a), the parties shall arrange for expedited preparation by the district court reporter of all portions of the official transcript of oral proceedings in the district court which the parties desire to be included in the record on appeal. Within 28 days of the docketing in the district court of a notice of appeal from an order specified in subparagraph (a), the appellant shall file an opening brief and excerpts of record. Appellee's brief and any supplemental excerpts of record shall be filed within 28 days of service of appellant's opening brief. Appellant may file a brief in reply to appellee's brief within 14 days of service of appellee's brief. *(Rev. 12/1/02; 12/1/09)*

(c) If a party files a motion to expedite the appeal or a motion to grant or stay the injunction pending appeal, the Court, in resolving those motions, may order a schedule for briefing that differs from that described above. *(Rev. 7/1/06)*

Cross Reference: *(Rev. 7-1-06)*

- FRAP 8. Stay or Injunction Pending Appeal on page 27
- Circuit Rule 27-2. Motions for Stays Pending Appeal on page 94
- Circuit Rule 27-3. Emergency and Urgent Motions on page 94
- FRAP 10. The Record on Appeal on page 31
- Circuit Rule 10-2. Contents of the Record on Appeal on page 33
- Circuit Rule 10-3. Ordering the Reporter's Transcript on page 33
- Circuit Rule 30-1. The Excerpts of Record on page 123
- FRAP 34. Oral Argument on page 144
- Circuit Rule 34-3. Priority Cases on page 145

CIRCUIT RULE 3-4. MEDIATION QUESTIONNAIRE

(New 12/1/09)

(a) The Court encourages the parties in Ninth Circuit civil appeals to engage in mediation. To that end, except as provided in section (b) below, within 7 days of the docketing of a civil appeal, the appellant(s) shall, and the appellee(s) may, complete and submit the Ninth Circuit Mediation Questionnaire. The Clerk shall transmit the Mediation Questionnaire to counsel with the time scheduling order. Counsel shall return it according to the instructions contained in the Mediation Questionnaire. The sole purpose of the Mediation Questionnaire is to provide information about new appeals to the Court's Mediation Office.

Appellant's failure to comply with this rule may result in dismissal of the appeal in accordance with Circuit Rule 42-1.

(b) The requirement for filing a Mediation Questionnaire shall not apply to:

(1) an appeal in which the appellant is proceeding without the assistance of counsel;

(2) an appeal from an action filed under 28 U.S.C. §§ 2241, 2254, 2255; and,

(3) petitions for a writ under 28 U.S.C. § 1651.

Cross Reference:

- Circuit Rule 25-5. Electronic Filing on page 84, specifically Circuit Rule 25-5(b), Documents that may be submitted either electronically or in paper format
- Circuit Rule 15-2. Mediation Questionnaire in Agency Cases on page 48
- FRAP 33. Appeal Conferences on page 141
- Circuit Rule 33-1. Circuit Mediation Office on page 141

CIRCUIT RULE 3-5. PROCEDURE FOR RECALCITRANT WITNESS APPEALS

Every notice of appeal from an order holding a witness in contempt and directing incarceration under 28 U.S.C. § 1826 shall bear the caption "RECALCITRANT WITNESS APPEAL." Immediately upon filing, the notice of appeal must be transmitted by the district court clerk's office to the Court of Appeals clerk's office. It shall also be the responsibility of the appellant to notify directly the motions unit of the Court of Appeals that such a notice of appeal has been filed in the district court. Such notification must be given by telephone (415/355-8000) within 24 hours of the filing of the notice of appeal.

A failure to provide such notice may result in sanctions against counsel imposed by the Court. *(Eff. 7/1/97; Rev. 12/1/09)*

Cross Reference: *(Rev. 12/1/09)*

- FRAP 27. Motions on page 90, specifically, Circuit Rule 27-1. Filing of Motions on page 92
- Interim Circuit Rule 27-13. Sealed Documents on page 101
- Circuit Rule 10-1. Notice of Filing Appeal on page 33
- Circuit Rule 25-1. Principal Office of Clerk on page 81

CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 3-5

A recalcitrant witness summarily ordered confined pursuant to 28 U.S.C. § 1826(a) is entitled to have the appeal from the order of confinement decided within 30 days after the filing of the notice of appeal. In the interest of obtaining a rapid disposition of the appeal, the Court impresses upon counsel that the record on appeal and briefs must be filed with the Court as soon as possible after the notice of appeal is filed. The Court will establish an expedited schedule for filing the record and briefs and will submit the appeal for decision on an expedited basis. If expedited treatment is sought for an interlocutory appeal, motions for expedition, summary affirmance or reversal, or dismissal may be filed pursuant to Circuit Rule 27-4. A party may file documents using a Doe designation or under seal to avoid disclosure of the identity of the applicant or the subject matter of the grand jury investigation. The party should file an accompanying motion to use such a designation. (Rev. 12/1/09)

CIRCUIT RULE 3-6. SUMMARY DISPOSITION OF CIVIL APPEALS

At any time prior to the completion of briefing in a civil appeal if the Court determines:

(a) that clear error or an intervening court decision or recent legislation requires reversal or vacation of the judgment or order appealed from or a remand for additional proceedings; or

(b) that it is manifest that the questions on which the decision in the appeal depends are so insubstantial as not to justify further proceedings the Court may, after affording the parties an opportunity to show cause, issue an appropriate dispositive order.

At any time prior to the disposition of a civil appeal if the Court determines that the appeal is not within its jurisdiction, the Court may issue an order dismissing the appeal without notice or further proceedings. *(Eff. 7/95)*

FRAP 3.1. APPEAL FROM A JUDGMENT OF A MAGISTRATE JUDGE IN A CIVIL CASE

[Abrogated Apr. 24, 1998, eff. Dec. 1, 1998]

FRAP 4. APPEAL AS OF RIGHT—WHEN TAKEN

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.

(B) The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from if one of the parties is:

(i) the United States;

(ii) a United States agency;

(iii) a United States officer or employee sued in an official capacity; or

(iv) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf—including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person.

(C) An appeal from an order granting or denying an application for a writ of error coram nobis is an appeal in a civil case for purposes of Rule 4(a).

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

(3) Multiple Appeals. If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party files in the district court any of the following motions under the Federal Rules of Civil Procedure—and does so within the time allotted by those rules—the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered.

(B)

(i) If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal—in compliance with Rule 3(c)—within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(iii) No additional fee is required to file an amended notice

(5) Motion for Extension of Time.

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later.

(6) Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

(7) Entry Defined.

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58(a) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a); or

(ii) if Federal Rule of Civil Procedure 58(a) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

- the judgment or order is set forth on a separate document, or
- 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a) does not affect the validity of an appeal from that judgment or order.

(b) Appeal in a Criminal Case.

(1) Time for Filing a Notice of Appeal.

(A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 14 days after the later of:

(i) the entry of either the judgment or the order being appealed; or

(ii) the filing of the government's notice of appeal.

(B) When the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days after the later of:

(i) the entry of the judgment or order being appealed; or

(ii) the filing of a notice of appeal by any defendant.

(2) **Filing Before Entry of Judgment.** A notice of appeal filed after the court announces a decision, sentence, or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

(3) **Effect of a Motion on a Notice of Appeal.**

(A) If a defendant timely makes any of the following motions under the Federal Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within 14 days after the entry of the order disposing of the last such remaining motion, or within 14 days after the entry of the judgment of conviction, whichever period ends later. This provision applies to a timely motion:

(i) for judgment of acquittal under Rule 29;

(ii) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than 14 days after the entry of the judgment; or

(iii) for arrest of judgment under Rule 34.

(B) A notice of appeal filed after the court announces a decision, sentence, or order—but before it disposes of any of the motions referred to in Rule 4(b)(3)(A)—becomes effective upon the later of the following:

(i) the entry of the order disposing of the last such remaining motion; or

(ii) the entry of the judgment of conviction.

(C) A valid notice of appeal is effective—without amendment—to appeal from an order disposing of any of the motions referred to in Rule 4(b)(3)(A).

(4) **Motion for Extension of Time.** Upon a finding of excusable neglect or good cause, the district court may—before or after the time has expired, with or without motion and notice—extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b).

(5) **Jurisdiction.** The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(a), nor does the filing of a motion under 35(a) affect the validity of a notice of appeal filed before entry of the order disposing of the motion. The filing of a motion under Federal Rule of Criminal Procedure 35(a) does not suspend the time for filing a notice of appeal from a judgment of conviction.

(6) **Entry Defined.** A judgment or order is entered for purposes of this Rule 4(b) when it is entered on the criminal docket.

(c) Appeal by an Inmate Confined in an Institution.

(1) If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 4(c)(1). If an inmate files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing and:

(A) it is accompanied by:

(i) a declaration in compliance with 28 U.S.C. § 1746—or a notarized statement—setting out the date of deposit and stating that first-class postage is being prepaid; or

(ii) evidence (such as a postmark or date stamp) showing that the notice was so deposited and that postage was prepaid; or

(B) the court of appeals exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies Rule 4(c)(1)(A)(i).

(2) If an inmate files the first notice of appeal in a civil case under this Rule 4(c), the 14-day period provided in Rule 4(a)(3) for another party to file a notice of appeal runs from the date when the district court dockets the first notice.

(3) When a defendant in a criminal case files a notice of appeal under this Rule 4(c), the 30-day period for the government to file its notice of appeal runs from the entry of the judgment or order appealed from or from the district court's docketing of the defendant's notice of appeal, whichever is later.

(d) Mistaken Filing in the Court of Appeals. If a notice of appeal in either a civil or a criminal case is mistakenly filed in the court of appeals, the clerk of that court must note on the notice the date when it was received and send it to the district clerk. The notice is then considered filed in the district court on the date so noted.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Pub. L. 100–690, title VII, § 7111, Nov. 18, 1988, 102 Stat. 4419; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 27, 1995, eff. Dec. 1, 1995; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 25, 2005, eff. Dec. 1, 2005; Mar. 26, 2009, eff. Dec. 1, 2009; Apr. 28, 2010, eff. Dec. 1, 2010; Apr. 26, 2011, eff. Dec. 1, 2011; Apr. 28, 2016, eff. Dec. 1, 2016.)

Cross Reference:

- Circuit Rule 3-5. Procedure for Recalcitrant Witness Appeals on page 7
- Circuit Rule 10-2. Contents of the Record on Appeal on page 33
- Circuit Rule 27-4. Emergency Criminal Interlocutory Appeals on page 97

CIRCUIT RULE 4-1. COUNSEL IN CRIMINAL APPEALS

This rule applies to appeals in categories of cases listed in 18 U.S.C. § 3006A.

(a) Continuity of Representation on Appeal

Counsel in criminal cases, whether retained or appointed by the district court, shall ascertain whether the defendant wishes to appeal and file a notice of appeal upon the defendant's request. Counsel shall continue to represent the defendant on appeal until counsel is relieved and replaced by substitute counsel or by the defendant pro se in accordance with this rule. If counsel was appointed by the district court pursuant to 18 U.S.C. § 3006A and a notice of appeal has been filed, counsel's appointment automatically shall continue on appeal.

(b) Application for Indigent Status on Appeal

A person for whom counsel was appointed by the district court under section 3006A of the Criminal Justice Act may appeal to this Court without prepayment of fees and costs or security therefor and without filing the affidavit required by 28 U.S.C. § 1915(a).

If the district court did not appoint counsel, but the defendant or petitioner appears to qualify for appointment of counsel on appeal, retained counsel, or the defendant if the defendant proceeded pro se before the district court, shall file on the client's behalf a financial affidavit (CJA Form 23). If the notice of appeal is filed at the time of sentencing, the motions to proceed on appeal in forma pauperis and for appointment of counsel shall be presented to the district court at that time. If the district court finds that appointment of counsel is warranted, the Court shall appoint the counsel who represented the defendant in district court, a Criminal Justice Act defender, or a panel attorney to represent the defendant or petitioner on appeal. The district court shall require appointed counsel and the court reporter to prepare the appropriate CJA form for preparation of the reporter's transcript. A copy of the order appointing counsel on appeal shall be transmitted forthwith by the Clerk of the district court to the Clerk of this Court. Substitute counsel shall within 14 days of appointment file a notice of appearance in this Court. *(Rev. 12/1/09)*

If the district court declines to appoint counsel on appeal, and if counsel below believes that the district court erred, counsel shall, within 14 days from the district court's order, file with the Clerk of this Court a motion for appointment of counsel accompanied by a financial affidavit (CJA Form 23). *(Rev. 12/1/09)*

(c) Withdrawal of Counsel After Filing the Notice of Appeal

A motion to withdraw as counsel on appeal after the filing of the notice of appeal, where counsel is retained in a criminal case or appointed under the Criminal Justice Act, shall be filed with the Clerk of this Court within 21 days after the filing of the notice of appeal and shall be accompanied by a statement of reasons and: *(Rev. 12/1/09)*

(1) A substitution of counsel which indicates that new counsel has been retained to represent defendant; or

(2) A motion by retained counsel for leave to proceed in forma pauperis and for appointment of counsel under the Criminal Justice Act, supported by a completed financial affidavit (CJA Form 23); *(Rev. 7/1/06)*

(3) A motion by appointed counsel to be relieved and for appointment of substitute counsel; (Rev. 7/1/06)

(4) A motion by defendant to proceed pro se; or

(5) An affidavit or signed statement from the defendant showing that the defendant has been advised of his or her rights with regard to the appeal and expressly stating that the defendant wishes to dismiss the appeal voluntarily.

Any motion filed pursuant to this section shall be served on defendant; the proof of service shall include defendant's current address. *(Rev. 7/1/06)*

(6) Alternatively, if after conscientious review of the record appointed counsel believes the appeal is frivolous, on or before the due date for the opening brief, appointed counsel shall file a separate motion to withdraw and an opening brief that identifies anything in the record that might arguably support the appeal, with citations to the record and applicable legal authority. The motion and brief shall be accompanied by proof of service on defendant. *See Anders v. California*, 386 U.S. 738 (1967), and *United States v. Griffy*, 895 F.2d 561 (9th Cir. 1990). The cover of the opening brief shall state that the brief is being filed pursuant to *Anders v. California*. The filing of a motion to withdraw as counsel along with a proposed *Anders* brief serves to vacate the previously established briefing schedule.

To facilitate this Court's independent review of the district court proceedings, counsel shall designate all appropriate reporter's transcripts, including but not limited to complete transcripts for the plea hearing and sentencing hearing, and shall include the transcripts in the excerpts of record. Counsel are advised to consult Circuit Rule 30-1.

When an appointed attorney has properly moved for leave to withdraw pursuant to Anders and has included all appropriate reporter's transcripts, this Court will establish a briefing schedule permitting the defendant to file a pro se supplemental opening brief raising any issues that defendant wishes to present. The order will also direct appellee by a date certain either to file its answering brief or notify the Court by letter that no answering brief will be filed. *(New 1/1/01)*

(d) Motions for Leave to Proceed Pro Se in Direct Criminal Appeals

The Court will permit defendants in direct criminal appeals to represent themselves if: (1) the defendant's request to proceed pro se and the waiver of the right to counsel are

knowing, intelligent and unequivocal; (2) the defendant is apprised of the dangers and disadvantages of self-representation on appeal; and (3) self-representation would not undermine a just and orderly resolution of the appeal. If, after granting leave to proceed pro se the Court finds that appointment of counsel is essential to a just and orderly resolution of the appeal, leave to proceed pro se may be modified or withdrawn. *(New 7/1/01)*

(e) Post Appeal Proceedings

If the decision of this Court is adverse to the client, in part or in full, counsel, whether appointed or retained, shall, within 14 days after entry of judgment or denial of a petition for rehearing, advise the client of the right to initiate further review by filing a petition for a writ of certiorari in the United States Supreme Court. *See* Sup. Ct. R. 13, 14. If in counsel's considered judgment there are no grounds for seeking Supreme Court review that are non-frivolous and consistent with the standards for filing a petition, *see* Sup. Ct. R. 10, counsel shall further notify the client that counsel intends to move this Court for leave to withdraw as counsel of record if the client insists on filing a petition in violation of Sup. Ct. R. 10.

In cases in which a defendant who had retained counsel or proceeded pro se in this Court wishes to file a petition for writ of certiorari in the United States Supreme Court or wishes to file an opposition to a certiorari petition, and is financially unable to obtain representation for this purpose, this Court will entertain a motion for appointment of counsel within 21 days from judgment or the denial of rehearing. It is the duty of retained counsel to assist the client in preparing and filing a motion for appointment of counsel and a financial affidavit under this subsection.

If requested to do so by the client, appointed or retained counsel shall petition the Supreme Court for certiorari only if in counsel's considered judgment sufficient grounds exist for seeking Supreme Court review. *See* Sup. Ct. R. 10.

Any motion by appointed or retained counsel to withdraw as counsel of record shall be made within 21 days of judgment or the denial of rehearing and shall state the efforts made by counsel to notify the client. A cursory statement of frivolity is not a sufficient basis for withdrawal. *See Austin v. United States*, 513 U.S. 5 (1994) (per curiam); Sup. Ct. R. 10. Within this same period, counsel shall serve a copy of any such motion on the client. If relieved by this Court, counsel shall, within 14 days after such motion is granted, notify the client in writing and, if unable to do so, inform this Court. *(Rev. 12/1/09)*

Unless counsel is relieved of his or her appointment by this Court, counsel's appointment continues through the resolution of certiorari proceedings and includes providing representation when an opposing party files a petition for certiorari.

(f) Counsel's Claim for Fees and Expenses

An attorney appointed by the Court shall be compensated for services and reimbursed for

expenses reasonably incurred as set forth in the Criminal Justice Act. All vouchers claiming compensation for services rendered in this Court under the Criminal Justice Act shall be submitted to the Clerk of this Court no later than 45 days after the final disposition of the case in this Court or after the filing of a petition for certiorari, whichever is later. Subsequent work on the appeal may be claimed on a supplemental voucher. A voucher for work on a petition for a writ of certiorari must be accompanied by a copy of the petition. If a party wishes interim payment, a request for such relief may be filed.

The Clerk shall refer all vouchers, including those requesting payment in excess of the statutory maximum, to the Appellate Commissioner, for approval of such compensation as the Appellate Commissioner deems reasonable and appropriate under the Criminal Justice Act. If the Appellate Commissioner concludes that an amount less than that requested by the attorney is appropriate, he or she shall communicate to the attorney the basis for reducing the claim. The Appellate Commissioner will offer the attorney an opportunity to respond regarding the propriety and reasonableness of the voucher before approving a reduction in the amount. If the amount requested is reduced, and the attorney seeks reconsideration, the Appellate Commissioner shall receive and review the request for reconsideration and may grant it in full or in part. If the Appellate Commissioner does not grant a request for reconsideration in full or in part, the request shall be referred to and decided by: (1) the authoring judge on the merits panel if the case was submitted to a merits panel; or (2) the appropriate administrative judge if the case was resolved before submission to a merits panel. *(Rev. 12/1/09)*

Whenever the Appellate Commissioner certifies payment in excess of the statutory maximum provided by the Criminal Justice Act, the Clerk shall forward the voucher to the appropriate administrative judge for review and approval. *(eff. 7/95; amended 1/1/99)*

Cross Reference:

- FRAP 42. Voluntary Dismissal on page 165
- FRAP 46. Attorneys on page 170, specifically, FRAP 46(c), Discipline
- Circuit Rule 27-9. Motions to Dismiss Criminal Appeals on page 98, specifically, 27-9.1. Voluntary Dismissals on page 98

FRAP 5. APPEAL BY PERMISSION

(a) Petition for Permission to Appeal.

(1) To request permission to appeal when an appeal is within the court of appeals' discretion, a party must file a petition for permission to appeal. The petition must be filed with the circuit clerk with proof of service on all other parties to the district-court action.

(2) The petition must be filed within the time specified by the statute or rule authorizing the appeal or, if no such time is specified, within the time provided by Rule 4(a) for filing a notice of appeal.

(3) If a party cannot petition for appeal unless the district court first enters an order granting permission to do so or stating that the necessary conditions are met, the district court may amend its order, either on its own or in response to a party's motion, to include the required permission or statement. In that event, the time to petition runs from entry of the amended order.

(b) Contents of the Petition; Answer or Cross-Petition; Oral Argument.

(1) The petition must include the following:

(A) the facts necessary to understand the question presented;

(B) the question itself;

(C) the relief sought;

(D) the reasons why the appeal should be allowed and is authorized by a statute or rule; and

(E) an attached copy of:

(i) the order, decree, or judgment complained of and any related opinion or memorandum, and

(ii) any order stating the district court's permission to appeal or finding that the necessary conditions are met.

(2) A party may file an answer in opposition or a cross-petition within 10 days after the petition is served.

(3) The petition and answer will be submitted without oral argument unless the court of appeals orders otherwise.

(c) Form of Papers; Number of Copies; Length Limits. All papers must conform to Rule 32(c)(2). An original and 3 copies must be filed unless the court requires a different

number by local rule or by order in a particular case. Except by the court's permission, and excluding the accompanying documents required by Rule 5(b)(1)(E):

(1) a paper produced using a computer must not exceed 5,200 words; and

(2) a handwritten or typewritten paper must not exceed 20 pages.

(d) Grant of Permission; Fees; Cost Bond; Filing the Record.

(1) Within 14 days after the entry of the order granting permission to appeal, the appellant must:

(A) pay the district clerk all required fees; and

(B) file a cost bond if required under Rule 7.

(2) A notice of appeal need not be filed. The date when the order granting permission to appeal is entered serves as the date of the notice of appeal for calculating time under these rules.

(3) The district clerk must notify the circuit clerk once the petitioner has paid the fees. Upon receiving this notice, the circuit clerk must enter the appeal on the docket. The record must be forwarded and filed in accordance with Rules 11 and 12(c).

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; Mar. 26, 2009, eff. Dec. 1, 2009; Apr.28, 2016, eff. Dec. 1, 2016.)

Cross Reference:

- Circuit Rule 39-2. Attorneys Fees and Expenses Under the Equal Access to Justice Act on page 159, specifically, 39-2.1. Applications for Fees on page 159 and 39-2.2. Petitions by Permission on page 159.

FRAP 5.1. APPEAL BY LEAVE UNDER 28 U.S.C. § 636(C)(5)

[Abrogated Apr. 24, 1998, eff. Dec. 1, 1998]

CIRCUIT RULE 5-1. CIVIL APPEALS DOCKETING STATEMENT IN APPEALS BY PERMISSION UNDER FRAP 5

[Abrogated 12/1/09]

CIRCUIT RULE 5-2. NUMBER OF COPIES AND LENGTH

(a) **Number of Copies:** The parties must file an original in paper format of a petition, cross-petition, answer, and any supporting papers and appendices filed pursuant to FRAP 5 unless the petition, cross-petition, or answer is submitted via Appellate CM/ECF. *(New Rule 7/1/00; Rev. 12/1/09; Rev. 7/1/13; Rev. 12/1/16)*

(b) **Length:** Except by permission of the Court, a petition, cross-petition, or answer filed under FRAP 5 may not exceed 20 pages. The documents listed at FRAP 5(b)(1)(E) and 32(f) are excluded from the length limit calculation. *(New 12/1/16)*

Cross Reference:

- Circuit Rule 25-5. Electronic Filing on page 84, specifically, Circuit Rule 25-5(b), Documents that may be submitted either electronically or in paper format
- Circuit Rule 32-3. Page/Word Count Conversion Formula for Briefs and Other Documents on page 139

FRAP 6. APPEAL IN A BANKRUPTCY CASE

(a) **Appeal From a Judgment, Order, or Decree of a District Court Exercising Original Jurisdiction in a Bankruptcy Case.** An appeal to a court of appeals from a final judgment, order, or decree of a district court exercising jurisdiction under 28 U.S.C. § 1334 is taken as any other civil appeal under these rules.

(b) **Appeal From a Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel Exercising Appellate Jurisdiction in a Bankruptcy Case.**

(1) **Applicability of Other Rules.** These rules apply to an appeal to a court of appeals under 28 U.S.C. § 158(d)(1) from a final judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction under 28 U.S.C. § 158(a) or (b), but with these qualifications:

(A) Rules 4(a)(4), 4(b), 9, 10, 11, 12(c), 13–20, 22–23, and 24(b) do not apply;

(B) the reference in Rule 3(c) to "Form 1 in the Appendix of Forms" must be read as a reference to Form 5;

(C) when the appeal is from a bankruptcy appellate panel, "district court," as used in any applicable rule, means "appellate panel"; and

(D) in Rule 12.1, "district court" includes a bankruptcy court or bankruptcy appellate panel.

(2) **Additional Rules.** In addition to the rules made applicable by Rule 6(b)(1), the following rules apply:

(A) **Motion for Rehearing.**

(i) If a timely motion for rehearing under Bankruptcy Rule 8022 is filed, the time to appeal for all parties runs from the entry of the order disposing of the motion. A notice of appeal filed after the district court or bankruptcy appellate panel announces or enters a judgment, order, or decree—but before disposition of the motion for rehearing—becomes effective when the order disposing of the motion for rehearing is entered.

(ii) If a party intends to challenge the order disposing of the motion – or the alteration or amendment of a judgment, order, or decree upon the motion – then the party, in compliance with Rules 3(c) and 6(b)(1)(B), must file a notice of appeal or amended notice of appeal. The notice or amended notice must be filed within the time prescribed by Rule 4—excluding Rules 4(a)(4) and 4(b)—measured from the entry of the order disposing of the motion.

(iii) No additional fee is required to file an amended notice.

(B) The Record on Appeal.

(i) Within 14 days after filing the notice of appeal, the appellant must file with the clerk possessing the record assembled in accordance with Bankruptcy Rule 8009—and serve on the appellee—a statement of the issues to be presented on appeal and a designation of the record to be certified and made available to the circuit clerk.

(ii) An appellee who believes that other parts of the record are necessary must, within 14 days after being served with the appellant's designation, file with the clerk and serve on the appellant a designation of additional parts to be included.

(iii) The record on appeal consists of:

- the redesignated record as provided above;
- the proceedings in the district court or bankruptcy appellate panel; and
- a certified copy of the docket entries prepared by the clerk under Rule 3(d).

(C) Making the Record Available.

(i) When the record is complete, the district clerk or bankruptcy-appellate-panel clerk must number the documents constituting the record and promptly make it available to the circuit clerk. If the clerk makes the record available in paper form, the clerk will not send documents of unusual bulk or weight, physical exhibits other than documents, or other parts of the record designated for omission by local rule of the court of appeals unless directed to do so by a party or the circuit clerk. If unusually bulky or heavy exhibits are to be made available in paper form, a party must arrange with the clerks in advance for their transportation and receipt.

(ii) All parties must do whatever else is necessary to enable the clerk to assemble the record and make it available. When the record is made available in paper form, the court of appeals may provide by rule or order that a certified copy of the docket entries be made available in place of the redesignated record. But any party may request at any time during the pendency of the appeal that the redesignated record be made available.

(D) Filing the Record. When the district clerk or bankruptcy-appellate-panel clerk has made the record available, the circuit clerk must note that fact on the docket. The date noted on the docket serves as the filing date of the record. The circuit clerk must immediately notify all parties of the filing date.

(c) Direct Review by Permission Under 28 U.S.C. § 158(d)(2).

(1) Applicability of Other Rules. These rules apply to a direct appeal by permission under 28 U.S.C. § 158(d)(2), but with these qualifications:

(A) Rules 3-4, 5(a)(3), 6(a), 6(b), 8(a), 8(c), 9-12, 13-20, 22-23, and 24(b) do not apply;

(B) as used in any applicable rule, "district court" or "district clerk" includes – to the extent appropriate – a bankruptcy court or bankruptcy appellate panel or its clerk; and

(C) the reference to "Rules 11 and 12(c)" in Rule 5(d)(3) must be read as a reference to Rules 6(c)(2)(B) and (C).

(2) Additional Rules. In addition, the following rules apply:

(A) The Record on Appeal. Bankruptcy Rule 8009 governs the record on appeal.

(B) Making the Record Available. Bankruptcy Rule 8010 governs completing the record and making it available.

(C) Stays Pending Appeal. Bankruptcy Rule 8007 applies to stays pending appeal.

(D) Duties of the Circuit Clerk. When the bankruptcy clerk has made the record available, the circuit clerk must note that fact on the docket. The date noted on the docket serves as the filing date of the record. The circuit clerk must immediately notify all parties of the filing date.

(E) Filing a Representation Statement. Unless the court of appeals designates another time, within 14 days after entry of the order granting permission to appeal, the attorney who sought permission must file a statement with the circuit clerk naming the parties that the attorney represents on appeal.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Apr. 25, 1989, eff. Dec. 1, 1989; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 24, 1998, eff. Dec. 1, 1998; Mar. 26, 2009, eff. Dec. 1, 2009; Apr. 25, 2014, eff. Dec. 1, 2014.)

Cross Reference:

- Circuit Rule 11-4. Retention of Physical Exhibits in the District Court, Transmittal of Clerk's Record on Request on page 40, specifically, 11-4.1. Retention of Clerk's Record in the District Court on page 40

CIRCUIT RULE 6-1. APPEALS FROM FINAL DECISIONS OF THE SUPREME COURT OF THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

(a) Applicability of Other Rules. *[Abrogated 1/1/05]*

CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 6-1

[Abrogated 1/1/05]

CIRCUIT RULE 6-2. PETITION FOR WRIT OF CERTIORARI TO REVIEW FINAL DECISIONS OF THE SUPREME COURT OF GUAM

(a) Petition of Writ of Certiorari. *[Abrogated 1/1/05]*

CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 6-2(B) AND (C)

[Abrogated 1/1/05]

FRAP 7. BOND FOR COSTS ON APPEAL IN A CIVIL CASE

In a civil case, the district court may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal. Rule 8(b) applies to a surety on a bond given under this rule.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Apr. 24, 1998, eff. Dec. 1, 1998.)

FRAP 8. STAY OR INJUNCTION PENDING APPEAL

(a) Motion for Stay.

(1) Initial Motion in the District Court. A party must ordinarily move first in the district court for the following relief:

(A) a stay of the judgment or order of a district court pending appeal;

(B) approval of a supersedeas bond; or

(C) an order suspending, modifying, restoring, or granting an injunction while an appeal is pending.

(2) Motion in the Court of Appeals; Conditions on Relief. A motion for the relief mentioned in Rule 8(a)(1) may be made to the court of appeals or to one of its judges.

(A) The motion must:

(i) show that moving first in the district court would be impracticable; or

(ii) state that, a motion having been made, the district court denied the motion or failed to afford the relief requested and state any reasons given by the district court for its action.

(B) The motion must also include:

(i) the reasons for granting the relief requested and the facts relied on;

(ii) originals or copies of affidavits or other sworn statements supporting facts subject to dispute; and

(iii) relevant parts of the record.

(C) The moving party must give reasonable notice of the motion to all parties.

(D) A motion under this Rule 8(a)(2) must be filed with the circuit clerk and normally will be considered by a panel of the court. But in an exceptional case in which time requirements make that procedure impracticable, the motion may be made to and considered by a single judge.

(E) The court may condition relief on a party's filing a bond or other appropriate security in the district court.

(b) Proceeding Against a Surety. If a party gives security in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the district court and irrevocably appoints the district clerk as the surety's agent on whom any papers affecting the surety's liability on the bond or undertaking may

be served. On motion, a surety's liability may be enforced in the district court without the necessity of an independent action. The motion and any notice that the district court prescribes may be served on the district clerk, who must promptly mail a copy to each surety whose address is known.

(c) **Stay in a Criminal Case.** Rule 38 of the Federal Rules of Criminal Procedure governs a stay in a criminal case.

(As amended Mar. 10, 1986, eff. July 1, 1986; Apr. 27, 1995, eff. Dec. 1, 1995; Apr. 24, 1998, eff. Dec. 1, 1998.)

FRAP 9. RELEASE IN A CRIMINAL CASE

(a) Release Before Judgment of Conviction.

(1) The district court must state in writing, or orally on the record, the reasons for an order regarding the release or detention of a defendant in a criminal case. A party appealing from the order must file with the court of appeals a copy of the district court's order and the court's statement of reasons as soon as practicable after filing the notice of appeal. An appellant who questions the factual basis for the district court's order must file a transcript of the release proceedings or an explanation of why a transcript was not obtained.

(2) After reasonable notice to the appellee, the court of appeals must promptly determine the appeal on the basis of the papers, affidavits, and parts of the record that the parties present or the court requires. Unless the court so orders, briefs need not be filed.

(3) The court of appeals or one of its judges may order the defendant's release pending the disposition of the appeal.

(b) Release After Judgment of Conviction. A party entitled to do so may obtain review of a district-court order regarding release after a judgment of conviction by filing a notice of appeal from that order in the district court, or by filing a motion in the court of appeals if the party has already filed a notice of appeal from the judgment of conviction. Both the order and the review are subject to Rule 9(a). The papers filed by the party seeking review must include a copy of the judgment of conviction.

(c) Criteria for Release. The court must make its decision regarding release in accordance with the applicable provisions of 18 U.S.C. §§ 3142, 3143, and 3145(c).

(As amended Apr. 24, 1972, eff. Oct. 1, 1972; Pub. L. 98–473, title II, § 210, Oct. 12, 1984, 98 Stat. 1987; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998.)

CIRCUIT RULE 9-1. RELEASE IN CRIMINAL CASES

9-1.1. Release Before Judgment of Conviction

(a) Every notice of appeal from a release or detention order entered before or at the time of a judgment of conviction shall bear the caption "FRAP 9(a) Appeal." Immediately upon filing, the district court shall transmit the notice of appeal to the Court of Appeals Clerk's Office. Upon filing the notice of appeal, counsel shall contact the Court of Appeals' motions unit to notify the Court that such an appeal has been filed. Unless otherwise directed by the Court, appellant shall file a memorandum of law and facts in support of the appeal within 14 days of filing the notice of appeal. Appellant's memorandum shall

be accompanied by the district court's release or detention order and, if the appellant questions the factual basis of the order, a transcript of the district court's bail proceedings. If unable to obtain a transcript of the bail proceedings, the appellant shall state in an affidavit the reasons why the transcript has not been obtained. *(Rev. 1/1/03; 12/1/09)*

(b) Unless otherwise directed by the Court, appellee shall file a response to appellant's memorandum within 10 days of service. *(Rev. 1/1/03; 12/1/09)*

(c) Unless otherwise directed by the Court, appellant may file a reply within 7 days of service of the response. The appeal shall be decided promptly upon the completion of briefing. *(Rev. 1/1/03; 12/1/09)*

9-1.2. Release Pending Appeal

(a) A motion for bail pending appeal or for revocation of bail pending appeal, made in this Court, shall be accompanied by the district court's bail order, and, if the movant questions the factual basis of the order, a transcript of the proceedings had on the motion for bail made in the district court. If unable to obtain a transcript of the bail proceedings, the movant shall state in an affidavit the reason why the transcript has not been obtained. *(Rev. 12/1/09)*

(b) A movant for bail pending appeal shall also attach to the motion a certificate of the court reporter containing the name, address, and telephone number of the reporter who will prepare the transcript on appeal and the reporter's verification that the transcript has been ordered and that satisfactory arrangements have been made to pay for it, together with the estimated date of completion of the transcript. A motion for bail which does not comply with part (b) of this rule will be prima facie evidence that the appeal is taken for the purpose of delay within the meaning of 18 U.S.C. § 3143(b).

(c) Unless otherwise directed by the Court, the non-moving party shall file an opposition or statement of non-opposition to all motions for bail or revocation of bail pending appeal of a judgment of conviction within 10 days of service of the motion. *(Rev. 1/1/2003; 12/1/09)*

(d) Unless otherwise directed by the Court, the movant may file an optional reply within 7 days of service of the response. *(Rev. 1/1/2003; 12/1/09)*

(e) If the appellant is on bail at the time the motion is filed in this Court, that bail will remain in effect until the Court rules on the motion. (Rev. 1/1/01 - changed from (d) to (e))

Cross Reference

- Circuit Rule 27-1. Filing of Motions on page 92
- Circuit Rule 27-3. Emergency and Urgent Motions on page 94

FRAP 10. THE RECORD ON APPEAL

(a) **Composition of the Record on Appeal.** The following items constitute the record on appeal:

(1) the original papers and exhibits filed in the district court;

(2) the transcript of proceedings, if any; and

(3) a certified copy of the docket entries prepared by the district clerk.

(b) **The Transcript of Proceedings.**

(1) **Appellant's Duty to Order.** Within 14 days after filing the notice of appeal or entry of an order disposing of the last timely remaining motion of a type specified in Rule 4(a)(4)(A), whichever is later, the appellant must do either of the following:

(A) order from the reporter a transcript of such parts of the proceedings not already on file as the appellant considers necessary, subject to a local rule of the court of appeals and with the following qualifications:

(i) the order must be in writing;

(ii) if the cost of the transcript is to be paid by the United States under the Criminal Justice Act, the order must so state; and

(iii) the appellant must, within the same period, file a copy of the order with the district clerk; or

(B) file a certificate stating that no transcript will be ordered.

(2) **Unsupported Finding or Conclusion.** If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record a transcript of all evidence relevant to that finding or conclusion.

(3) **Partial Transcript.** Unless the entire transcript is ordered:

(A) the appellant must—within the 14 days provided in Rule 10(b)(1)—file a statement of the issues that the appellant intends to present on the appeal and must serve on the appellee a copy of both the order or certificate and the statement;

(B) if the appellee considers it necessary to have a transcript of other parts of the proceedings, the appellee must, within 14 days after the service of the order or certificate and the statement of the issues, file and serve on the appellant a designation of additional parts to be ordered; and

(C) unless within 14 days after service of that designation the appellant has ordered all such parts, and has so notified the appellee, the appellee may within the following 14 days either order the parts or move in the district court for an order requiring the appellant to do so.

(4) **Payment.** At the time of ordering, a party must make satisfactory arrangements with the reporter for paying the cost of the transcript.

(c) **Statement of the Evidence When the Proceedings Were Not Recorded or When a Transcript Is Unavailable.** If the transcript of a hearing or trial is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement must be served on the appellee, who may serve objections or proposed amendments within 14 days after being served. The statement and any objections or proposed amendments must then be submitted to the district court for settlement and approval. As settled and approved, the statement must be included by the district clerk in the record on appeal.

(d) **Agreed Statement as the Record on Appeal.** In place of the record on appeal as defined in Rule 10(a), the parties may prepare, sign, and submit to the district court a statement of the case showing how the issues presented by the appeal arose and were decided in the district court. The statement must set forth only those facts averred and proved or sought to be proved that are essential to the court's resolution of the issues. If the statement is truthful, it—together with any additions that the district court may consider necessary to a full presentation of the issues on appeal—must be approved by the district court and must then be certified to the court of appeals as the record on appeal. The district clerk must then send it to the circuit clerk within the time provided by Rule 11. A copy of the agreed statement may be filed in place of the appendix required by Rule 30.

(e) **Correction or Modification of the Record.**

(1) If any difference arises about whether the record truly discloses what occurred in the district court, the difference must be submitted to and settled by that court and the record conformed accordingly.

(2) If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected and a supplemental record may be certified and forwarded:

(A) on stipulation of the parties;

(B) by the district court before or after the record has been forwarded; or

(C) by the court of appeals.

(3) All other questions as to the form and content of the record must be presented to the court of appeals.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Mar. 10, 1986, eff. July 1, 1986; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 27, 1995, eff. Dec. 1, 1995; Apr. 24, 1998, eff. Dec. 1, 1998; Mar. 26, 2009, eff. Dec. 1, 2009.)

CIRCUIT RULE 10-1. NOTICE OF FILING APPEAL

When the notice of appeal is filed in the district court, the clerk of the district court shall immediately transmit the notice to the Court of Appeals. *(Rev. 12/1/09)*

Cross Reference:

- FRAP 3. Appeal as of Right—How Taken on page 3
- Circuit Rule 3-1. Filing the Appeal on page 4

CIRCUIT RULE 10-2. CONTENTS OF THE RECORD ON APPEAL

Pursuant to FRAP 10(a), the complete record on appeal consists of:

(a) the official transcript of oral proceedings before the district court ("transcript"), if there is one; and

(b) the district court clerk's record of original pleadings, exhibits and other papers filed with the district court ("clerk's record"). *(Rev. 12/1/09)*

Cross Reference:

- Circuit Rule 30-1. The Excerpts of Record on page 123

CIRCUIT RULE 10-3. ORDERING THE REPORTER'S TRANSCRIPT

10-3.1. Civil Appeals

(a) Appellant's Initial Notice
Unless the parties have agreed on which portions of the transcript to order, or appellant intends to order the entire transcript, appellant shall serve appellee with a notice specifying which portions of the transcript appellant intends to order from the court reporter, as well as a statement of the issues the appellant intends to present on appeal. In the alternative, appellant shall serve on appellee a statement indicating that appellant does not intend to order any transcripts. This notice and statement shall be served on appellee within 10 days of the filing of the notice of appeal or within 10 days of the entry of an order disposing of the last timely filed motion of a type specified in FRAP 4(a)(4). *(Rev. 12/1/09)*

(b) Appellee's Response
Within 10 days of the service date of appellant's initial notice, appellee may respond to appellant's initial notice by serving on appellant a list of any additional portions of the transcript that appellee deems necessary to the appeal. *(Rev. 12/1/09)*

(c) No Transcripts Necessary

If the parties agree that no transcripts are necessary, appellant shall file in the district court a notice stating that no transcripts will be ordered, and provide copies of this notice to the court reporter and the Court of Appeals.

(d) Ordering the Transcript

Within 30 days of the filing of the notice of appeal, appellant shall file a transcript order in the district court, using the district court's transcript designation form and shall provide a copy of the designation form to the court reporter. *(Rev. 12/1/09)*

In ordering the transcripts, appellant shall either order all portions of the transcript listed by both appellant and appellee or certify to the district court pursuant to subsection (f) of this rule that the portions listed by appellee in the response to appellant's initial notice are unnecessary.

(e) Paying for the Transcript

On or before filing the designation form in the district court, appellant shall make arrangements with the court reporter to pay for the transcripts ordered. The United States Judicial Conference has approved the rates a reporter may charge for the production of the transcript and copies of a transcript. Appellant must pay for the original transcript. The transcript is considered ordered only after the designation form has been filed in the district court and appellant has made payment arrangements with the court reporter or the district court has deemed the transcripts designated by appellee to be unnecessary and appellee has made financial arrangements. Payment arrangements include obtaining authorization for preparation of the transcript at government expense.

(f) Paying for Additional Portions of the Transcript

If appellee notifies appellant that additional portions of the transcript are required pursuant to Circuit Rule 10-3.1(b), appellant shall make arrangements with the court reporter to pay for these additional portions unless appellant certifies that they are unnecessary to the appeal and explains why not.

If such a certificate is filed in the district court, with copies to the court reporter and this Court, the district court shall determine which party shall pay for which portions of the transcript. Appellant may ask the Court of Appeals for an extension of time to make arrangements with the court reporter to pay for the transcripts pending the district court's resolution of the issue.

10-3.2. Criminal Appeals

(a) Early Ordering of the Transcript in Criminal Trials Lasting 10 Days or More

Where criminal proceedings result in a trial lasting 10 days or more, the district court may authorize the preparation of the transcript for the appeal and payment of the court reporter after the entry of a verdict but before the filing of a notice of appeal. In addition to filing a CJA Form 24 (Authorization and Voucher for Payment of Transcript), appointed counsel shall certify to the district court that defendant is aware of the right to appeal, and that the defendant has instructed counsel to appeal regardless of the nature or length of the sentence imposed. *(Rev. 12/1/09)*

Retained counsel must make a similar certification to the district court along with

financial arrangements with the court reporter to pay for the transcripts before obtaining early preparation authorization.

The Court of Appeals waives the reduction on transcript price for transcripts ordered pursuant to this subsection from the date of the initial order to the date the transcripts would otherwise be ordered, i.e., 7 days from the filing of the notice of appeal. *(Rev. 12/1/02; 12/1/09)*

The parties shall comply with all other applicable parts of Circuit Rule 10-3.2(b) - (f).

(b) Appellant's Initial Notice

Unless parties have agreed on which portions of the transcript to order or appellant intends to order the entire transcript, appellant shall serve appellee with a notice listing the portions of the transcript appellant will order from the court reporter, as well as a statement of the issues the appellant intends to present on appeal. In the alternative, the appellant shall serve appellee with a statement indicating that no transcripts will be ordered. This notice and statement shall be served on appellee within 7 days of the filing of the notice of appeal or within 7 days of the entry of an order disposing of the last timely filed motion of a type specified in FRAP 4(b). *(Rev. 12/1/02; 12/1/09)*

(c) Appellee's Response

Within 7 days of the service of appellant's initial notice, the appellee may serve on the appellant a response specifying what, if any, additional portions of the transcript are necessary to the appeal. *(Rev. 12/1/09)*

(d) Ordering the Transcript

Within 21 days from the filing of the notice of appeal, appellant shall file a transcript order in the district court using the district court's transcript designation form and shall provide a copy of this designation form to the court reporter. Appellant shall order all the portions of the transcript listed by both appellant and appellee, or certify to the district court pursuant to subsection (f) of this rule that the portions of the transcript listed by appellee in the response to appellant's initial notice are unnecessary. *(Rev. 12/1/09)*

(e) Paying for the Transcript

Where appellant is represented by retained counsel, counsel shall make arrangements with the court reporter to pay for the transcripts on or before the day the transcript designation form is filed in the district court. Appellee shall make financial arrangements when the district court has deemed the transcripts designated by appellee to be unnecessary and appellee desires production of those transcripts.

Where the appellant is proceeding in forma pauperis, appellant shall prepare a CJA Voucher Form 24 and submit the voucher to the district court along with the designation form.

In either case, failure to make proper arrangements with the court reporter to pay for the ordered transcripts may result in sanctions pursuant to FRAP 46(c).

(f) Paying for Additional Portions of the Transcript

If appellee notifies appellant that additional portions of the transcript are required pursuant to Circuit Rule 10-3.2(c), appellant shall make arrangements with the court reporter to pay for these additional portions unless appellant certifies that they are unnecessary to the appeal and explains why not.

If such a certificate is filed in the district court, with copies to the court reporter and this Court, the district court shall determine which party shall pay for which portions of the transcript. Appellant may ask the Court of Appeals for an extension of time to make arrangements with the court reporter to pay for the transcripts pending the district court's resolution of the issue. *(Rev. 7/97)*

CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 10-3

The intent of the requirement of a statement of the issues is to provide the appellee with notice of those transcripts necessary for resolution of the issues to be raised by the appellant on appeal. While failure to comply with this rule may, in the Court's discretion, result in dismissal of the appeal, dismissal is not mandated if the record is otherwise sufficient to permit resolution of the issues on appeal. See United States v. Alerta, 96 F.3d 1230, 1233-34 (9th Cir. 1996); Syncom Capitol Corp. v. Wade, 924 F.2d 167 (9th Cir. 1991). Similarly, the omission of a given issue from the statement of the issues does not bar appellant from raising that issue in the brief if any transcript portions necessary to support that argument have been prepared.

A party who subsequently determines that the initially designated transcripts are insufficient to address the arguments advanced on appeal may seek leave to file a supplemental transcript designation and, if necessary, to expand the record to include that transcript.

FRAP 11. FORWARDING THE RECORD

(a) **Appellant's Duty.** An appellant filing a notice of appeal must comply with Rule 10(b) and must do whatever else is necessary to enable the clerk to assemble and forward the record. If there are multiple appeals from a judgment or order, the clerk must forward a single record.

(b) **Duties of Reporter and District Clerk.**

(1) **Reporter's Duty to Prepare and File a Transcript.** The reporter must prepare and file a transcript as follows:

(A) Upon receiving an order for a transcript, the reporter must enter at the foot of the order the date of its receipt and the expected completion date and send a copy, so endorsed, to the circuit clerk.

(B) If the transcript cannot be completed within 30 days of the reporter's receipt of the order, the reporter may request the circuit clerk to grant additional time to complete it. The clerk must note on the docket the action taken and notify the parties.

(C) When a transcript is complete, the reporter must file it with the district clerk and notify the circuit clerk of the filing.

(D) If the reporter fails to file the transcript on time, the circuit clerk must notify the district judge and do whatever else the court of appeals directs.

(2) **District Clerk's Duty to Forward.** When the record is complete, the district clerk must number the documents constituting the record and send them promptly to the circuit clerk together with a list of the documents correspondingly numbered and reasonably identified. Unless directed to do so by a party or the circuit clerk, the district clerk will not send to the court of appeals documents of unusual bulk or weight, physical exhibits other than documents, or other parts of the record designated for omission by local rule of the court of appeals. If the exhibits are unusually bulky or heavy, a party must arrange with the clerks in advance for their transportation and receipt.

(c) **Retaining the Record Temporarily in the District Court for Use in Preparing the Appeal.** The parties may stipulate, or the district court on motion may order, that the district clerk retain the record temporarily for the parties to use in preparing the papers on appeal. In that event the district clerk must certify to the circuit clerk that the record on appeal is complete. Upon receipt of the appellee's brief, or earlier if the court orders or the parties agree, the appellant must request the district clerk to forward the record.

(d) **[Abrogated.]**

(e) Retaining the Record by Court Order.

(1) The court of appeals may, by order or local rule, provide that a certified copy of the docket entries be forwarded instead of the entire record. But a party may at any time during the appeal request that designated parts of the record be forwarded.

(2) The district court may order the record or some part of it retained if the court needs it while the appeal is pending, subject, however, to call by the court of appeals.

(3) If part or all of the record is ordered retained, the district clerk must send to the court of appeals a copy of the order and the docket entries together with the parts of the original record allowed by the district court and copies of any parts of the record designated by the parties.

(f) Retaining Parts of the Record in the District Court by Stipulation of the Parties. The parties may agree by written stipulation filed in the district court that designated parts of the record be retained in the district court subject to call by the court of appeals or request by a party. The parts of the record so designated remain a part of the record on appeal.

(g) Record for a Preliminary Motion in the Court of Appeals. If, before the record is forwarded, a party makes any of the following motions in the court of appeals:

- for dismissal;
- for release;
- for a stay pending appeal;
- for additional security on the bond on appeal or on a supersedeas bond; or
- for any other intermediate order—

the district clerk must send the court of appeals any parts of the record designated by any party.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Mar. 10, 1986, eff. July 1, 1986; Apr. 24, 1998, eff. Dec. 1, 1998.)

CIRCUIT RULE 11-1. FILING THE REPORTER'S TRANSCRIPT

11-1.1. Time for Filing the Reporter's Transcript

The reporter's transcript shall be filed in the district court within 30 days from the date the Transcript Designation/Ordering Form is filed with the district court, pursuant to the provisions of FRAP 11(b) or in accordance with the scheduling orders issued by the Court for all appeals, whichever is later. Upon motion by a reporter, the Clerk of the Court of Appeals or a designated deputy clerk may grant a reasonable extension of time to file the transcript. The grant of an extension of time does not waive the mandatory fee reduction for the late delivery of transcripts unless such waiver is stated in the order.

11-1.2. Notice of Reporter Defaults

In the event the reporter fails to prepare the transcripts in accordance with the scheduling order issued by the Court or within an extension of time granted by this Court, appellant shall notify this Court of the need to modify the briefing schedule. Such notice shall be filed within 21 days after the due date for filing of the transcripts. The notice shall indicate when the transcripts were designated, when financial arrangements were made or the voucher was prepared, the dates of hearings for which transcripts have not been prepared and the name of the reporter assigned to those hearings. Prior to submitting any notice, appellant shall contact the court reporter and court reporter supervisor in an effort to cause preparation of the transcripts. The notice shall be accompanied by an affidavit or declaration that describes the contacts appellant has made with the reporter and the supervisor. A copy of the notice and affidavit/declaration shall be served on the court reporter supervisor. *(Rev. 1/93, 7/1/06)*

CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 11-1.2

The filing of a motion for an extension of time by a reporter relieves appellant of the requirement to file the notification described in Circuit Rule 11-1.2 as to that reporter. (Rev. 7/94)

11-1.3. Form and Content of the Reporter's Transcript

The pages of the transcript shall be consecutively numbered throughout all volumes if all proceedings were reported by one individual. If proceedings were reported by multiple reporters, consecutive numbering is not required. It shall include an index with the names of witnesses, the direct, cross, redirect and other examinations, and exhibit numbers, when offered and received or rejected, as well as instructions and colloquy on instructions. The index shall refer to the number of the volume and the page, shall be cumulative for all volumes, and shall be placed in the first volume. The original set of the transcript shall serve as the copy required by 28 U.S.C. § 753(b). *(Rev. 1/93; 12/1/09)*

CIRCUIT RULE 11-2. THE CERTIFICATE OF RECORD

[Abrogated 12/1/09]

CIRCUIT RULE 11-3. RETENTION OF THE TRANSCRIPT AND CLERK'S RECORD IN THE DISTRICT COURT DURING PREPARATION OF THE BRIEFS

[Abrogated 12/1/09]

CIRCUIT RULE 11-4. RETENTION OF PHYSICAL EXHIBITS IN THE DISTRICT COURT, TRANSMITTAL OF CLERK'S RECORD ON REQUEST

11-4.1. Retention of Clerk's Record in the District Court

[Abrogated 12/1/09]

11-4.2. Retention of Physical Exhibits in the District Court

All physical exhibits in all cases shall be retained in the district court until the mandate issues unless requested by the Court of Appeals. *(Rev. 12/1/09)*

11-4.3. Transmittal of Reporter's Transcript

[Abrogated 12/1/09]

11-4.4. Transmittal of Clerk's Record Upon Requests

When the Court of Appeals at any time requires all or part of the clerk's record, the Clerk of the Court of Appeals will request the record from the district court. The district court clerk shall transmit the record, including agency records lodged or filed with the district court during the district court proceedings, to the Court within 7 days of receiving the request. In appeals from the Bankruptcy Appellate Panel, records will be treated in the same fashion as records on appeal in cases arising from the district court. *(Rev. 12/1/09; Rev. 7/1/13)*
The district court shall within 7 days after a notice of appeal is filed transmit any state court records lodged or filed in 28 U.S.C. § 2254 proceedings to this Court unless the documents are available in the district court's electronic case file or the district court determines that the notice of appeal was prematurely filed. *(New 7/1/13)*

Cross Reference: *(Rev. 12/1/09)*

- Circuit Rule 22-1. Certificate of Appealability (COA) on page 65, specifically, Circuit Rule 22-1(b)

CIRCUIT RULE 11-5. TRANSMITTAL OF THE CLERK'S RECORD AND REPORTER'S TRANSCRIPT AND EXHIBITS IN ALL OTHER CASES

[Abrogated 12/1/09]

CIRCUIT RULE 11-6. PREPARATION OF THE CLERK'S RECORD FOR TRANSMITTAL

11-6.1. Preparation of the Clerk's Record for Transmittal

In cases where the clerk's record is to be transmitted to the Court of Appeals pursuant to Circuit Rule 11-4.4 and where the record is not available electronically, the district court clerk shall tab and identify each document by the docket control number assigned when the document was initially entered on the district court docket. The documents shall be assembled in sequence according to filing dates, with a certified copy of the docket entries at the beginning. Papers shall be bound in a volume or volumes with each document individually tabbed showing the number corresponding to the district court docket entry. The docket sheet shall serve as the index. *(Rev. 12/1/09)*

11-6.2. Number of Copies

[Abrogated 12/1/09]

FRAP 12. DOCKETING THE APPEAL; FILING A REPRESENTATION STATEMENT; FILING THE RECORD

(a) **Docketing the Appeal.** Upon receiving the copy of the notice of appeal and the docket entries from the district clerk under Rule 3(d), the circuit clerk must docket the appeal under the title of the district-court action and must identify the appellant, adding the appellant's name if necessary.

(b) **Filing a Representation Statement.** Unless the court of appeals designates another time, the attorney who filed the notice of appeal must, within 14 days after filing the notice, file a statement with the circuit clerk naming the parties that the attorney represents on appeal.

(c) **Filing the Record, Partial Record, or Certificate.** Upon receiving the record, partial record, or district clerk's certificate as provided in Rule 11, the circuit clerk must file it and immediately notify all parties of the filing date.

(As amended Apr. 1, 1979, eff. Aug. 1, 1979; Mar. 10, 1986, eff. July 1, 1986; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 24, 1998, eff. Dec. 1, 1998; Mar. 26, 2009, eff. Dec. 1, 2009.)

Cross Reference:

- Circuit Rule 3-1. Filing the Appeal on page 4
- Circuit Rule 3-2. Representation Statement on page 5
- Circuit Rule 3-4. Mediation Questionnaire on page 6

FRAP 12.1. REMAND AFTER AN INDICATIVE RULING BY THE DISTRICT COURT ON A MOTION FOR RELIEF THAT IS BARRED BY A PENDING APPEAL

(a) **Notice to the Court of Appeals.** If a timely motion is made in the district court for relief that it lacks authority to grant because of an appeal that has been docketed and is pending, the movant must promptly notify the circuit clerk if the district court states either that it would grant the motion or that the motion raises a substantial issue.

(b) **Remand After an Indicative Ruling.** If the district court states that it would grant the motion or that the motion raises a substantial issue, the court of appeals may remand for further proceedings but retains jurisdiction unless it expressly dismisses the appeal. If the court of appeals remands but retains jurisdiction, the parties must promptly notify the circuit clerk when the district court has decided the motion on remand.

(As added Mar. 26, 2009, eff. Dec. 1, 2009.)

CIRCUIT RULE 12-1. NOTICE OF EMERGENCY MOTIONS IN CAPITAL CASES

Upon the filing of a notice of appeal in a capital case in which the district court has denied a stay of execution, the clerk of the district court shall immediately notify the clerk of this Court by telephone of such filing and transmit the notice of appeal by the most expeditious method. *(Rev. 12/1/09)*

Cross Reference:

- Circuit Rule 22-6. Rules Applicable to all Death Penalty Cases on page 73
- Circuit Rule 27-3. Emergency and Urgent Motions on page 94

CIRCUIT RULE 12-2. REPRESENTATION STATEMENT

Parties filing appeals need file the Representation Statement specified in FRAP 12(b) only as required by Circuit Rule 3-2. *(Rev. 7/94)*

Cross Reference:

- Circuit Rule 3-2. Representation Statement on page 5

TITLE III. Appeals from the United States Tax Court

FRAP 13. APPEALS FROM THE TAX COURT

(a) Appeal as of Right.

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

(A) An appeal as of right from the United States Tax Court is commenced by filing a notice of appeal with the Tax Court clerk within 90 days after the entry of the Tax Court's decision. At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d). If one party files a timely notice of appeal, any other party may file a notice of appeal within 120 days after the Tax Court's decision is entered.

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

(2) Notice of Appeal; How Filed. The notice of appeal may be filed either at the Tax Court clerk's office in the District of Columbia or by mail addressed to the clerk. If sent by mail the notice is considered filed on the postmark date, subject to §7502 of the Internal Revenue Code, as amended, and the applicable regulations.

(3) Contents of the Notice of Appeal; Service; Effect of Filing and Service. Rule 3 prescribes the contents of a notice of appeal, the manner of service, and the effect of its filing and service. Form 2 in the Appendix of Forms is a suggested form of a notice of appeal.

(4) The Record on Appeal; Forwarding; Filing.

(A) Except as otherwise provided under Tax Court rules for the transcript of proceedings, the appeal is governed by the parts of Rules 10, 11, and 12 regarding the record on appeal from a district court, the time and manner of forwarding and filing, and the docketing in the court of appeals.

(B) If an appeal is taken to more than one court of appeals, the original record must be sent to the court named in the first notice of appeal filed. In an appeal to any other court of appeals, the appellant must apply to that other court to make provision for the record.

(b) Appeal by Permission. An appeal by permission is governed by Rule 5.

(As amended Apr. 1, 1979, eff. Aug. 1, 1979; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 16, 2013, eff. Dec. 1, 2013.)

CIRCUIT RULE 13-1. FILING NOTICE OF APPEAL IN TAX COURT CASES

The content of the notice of appeal and the manner of its filing shall be as prescribed for other civil cases by FRAP 3. Appellants also shall comply with Circuit Rules 3-2 and 3-4. *(Rev. 7/94)*

CIRCUIT RULE 13-2. EXCERPTS OF RECORD IN TAX COURT CASES

Review of the decisions of the Tax Court shall be in accordance with FRAP 13, except that preparation and filing of the excerpts of record in such cases shall be in accordance with Circuit Rule 30-1. Each reference in Circuit Rule 30-1 to the district court and to the clerk of the district court shall be read as a reference to the Tax Court and to the clerk of the Tax Court, respectively. *(Rev. 7/94)*

CIRCUIT RULE 13-3. TRANSMISSION OF THE RECORD IN TAX COURT CASES

When the Court of Appeals at any time requires the record, the Clerk will request the record from the tax court. The tax court clerk shall transmit the record to the Court within 14 days of receiving the request. *(Rev. 12/1/09)*

FRAP 14. APPLICABILITY OF OTHER RULES TO APPEALS FROM THE TAX COURT

All provisions of these rules, except Rules 4, 6–9, 15–20, and 22–23, apply to appeals from the Tax Court. References in any applicable rule (other than Rule 24(a)) to the district court and district clerk are to be read as referring to the Tax Court and its clerk.

(As amended Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 16, 2013, eff. Dec. 1, 2013.)

CIRCUIT RULE 14-1. APPLICABILITY OF OTHER RULES TO REVIEW DECISIONS OF THE TAX COURT

All provisions of these Circuit Rules are applicable to review of a decision of the Tax Court, except that any Circuit Rules accompanying FRAP 4-9, 15-20, and 22 and 23 are not applicable.

TITLE IV. Review of Enforcement of an Order of an Administrative Agency, Board, Commission, or Officer

FRAP 15. REVIEW OR ENFORCEMENT OF AN AGENCY ORDER—HOW OBTAINED; INTERVENTION

(a) Petition for Review; Joint Petition.

(1) Review of an agency order is commenced by filing, within the time prescribed by law, a petition for review with the clerk of a court of appeals authorized to review the agency order. If their interests make joinder practicable, two or more persons may join in a petition to the same court to review the same order.

(2) The petition must:

(A) name each party seeking review either in the caption or the body of the petition—using such terms as "et al.," "petitioners," or "respondents" does not effectively name the parties;

(B) name the agency as a respondent (even though not named in the petition, the United States is a respondent if required by statute); and

(C) specify the order or part thereof to be reviewed.

(3) Form 3 in the Appendix of Forms is a suggested form of a petition for review.

(4) In this rule "agency" includes an agency, board, commission, or officer; "petition for review" includes a petition to enjoin, suspend, modify, or otherwise review, or a notice of appeal, whichever form is indicated by the applicable statute.

(b) Application or Cross-Application to Enforce an Order; Answer; Default.

(1) An application to enforce an agency order must be filed with the clerk of a court of appeals authorized to enforce the order. If a petition is filed to review an agency order that the court may enforce, a party opposing the petition may file a cross-application for enforcement.

(2) Within 21 days after the application for enforcement is filed, the respondent must serve on the applicant an answer to the application and file it with the clerk. If the respondent fails to answer in time, the court will enter judgment for the relief requested.

(3) The application must contain a concise statement of the proceedings in which the order was entered, the facts upon which venue is based, and the relief requested.

(c) Service of the Petition or Application. The circuit clerk must serve a copy of the petition for review, or an application or cross-application to enforce an agency order, on

each respondent as prescribed by Rule 3(d), unless a different manner of service is prescribed by statute. At the time of filing, the petitioner must:

(1) serve, or have served, a copy on each party admitted to participate in the agency proceedings, except for the respondents;

(2) file with the clerk a list of those so served; and

(3) give the clerk enough copies of the petition or application to serve each respondent.

(d) **Intervention.** Unless a statute provides another method, a person who wants to intervene in a proceeding under this rule must file a motion for leave to intervene with the circuit clerk and serve a copy on all parties. The motion—or other notice of intervention authorized by statute—must be filed within 30 days after the petition for review is filed and must contain a concise statement of the interest of the moving party and the grounds for intervention.

(e) **Payment of Fees.** When filing any separate or joint petition for review in a court of appeals, the petitioner must pay the circuit clerk all required fees.

(As amended Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 24, 1998, eff. Dec. 1, 1998; Mar. 26, 2009, eff. Dec. 1, 2009.)

CIRCUIT RULE 15-1. REVIEW OR ENFORCEMENT OF AGENCY ORDERS

Review of an order of an administrative agency, board, commission or officer (hereinafter "agency") and application for enforcement of an order of an agency shall be governed by FRAP 15. If petitioner or applicant submits the petition or application in paper format, it does not need to supply the Court with the copies required by FRAP 15(c)(3). *(Rev. 7/1/13)*

Cross Reference:

- Circuit Rule 25-5. Electronic Filing on page 84, specifically, Circuit Rule 25-5(b), Documents that may be submitted either electronically or in paper format

CIRCUIT RULE 15-2. MEDIATION QUESTIONNAIRE IN AGENCY CASES

(New 12/1/09)

(a) The Court encourages the parties in Ninth Circuit agency cases to engage in mediation. To that end, except as provided in section (b) below, within 7 days of the docketing of the petition for review, the petitioner(s) shall, and the respondent(s) may, complete and submit the Ninth Circuit Mediation Questionnaire. The Clerk shall transmit the Mediation

Questionnaire to counsel with the time scheduling order. Counsel shall return it according to the instructions contained in the Mediation Questionnaire. The sole purpose of the Mediation Questionnaire is to provide information about new petitions to the Court's Mediation Office.

Petitioner's failure to comply with this rule may result in dismissal of the petition in accordance with Circuit Rule 42-1.

(b) The requirement for filing a Mediation Questionnaire shall not apply to:

(1) a petition in which the petitioner is proceeding without the assistance of counsel; and

(2) a petition for review of an order of the Board of Immigration Appeals.

Cross Reference:

- Circuit Rule 3-4. Mediation Questionnaire on page 6
- FRAP 33. Appeal Conferences on page 141
- Circuit Rule 33-1. Circuit Mediation Office on page 141

CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 15-2

(New 12/1/09)

Although petitioners challenging Board of Immigration Appeals orders are exempt from the requirement to file Mediation Questionnaires, the parties in these cases are invited to contact the Court Mediation Unit when there is potential for mediation. Petitioners will normally be required to demonstrate eligibility for any requested relief. When making a request for mediation based on applications or circumstances that are not documented in the administrative record, petitioners shall provide supporting documents to the mediators.

CIRCUIT RULE 15-3. PROCEDURES FOR REVIEW UNDER THE PACIFIC NORTHWEST ELECTRIC POWER PLANNING AND CONSERVATION ACT

15-3.1. Contents of Petition

A petition for review of a final action or decision of the Bonneville Power Administration (BPA) under the Pacific Northwest Electric Power Planning and Conservation Act ("Northwest Power Act") shall be labeled "Petition for Review under the Northwest Power Act." The petition must state on its face the date of the final action or decision from which review is sought, the title (if one exists), the BPA docket number (if one exists) and the Ninth Circuit docket numbers of any known petitions for review of the same final action or decision. *(Rev. 7/1/13)*

15-3.2. Consolidation

Petitions for review of the same final action or decision under the Northwest Power Act will be consolidated for briefing and argument. Respondent must file a motion to consolidate all petitions from the same final action or decision within 10 days after the expiration of the time to file petitions for review from that final action or decision unless all the petitions already have been consolidated by the Court or a motion to consolidate all the petitions is pending. Petitions from related final actions or decisions may be scheduled for hearing before a single panel. *(Rev. 7/1/13)*

15-3.3. Intervention

Any petitioner in any consolidated case and any party granted leave to intervene in any consolidated case will be deemed to have intervened in all the consolidated cases. Notwithstanding FRAP 15(d), motions to intervene may be filed within 30 days of the expiration of the time to file petitions for review from the final action or decision at issue. A motion to intervene must state on its face the date of the final action or decision from which review is sought, the title (if one exists), the BPA docket number (if one exists) and the Ninth Circuit docket numbers of any known petitions for review of the same final action or decision. *(Rev. 7/1/13)*

Cross Reference:

- Circuit Rule 1-2. Scope of Circuit Rules on page 1

CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 15-3

(New 7/1/13)

Parties are encouraged to minimize the number of motions to intervene that they file. A petitioner need not file a motion to intervene in petitions challenging the same BPA final action or decision that its petition challenges. A non-petitioner party seeking intervention may file a single motion to intervene – either in any one of the petitions from the final action or decision at issue or in the consolidated petition. The deadline set forth in FRAP 15(d) to file motions to intervene has been relaxed in these cases in order to make this possible.

CIRCUIT RULE 15-4. PETITIONS FOR REVIEW OF BOARD OF IMMIGRATION APPEALS DECISIONS

A petition for review of a Board of Immigration Appeals decision shall state whether petitioner (1) is detained in the custody of the Department of Homeland Security or at liberty and/or (2) has moved the Board of Immigration Appeals to reopen or applied to the district director for an adjustment of status. The petition shall be (1) accompanied by a copy of the Board of Immigration Appeals order being challenged, (2) include the petitioner's alien registration number in the caption and (3) filed as an original in paper format unless submitted via Appellate CM/ECF. *(New 1/1/05; Rev. 12/1/09; Rev. 7/1/13)*

Cross Reference:

- Circuit Rule 25-5. Electronic Filing on page 84, specifically, Circuit Rule 25-5(b), Documents that may be submitted either electronically or in paper format

FRAP 15.1. BRIEFS AND ORAL ARGUMENT IN A NATIONAL LABOR RELATIONS BOARD PROCEEDING

In either an enforcement or a review proceeding, a party adverse to the National Labor Relations Board proceeds first on briefing and at oral argument, unless the court orders otherwise.

(As added Mar. 10, 1986, eff. July 1, 1986; amended Apr. 24, 1998, eff. Dec. 1, 1998.)

FRAP 16. THE RECORD ON REVIEW OR ENFORCEMENT

(a) **Composition of the Record.** The record on review or enforcement of an agency order consists of:

(1) the order involved;

(2) any findings or report on which it is based; and

(3) the pleadings, evidence, and other parts of the proceedings before the agency.

(b) **Omissions From or Misstatements in the Record.** The parties may at any time, by stipulation, supply any omission from the record or correct a misstatement, or the court may so direct. If necessary, the court may direct that a supplemental record be prepared and filed.

(As amended Apr. 24, 1998, eff. Dec. 1, 1998.)

FRAP 17. FILING THE RECORD

(a) **Agency to File; Time for Filing; Notice of Filing.** The agency must file the record with the circuit clerk within 40 days after being served with a petition for review, unless the statute authorizing review provides otherwise, or within 40 days after it files an application for enforcement unless the respondent fails to answer or the court orders otherwise. The court may shorten or extend the time to file the record. The clerk must notify all parties of the date when the record is filed.

(b) **Filing—What Constitutes.**

(1) The agency must file:

(A) the original or a certified copy of the entire record or parts designated by the parties; or

(B) a certified list adequately describing all documents, transcripts of testimony, exhibits, and other material constituting the record, or describing those parts designated by the parties.

(2) The parties may stipulate in writing that no record or certified list be filed. The date when the stipulation is filed with the circuit clerk is treated as the date when the record is filed.

(3) The agency must retain any portion of the record not filed with the clerk. All parts of the record retained by the agency are a part of the record on review for all purposes and, if the court or a party so requests, must be sent to the court regardless of any prior stipulation.

(As amended Apr. 24, 1998, eff. Dec. 1, 1998.)

CIRCUIT RULE 17-1. EXCERPTS OF RECORD ON REVIEW OR ENFORCEMENT OF AGENCY ORDERS

17-1.1. Purpose

Parties are required to prepare excerpts of record unless Circuit Rule 17-1.2 applies. The purpose of the excerpts of record is to provide each member of the panel with those portions of the record necessary to reach a decision. The parties shall ensure that, in accordance with the limitations of Circuit Rule 17-1, those parts of the record necessary to permit an informed analysis of their positions are included in the excerpts. *(Rev. 12/1/09)*

17-1.2. Parties Exempt from Excerpts Requirement *(Rev. 12/1/09)*

(a) Unrepresented Parties: Petitioners and respondents proceeding without counsel need not file excerpts, supplemental excerpts and further excerpts of record.

(b) Petitioners challenging a Board of Immigration Appeals order need not file the initial excerpts and further excerpts; respondent need not file supplemental excerpts. *(New 1/1/05; Rev. 12/1/09)*

Cross Reference:

- Circuit Rule 28-2. Contents of Briefs on page 109, specifically, 28-2.7. Addendum to Briefs on page 110

17-1.3. Petitioner's Initial Excerpts of Record *(Rev. 12/1/09)*

At the time the petitioner's opening brief is submitted, the petitioner shall, unless exempt pursuant to Circuit Rule 17-1.2, submit 4 copies of the excerpts of record bound separately from the briefs. The petitioner shall serve one copy of the excerpts on each of the other parties. If the brief is submitted electronically, the excerpts shall be mailed to the other parties and the Court on the same day that the brief is submitted electronically. If the brief is not submitted electronically, the excerpts shall accompany the original and copies of the brief. *(Rev. 12/1/09)*

17-1.4. Required Contents of the Excerpts of Record

(a) When review or enforcement of an agency order is sought, the excerpts of record shall include:

(i) the agency docket sheet, if there is one;

(ii) the agency order to be reviewed;

(iii) any opinion, findings of fact or conclusions of law filed by the agency, board, commissioner or officer which relates to the order to be reviewed;

(iv) except as provided in Circuit Rule 17-1.4(b), where an issue raised in the petition is based upon a challenge to the admission or exclusion of evidence, that specific portion of the reporter's transcript recording any discussion by court or counsel involving the evidence, offer of proof, ruling or order, and objections at issue;

(v) except as provided in Circuit Rule 17-1.4(b), where an issue raised in the petition is based upon a challenge to any other ruling, order, finding of fact, or conclusion of law, and that ruling, order, finding or conclusion was delivered orally, that specific portion of the reporter's transcript recording any discussion by court or counsel in which the assignment of error is alleged to rest;

(vi) where an issue raised in the petition is based on a written exhibit (including affidavits), those specific portions of the exhibit necessary to resolve the issue;

(vii) (vii) any other specific portions of any documents in the record that are cited in petitioner's briefs and are necessary to the resolution of an issue on review; and *(Rev. 12/1/09)*

(viii) where the petition is from the grant or denial of a motion, those specific portions of any affidavits, declarations, exhibits or similar attachments submitted in support of or in opposition to the motion that are essential to the resolution of an issue on review.

(b) In addition to the items required by Circuit Rule 17-1.4(a), where the petition seeks review of an agency adjudication regarding the grant or denial of benefits, the excerpts of record shall also include the entire reporter's transcript of proceedings before the administrative law judge. *(Rev. 1/1/05)*

17-1.5. Items Not to Be Included in the Excerpts of Record

The excerpts of record shall not include briefs or other memoranda of law unless necessary to the resolution of an issue on review, and shall include only those pages necessary therefor. *(Rev. 12/1/09)*

Cross Reference:

- Circuit Rule 17-2. Sanctions for Failure to Comply with Circuit Rule 17-1 on page 57

17-1.6. Form of the Excerpts of Record

If the excerpts exceed 75 pages, the first volume of the excerpts of record shall be limited to specific portions of the transcript containing any oral statements of decisions, the orders to be reviewed, and any reports, opinions, memoranda or findings of fact or conclusions of law prepared by the agency, board, commissioner or officer that relate to the orders to be reviewed. All additional documents shall be included in subsequent volumes of the excerpts. *(New 7/1/07)*

The form of the excerpts shall otherwise be governed by Circuit Rule 30-1.6, with references in Circuit Rule 30-1.6 to appellant and the district court to be read as references to petitioner and agency, respectively. *(Rev. 7/1/07)*

17-1.7. Respondent's Supplemental Excerpts of Record

The provisions for respondent's supplemental excerpts shall be governed by Circuit Rule 30-1.7, with references in Circuit Rule 30-1.7 to appellee to be read as references to respondent.

17-1.8. Further Excerpts of Record

The provisions for further excerpts shall be governed by Circuit Rule 30-1.8, with references in Circuit Rule 30-1.8 to appellant to be read as references to petitioner.

17-1.9. Additional Copies of the Excerpts of Record

Should the Court of Appeals consider a case en banc, the Clerk of the Court of Appeals will require counsel to submit an additional 20 copies of the excerpts of record. *(Rev. 7/95)*

CIRCUIT RULE 17-2. SANCTIONS FOR FAILURE TO COMPLY WITH CIRCUIT RULE 17-1

If materials required to be included in the excerpts under these rules are omitted, or irrelevant materials are included, the Court may take one or more of the following actions:

(a) strike the excerpts and order that they be corrected and resubmitted;

(b) order that the excerpts be supplemented;

(c) if the Court concludes that a party or attorney has vexatiously or unreasonably increased the cost of litigation by inclusion of irrelevant materials, deny that portion of the costs the Court deems to be excessive; and/or

(d) impose monetary sanctions.

Counsel will be provided notice and have an opportunity to respond before sanctions are imposed.

FRAP 18. STAY PENDING REVIEW

(a) Motion for a Stay.

(1) Initial Motion Before the Agency. A petitioner must ordinarily move first before the agency for a stay pending review of its decision or order.

(2) Motion in the Court of Appeals. A motion for a stay may be made to the court of appeals or one of its judges.

(A) The motion must:

(i) show that moving first before the agency would be impracticable; or

(ii) state that, a motion having been made, the agency denied the motion or failed to afford the relief requested and state any reasons given by the agency for its action.

(B) The motion must also include:

(i) the reasons for granting the relief requested and the facts relied on;

(ii) originals or copies of affidavits or other sworn statements supporting facts subject to dispute; and

(iii) relevant parts of the record.

(C) The moving party must give reasonable notice of the motion to all parties.

(D) The motion must be filed with the circuit clerk and normally will be considered by a panel of the court. But in an exceptional case in which time requirements make that procedure impracticable, the motion may be made to and considered by a single judge.

(b) Bond. The court may condition relief on the filing of a bond or other appropriate security.

(As amended Apr. 24, 1998, eff. Dec. 1, 1998.)

Cross Reference:

- Circuit Rule 27-1. Filing of Motions on page 92
- Circuit Rule 27-2. Motions for Stays Pending Appeal on page 94
- Circuit Rule 27-3. Emergency and Urgent Motions on page 94

FRAP 19. SETTLEMENT OF A JUDGMENT ENFORCING AN AGENCY ORDER IN PART

When the court files an opinion directing entry of judgment enforcing the agency's order in part, the agency must within 14 days file with the clerk and serve on each other party a proposed judgment conforming to the opinion. A party who disagrees with the agency's proposed judgment must within 10 days file with the clerk and serve the agency with a proposed judgment that the party believes conforms to the opinion. The court will settle the judgment and direct entry without further hearing or argument.

(As amended Mar. 10, 1986, eff. July 1, 1986; Apr. 24, 1998, eff. Dec. 1, 1998; Mar. 26, 2009, eff. Dec. 1, 2009.)

FRAP 20. APPLICABILITY OF RULES TO THE REVIEW OR ENFORCEMENT OF AN AGENCY ORDER

All provisions of these rules, except Rules 3–14 and 22–23, apply to the review or enforcement of an agency order. In these rules, “appellant” includes a petitioner or applicant, and “appellee” includes a respondent.

(As amended Apr. 24, 1998, eff. Dec. 1, 1998.)

CIRCUIT RULE 20-1. APPLICABILITY OF OTHER RULES TO REVIEW OF AGENCY DECISIONS

All provisions of these Circuit Rules are applicable to review or enforcement of orders of agencies, except that any Circuit Rules accompanying FRAP 3 through 14, and FRAP 22 and 23 are not applicable. As used in any applicable rule, in proceedings to review or enforce agency orders, the term “appellant” includes a petitioner, the term “appellee” includes a respondent, and the term “appeal” includes a petition for review or enforcement. *(Rev. 12/1/09)*

TITLE V. Extraordinary Writs

FRAP 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 must file a petition with the circuit clerk with proof of service on all parties to the proceeding in the trial court. The party must 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 must be titled "In re [name of petitioner]."

(B) The petition must state:

(i) the relief sought;

(ii) the issues presented;

(iii) the facts necessary to understand the issue presented by the petition; and

(iv) the reasons why the writ should issue.

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

(3) Upon receiving the prescribed docket fee, the clerk must 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 answer. Otherwise, it must order the respondent, if any, to answer within a fixed time.

(2) The clerk must 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 address the petition or may invite an amicus curiae to do so. The trial-court judge may request permission to address the petition but may not do so unless invited or ordered to do so by the court of appeals.

(5) If briefing or oral argument is required, the clerk must advise the parties, and when appropriate, the trial-court judge or amicus curiae.

(6) The proceeding must be given preference over ordinary civil cases.

(7) The circuit clerk must send a copy of the final disposition to the trial-court judge.

(c) **Other Extraordinary Writs.** An application for an extraordinary writ other than one provided for in Rule 21(a) must be made by filing a petition with the circuit clerk with proof of service on the respondents. Proceedings on the application must conform, so far as is practicable, to the procedures prescribed in Rule 21(a) and (b).

(d) **Form of Papers; Number of Copies; Length Limits.** All papers must conform to Rule 32(c)(2). An original and 3 copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case. Except by the court's permission, and excluding the accompanying documents required by Rule 21(a)(2)(C):

(1) a paper produced using a computer must not exceed 7,800 words; and

(2) a handwritten or typewritten paper must not exceed 30 pages.

(As amended Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 23, 1996, eff. Dec. 1, 1996; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 28, 2016, eff. Dec. 1, 2016.)

Cross Reference:

- FRAP 22. Habeas Corpus and Section 2255 Proceedings on page 65
- Circuit Rule 27-1. Filing of Motions on page 92
- Circuit Rule 27-2. Motions for Stays Pending Appeal on page 94
- Circuit Rule 27-3. Emergency and Urgent Motions on page 94

CIRCUIT RULE 21-1. EXTRAORDINARY WRITS

Petitions for extraordinary writs shall conform to and be filed in accordance with the provisions of FRAP 21(a). (Rev. 7/93)

CIRCUIT RULE 21-2. FORMAT OF EXTRAORDINARY WRITS AND ANSWERS; NUMBER OF COPIES; LENGTH

(a) **Format:** Petitions for writs of mandamus, prohibition or other extraordinary relief directed to a district judge, magistrate judge, or bankruptcy judge must bear the title of the appropriate court and may not bear the name of the judge as respondent in the caption. Petitions must include in the caption: the name of each petitioner; the name of the appropriate court as respondent; and the name of each real party in interest. Other petitions for extraordinary writs must include in the caption: the name of each petitioner

and the name of each appropriate adverse party below as respondent. *(Rev. 7/1/00; Rev. 12/1/16)*

(b) **Number of Copies:** The parties must file an original in paper format of the petition, an answer, if ordered, and any supporting papers and appendices unless the petition or answer is submitted via Appellate CM/ECF. *(New 7/1/00; Rev. 12/1/09; Rev. 7/1/13; Rev 12/1/16)*

(c) **Length:** Except by permission of the Court, a petition, or answer, if ordered, may not exceed 30 pages. The documents listed at FRAP 21(a)(2)(C) and FRAP 32(f) are excluded from the length limit calculation. *(New 12/1/16)*

Cross Reference:

- Circuit Rule 25-5. Electronic Filing on page 84, specifically, Circuit Rule 25-5(b), Documents that may be submitted either electronically or in paper format
- Circuit Rule 32-3. Page/Word Count Conversion Formula for Briefs and Other Documents on page 139

CIRCUIT RULE 21-3. CERTIFICATE OF INTERESTED PARTIES

Petitions for writs of mandamus or prohibition, and for other extraordinary writs, shall include the corporate disclosure statement required by FRAP 26.1 and the statement of related cases required by Circuit Rule 28-2.6.

CIRCUIT RULE 21-4. ANSWERS TO PETITIONS

No answer to such a petition may be filed unless ordered by the Court. Except in emergency cases, the Court will not grant a petition without a response. *(Rev. 12/1/09; Rev. 12/1/16)*

Cross Reference:

- FRAP 22. Habeas Corpus and Section 2255 Proceedings on page 65
- Circuit Rule 27-1. Filing of Motions on page 92
- Circuit Rule 27-2. Motions for Stays Pending Appeal on page 94
- Circuit Rule 27-3. Emergency and Urgent Motions on page 94

CIRCUIT ADVISORY COMMITTEE NOTE TO RULES 21−1 TO 21−4

A petition for writ of mandamus, writ of prohibition or other extraordinary relief is processed by the clerk and motions attorneys in the same fashion as a motion. If the panel does not believe that the petition makes a prima facie showing justifying issuance of the writ, it will deny the petition forthwith. That denial is not regarded as a decision on the merits of the claims. In other instances, the panel will direct that an answer and reply may be filed within specified times. The panel may also issue a stay or injunction pending further consideration of the petition. After receipt of the answer and reply, or expiration of the times set therefor, the matter is then forwarded to a new motions panel unless the first panel directs otherwise. The panel may grant or deny the petition or set it for oral argument. If the panel decides to set the petition for argument, it may be calendared before a regular panel of the Court or before the motions panel. (Rev. 7/1/00)

In emergency circumstances, an individual judge may grant temporary relief to permit a motions panel to consider the petition, may decline to act, or may order that an answer be filed. If the judge determines that immediate action on the merits is necessary, the judge will contact the members of the Court currently sitting as a motions panel until two or more judges can consider whether to grant or deny the petition. Except in extreme emergencies, the judges will not grant a petition without calling for an answer to the petition. (Rev. 7/1/00)

CIRCUIT RULE 21-5. PETITION FOR WRIT OF MANDAMUS PURSUANT TO 18 U.S.C. § 3771(D)(3)

A petition for writ of mandamus filed pursuant to 18 U.S.C. § 3771(d)(3) shall bear the caption "PETITION FOR WRIT OF MANDAMUS PURSUANT TO 18 U.S.C. § 3771(d)(3)." Before filing such a petition, the petitioner's counsel, or the petitioner if appearing pro se, must notify the motions unit of the Court of Appeals that such a petition will be filed, and must make arrangements for the filing and immediate service of the petition on the relevant parties. Such notification must be by telephone (415/355-8020 or 8000). The real party in interest must telephonically notify the Court when it becomes aware of the filing of the petition. *(Rev. 1/1/07)*

CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 21-5

A failure to notify this Court ahead of time that such a filing is being made will adversely affect this Court's ability to decide any such petition with 72 hours of filing as contemplated by the statute. (Rev. 1/1/07)

Cross Reference:

- Circuit Rule 27-3. Emergency and Urgent Motions on page 94

TITLE VI. Habeas Corpus; Proceedings In Forma Pauperis

FRAP 22. HABEAS CORPUS AND SECTION 2255 PROCEEDINGS

(a) **Application for the Original Writ.** An application for a writ of habeas corpus must be made to the appropriate district court. If made to a circuit judge, the application must be transferred to the appropriate district court. If a district court denies an application made or transferred to it, renewal of the application before a circuit judge is not permitted. The applicant may, under 28 U.S.C. § 2253, appeal to the court of appeals from the district court's order denying the application.

(b) **Certificate of Appealability.**

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district clerk must send to the court of appeals the certificate (if any) and the statement described in Rule 11(a) of the Rules Governing Proceedings Under 28 U.S.C. § 2254 or § 2255 (if any), along with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue it.

(2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals.

(3) A certificate of appealability is not required when a state or its representative or the United States or its representative appeals.

(As amended Pub. L. 104–132, title I, § 103, Apr. 24, 1996, 110 Stat.1218; Apr. 24, 1998, eff. Dec. 1, 1998; Mar. 26, 2009, eff. Dec 1, 2009.)

CIRCUIT RULE 22-1. CERTIFICATE OF APPEALABILITY (COA)

(a) **General Procedures.** Petitioners appealing the district court's judgment in either a 28 U.S.C. § 2254 or a § 2255 proceeding shall follow the procedures set forth in FRAP 4 and 22(b). A motion for a certificate of appealability ("COA") must first be considered by the district court. If the district court grants a COA, the Court shall state which issue or issues satisfy the standard set forth in 28 U.S.C. § 2253(c)(2). The court of appeals will

not act on a motion for a COA if the district court has not ruled first. *(Rev. 1/1/04; 12/1/09)*

(b) **District Court Records.** If the district court denies a COA in full in a § 2254 proceeding and the district court record cannot be accessed electronically, the district court clerk shall forward the entire record to the court of appeals. If the district court denies a COA in full in a § 2255 proceeding and the district court record cannot be accessed electronically, the district court clerk shall forward that portion of the record beginning with the filing of the § 2255 motion. *(Rev. 1/1/04; 12/1/09)*

(c) **Grant in Part or in Full by District Court.** If the district court grants a COA as to any or all issues, a briefing schedule will be established by the Court at case opening and petitioner shall brief only those issues certified or otherwise proceed according to section (e), below. *(Rev. 1/1/04; 3/11/04)*

(d) **Denial in Full by District Court.** If the district court denies a COA as to all issues, petitioner may file a motion for a COA in the court of appeals within 35 days of the district court's entry of its order (1) denying a COA in full, or, (2) denying a timely filed post-judgment motion, whichever is later. If petitioner does not file a COA motion with the court of appeals after the district court denies a COA motion in full, the court of appeals will deem the notice of appeal to constitute a motion for a COA. If the court of appeals appoints counsel to represent petitioner, counsel will be given additional time to file a renewed COA motion. *(Rev. 1/1/04; 12/1/09)*

If petitioner files a motion for a COA with the court of appeals, respondent may, and in capital cases with no pending execution date shall, file a response to the motion for a COA within 35 days from service of the COA motion. In capital cases where an execution date is scheduled and no stay is in place, respondent shall file a response as soon as practicable after the date petitioner's motion is served or, if no motion is filed, as soon as practicable after the district court's entry of its order denying a COA. *(New 1/1/04; Rev. 12/1/09)*

If, after the district court has denied a COA in full, the motions panel also denies a COA in full, petitioner, pursuant to Circuit Rule 27-10, may file a motion for reconsideration. *(New 1/1/04)*

When a motions panel grants a COA in part and denies a COA in part, a briefing schedule will be established and no motion for reconsideration will be entertained. Petitioner shall brief only those issues certified or otherwise proceed according to section (e), below. *(New 1/1/04)*

(e) **Briefing Uncertified Issues.** Petitioners shall brief only issues certified by the district court or the court of appeals. Alternatively, if a petitioner concludes during the course of preparing the opening brief, that an uncertified issue should be discussed in the brief, the petitioner shall first brief all certified issues under the heading, "Certified Issues," and then, in the same brief, shall discuss any uncertified issues under the heading, "Uncertified Issues." Uncertified issues raised and designated in this manner will be construed as a motion to expand the COA and will be addressed by the merits panel to

such extent as it deems appropriate. Except in the extraordinary case, the Court will not permit a longer brief to accommodate the uncertified issues. *(New 1/1/04; Rev. 7/1/16)*

(f) **Response to Uncertified Issues.** Respondent may, but need not, address any uncertified issues in its responsive brief. The Court will afford respondent an opportunity to respond before relief is granted on any previously uncertified issue. *(New 1/1/04)*

Cross Reference: *(New 1/1/04; Rev. 12/1/09)*

- FRAP 27. Motions on page 90
- Circuit Rule 11-4. Retention of Physical Exhibits in the District Court, Transmittal of Clerk's Record on Request on page 40, specifically, 11-4.2. Retention of Physical Exhibits in the District Court on page 40
- Circuit Rule 27-1. Filing of Motions on page 92
- FRAP 32. Form of Briefs, Appendices, and Other Papers on page 134, specifically, FRAP 32(a)(5)(6)(7)

CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 22-1

The Court strongly encourages petitioner to brief only certified issues. However, if petitioner concludes that an uncertified issue should be discussed in the opening brief, petitioner shall first discuss certified issues under the heading, "Certified Issues" and then, in the same brief, shall discuss uncertified issues under the heading, "Uncertified Issues." The Court may decline to address uncertified issues if they are not raised and designated as required by this Rule. (Rev. 1/1/04)

CIRCUIT RULE 22-2. DIRECT CRIMINAL APPEALS, FIRST PETITIONS, AND STAYS OF EXECUTION: CAPITAL CASES

(a) **Assignment.** In direct criminal appeals and section 2241, section 2254, and section 2255 appeals which involve judgments of death and finally dispose of the case, the Clerk, upon the completion of briefing, will assign the appeal to a death penalty panel composed of active judges and senior judges willing to serve on death penalty panels. However, when an execution is scheduled and no stay is in place, the Clerk may select a panel to hear the appeal and any emergency motion whenever in the Clerk's discretion it would be prudent to do so. (Rev. 12/1/09)

(b) **Related Civil Proceedings.** The Court may apply the provisions of Circuit Rule 22 to any related civil proceedings challenging an execution as being in violation of federal law, including proceedings filed by the prisoner or someone else on his or her behalf.

(c) **Duties.** Once a case is assigned to a death penalty panel, the panel will handle all matters pertaining to the case, including motions for leave to file a second or successive petition or motion, appeals from authorized second or successive petitions or motions, any related

civil proceedings, and remands from the Supreme Court of the United States. When a case is pending before a death penalty en banc court, any additional applications for relief pertaining to that case will be assigned to the panel with responsibility for that case, unless the question presented is such that its decision would resolve an issue then before the en banc court, in which event the additional application will be assigned to the en banc court. The determination as to whether the case is assigned to the panel or the en banc court is made by the Chief Judge in consultation with the concerned panel and the en banc court. (Rev. 12/1/09)

(d) **The En Banc Court.** The Clerk shall include in the pool of the names of all active judges, the names of those eligible senior judges willing to serve on the en banc court. An eligible senior judge is one who sat on the panel whose decision is subject to review. Judges shall be assigned by random drawing from the pool, and in accordance with Circuit Rule 35-3. Review by the en banc court may include not only orders granting or denying applications for a certificate of appealability and motions to stay or vacate a stay of execution, but may extend to all other issues on appeal.

(e) **Stays of Execution.** Counsel shall communicate with the Clerk of this Court by telephone as soon as it becomes evident that emergency relief will be sought from this Court. Any motion for a stay of execution filed before a case has been assigned to a death penalty panel will be presented for decision to a motions panel. Once a death penalty panel has been assigned, that panel then must decide all subsequent matters (unless the case is then before the en banc court).

If a motion for a stay of execution is presented to a judge of this Court not on the death penalty panel rather than to the Clerk of the Court of Appeals, that judge shall refer the motion to the Clerk, unless the execution is imminent. If an execution is imminent and the death penalty panel has not yet determined whether to grant a stay pending final disposition of the appeal, any judge may issue a temporary stay of a scheduled execution. Any judge or judges who issue a temporary stay of execution shall immediately notify the Clerk and the panel of such action. By majority vote, the panel may vacate such a stay of execution.

A motion for stay of execution shall state whether relief was sought in the district court and, if so, whether all grounds advanced in support thereof in this Court were submitted to the district court and if not, why the matter should not be remanded to the district court or relief denied for that reason. If a majority of the panel votes to deny the stay, it shall enter an order to that effect and, unless impracticable, state the issues presented and the reasons for the denial. If no execution date is set, the ordinary rules for obtaining en banc review of a three-judge panel decision shall apply on a first petition or motion.

When the panel affirms a denial or reverses a grant of a first petition or motion, it shall enter an order staying the mandate pursuant to FRAP 41(b). If the panel affirms the denial of a first section 2254 petition or section 2255 motion in a capital case and denies a stay of execution, any judge of the Court may request en banc rehearing and issue a temporary stay of execution.

CIRCUIT RULE 22-3. APPLICATIONS FOR AUTHORIZATION TO FILE SECOND OR SUCCESSIVE 28 U.S.C. § 2254 PETITION OR § 2255 MOTION - ALL CASES; STAY OF EXECUTION - CAPITAL CASES

(a) **Applications.** An applicant seeking authorization to file a second or successive 28 U.S.C. § 2254 petition or 28 U.S.C. § 2255 motion in the district court must file an application in the Court of Appeals demonstrating entitlement to such leave under sections 2254 or 2255. *See* Form 12. An original in paper format of the application must be filed with the Clerk of the Court of Appeals unless the application is submitted via Appellate CM/ECF. No filing fee is required. If an application for authorization to file a second or successive section 2254 petition or section 2255 motion is mistakenly submitted to the district court, the district court shall refer it to the court of appeals. If an unauthorized second or successive section 2254 petition or section 2255 motion is submitted to the district court, the district court may, in the interests of justice, refer it to the Court of Appeals. *(Rev. 12/1/09; Rev. 7/1/13; Rev. 7/1/16)*

The applicant must:

(1) include Form 12 if submitted by an applicant not represented by counsel;

(2) include the proposed section 2254 petition or section 2255 motion that the applicant seeks to file in the district court;

(3) state as to each claim presented whether it previously has been raised in any state or federal court and, if so, the name of the court and the date of the order disposing of such claim(s); and

(4) state how the requirements of sections 2244(b) or 2255 have been satisfied.

(b) **Attachments.** If reasonably available to the applicant, the application must include copies of all relevant state court orders and decisions. *(Rev. 12/1/09; Rev 7/1/16)*

(c) **Service.**

(1) **Capital Cases:** In capital cases, the applicant must serve a copy of the application, attachments, and proposed section 2254 petition/section 2255 motion on the respondent, and must attach a certificate of service to the application filed with the Court. *(Rev. 7/1/16)*

(2) **Noncapital Cases:** In noncapital cases, service of the application on the respondent is not required. *(New 7/1/16)*

(d) **Response.**

(1) **Capital Cases:** In capital cases where an execution date is scheduled and no stay is in place, respondent shall respond to the application and file supplemental attachments as soon as practicable. Otherwise, in capital cases, respondent shall respond and file supplemental attachments within 14 days of the date the application is served. *(Rev. 12/1/09)*

(2) **Noncapital Cases:** In noncapital cases, no response is required unless ordered by the Court. Respondent may include supplemental attachments with its response. *(Rev. 7/1/16)*

(e) **Decision.** The application will be determined by a three-judge panel. In capital cases where an execution date is scheduled and no stay is in place, the Court will grant or deny the application, and state its reasons therefore, as soon as practicable.

(f) **Stays of Execution.** If an execution date is scheduled and no stay is in place, any judge may, if necessary, enter a stay of execution, *see* Circuit Rule 22-2(e), but the question will be presented to the panel as soon as practicable. If the Court grants leave to file a second or successive application, the Court shall stay the applicant's execution pending disposition of the second or successive petition by the district court.

Cross Reference:

- Circuit Rule 25-5. Electronic Filing on page 84, specifically, Circuit Rule 25-5(b), Documents that may be submitted either electronically or in paper format

CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 22-3

The district court is required to transfer mistakenly filed applications for authorization to file a second or successive section 2254 petition or 2255 motion. If an applicant files a document that appears to be an unauthorized section 2254 petition or 2255 motion and facially alleges a claim based on a new rule of constitutional law or newly discovered evidence of actual innocence, the district court may transfer the filing to the court of appeals in the interests of justice or, in the alternative, the district court may dismiss the filing without prejudice to the applicant seeking authorization from the court of appeals on Ninth Circuit Form 12.

The rule requires applicants to provide this Court with the proposed petition or motion. Pro se applicants are encouraged to use the form petition or motion adopted by the district court where the applicant anticipates filing the document. (New 7/1/16)

CIRCUIT RULE 22-4. APPEALS FROM AUTHORIZED SECOND OR SUCCESSIVE 2254 PETITIONS OR 2255 MOTIONS

This rule applies to appellate proceedings involving any authorized second or successive ("SOS") section 2254 petition or 2255 motion.

(a) **Necessary Documents.** A petitioner appealing the denial of an authorized SOS petition or motion and filing a motion for a certificate of appealability and/or a stay of execution, shall file with the Clerk of the Court of Appeals the following documents in an attachment:

(1) the original application for a certificate of appealability ("COA") and/or a motion for stay of execution;

(2) all papers filed in the subsequent proceeding in district court;

(3) all orders issued by the district court in the subsequent proceeding;

(4) a copy of any state or federal court opinion or judgment or, if there is no written opinion or judgment, a copy of the relevant portions of the transcript; and

(5) a copy of the notice of appeal.

If all documents referred to in this provision are not filed, petitioner shall state why the documents are unavailable and where they may be obtained. If petitioner does not provide the documents, respondent shall provide them or state in any response why they are not available. *(Rev. 12/1/09)*

If petitioner appeals the district court's denial of an authorized SOS petition or motion and the district court has denied in full an application for a COA, petitioner shall file with the Clerk of the Court of Appeals a motion for a COA. Circuit Rule 22-1 shall apply to the extent not inconsistent with this rule. *(Rev. 12/1/09)*

(b) **Capital Cases, Emergency Motions.** In capital cases when the district court has denied an authorized SOS petition or motion and an execution is scheduled and imminent, counsel shall adhere to Circuit Rule 27-3 regarding emergency motions, except to the extent that it may be inconsistent with these rules. *(New 12/1/09)*

(c) **Capital Cases, COA Applications.** In all capital cases where the district court has denied an authorized SOS petition or motion and denied a COA in full, the Clerk shall refer the motion for a COA to the death penalty panel. Oral argument may be held at the request of any member of the panel. Any member of the panel may grant a COA. If the panel votes unanimously to deny a COA in full, it shall enter an order setting forth the issues presented and the reasons why a COA should not issue. A copy of the order shall be circulated by the Clerk to all judges. *(New 12/1/09)*

(d) **En Banc Review.** Any active or senior judge of the Court may request that the en banc court review the panel's order. The request shall be supported by a statement setting forth the requesting judge's reasons why the order should be vacated. If an execution date is scheduled and imminent, the Clerk shall notify the parties when a request for rehearing en banc is made and of the time frame for voting or, if no such request has been made, the Clerk shall notify the parties upon expiration of the period to request en banc rehearing. Such a request for rehearing en banc shall result in en banc review if a majority of active judges votes in favor of en banc review. A judge's failure to vote within the time established by General Order 5.5(b) shall be considered a "yes" vote in favor of en banc review. The en banc coordinator, if time permits, may set a schedule in which other judges may respond to the points made in the request for en banc review. If a majority of active judges votes in favor of en banc review, the Clerk shall notify the parties that the matter will receive en banc review, and identify the members of the en banc court. *(New 12/1/09)*

Any active judge may request a rehearing of the decision of the en banc court by all the active judges of the Court. If no stay is in effect, such judge may issue a temporary stay. The eleven-judge en banc court by majority vote may vacate such a temporary stay, and in that event there will be no stay in effect unless a stay is granted by the full court. *(New 12/1/09)*

(e) **Stays of Execution.** In all capital cases where petitioner seeks a stay of execution, the Clerk shall refer any motion for a stay of execution to the death penalty panel. Oral argument may be held at the request of any member of the panel. If a majority of the panel votes to deny the stay, it shall enter an order setting forth the issues presented and the reasons for the denial. *(New 12/1/09)*

If the panel denies a stay of execution and the execution date is imminent, any judge of the Court who requests en banc review may issue a temporary stay of execution. That stay shall lapse and be dissolved if a majority of active judges does not vote in favor of en banc review. A judge's failure to vote within the time established by General Order 5.5(b) shall be considered a "yes" vote in favor of en banc review. *(New 12/1/09)*

If the matter receives en banc review, the stay shall remain in effect until the en banc court completes voting on the question of granting a stay. Voting is complete when all available judges have been polled and a majority of the en banc court has voted either to grant or deny a stay. If at the completion of voting, a majority of the en banc court has not voted to grant the stay, there will be no stay in effect unless granted by the full court. *(New 12/1/09)*

If a motion for a stay of execution is presented to a judge of this Court not on the panel rather than to the Clerk of the Court of Appeals, that judge shall refer the motion to the Clerk for determination by the panel, unless the execution is imminent. If an execution is imminent and the panel has not yet determined whether to grant a stay pending final disposition of the appeal, any judge of the Court may issue a temporary stay of a scheduled execution. Any judge or judges who issue a temporary stay of execution shall immediately notify the Clerk and the panel of such action. By majority vote the panel may vacate such a stay of execution. *(New 12/1/09)*

If a motion for a stay of execution is presented to a judge of this Court not on the panel, counsel presenting such motion shall include in the materials presented a declaration that shall reflect:

(i) why the motion is being presented to a single judge instead of the Clerk of the Court of Appeals for reference to the panel;

(ii) the name of any other judge to whom the motion has been presented, including any district judge, and the date when such application was made, and any ruling on the motion;

(iii) what petitions, applications, motions and appeals are then pending before this Court in any case involving the same prisoner, together with a report of the status of each such proceeding. *(New 12/1/09)*

Before presenting such a motion to a single judge, the applicant shall make every practicable effort to notify the Clerk and opposing counsel and to serve the motion at the earliest possible time. A certificate of counsel for the applicant shall follow the cover page of the motion and shall contain:

(iv) the telephone numbers and office addresses of the attorneys for the parties;

(v) facts showing the existence and nature of the claimed emergency; and

(vi) when and how counsel for the other parties were notified and served with the motion, or, if not notified and served, why that was not done.

If the relief sought was available in the district court, the motion shall state whether all grounds advanced in support thereof in this Court were submitted to the district court, and, if not, why the matter should not be remanded to the district court or the relief denied for that reason. *(New 12/1/09)*

CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 22-4

If a prisoner has been granted relief, in whole or in part, a petition or motion challenging a subsequent conviction or sentence shall be considered as a "first petition" or "first motion" and this rule shall apply. Such a petition or motion will be assigned to the same panel to which the initial petition or motion was assigned. (Rev. 12/1/09)

CIRCUIT RULE 22-5. SUBSEQUENT PETITIONS OR MOTIONS; RELATED CIVIL PROCEEDINGS

[Abrogated 12/1/09]

CIRCUIT RULE 22-6. RULES APPLICABLE TO ALL DEATH PENALTY CASES

(a) **Notice of Emergency Motions.** Upon the filing of a notice of appeal where the district court has denied a stay of execution, the clerk of the district court shall immediately notify the Clerk of this Court by telephone of such filing and transmit the notice of appeal. Counsel shall communicate with the Clerk of this Court by telephone as soon as it becomes evident that emergency relief will be sought from this Court. *(Rev. 12/1/09)*

(b) *[Abrogated, see Circuit Rule 32-4, 1/1/99]*

(c) **Excerpts of Record.** The appellant shall prepare and file excerpts of record in compliance with Circuit Rule 30-1. An appellant unable to obtain all or part of the record shall so notify the Court. In addition to the documents listed in Circuit Rule 30-1.2, excerpts of record shall contain all final orders and rulings of all state courts in appellate

and post-conviction proceedings. Excerpts of records shall also include all final orders of the Supreme Court of the United States involving the conviction or sentence.

(d) **Retention of Record.** The clerk shall keep all papers filed in the Court of Appeals for future use of the Court. *(Eff. 7/1/97)*

FRAP 23. CUSTODY OR RELEASE OF A PRISONER IN A HABEAS CORPUS PROCEEDING

(a) **Transfer of Custody Pending Review.** Pending review of a decision in a habeas corpus proceeding commenced before a court, justice, or judge of the United States for the release of a prisoner, the person having custody of the prisoner must not transfer custody to another unless a transfer is directed in accordance with this rule. When, upon application, a custodian shows the need for a transfer, the court, justice, or judge rendering the decision under review may authorize the transfer and substitute the successor custodian as a party.

(b) **Detention or Release Pending Review of Decision Not to Release.** While a decision not to release a prisoner is under review, the court or judge rendering the decision, or the court of appeals, or the Supreme Court, or a judge or justice of either court, may order that the prisoner be:

(1) detained in the custody from which release is sought;

(2) detained in other appropriate custody; or

(3) released on personal recognizance, with or without surety.

(c) **Release Pending Review of Decision Ordering Release.** While a decision ordering the release of a prisoner is under review, the prisoner must—unless the court or judge rendering the decision, or the court of appeals, or the Supreme Court, or a judge or justice of either court orders otherwise—be released on personal recognizance, with or without surety.

(d) **Modification of the Initial Order on Custody.** An initial order governing the prisoner's custody or release, including any recognizance or surety, continues in effect pending review unless for special reasons shown to the court of appeals or the Supreme Court, or to a judge or justice of either court, the order is modified or an independent order regarding custody, release, or surety is issued.

(As amended Mar. 10, 1986, eff. July 1, 1986; Apr. 24, 1998, eff. Dec. 1, 1998.)

CIRCUIT RULE 23-1. CUSTODY OF FEDERAL PRISONERS PENDING APPEALS IN PROCEEDINGS TO VACATE SENTENCE

Pending an appeal from the final decision of any court or judge in a proceeding attacking a sentence under 28 U.S.C. § 2255, or an appeal from an order disposing of a motion made under Rules 33 or 35 of the Federal Rules of Criminal Procedure or any other proceeding in which a question of interim release is raised, the detention or release of the prisoner shall be governed by FRAP 23(b), (c) and (d).

FRAP 24. PROCEEDING IN FORMA PAUPERIS

(a) Leave to Proceed in Forma Pauperis.

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

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

(B) claims an entitlement to redress; and

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

(2) Action on the Motion. If the district court grants the motion, the party may proceed on appeal without prepaying or giving security for fees and costs, unless a statute provides otherwise. If the district court denies the motion, it must state its reasons in writing.

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

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

(B) a statute provides otherwise.

(4) Notice of District Court's Denial. The district clerk must immediately notify the parties and the court of appeals when the district court does any of the following:

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

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

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

(5) Motion in the Court of Appeals. A party may file a motion to proceed on appeal in forma pauperis in the court of appeals within 30 days after service of the notice prescribed in Rule 24(a)(4). The motion must include a copy of the affidavit filed in the district court and the district court's statement of reasons for its action. If no affidavit was filed in the district court, the party must include the affidavit prescribed by Rule 24(a)(1).

(b) **Leave to Proceed in Forma Pauperis on Appeal from the United States Tax Court or on Appeal or Review of an Administrative-Agency Proceeding.** A party may file in the court of appeals a motion for leave to proceed on appeal in forma pauperis with an affidavit prescribed by Rule 24(a)(1):

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

(2) when an appeal or review of a proceeding before an administrative agency, board, commission, or officer proceeds directly in the court of appeals.

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

(As amended Apr. 1, 1979, eff. Aug. 1, 1979; Mar. 10, 1986, eff. July 1, 1986; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 16, 2013, eff. Dec. 1, 2013.)

CIRCUIT RULE 24-1. EXCERPTS OF RECORD WAIVER

[Abrogated 1/1/05]

TITLE VII. General Provisions

FRAP 25. FILING AND SERVICE

(a) Filing.

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

(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 a third-party commercial carrier for delivery to the clerk within 3 days.

(C) **Inmate filing.** If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 25(a)(2)(C). A paper filed by an inmate is timely if it is deposited in the institution's internal mail system on or before the last day for filing and:

(i) it is accompanied by:

- a declaration in compliance with 28 U.S.C. § 1746—or a notarized statement—setting out the date of deposit and stating that first-class postage is being prepaid; or
- evidence (such as a postmark or date stamp) showing that the paper was so deposited and that postage was prepaid; or

(ii) the court of appeals exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies Rule 25(a)(2)(C)(i).

(D) **Electronic filing.** A court of appeals may by local rule permit or require 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 local rule may require filing by electronic means only if reasonable exceptions are allowed. 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 filed with the judge; the judge must note the filing date on the motion and give it to the clerk.

(4) **Clerk's Refusal of Documents.** The clerk must 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 rule or practice.

(5) **Privacy Protection.** An appeal in a case whose privacy protection was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same rule on appeal. In all other proceedings, privacy protection is governed by Federal Rule of Civil Procedure 5.2, except that Federal Rule of Criminal Procedure 49.1 governs when an extraordinary writ is sought in a criminal case.

(b) **Service of All Papers Required.** Unless a rule requires service by the clerk, a party must, at or before the time of filing a paper, serve a copy on the other parties to the appeal or review. Service on a party represented by counsel must be made on the party's counsel.

(c) **Manner of Service.**

(1) Service may be any of the following:

(A) personal, including delivery to a responsible person at the office of counsel;

(B) by mail;

(C) by third-party commercial carrier for delivery within 3 days; or

(D) by electronic means, if the party being served consents in writing.

(2) If authorized by local rule, a party may use the court's transmission equipment to make electronic service under Rule 25(c)(1)(D).

(3) When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, service on a party must be by a manner at least as expeditious as the manner used to file the paper with the court.

(4) Service by mail or by commercial carrier is complete on mailing or delivery to the carrier. Service by electronic means is complete on transmission, unless the party making service is notified that the paper was not received by the party served.

(d) **Proof of Service.**

(1) A paper presented for filing must contain either of the following:

(A) an acknowledgment of service by the person served; or

(B) proof of service consisting of a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) their mail or electronic addresses, facsimile numbers, or the addresses of the places of delivery, as appropriate for the manner of service.

(2) When a brief or appendix is filed by mailing or dispatch in accordance with Rule 25(a)(2)(B), the proof of service must also state the date and manner by which the document was mailed or dispatched to the clerk.

(3) Proof of service may appear on or be affixed to the papers filed.

(e) **Number of Copies.** When these rules require the filing or furnishing of a number of copies, a court may require a different number by local rule or by order in a particular case.

(As amended Mar. 10, 1986, eff. July 1, 1986; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 23, 1996, eff. Dec. 1, 1996; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 12, 2006, eff. Dec. 1, 2006; Apr. 30, 2007, eff. Dec. 1, 2007; Mar. 26, 2009, eff. Dec. 1, 2009; Apr. 28, 2016, eff. Dec. 1, 2016.)

Cross Reference:

- FRAP 26. Computing and Extending Time on page 86, specifically, FRAP 26(c), Additional Time after Service by Mail
- FRAP 40. Petition for Panel Rehearing on page 160, specifically, FRAP 40(a), Time for Filing Petition for Rehearing

CIRCUIT RULE 25-1. PRINCIPAL OFFICE OF CLERK

The principal office of the Clerk shall be in the United States Court of Appeals, 95 Seventh Street, San Francisco, California.

The duties of the Clerk are set forth in FRAP 45.

CIRCUIT RULE 25-2. COMMUNICATIONS TO THE COURT

All communications to the Court shall be in writing unless otherwise permitted by these rules. All communications to the Court shall comply with FRAP 32 and shall be filed electronically unless (1) counsel has been granted an exemption from electronic filing under FRAP 25(a)(2)(D); (2) the filer is a pro se party; or (3) the document is excluded from the electronic filing requirement by the Court's orders and/or rules. *(Rev. 12/1/09)*

If a paper document is to be submitted, the document shall be addressed to the Clerk at the United States Court of Appeals. Documents transmitted via commercial carrier shall be directed to the Court at 95 Seventh Street, San Francisco, CA 94103-1526; documents transmitted via the United States Postal Service shall be directed to Post Office Box 193939, San Francisco, CA 94119-3939. *(Rev. 12/1/09)*

Parties and counsel shall not submit filings directly to any particular judge.

If adverse weather or other exceptional conditions render the San Francisco Clerk's Office inaccessible, the Court may by special order permit parties to submit paper documents to the Court's divisional offices. *(Rev. 12/1/09)*

CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 25-2

Litigants are reminded that a commercial carrier's failure to deliver a document within the anticipated interval does not excuse the failure to meet a mandatory and jurisdictional deadline. Magtanong v. Gonzales, 494 F.3d 1190, 1191 (9th Cir. 2007). (Rev. 12/1/09)

Notice of Delay: *If an appeal or petition has been pending before the Court for any period in excess of those set forth below, the party is encouraged to communicate this fact to the Court. Such notice can be accomplished by a letter to the Clerk identifying the case and the nature of the delay. Generally, such a letter would be appropriate if:*

(1) *a motion has been pending for longer than 4 months;*

(2) *the parties have not received notice of oral argument or submission on the briefs within 15 months after the completion of briefing;*

(3) *a decision on the merits has not been issued within 9 months after submission;*

(4) *the mandate has not issued within 28 days after the time to file a petition for rehearing has expired; or*

(5) *a petition for rehearing has been pending for longer than 6 months.*

A letter noting the pendency of the matters listed at (3) and (5) above may be submitted electronically or via paper copy. A non-electronically transmitted letter will not be recorded on the docket. (Rev. 12/1/09)

Litigants are advised that the complexity of a given matter may preclude court action within the noted time period. (New 1/01)

Cross Reference:

- Circuit Rule 27-1. Filing of Motions on page 92
- Circuit Rule 27-2. Motions for Stays Pending Appeal on page 94
- Circuit Rule 27-3. Emergency and Urgent Motions on page 94

CIRCUIT RULE 25-3. FACSIMILE AND E-MAIL FILING

(Rev. 12/1/09)

25-3.1. Direct Filing

The Court does not accept for filing documents transmitted by telephone facsimile machine ("fax") or by e-mail, except in extreme emergencies and with advance permission of court personnel. Any party who transmits a document to the Court without authorization may be sanctioned. *(Rev. 12/1/09)*

Any document transmitted to the Court by fax or e-mail must show service on all other parties by fax, e-mail, or hand delivery, unless another form of service is authorized by the Court. *(Rev. 12/1/09)*

25-3.2. Third Party Filing

The Court accepts for filing documents transmitted to third parties by fax and subsequently delivered by hand to the Court if the party is exempt from the electronic filing requirement, the document is excluded from the electronic filing requirement by the Court's orders and/or rules, or the party has obtained permission for a third party filing. Documents filed in this fashion must comply with all applicable rules, including requirements for service, number of copies and colors of covers. *(Rev. 12/1/09)*

The filing party shall designate one copy of the filed document as the "fax original." It shall be of laser quality and shall bear the notation "fax original." Other copies shall not bear that notation. *(Rev. 12/1/09)*

25-3.3 Electronic Service

[Abrogated 12/1/09]

CIRCUIT RULE 25-4. CALENDARED CASES

After a case has been scheduled for oral argument, has been argued, is under submission or has been decided, all documents submitted to the Court for filing, including FRAP 28(j) letters, must include the latest of the date of argument, submission or decision. If known, the names of the panel members shall be included. This information shall be included on the initial page and/or cover, if any, immediately below the case number. *(New 7/1/00; Rev. 7/1/06; Rev. 1/1/09; 12/1/09)*

CIRCUIT RULE 25-5. ELECTRONIC FILING

(New Rule 12/1/09, Rev. 7/1/13, 3/23/16)

(a) Participation.

All attorneys and court reporters are required to submit all filings electronically using the Court's Appellate Case Management/Electronic Case Files ("CM/ECF") system unless the Court grants a request to be exempted from the requirement. Filers seeking an exemption must complete the Appellate CM/ECF Exemption Form found on the Court's website. If an exempt filer registers for the Appellate CM/ECF system, that registration will abrogate the exemption. *(Rev. 7/1/13)*

Use of the Appellate CM/ECF system is voluntary for all parties proceeding without counsel.

If a technical malfunction prevents access to the Appellate CM/ECF system for a protracted period, the Court by special order may permit paper filings pending restoration of electronic access.

(b) Documents that may be submitted either electronically or in paper format.

(1) Petitions for review of agency orders under FRAP 15(a) and Circuit Rule 15-1;

(2) Applications for enforcement of agency orders under FRAP 15(b) and Circuit Rule 15-1;

(3) Petitions for permission to appeal under FRAP 5 and Circuit Rule 5-2;

(4) Petitions for writs of mandamus or prohibition under FRAP 21 and Circuit Rule 21-1; and

(5) Applications for leave to file second or successive petitions under 28 U.S.C. § 2254 or motions under 28 U.S.C. § 2255 and Circuit Rule 22-3. *(Rev. 7/1/13)*

(c) Deadlines.

(1) When permitted. Electronic filing is permitted at any time other than when precluded by system maintenance. Filings will be processed by the Court during the Court's business hours.

(2) Timeliness. An electronic filing successfully completed by 11:59 p.m. Pacific Time will be entered on the Court's docket as of that date. The Court's Appellate CM/ECF system determines the date and time a filing is completed. If technical failure prevents timely electronic filing of any document, the filing party shall preserve documentation of the failure and seek appropriate relief from the Court.

(d) Technical requirements. All documents must be submitted in Portable Document Format ("PDF"). The version filed with the Court must be generated from the original word processing file to permit the electronic version of the document to be searched and copied. PDF files created by scanning paper documents are prohibited; however, exhibits submitted as attachments to a document may be scanned and attached if the filer does not

possess a word processing file version of the attachment. No single attachment shall exceed 50MB in size. Attachments that exceed that size must be divided into sub-volumes. *(Rev. 7/1/13)*

(e) **Signature.** Electronic filings shall indicate each signatory by using an "s/" in addition to the typed name of counsel or an unrepresented party. Documents filed on behalf of separately represented parties or multiple pro se parties must indicate one signatory by using an "s/" in addition to the typed name and attest that all other parties on whose behalf the filing is submitted concur in the filing's content.

(f) **Service.** All filings require a certificate of service. A sample certificate may be found on the Court's website. When a document is submitted electronically, the Appellate CM/ECF system will automatically notify the other parties and counsel registered for electronic filing of the submission; no service of paper copies upon other parties and counsel registered for electronic filing is necessary. Registration for the Appellate CM/ECF system constitutes consent to electronic service. If a counsel has successfully applied for an exemption from the electronic filing requirement, that counsel must serve paper copies consistent with the applicable provisions of FRAP 25(c)(1); other parties to the litigation must serve the exempt counsel in that fashion.

(g) **Court-Issued Documents.** Except as otherwise provided by these rules or court order, electronically filed and distributed orders, decrees, and judgments constitute entry on the docket under FRAP 36 and 45(b). Orders also may be issued as "text-only" entries on the docket without an attached document. Such orders are official and binding.

Cross Reference:

- FRAP 25. Filing and Service on page 79, specifically, FRAP 25(a)(5), Privacy Protection
- Circuit Rule 26-2. Three Day Service Allowance on page 88

CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 25-5

The parties are reminded of their obligations under FRAP 25(a)(5) to redact personal identifiers.

Additional information regarding the electronic filing and the Appellate CM/ECF system may be found at the Court's website at www.ca9.uscourts.gov; http://pacer.psc.uscourts.gov; and the informational materials provided to the parties upon the docketing of a case.

Practitioners appointed under the Criminal Justice Act are directed to the Court's website, www.ca9.uscourts.gov/attorneys for information regarding the submission procedures for claims for services and requests related to such services. (New 7/1/13)

When exigent circumstances require submission of an emergency motion under Circuit Rule 27-3 prior to the assignment of an appellate docket number, the moving party shall contact the Motions Attorney Unit at 415-355-8020 to obtain authorization under Circuit Rule 25-3.1 to transmit the motion via facsimile or electronic mail. (New 7/1/13)

FRAP 26. COMPUTING AND EXTENDING TIME

(a) **Computing Time.** The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.

(1) **Period Stated in Days or a Longer Unit.** When the period is stated in days or a longer unit of time:

(A) exclude the day of the event that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(2) **Period Stated in Hours.** When the period is stated in hours:

(A) begin counting immediately on the occurrence of the event that triggers the period;

(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(C) if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(3) **Inaccessibility of the Clerk's Office.** Unless the court orders otherwise, if the clerk's office is inaccessible:

(A) on the last day for filing under Rule 26(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday; or

(B) during the last hour for filing under Rule 26(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

(4) **"Last Day" Defined.** Unless a different time is set by a statute, local rule, or court order, the last day ends:

(A) for electronic filing in the district court, at midnight in the court's time zone;

(B) for electronic filing in the court of appeals, at midnight in the time zone of the circuit clerk's principal office;

(C) for filing under Rules 4(c)(1), 25(a)(2)(B), and 25(a)(2)(C)—and filing by mail under Rule 13(a)(2)—at the latest time for the method chosen for delivery to the post office, third-party commercial carrier, or prison mailing system; and

(D) for filing by other means, when the clerk's office is scheduled to close.

(5) **"Next Day" Defined.** The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(6) **"Legal Holiday" Defined.** "Legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day;

(B) any day declared a holiday by the President or Congress; and

(C) for periods that are measured after an event, any other day declared a holiday by the state where either of the following is located: the district court that rendered the challenged judgment or order, or the circuit clerk's principal office.

(b) **Extending Time.** For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. But the court may not extend the time to file:

(1) a notice of appeal (except as authorized in Rule 4) or a petition for permission to appeal; or

(2) a notice of appeal from or a petition to enjoin, set aside, suspend, modify, enforce, or otherwise review an order of an administrative agency, board, commission, or officer of the United States, unless specifically authorized by law.

(c) **Additional Time after Service.** When a party may or must act within a specified time after being served, 3 days are added after the period would otherwise expire under Rule 26(a), unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is treated as delivered on the date of service stated in the proof of service.

(As amended Mar. 1, 1971, eff. July 1, 1971; Mar. 10, 1986, eff. July 1, 1986; Apr. 25, 1989, eff. Dec. 1, 1989; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 23, 1996, eff. Dec. 1, 1996; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 25, 2005, eff. Dec. 1, 2005; Mar. 26, 2009, eff. Dec. 1, 2009; Apr. 28, 2016, eff. Dec. 1, 2016.)

CIRCUIT RULE 26-1. FILING DEADLINES FOR THE DISTRICTS OF GUAM AND THE NORTHERN MARIANA ISLANDS

Except as provided by order of the Court, or by FRAP 26(b) and 31, all deadlines for filing set forth in FRAP or these rules are extended by 7 days in cases arising from the Districts of Guam and the Northern Mariana Islands.

CIRCUIT RULE 26-2. THREE DAY SERVICE ALLOWANCE

(New 12/1/09)

The 3-day service allowance provided by FRAP 26(c) applies to documents served by the Appellate CM/ECF system pursuant to Circuit Rule 25-5.

FRAP 26.1. CORPORATE DISCLOSURE STATEMENT

(a) **Who Must File.** Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation.

(b) **Time for Filing; Supplemental Filing.** A party must file the Rule 26.1(a) statement with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include the statement before the table of contents. A party must supplement its statement whenever the information that must be disclosed under Rule 26.1(a) changes.

(c) **Number of Copies.** If the Rule 26.1(a) statement is filed before the principal brief, or if a supplemental statement is filed, the party must file an original and 3 copies unless the court requires a different number by local rule or by order in a particular case.

(As added Apr. 25, 1989, eff. Dec. 1, 1989; amended Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002.)

FRAP 27. MOTIONS

(a) In General.

(1) Application for Relief. An application for an order or other relief is made by motion unless these rules prescribe another form. A motion must be in writing unless the court permits otherwise.

(2) Contents of a Motion.

(A) Grounds and relief sought. A motion must state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support it.

(B) Accompanying documents.

(i) Any affidavit or other paper necessary to support a motion must be served and filed with the motion.

(ii) An affidavit must contain only factual information, not legal argument.

(iii) A motion seeking substantive relief must include a copy of the trial court's opinion or agency's decision as a separate exhibit.

(C) Documents barred or not required.

(i) A separate brief supporting or responding to a motion must not be filed.

(ii) A notice of motion is not required.

(iii) A proposed order is not required.

(3) Response.

(A) Time to file. Any party may file a response to a motion; Rule 27(a)(2) governs its contents. The response must be filed within 10 days after service of the motion unless the court shortens or extends the time. A motion authorized by Rules 8, 9, 18, or 41 may be granted before the 10-day period runs only if the court gives reasonable notice to the parties that it intends to act sooner.

(B) Request for affirmative relief. A response may include a motion for affirmative relief. The time to respond to the new motion, and to reply to that response, are governed by Rule 27(a)(3)(A) and (a)(4). The title of the response must alert the court to the request for relief.

(4) **Reply to Response.** Any reply to a response must be filed within 7 days after service of the response. A reply must not present matters that do not relate to the response.

(b) **Disposition of a Motion for a Procedural Order.** The court may act on a motion for a procedural order—including a motion under Rule 26(b)—at any time without awaiting a response, and may, by rule or by order in a particular case, authorize its clerk to act on specified types of procedural motions. A party adversely affected by the court's, or the clerk's, action may file a motion to reconsider, vacate, or modify that action. Timely opposition filed after the motion is granted in whole or in part does not constitute a request to reconsider, vacate, or modify the disposition; a motion requesting that relief must be filed.

(c) **Power of a Single Judge to Entertain a Motion.** A circuit judge may act alone on any motion, but may not dismiss or otherwise determine an appeal or other proceeding. A court of appeals may provide by rule or by order in a particular case that only the court may act on any motion or class of motions. The court may review the action of a single judge.

(d) **Form of Papers; Length Limits; Number of Copies.**

(1) **Format.**

(A) **Reproduction.** A motion, response, or reply may be reproduced by any process that yields a clear black image on light paper. The paper must be opaque and unglazed. Only one side of the paper may be used.

(B) **Cover.** A cover is not required, but there must be a caption that includes the case number, the name of the court, the title of the case, and a brief descriptive title indicating the purpose of the motion and identifying the party or parties for whom it is filed. If a cover is used, it must be white.

(C) **Binding.** The document must be bound in any manner that is secure, does not obscure the text, and permits the document to lie reasonably flat when open.

(D) **Paper size, line spacing, and margins.** The document must be on 8½ by 11 inch paper. The text must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all four sides. Page numbers may be placed in the margins, but no text may appear there.

(E) **Typeface and type styles.** The document must comply with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6).

(2) **Length Limits.** Except by the court's permission, and excluding the accompanying documents authorized by Rule 27(a)(2)(B):

(A) a motion or response to a motion produced using a computer must not exceed 5,200 words;

(B) a handwritten or typewritten motion or response to a motion must not exceed 20 pages;

(C) a reply produced using a computer must not exceed 2,600 words; and

(D) a handwritten or typewritten reply to a response must not exceed 10 pages.

(3) **Number of Copies.** An original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case.

(e) **Oral Argument.** A motion will be decided without oral argument unless the court orders otherwise.

(As amended Apr. 1, 1979, eff. Aug. 1, 1979; Apr. 25, 1989, eff. Dec. 1, 1989; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 25, 2005, eff. Dec. 1, 2005; Mar. 26, 2009, eff. Dec. 1, 2009; Apr. 28, 2016, eff. Dec. 1, 2016.)

CIRCUIT RULE 27-1. FILING OF MOTIONS

(1) Form and Length of Motions

(a) *[Abrogated 7/1/06]*

(b) If electronic filing of the motion, response or reply is not required, the Court requires an original of that filing. The Clerk may direct a party to submit additional paper copies of a motion, response and/or reply when paper copies would aid the Court's review of the motion. *(Rev. 7/1/02; 12/1/09)*

(c) The provisions of FRAP 27(d)(1) otherwise govern the format of motions. *(New 1/1/06)*

(d) Except by permission of the Court, a motion or a response to a motion may not exceed 20 pages. A reply to a response may not exceed 10 pages. The documents listed at FRAP 27(a)(2)(B) and 32(f) are excluded from the length limit calculation. *(New 12/1/16)*

(2) Position of Opposing Counsel

If counsel for the moving party learns that a motion is unopposed, counsel shall so advise the Court. *(Eff. 1/1/99)*

Cross Reference: *(Rev. 12/1/09)*

- Circuit Rule 25-2. Communications to the Court on page 81
- Circuit Rule 32-3. Page/Word Count Conversion Formula for Briefs and Other Documents on page 139

CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 27-1

(Rev. 1/1/11)

(1) ***Motions Acted on by the Appellate Commissioner.*** *The Appellate Commissioner is an officer appointed by the Court. The Court has delegated broad authority under FRAP 27(b) to the Appellate Commissioner to review a wide variety of motions, e.g., appointment, substitution, and withdrawal of counsel and motions for reinstatement. The Appellate Commissioner may deny a motion for dispositive relief, but may not grant such a request other than those filed under FRAP 42(b).*

(2) ***Motions Acted on by a Single Judge.*** *Under FRAP 27(c), a single judge may grant or deny any motion which by order or rule the Court has not specifically excluded, but a single judge may not dismiss or otherwise effectively determine an appeal or other proceeding. Thus, a single judge may not grant motions for summary disposition, dismissal, or remand. A single judge may grant or deny temporary relief in emergency situations pending full consideration of the motion by a motions panel. In addition, some types of motions may be ruled on by a single judge by virtue of a particular rule or statute.*

(3) ***Motions Acted on by Motions Panels.***

(a) ***Motions Heard by the Motions Panels.*** *The motions panel shall rule on substantive motions, including motions to dismiss, for summary affirmance, and similar motions. The Court has determined that in the interest of uniformity, motions for bail are considered by a three-judge motions panel.*

(b) ***Selection of Motions Panels.*** *Judges are ordinarily assigned to the three-judge motions panel on a rotating basis by the Clerk for a term of one month. A single motions panel is appointed for the entire circuit.*

(c) ***Procedures for Disposition of Motions by the Motions Panel.*** *All three judges of the motions panel participate in ruling on motions that dispose of the appeal. Other substantive motions are presented to two judges; if in agreement, they ordinarily decide the motion. The third judge participates only if*

(i) *one of the other members of the panel is disqualified or is otherwise unavailable; or*

(ii) *the other members of the panel disagree on the disposition of a motion or he or she is requested to participate by the other members of the panel.*

A motions panel sits in San Francisco for several days each month. If necessary, emergency motions are acted on by telephone. (See Cir. R. 27-3 through 27-4 and Advisory Committee Notes thereto.) (Rev. 12/1/09)

(4) ***Motions for Clarification, Reconsideration or Modification.*** *Motions for clarification, reconsideration or modification of an order deciding a motion are disfavored by the Court and are rarely granted. The filing of such motions is discouraged. (See Circuit Rule 27-10 as to time limits on filing motions for reconsideration.) (Rev. 7/95, 7/98)*

(5) ***Position of Opposing Counsel.*** *Unless precluded by extreme time urgency, counsel are to make every attempt to contact opposing counsel before filing any motion and to either inform the Court of the position of opposing counsel or provide an explanation regarding the efforts made to obtain that position.*

(6) ***Request to Amend the Briefing Schedule.*** *A party may request modification of the briefing schedule in conjunction with any request for other relief. The request for modification of the briefing schedule should be included in the legend as well as the body of the motion for other relief. (New Note 7/1/2000)*

(7) ***Requests for Judicial Notice.*** *Requests for judicial notice and responses thereto filed during the pendency of the case are retained for review by the panel that will consider the merits of a case. The parties may refer to the materials the request addresses with the understanding that the Court may strike such references and related arguments if it declines to grant the request.*

Cross Reference:

- Circuit Rule 25-2. Communications to the Court on page 81
- FRAP 32. Form of Briefs, Appendices, and Other Papers on page 134, specifically, FRAP 32(c), Form of Other Papers
- Circuit Rule 40-1. Format; Number of Copies on page 161

CIRCUIT RULE 27-2. MOTIONS FOR STAYS PENDING APPEAL

If a district court stays an order or judgment to permit application to the Court of Appeals for a stay pending appeal, an application for such stay shall be filed in the Court of Appeals within 7 days after issuance of the district court's stay. *(Rev. 12/1/09)*

Cross Reference:

- Circuit Rule 27-3. Emergency and Urgent Motions on page 94
- FRAP 8. Stay or Injunction Pending Appeal on page 27

CIRCUIT RULE 27-3. EMERGENCY AND URGENT MOTIONS

(a) Emergency Motions

If a movant certifies that to avoid irreparable harm relief is needed in less than 21 days, the motion shall be governed by the following requirements:

(1) before filing the motion, the movant shall make every practicable effort to notify the Clerk and opposing counsel, and to serve the motion, at the earliest possible time.

(2) the motion shall be filed electronically or, if proceeding pro se or if counsel is exempt from using the Appellate CM/ECF system, by paper with the Clerk in San Francisco. *(Rev. 12/1/09)*

(3) Any motion under this Rule shall have a cover page bearing the legend "Emergency Motion Under Circuit Rule 27-3" and the caption of the case. A certificate of counsel for the movant, entitled "Circuit Rule 27-3 Certificate," shall follow the cover page and shall contain:

(i) The telephone numbers, e-mail addresses, and office addresses of the attorneys for the parties; *(Rev. 12/1/09)*

(ii) Facts showing the existence and nature of the claimed emergency; and

(iii) When and how counsel for the other parties were notified and whether they have been served with the motion; or, if not notified and served, why that was not done.

(4) If the relief sought in the motion was available in the district court, Bankruptcy Appellate Panel or agency, the motion shall state whether all grounds advanced in support thereof in this Court were submitted to the district court, panel or agency, and, if not, why the motion should not be remanded or denied. *(Rev. 12/1/09)*

(b) Urgent Motion

If a movant certifies that to avoid irreparable harm, action is needed by a specific date or event but not within 21 days as in (a) above, the motion shall be governed by the following requirements.

(1) before filing the motion, the movant shall notify opposing counsel and serve the motion at the earliest possible time;

(2) the movant shall file the motion electronically or, if proceeding pro se or if counsel is exempt from using the Appellate CM/ECF system, by paper with the Clerk in San Francisco; *(Rev. 12/1/09)*

(3) any motion under this section shall have a cover page bearing the legend "Urgent Motion Under Circuit Rule 27-3(b)," the caption of the case, and a statement immediately below the title of the motion that states the date or event by which action is necessary;

(4) if the relief sought in the motion was available in the district court, Bankruptcy Appellate Panel or agency, the motion shall state whether all grounds advanced in support thereof in this Court were submitted to the district court, panel or agency, and if not, why the motion should not be remanded or denied.

The motion shall otherwise comport with FRAP 27. *(New 7/1/00)*

Cross Reference: *(New 7/1/00)*

- FRAP 8. Stay or Injunction Pending Appeal on page 27
- FRAP 25. Filing and Service on page 79

- Circuit Rule 27-5. Emergency Motions for Stay of Execution of Sentence of Death on page 97

CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 27-3

(1) ***Procedures for Motions.*** *When an emergency motion is filed with the Clerk in San Francisco, it is immediately referred to the motions attorney unit. A motions attorney will contact the lead judge of the motions panel, or, if he or she is unavailable, the second judge and then the third judge of the motions panel. (See Advisory Committee Note to Rule 27-1.) That judge then may either grant temporary relief or convene the motions panel (usually by telephone) to decide the motion. (Rev. 12/1/09)*

(2) ***Emergency Telephone Number.*** *The clerk's office provides 24-hour telephone service for calls placed to the main clerk's office number, (415) 355-8000. Messages left at times other than regular office hours are recorded and monitored on a regular basis by the motions attorneys.*

Messages should be left only with regard to matters of extreme urgency that must be handled by the Court before the next business day. Callers should make clear the nature of the emergency and the reasons why next-business-day treatment is not sufficient.

(3) ***Appropriate Application of Rule.*** *The provisions of Circuit Rule 27-3 are intended to be employed in instances where the absence of a response from the Court by a date certain would result in irreparable or significant harm to a party, e.g., a motion to reinstate an immigration petition where petitioner faces imminent removal or to stay enforcement of a district court order. The provisions of the rule are not intended for application to requests for procedural relief, e.g., a motion for an extension of time to file a brief.*

Cross Reference:

- Circuit Advisory Committee Note to Rule 31-2.2 on page 132
- Circuit Advisory Committee Note to Rule 32-2 on page 138

CIRCUIT RULE 27-4. EMERGENCY CRIMINAL INTERLOCUTORY APPEALS

If emergency treatment is sought for an interlocutory criminal appeal, motions for expedition, summary affirmances or reversal, or dismissal may be filed pursuant to Circuit Rule 27-3. To avoid delay in the disposition of such motions, counsel should include with the motion all material that may bear upon the disposition of the appeal, including: information concerning the scheduled trial date; information regarding codefendants; and information concerning other counts contained in the indictment but not in issue. *(Rev. 12/1/09)*

Cross Reference:

- FRAP 4. Appeal as of Right—When Taken on page 10, specifically, FRAP 4(b), Appeals in Criminal Cases
- FRAP 22. Habeas Corpus and Section 2255 Proceedings on page 65
- Circuit Rule 22-1. Certificate of Appealability (COA) on page 65
- Circuit Rule 22-2. Direct Criminal Appeals, First Petitions, and Stays of Execution: Capital Cases on page 67
- Circuit Rule 22-3. Applications for Authorization to File Second or Successive 28 U.S.C. § 2254 Petition or § 2255 Motion - All Cases; Stay of Execution - Capital Cases on page 69
- Circuit Rule 25-5. Electronic Filing on page 84, specifically, Circuit Rule 25-5(b), Documents that may be submitted either electronically or in paper format
- Circuit Rule 22-5. Subsequent Petitions or Motions; Related Civil Proceedings on page 73
- Circuit Rule 22-6. Rules Applicable to all Death Penalty Cases on page 73

CIRCUIT RULE 27-5. EMERGENCY MOTIONS FOR STAY OF EXECUTION OF SENTENCE OF DEATH

[Abrogated]

CIRCUIT RULE 27-6. NO ORAL ARGUMENT UNLESS OTHERWISE ORDERED

[Abrogated 1/99]

CIRCUIT RULE 27-7. DELEGATION OF AUTHORITY TO ACT ON MOTIONS

The Court may delegate to the Clerk or designated deputy clerks, staff attorneys, appellate commissioners or circuit mediators authority to decide motions filed with the Court. Orders issued pursuant to this section are subject to reconsideration pursuant to Circuit Rule 27-10. *(Rev. 1/1/04)*

CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 27-7

Procedural Motions. *Most non-dispositive procedural motions in appeals or other proceedings that have not yet been calendared are acted on by court staff under the supervision of the clerk, the appellate commissioner, or the chief circuit mediator. Court staff may act on procedural motions whether opposed or unopposed, but if there is any question under the guidelines as to what action should be taken on the motion, it is referred to the appellate commissioner or the chief circuit mediator. Through its General Orders, the Court has delegated authority to act on specific motions and to take other actions on its behalf. See, in particular, General Orders, Appendix A, (which are available on the Court's website). (Rev. 1-1-04)*

CIRCUIT RULE 27-8. REQUIRED RECITALS IN CRIMINAL AND IMMIGRATION CASES

27-8.1. Criminal Cases

Every motion in a criminal appeal shall recite any previous application for the relief sought and the bail status of the defendant.

27-8.2. Immigration Petitions

Every motion in a petition for review of a decision of the Board of Immigration Appeals shall recite any previous application for the relief sought and inform the Court if petitioner is detained in the custody of the Department of Homeland Security or at liberty. *(New, 1/1/05; Rev. 12/1/09)*

CIRCUIT RULE 27-9. MOTIONS TO DISMISS CRIMINAL APPEALS

27-9.1. Voluntary Dismissals

Motions or stipulations for voluntary dismissals of criminal appeals shall, if made or joined in by counsel for appellant, be accompanied by appellant's written consent thereto, or counsel's explanation of why appellant's consent was not obtained.

Cross Reference:

- FRAP 42. Voluntary Dismissal on page 165

27-9.2. Involuntary Dismissals

Motions by appellees for dismissal of criminal appeals, and supporting papers, shall be served upon both appellant and appellant's counsel, if any. If the ground of such motion is failure to prosecute the appeal, appellant's counsel, if any, shall respond within 10 days. If appellant's counsel does not respond, the clerk will notify the appellant of the Court's proposed action. *(Rev. 12/1/09)*

If the appeal is dismissed for failure to prosecute, the Court may impose sanctions on appellant's counsel. Counsel will be provided with 14 days notice and an opportunity to respond before sanctions are imposed.

CIRCUIT RULE 27-10. MOTIONS FOR RECONSIDERATION

(a) Filing for Reconsideration

(1) Time limit for orders that terminate the case
A party seeking further consideration of an order that disposes of the entire case on the merits, terminates a case, or otherwise concludes the proceedings in this Court must comply with the time limits of FRAP 40(a)(1). *(Rev. 7/1/16)*

(2) Time limit for all other orders
Unless the time is shortened or expanded by order of this Court, a motion for clarification, modification or reconsideration of a court order that does not dispose of the entire case on the merits, terminate a case or otherwise conclude proceedings in this Court must be filed within 14 days after entry of the order. *(Rev. 12/1/09; Rev. 7/1/16)*

(3) Required showing
A party seeking relief under this rule shall state with particularity the points of law or fact which, in the opinion of the movant, the Court has overlooked or misunderstood. Changes in legal or factual circumstances which may entitle the movant to relief also shall be stated with particularity.

(b) Court Processing

Motions Panel Orders: A timely motion for clarification, modification, or reconsideration of an order issued by a motions panel shall be decided by that panel. If the case subsequently has been assigned to a merits panel, the motions panel shall contact the merits panel before disposing of the motion. A party may file only one motion for clarification, modification, or reconsideration of a motions panel order. No answer to a motion for clarification, modification, or reconsideration of a motions panel's order is permitted unless requested by the Court, but ordinarily the Court will not grant such a

motion without requesting an answer and, if warranted, a reply. The rule applies to any motion seeking clarification, modification, or reconsideration of a motions panel order, either by the motions panel or by the Court sitting en banc. *(New 1/1/04; Rev. 12/1/09; Rev. 7/1/16)*

Orders Issued Under Circuit Rule 27-7: A motion to reconsider, clarify, or modify an order issued pursuant to Circuit Rule 27-7 by a deputy clerk, staff attorney, circuit mediator, or the appellate commissioner is initially directed to the individual who issued the order or, if appropriate, to his/her successor. The time to respond to such a motion is governed by FRAP 27(a)(3)(A). If that individual is disinclined to grant the requested relief, the motion for reconsideration, clarification, or modification shall be processed as follows: *(New 1/1/04; Rev. 7/1/16)*

(1) if the order was issued by a deputy clerk or staff attorney, the motion is referred to an appellate commissioner;

(2) if the order was issued by a circuit mediator, the motion is referred to the chief circuit mediator;

(3) if the order was issued by the appellate commissioner or the chief circuit mediator, the motion is referred to a motions panel.

CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 27-10

Motions for clarification, reconsideration or modification of orders entered by a motions panel are not favored by the Court and should be utilized only where counsel believes that the Court has overlooked or misunderstood a point of law or fact, or where there is a change in legal or factual circumstances after the order which would entitle the movant to relief. (Rev. 1/1/04)

CIRCUIT RULE 27-11. MOTIONS; EFFECT ON SCHEDULE

(a) Motions requesting the types of relief noted below shall stay the schedule for record preparation and briefing pending the Court's disposition of the motion: *(Rev. 1/1/03)*

(1) dismissal; *(Rev. 1/1/03)*

(2) transfer to another tribunal; *(Rev. 1/1/03)*

(3) full remand;

(4) in forma pauperis status in this Court; *(Rev. 1/1/03)*

(5) production of transcripts at government expense; and *(Rev. 1/1/03)*

(6) appointment or withdrawal of counsel. *(Rev. 1/1/03)*

(b) The schedule for record preparation and briefing shall be reset as necessary upon the Court's disposition of the motion. Motions for reconsideration are disfavored and will not stay the schedule unless otherwise ordered by the Court. *(Rev. 1/1/03)*

CIRCUIT RULE 27-12. MOTIONS TO EXPEDITE

Motions to expedite briefing and hearing may be filed and will be granted upon a showing of good cause. "Good cause" includes, but is not limited to, situations in which: (1) an incarcerated criminal defendant contends that the valid guideline term of confinement does not extend beyond 12 months from the filing of the notice of appeal; (2) the projected release date for an incarcerated criminal defendant occurs within 12 months from the filing of the notice of appeal; or (3) in the absence of expedited treatment, irreparable harm may occur or the appeal may become moot. The motion shall set forth the status of transcript preparation and opposing counsel's position or reason why moving counsel has been unable to determine that position. The motion may also include a proposed briefing schedule and date for argument or submission.

A motion pursuant to this rule may include a request for (i) a stay of the order on appeal, or (ii) release of a prisoner pending appeal. *(Eff. 7/95)*

Cross Reference:

- Circuit Rule 27-3. Emergency and Urgent Motions on page 94

INTERIM CIRCUIT RULE 27-13. SEALED DOCUMENTS[2]

(a) Introduction

This Court has a strong presumption in favor of public access to documents. Therefore, except as provided in (d) below, the presumption is that every document filed in or by this Court (whether or not the document was sealed in the district court) is in the public record unless this Court orders it to be sealed.

Accordingly, unless a case or document falls within the scope of (d) below, this Court will permit it to be filed under seal only if justified by a motion to seal the document from public view. *See* (e), (f), (g), and (h) below. The Court will not seal a case or a document based solely on the stipulation of the parties.

When an entire case was sealed in district court, the case will be docketed provisionally under seal in this Court, and within 21 days of filing the notice of appeal, a party must file a motion to continue the seal or the seal will be lifted without notice. *See* (g) below. When a document was sealed in the district court, the document will be filed

[2] This rule is promulgated on an interim basis pursuant to 28 U.S.C. § 2071(e), and replaces prior Circuit Rule 27-13 pending adoption of a final Rule.

provisionally under seal, and must be accompanied by a notice under subsection (d), a motion to seal under subsection (e), or a notice under subsection (f). The document will remain provisionally sealed until the Court rules on any motion to seal.

Documents in Social Security and Immigration cases, including administrative records, are not filed under seal in this Court. However, remote electronic access to documents is limited by rule to the parties to the case, though the documents will be available for public viewing in the Clerk's Office. *See* Fed. R. Civ. P. 5.2(c); Fed. R. App. P. 25(a)(5). This same rule, however, presumes that the orders and dispositions will be publicly available.

(b) Definitions

(1) Sealed Document: There is no public access via PACER. Once submitted, access to the document is restricted to the Court.
(2) Sealed Case: There is no public access via PACER. Access to the docket and all documents filed in the case is restricted to case participants and the Court.

(c) Form of Documents

All documents shall be submitted electronically unless the filer is exempt from the electronic filing requirement. Each document or volume of documents submitted under seal shall include the words "UNDER SEAL" on its cover and/or first page.

Because documents submitted under seal will not be viewable to the parties via CM/ECF noticing, any notice or motion submitted under seal and any document associated with such notice or motion shall be served on opposing counsel in paper form or, by mutual agreement, via email. *See* Fed. R. App. P. 25(c)(1)(D).

Rather than moving to file the entire excerpts of record under seal, a party shall submit any document(s) it wishes to seal as a separate volume. *See* Circuit Rule 30-1.6(c).

(d) Presentence Reports, Grand Jury Transcripts, and Sealed Filings Mandated by Statute or Procedural Rule

When a statute or procedural rule requires that a brief or other document be filed under seal (*see, e.g.,* 18 U.S.C. § 5038(c), 3509(d); Fed. R. Crim. P. 6(e)), or when a party is filing a presentence report, its attachments, and any confidential sentencing memoranda, a motion under subsection (e) is not required.

Instead, the document shall be submitted under seal in accordance with subsection (c), and accompanied by a notice of filing under seal that references this rule and the pertinent statute or procedural rule.

In cases in which the presentence report is referenced in the brief, the party first filing that brief must file under seal the presentence report, the documents attached to the report, and any sentencing memoranda filed under seal in the district court. The report

and documents shall be filed on the same day as the brief that references the report and documents, using the presentence report electronic filing event. These documents shall not be included in the excerpts of record.

(e) Motion to Submit a Sealed Document

In the absence of a statutory or procedural requirement as described in (d) above, a party who wishes to submit any document or portion of a document, including a brief, under seal, whether or not it was sealed in the district court, shall file a motion simultaneously with the document. The motion shall explain the specific reasons for this relief and describe the potential for irreparable injury in the absence of such relief. In addition, the motion shall request the least restrictive scope of sealing and be limited in scope to only the specific documents or portion of documents that merit sealing, for example, propose redaction of a single paragraph or limit the request to a portion of a contract. The motion and document will be provisionally sealed pending a ruling on the motion.

Additionally, rather than moving to file the entire excerpts of record under seal, a party shall submit any document(s) that fall within this subsection as a separate volume. *See* subsection (c) above.

(f) Notice of Intent to File a Document Publicly that Was the Subject of a Seal Below

If the filing party does not intend to ask that a seal issued by the district court be continued, the party shall file the documents provisionally under seal, along with a notice of intent to file publicly, in order to allow any other party an opportunity to move for appropriate relief within 21 days of the notice. Absent a motion by another party to continue the seal, or a notice pursuant to subsection (d), the provisional seal will be lifted without notice and the documents will be made available to the public.

(g) Motion or Notice to Maintain a Case Under Seal

A party who wants a case that was fully sealed in the district court to remain fully sealed on appeal shall file a motion to continue the seal within 21 days of the filing of the notice of appeal. The motion must explain with specificity why it is necessary for the entire case to be sealed on appeal and why no less restrictive alternatives are available.

When the seal is required by statute or procedural rule, a motion is not required; instead, a party must file a notice that references this rule and the pertinent statute or rule within 21 days of the filing of the notice of appeal.

Absent a motion or notice, the seal will be lifted without notice and the case in full will be made available to the public.

(h) Motion or Notice to Maintain the Record Under Seal

Any portion of the record that was sealed below and is transmitted to this Court by the district court or agency will be provisionally sealed and the parties must move to maintain the seal within 21 days of transmission. The motion must explain with

specificity why it is necessary to maintain the seal on appeal and why no less restrictive alternatives are available. Absent a motion to continue the seal, or a notice pursuant to subsection (d), any seal will be lifted without notice and the record in full will be made available to the public.

(i) Motions to Unseal

Motions to unseal may be made on any grounds permitted by law. The parties in a civil case may stipulate to the public filing in this Court of a document that was filed under seal in the district court.

(j) Argument

Except as otherwise ordered by the Court, the Court will not close oral argument to the public in any type of case, even when the case itself or the briefs or excerpts of record have been filed under seal. A party seeking a closed hearing shall move for such extraordinary relief at least 14 days prior to the scheduled argument date and explain with specificity why such relief is required and whether any less extraordinary alternative is available.

(k) Dispositions

This Court will presumptively file any disposition publicly, even in cases involving sealed materials. Any party who believes the Court's disposition should be sealed shall file a motion seeking that relief within 28 days of the completion of briefing.

CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 27-13

The Court has a strong presumption in favor of public access to Court records in both civil and criminal cases. See The Center for Auto Safety v. Chrysler Group, LLC, 809 F.3d 1092, 1096 (9th Cir. 2016); Oliner v. Kontrabecki, 745 F.3d 1024, 1025-26 (9th Cir. 2014); Seattle Times v. U.S. Dist. Court of Western Washington, 845 F.2d 1513, 1516 (9th Cir. 1988). Motions to file documents under seal are therefore discouraged. Moreover, if the contents of documents originally sealed in the district court have subsequently been disclosed publicly, the Court will be disinclined to maintain the seal.

A motion to seal does not ordinarily change the briefing schedule and any order resolving such a motion will include further instructions for the parties as needed. The Court may defer ruling on the motion until the completion of briefing. If the Court denies a motion to file a document under seal, the Court will ordinarily provide the moving party with an opportunity to withdraw that document and will shield the document from public access during that period.

When the filing of classified documents on an ex parte or sealed basis in a given case is necessary in light of national security issues, the Court will adopt procedures specific to that case.

Cross Reference:

- FRAP 25. Filing and Service on page 79, specifically FRAP 25(a)(5), Privacy Protection
- Circuit Advisory Committee Note to Rule 3-5 on page 7

CIRCUIT RULE 27-13. SEALED DOCUMENTS; MOTIONS TO SEAL

Abrogated 3/23/16

CIRCUIT RULE 27-14. MOTIONS TO TRANSMIT PHYSICAL AND DOCUMENTARY EXHIBITS

(New 7/1/13)

If a party asserts that review of an exhibit not currently available on the electronic district court docket is necessary to resolution of an issue on appeal, that party shall move the Court for leave to transmit to the Court a copy or replication of the exhibit. The copy, or photograph or other replication shall not be included with the motion. The Court will defer ruling on the motion until after the completion of briefing.

CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 27-14

The parties should be aware that frequently this Court does not have access to trial exhibits because the district courts typically return them to the parties. Therefore, the parties are encouraged during the course of the district court proceedings to file documentary exhibits electronically and, when practicable, to photograph or otherwise electronically replicate physical exhibits in a manner that permits the exhibits' inclusion on the electronic district court docket. The parties may consider including portions of relevant documentary exhibits that were admitted and/or offered and excluded in the excerpts of record. To the extent that the Court finds additional exhibits relevant, the Court may direct the parties to provide the exhibits. (New 7/1/13)

FRAP 28. BRIEFS

(a) **Appellant's Brief.** The appellant's brief must contain, under appropriate headings and in the order indicated:

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

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

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

(4) a jurisdictional statement, including:

(A) the basis for the district court's or agency's subject-matter jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

(B) the basis for the court of appeals' jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

(C) the filing dates establishing the timeliness of the appeal or petition for review; and

(D) an assertion that the appeal is from a final order or judgment that disposes of all parties' claims, or information establishing the court of appeals' jurisdiction on some other basis;

(5) a statement of the issues presented for review;

(6) a concise 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, with appropriate references to the record (*see* Rule 28(e));

(7) a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief, and which must not merely repeat the argument headings;

(8) the argument, which must contain:

(A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies; and

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

(9) a short conclusion stating the precise relief sought; and

(10) the certificate of compliance, if required by Rule 32(g)(1).

(b) **Appellee's Brief.** The appellee's brief must conform to the requirements of Rule 28(a)(1)–(8) and (10), except that none of the following need appear unless the appellee is dissatisfied with the appellant's statement:

(1) the jurisdictional statement;

(2) the statement of the issues;

(3) the statement of the case; and

(4) the statement of the standard of review.

(c) **Reply Brief.** The appellant may file a brief in reply to the appellee's brief. Unless the court permits, no further briefs may be filed. A reply brief must contain a table of contents, with page references, and a table of authorities—cases (alphabetically arranged), statutes, and other authorities—with references to the pages of the reply brief where they are cited.

(d) **References to Parties.** In briefs and at oral argument, counsel should minimize use of the terms "appellant" and "appellee." To make briefs clear, counsel should use the parties' actual names or the designations used in the lower court or agency proceeding, or such descriptive terms as "the employee," "the injured person," "the taxpayer," "the ship," "the stevedore."

(e) **References to the Record.** References to the parts of the record contained in the appendix filed with the appellant's brief must be to the pages of the appendix. If the appendix is prepared after the briefs are filed, a party referring to the record must follow one of the methods detailed in Rule 30(c). If the original record is used under Rule 30(f) and is not consecutively paginated, or if the brief refers to an unreproduced part of the record, any reference must be to the page of the original document. For example:

- Answer p. 7;
- Motion for Judgment p. 2;
- Transcript p. 231.

Only clear abbreviations may be used. A party referring to evidence whose admissibility is in controversy must cite the pages of the appendix or of the transcript at which the evidence was identified, offered, and received or rejected.

(f) **Reproduction of Statutes, Rules, Regulations, etc.** If the court's determination of the issues presented requires the study of statutes, rules, regulations, etc., the relevant parts must be set out in the brief or in an addendum at the end, or may be supplied to the court in pamphlet form.

(g) **[Reserved]**

(h) **[Reserved]**

(i) **Briefs in a Case Involving Multiple Appellants or Appellees.** In a case involving more than one appellant or appellee, including consolidated cases, any number of appellants or

appellees may join in a brief, and any party may adopt by reference a part of another's brief. Parties may also join in reply briefs.

(j) **Citation of Supplemental Authorities.** If pertinent and significant authorities come to a party's attention after the party's brief has been filed—or after oral argument but before decision—a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations. The letter must state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 350 words. Any response must be made promptly and must be similarly limited.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Mar. 10, 1986, eff. July 1, 1986; Apr. 25, 1989, eff. Dec. 1, 1989; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 25, 2005, eff. Dec. 1, 2005; Apr. 16, 2013, eff. Dec. 1, 2013; Apr. 28, 2016, eff. Dec. 1, 2016.)

CIRCUIT RULE 28-1. BRIEFS, APPLICABLE RULES

(a) Briefs shall be prepared and filed in accordance with the Federal Rules of Appellate Procedure except as otherwise provided by these rules. *See* FRAP 28, 29, 31 and 32. Briefs not complying with FRAP and these rules may be stricken by the Court.

(b) Parties must not append or incorporate by reference briefs submitted to the district court or agency or this Court in a prior appeal, or refer this Court to such briefs for the arguments on the merits of the appeal. *(New Rule 7/1/00)*

(c) Appellants proceeding without assistance of counsel may file the form brief provided by the Clerk in lieu of the brief described in the preceding paragraph. If an appellant uses the informal brief form, the optional reply brief need not comply with the technical requirements of FRAP 28(c) or 32(a). *(Rev. 1/96)*

Cross Reference:

- FRAP 28. Briefs on page 106, specifically, FRAP 28(j), Citation of Supplemental Authorities *(Rev. 7/1/00)*

CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 28-1

[Abrogated 7/1/06]

CIRCUIT RULE 28-2. CONTENTS OF BRIEFS

In addition to the requirements of FRAP 28, briefs shall comply with the following rules:

28-2.1. Certificate as to Interested Parties *[Abrogated 7/1/90]*

28-2.2. Statement of Jurisdiction

In a statement preceding the statement of the case in its initial brief, each party shall demonstrate the jurisdiction of the district court or agency and of this Court by stating, in the following order:

(a) The statutory basis of subject matter jurisdiction of the district court or agency;

(b) The basis for claiming that the judgment or order appealed from is final or otherwise appealable, and the statutory basis of jurisdiction of this Court. *(Rev. 12/1/09)*

(c) The date of entry of the judgment or order appealed from; the date of filing of the notice of appeal or petition for review; and the statute or rule under which it is claimed the appeal is timely.

If the appellee agrees with appellant's statement of one or more of the foregoing matters, it will be sufficient for the appellee to state such agreement under an appropriate heading.

28-2.3. Attorneys Fees *[Abrogated 7/1/97]*

28-2.4. Bail / Detention Status

(a) The opening brief in a criminal appeal shall contain a statement as to the bail status of the defendant. If the defendant is in custody, the projected release date should be included.

(b) The opening brief in a petition for review of a decision of the Board of Immigration Appeals shall state whether petitioner (1) is detained in the custody of the Department of Homeland Security or at liberty and/or (2) has moved the Board of Immigration Appeals to reopen or applied to the district director for an adjustment of status. *(New 1/1/05; Rev. 12/1/09)*

28-2.5. Reviewability and Standard of Review

As to each issue, appellant shall state where in the record on appeal the issue was raised and ruled on and identify the applicable standard of review.

In addition, if a ruling complained of on appeal is one to which a party must have objected at trial to preserve a right of review, e.g., a failure to admit or to exclude evidence or the giving of or refusal to give a jury instruction, the party shall state where in the record on appeal the objection and ruling are set forth. *(Rev. 12/1/09)*

28-2.6. Statement of Related Cases

Each party shall identify in a statement on the last page of its initial brief any known related case pending in this Court. As to each such case, the statement shall include the name and Court of Appeals docket number of the related case and describe its relationship to the case being briefed. Cases are deemed related if they:

(a) arise out of the same or consolidated cases in the district court or agency;

(b) are cases previously heard in this Court which concern the case being briefed;

(c) raise the same or closely related issues; or

(d) involve the same transaction or event.

If no other cases in this Court are deemed related, a statement shall be made to that effect. The appellee need not include any case identified as related in the appellant's brief.

28-2.7. Addendum to Briefs

Statutory. Pertinent constitutional provisions, treaties, statutes, ordinances, regulations or rules must be set forth verbatim and with appropriate citation either (1) following the statement of issues presented for review or (2) in an addendum introduced by a table of contents and bound with the brief or separately; in the latter case, a statement must appear referencing the addendum after the statement of issues. If this material is included in an addendum bound with the brief, the addendum must be separated from the body of the brief (and from any other addendum) by a distinctively colored page. A party need not resubmit material included with a previous brief or addendum; if it is not repeated, a statement must appear under this heading as follows: [e]xcept for the following, all applicable statutes, etc., are contained in the brief or addendum of _____. *(Rev. 12/1/09)*

Orders Challenged in Immigration Cases. All opening briefs filed in counseled petitions for review of immigration cases must include an addendum comprised of the orders being challenged, including any orders of the immigration court and Board of Immigration Appeals. The addendum shall be bound with the brief but separated from the brief by a distinctively colored page. *(New 7/1/07; Rev. 12/1/09)*

28-2.8. Record References

Every assertion in briefs regarding matters in the record shall be supported by a reference to the location in the excerpts of record where the matter is to be found. *(Rev. 7/1/98; 12/1/09)*

28-2.9. Bankruptcy Appeals *[Abrogated 12/1/09]*

CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 28-2

Sanctions may be imposed for failure to comply with this rule, particularly with respect to record references. See Mitchel v. General Elec. Co., 689 F.2d 877 (9th Cir. 1982).

CIRCUIT RULE 28-3. LENGTH OF BRIEFS; MOTIONS TO EXCEED PAGE LIMITS

[Abrogated 1/96]

(*See* FRAP 32. Form of Briefs, Appendices, and Other Papers on page 125, specifically, FRAP 32(a)(7) and Circuit Rule 32. Form of Brief on page 127)

CIRCUIT RULE 28-4. EXTENSIONS OF TIME AND ENLARGEMENTS OF SIZE FOR CONSOLIDATED AND JOINT BRIEFING

[Abrogated 7/1/16]

(*See* Circuit Rule 32-2. Requests to Exceed the Page or Type-Volume Limits on page 138)

CIRCUIT RULE 28-5. MULTIPLE REPLY BRIEFS

If multiple answering briefs or multiple combined answering and reply cross-appeal briefs are filed, an appellant or group of jointly represented appellants is limited to filing a single brief in response to the multiple briefs.

In the absence of a specifically scheduled due date for the reply brief, the due date for a brief that replies to multiple answering or cross-appeal briefs is calculated from the service date of the last-served answering brief. *(Rev. 1/99)*

CIRCUIT RULE 28-6. CITATION OF SUPPLEMENTAL AUTHORITIES

The body of a letter filed pursuant to FRAP 28(j) shall not exceed 350 words. If the letter is not required to be filed electronically, litigants shall submit an original of a FRAP 28(j) letter. *(New 12/1/02; Rev. 12/1/09)*

CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 28-6

In the interests of promoting full consideration by the Court and fairness to all sides, the parties should file all FRAP 28(j) letters as soon as possible. When practical, the parties are particularly urged to file FRAP 28(j) letters at least 7 days in advance of any scheduled oral argument or within 7 days after notification that the case will be submitted on the briefs. (New 7/1/07; Rev. 12/1/09)

Cross Reference: *(New 7/1/06)*

- Circuit Rule 25-4. Calendared Cases on page 83

FRAP 28.1. CROSS-APPEALS

(a) **Applicability.** This rule applies to a case in which a cross-appeal is filed. Rules 28(a)–(c), 31(a)(1), 32(a)(2), and 32(a)(7(A)–(B) do not apply to such a case, except as otherwise provided in this rule.

(b) **Designation of Appellant.** The party who files a notice of appeal first is the appellant for the purposes of this rule and Rules 30 and 34. If notices are filed on the same day, the plaintiff in the proceeding below is the appellant. These designations may be modified by the parties' agreement or by court order.

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

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

(2) **Appellee's Principal and Response Brief.** The appellee must file a principal brief in the cross-appeal and must, in the same brief, respond to the principal brief in the appeal. That appellee's brief must comply with Rule 28(a), except that the brief need not include a statement of the case unless the appellee is dissatisfied with the appellant's statement.

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

(A) the jurisdictional statement;

(B) the statement of the issues;

(C) the statement of the case; and

(D) the statement of the standard of review.

(4) **Appellee's Reply Brief.** The appellee may file a brief in reply to the response in the cross-appeal. That brief must comply with Rule 28(a)(2)–(3) and (10) and must be limited to the issues presented by the cross-appeal.

(5) **No Further Briefs.** Unless the court permits, no further briefs may be filed in a case involving a cross-appeal.

(d) **Cover.** Except for filings by unrepresented parties, the cover of the appellant's principal brief must be blue; the appellee's principal and response brief, red; the appellant's response and reply brief, yellow; the appellee's reply brief, gray; and intervenor's or amicus curiae's brief, green; and any supplemental brief, tan. The front cover of a brief must contain the information required by Rule 32(a)(2).

(e) Length.

(1) Page Limitation. Unless it complies with Rule 28.1(e)(2), the appellant's principal brief must not exceed 30 pages; the appellee's principal and response brief, 35 pages; the appellant's response and reply brief, 30 pages; and the appellee's reply brief, 15 pages.

(2) Type-Volume Limitation.

(A) The appellant's principal brief or the appellant's response and reply brief is acceptable if it:

(i) contains no more than 13,000 words; or

(ii) uses a monospaced face and contains no more than 1,300 lines of text.

(B) The appellee's principal and response brief is acceptable if it:

(i) contains no more than 15,300 words; or

(ii) uses a monospaced face and contains no more than 1,500 lines of text.

(C) The appellee's reply brief is acceptable if it contains no more than half of the type volume specified in Rule 28.1(e)(2)(A).

(3) Certificate of Compliance. A brief submitted under Rule 28.1(e)(2) must comply with Rule 32(a)(7)(C).

(f) Time to Serve and File a Brief. Briefs must be served and filed as follows:

(1) the appellant's principal brief, within 40 days after the record is filed;

(2) the appellee's principal and response brief, within 30 days after the appellant's principal brief is served;

(3) the appellant's response and reply brief, within 30 days after the appellee's principal and response brief is served; and

(4) the appellee's reply brief, within 14 days after the appellant's response and reply brief is served, but at least 7 days before argument unless the court, for good cause, allows a later filing.

(As added Apr. 25, 2005, eff. Dec. 1, 2005; amended Mar. 26, 2009, eff. Dec. 1, 2009; Apr. 16, 2013, eff. Dec. 1, 2013; Apr. 28, 2016, eff. Dec. 1, 2016.)

CIRCUIT RULE 28.1-1. SEQUENCE, CONTENT, FORM, AND LENGTH OF CROSS-APPEAL BRIEFS; CERTIFICATE OF COMPLIANCE

(New 12/1/16)

(a) **Sequence, Content, and Form:** The sequence, form, and content of briefing are governed by FRAP 28.1(b) – (d) and 32(a)(1), (3), and (4) – (6).

(b) **Principal Brief:** The length of appellant's principal brief under FRAP 28.1(c)(1) and appellant's response and reply brief under FRAP 28.1(c)(3) may not exceed 14,000 words.

(c) **Principal and Response Brief:** The length of appellee's principal and response brief under FRAP 28.1(c)(2) may not exceed 16,500 words.

(d) **Reply Brief:** The length of appellee's reply brief under FRAP 28.1(c)(4) may not exceed half of the length limit set forth in (b) above.

(e) **Exclusions:** The materials listed at FRAP 32(f) are excluded from the length limit.

(f) **Certificate of Compliance:** A brief using a word count length calculation must be accompanied by Form 8 found on the Court's website.

(g) **Handwritten or Typewritten Briefs:** Handwritten or typewritten briefs filed in cross-appeals may not exceed 50 pages for principal and response/reply briefs; 59 pages for principal/response briefs; and 25 pages for reply briefs.

FRAP 29. BRIEF OF AN AMICUS CURIAE

(a) During Initial Consideration of a Case on the Merits.

(1) Applicability. This Rule 29(a) governs amicus filings during a court's initial consideration of a case on the merits.

(2) When Permitted. The United States or its officer or agency or a state may file an amicus curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.

(3) Motion for Leave to File. The motion must be accompanied by the proposed brief and state:

(A) the movant's interest; and

(B) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.

(4) Contents and Form. An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. An amicus brief need not comply with Rule 28, but must include the following:

(A) if the amicus curiae is a corporation, a disclosure statement like that required of parties by Rule 26.1;

(B) a table of contents, with page references;

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

(D) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;

(E) unless the amicus curiae is one listed in the first sentence of Rule 29(a)(2), a statement that indicates whether:

(i) a party's counsel authored the brief in whole or in part;

(ii) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and

(iii) a person—other than the amicus curiae, its members, or its counsel— contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person;

(F) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review; and

(G) a certificate of compliance under Rule 32(g)(1), if length is computed using a word or line limit.

(5) **Length.** Except by the court's permission, an amicus brief may be no more than one-half the maximum length authorized by these rules for a party's principal brief. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.

(6) **Time for Filing.** An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's or petitioner's principal brief is filed. A court may grant leave for later filing, specifying the time within which an opposing party may answer.

(7) **Reply Brief.** Except by the court's permission, an amicus curiae may not file a reply brief.

(8) **Oral Argument.** An amicus curiae may participate in oral argument only with the court's permission.

(b) **During Consideration of Whether to Grant Rehearing.**

(1) **Applicability.** This Rule 29(b) governs amicus filings during a court's consideration of whether to grant panel rehearing or rehearing en banc, unless a local rule or order in a case provides otherwise.

(2) **When Permitted.** The United States or its officer or agency or a state may file an amicus- curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court.

(3) **Motion for Leave to File.** Rule 29(a)(3) applies to a motion for leave.

(4) **Contents, Form, and Length.** Rule 29(a)(4) applies to the amicus brief. The brief must not exceed 2,600 words.

(5) **Time for Filing.** An amicus curiae supporting the petition for rehearing or supporting neither party must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the petition is filed. An amicus curiae opposing the petition must file its brief, accompanied by a motion for filing when necessary, no later than the date set by the court for the response.

(As amended Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 28, 2010, eff. Dec. 1, 2010; Apr. 28, 2016, eff. Dec. 1, 2016.)

CIRCUIT RULE 29-1. REPLY BRIEF OF AN AMICUS CURIAE

No reply brief of an amicus curiae will be permitted. *(Rev. 12/1/09)*

CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 29-1

The filing of multiple amici curiae briefs raising the same points in support of one party is disfavored. Prospective amici are encouraged to file a joint brief. Movants are reminded that the Court will review the amicus curiae brief in conjunction with the briefs submitted by the parties, so that amici briefs should not repeat arguments or factual statements made by the parties.

Amici who wish to join in the arguments or factual statements of a party or other amici are encouraged to file and serve on all parties a short letter so stating in lieu of a brief. If the letter is not required to be filed electronically, the letter shall be provided in an original. (Rev. 7/94; 12/1/09)

CIRCUIT RULE 29-2. BRIEF AMICUS CURIAE SUBMITTED TO SUPPORT OR OPPOSE A PETITION FOR PANEL OR EN BANC REHEARING OR DURING THE PENDENCY OF REHEARING

(a) **When Permitted.** An amicus curiae may be permitted to file a brief when the Court is considering a petition for panel or en banc rehearing or when the Court has granted rehearing. The United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia may file an amicus curiae brief without the consent of the parties or leave of court. Subject to the provisions of subsection (f) of this rule, any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.

(b) **Motion for Leave to File.** The motion must be accompanied by the proposed brief and include the recitals set forth at FRAP 29(a)(3).

(c) **Format/Length.**

(1) A brief submitted while a petition for rehearing is pending shall be styled as an amicus curiae brief in support of or in opposition to the petition for rehearing or as not supporting either party. A brief submitted during the pendency of panel or en banc rehearing shall be styled as an amicus curiae brief in support of appellant or appellee or as not supporting either party.

(2) A brief submitted while a petition for rehearing is pending may not exceed 15 pages unless it complies with the alternative length limit of 4,200 words. Motions for leave to file a longer brief are strongly disfavored. *(Rev. 12/1/16)*

(3) Unless otherwise ordered by the Court, a brief submitted after the Court has voted to rehear a case en banc may not exceed 25 pages unless it complies with the alternative length limit of 7,000 words. Motions for leave to file a longer brief are strongly disfavored. *(Rev. 7/1/16; Rev 12/1/16)*

(d) Number of Copies.

(1) If a petition for rehearing en banc has been granted and the brief is not required to be submitted electronically, an original and 20 copies of the brief shall be submitted.

(2) For all other briefs described by this rule that are not required to be submitted electronically, an original shall be submitted.

The Clerk may order the submission of paper copies or additional copies of any brief filed pursuant to this rule. *(Rev. 12/1/09)*

(e) Time for Filing.

(1) Brief Submitted to Support or Oppose a Petition for Rehearing. An amicus curiae must serve its brief along with any necessary motion no later than 10 days after the petition or response of the party the amicus wishes to support is filed or is due. An amicus brief that does not support either party must be served along with any necessary motion no later than 10 days after the petition is filed. Motions for extensions of time to file an amicus curiae brief submitted under this rule are disfavored. *(Rev. 12/1/09)*

(2) Briefs Submitted During the Pendency of Rehearing. Unless the Court orders otherwise, an amicus curiae supporting the position of the petitioning party or not supporting either party must serve its brief, along with any necessary motion, no later than 21days after the petition for rehearing is granted. Unless the Court orders otherwise, an amicus curiae supporting the position of the responding party must serve its brief, along with any necessary motion, no later than 35 days after the petition for panel or en banc rehearing is granted. Motions for extensions of time to file an amicus curiae brief submitted under this rule are disfavored. *(Rev. 12/1/09)*

(f) Circulation. Motions for leave to file an amicus curiae brief to support or oppose a petition for panel rehearing are circulated to the panel. Motions for leave to file an amicus curiae brief to support or oppose a petition for en banc rehearing are circulated to all members of the Court. Motions for leave to file an amicus curiae brief during the pendency of en banc rehearing are circulated to the en banc court. *(New 7/1/07)*

Cross Reference:

- FRAP 29. Brief of an Amicus Curiae on page 116
- Circuit Rule 25-4. Calendared Cases on page 83

CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 29-2

Circuit Rule 29-2 only concerns amicus curiae briefs submitted to support or oppose a petition for panel or en banc rehearing and amicus curiae briefs submitted during the pendency of rehearing. The Court considers the filing of amicus curiae briefs related to petitions for rehearing or en banc review to be appropriate only when the post-disposition deliberations involve novel or particularly complex issues.

The Court will ordinarily deny motions and disallow stipulations for leave to file an amicus curiae brief where the filing of the brief would result in the recusal of a member of the en banc court. Any member of the Court who would be subject to disqualification in light of the amicus curiae brief may, of course, voluntarily recuse, thereby allowing the filing of the amicus curiae brief. (New 7/1/07)

CIRCUIT RULE 29-3. MOTIONS FOR LEAVE TO FILE AMICUS CURIAE BRIEFS

A motion for leave to file an amicus brief shall state that movant endeavored to obtain the consent of all parties to the filing of the brief before moving the Court for permission to file the proposed brief. *(New 1/1/12)*

CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 29-3

FRAP 29(a) permits the timely filing of an amicus curiae brief without leave of the Court if all parties consent to the filing of the brief; obtaining such consent relieves the Court of the need to consider a motion. (New 1/1/12)

FRAP 30. APPENDIX TO THE BRIEFS

(a) Appellant's Responsibility.

(1) Contents of the Appendix. The appellant must prepare and file an appendix to the briefs containing:

(A) the relevant docket entries in the proceeding below;

(B) the relevant portions of the pleadings, charge, findings, or opinion;

(C) the judgment, order, or decision in question; and

(D) other parts of the record to which the parties wish to direct the court's attention.

(2) Excluded Material. Memoranda of law in the district court should not be included in the appendix unless they have independent relevance. Parts of the record may be relied on by the court or the parties even though not included in the appendix.

(3) Time to File; Number of Copies. Unless filing is deferred under Rule 30(c), the appellant must file 10 copies of the appendix with the brief and must serve one copy on counsel for each party separately represented. An unrepresented party proceeding in forma pauperis must file 4 legible copies with the clerk, and one copy must be served on counsel for each separately represented party. The court may by local rule or by order in a particular case require the filing or service of a different number.

(b) All Parties' Responsibilities.

(1) Determining the Contents of the Appendix. The parties are encouraged to agree on the contents of the appendix. In the absence of an agreement, the appellant must, within 14 days after the record is filed, serve on the appellee a designation of the parts of the record the appellant intends to include in the appendix and a statement of the issues the appellant intends to present for review. The appellee may, within 14 days after receiving the designation, serve on the appellant a designation of additional parts to which it wishes to direct the court's attention. The appellant must include the designated parts in the appendix. The parties must not engage in unnecessary designation of parts of the record, because the entire record is available to the court. This paragraph applies also to a cross-appellant and a cross-appellee.

(2) Costs of Appendix. Unless the parties agree otherwise, the appellant must pay the cost of the appendix. If the appellant considers parts of the record designated by the appellee to be unnecessary, the appellant may advise the appellee, who must then advance the cost of including those parts. The cost of the appendix is a

taxable cost. But if any party causes unnecessary parts of the record to be included in the appendix, the court may impose the cost of those parts on that party. Each circuit must, by local rule, provide for sanctions against attorneys who unreasonably and vexatiously increase litigation costs by including unnecessary material in the appendix.

(c) Deferred Appendix.

(1) Deferral Until After Briefs Are Filed. The court may provide by rule for classes of cases or by order in a particular case that preparation of the appendix may be deferred until after the briefs have been filed and that the appendix may be filed 21 days after the appellee's brief is served. Even though the filing of the appendix may be deferred, Rule 30(b) applies; except that a party must designate the parts of the record it wants included in the appendix when it serves its brief, and need not include a statement of the issues presented.

(2) References to the Record.

(A) If the deferred appendix is used, the parties may cite in their briefs the pertinent pages of the record. When the appendix is prepared, the record pages cited in the briefs must be indicated by inserting record page numbers, in brackets, at places in the appendix where those pages of the record appear.

(B) A party who wants to refer directly to pages of the appendix may serve and file copies of the brief within the time required by Rule 31(a), containing appropriate references to pertinent pages of the record. In that event, within 14 days after the appendix is filed, the party must serve and file copies of the brief, containing references to the pages of the appendix in place of or in addition to the references to the pertinent pages of the record. Except for the correction of typographical errors, no other changes may be made to the brief.

(d) Format of the Appendix. The appendix must begin with a table of contents identifying the page at which each part begins. The relevant docket entries must follow the table of contents. Other parts of the record must follow chronologically. When pages from the transcript of proceedings are placed in the appendix, the transcript page numbers must be shown in brackets immediately before the included pages. Omissions in the text of papers or of the transcript must be indicated by asterisks. Immaterial formal matters (captions, subscriptions, acknowledgments, etc.) should be omitted.

(e) Reproduction of Exhibits. Exhibits designated for inclusion in the appendix may be reproduced in a separate volume, or volumes, suitably indexed. Four copies must be filed with the appendix, and one copy must be served on counsel for each separately represented party. If a transcript of a proceeding before an administrative agency, board, commission, or officer was used in a district-court action and has been designated for inclusion in the appendix, the transcript must be placed in the appendix as an exhibit.

(f) **Appeal on the Original Record Without an Appendix.** The court may, either by rule for all cases or classes of cases or by order in a particular case, dispense with the appendix and permit an appeal to proceed on the original record with any copies of the record, or relevant parts, that the court may order the parties to file.

(As amended Mar. 30, 1970, eff. July 1, 1970; Mar. 10, 1986, eff. July 1, 1986; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998; Mar. 26, 2009, eff. Dec. 1, 2009.)

CIRCUIT RULE 30-1. THE EXCERPTS OF RECORD

30-1.1. Purpose

(a) In the Ninth Circuit the appendix prescribed by FRAP 30 is not required. Instead, Circuit Rule 30-1 requires the parties to prepare excerpts of record. The purpose of the excerpts of record is to provide each member of the panel with those portions of the record necessary to reach a decision. The parties should ensure that in accordance with the limitations of Circuit Rule 30-1, those parts of the record necessary to permit an informed analysis of their positions are included in the excerpts. *(Rev. 12/1/09)*

(b) Excerpts of record must be filed in all cases, unless Circuit Rule 30-1.2 applies. The requirements for petitions for review and applications for enforcement of agency decisions are set forth at Circuit Rule 17-1. In appeals from district court decisions reviewing agency actions, the excerpts of record shall comply with Circuit Rule 30-1 and shall include as well the materials required by Circuit Rule 17-1. *(Rev. 12/1/09)*

30-1.2. Unrepresented Litigants

Appellants and appellees proceeding without counsel need not file the initial excerpts, supplemental excerpts or further excerpts of record described in this section. *(New 1/1/05; Rev. 12/1/09)*

30-1.3. Appellant's Initial Excerpts of Record

The appellant shall, unless exempt pursuant to Circuit Rule 30-1.2, submit the initial excerpts of record at the time appellant's opening brief is submitted. The excerpts shall be separate from the brief and submitted electronically unless appellant is exempt from the electronic filing requirement. On the same day the excerpts are submitted electronically, appellant shall serve one paper copy of the excerpts on any other party that is not registered for electronic filing, but shall defer submission of the paper copies of the excerpts to the Court until directed by the Clerk to do so. If appellant is exempt from the electronic filing requirement, appellant shall file the 4 paper copies of the excerpts at the time the brief is submitted, bound separately from the brief, and serve one paper copy on each of the other parties. *(Rev. 12/1/09, 3/23/16)*

Cross Reference:

- Circuit Rule 25-5. Electronic Filing on page 84, specifically, Circuit Rule 25-5(a), Parties exempt from electronic filing requirement.

30-1.4. Required Contents of the Excerpts of Record

(a) In all appeals, the excerpts of record shall include:

(i) the notice of appeal;

(ii) the trial court docket sheet;

(iii) the judgment or interlocutory order appealed from;

(iv) any opinion, findings of fact or conclusions of law relating to the judgment or order appealed from;

(v) any other orders or rulings, including minute orders, sought to be reviewed;

(vi) any jury instruction given or refused which presents an issue on appeal;

(vii) except as provided in Circuit Rule 30-1.4(b)(ii), where an issue on appeal is based upon a challenge to the admission or exclusion of evidence, that specific portion of the reporter's transcript recording any discussion by court or counsel involving the evidence, offer of proof, ruling or order, and objections at issue;

(viii) except as provided in Circuit Rule 30-1.4(b)(ii), where an issue on appeal is based upon a challenge to any other ruling, order, finding of fact, or conclusion of law, and that ruling, order, finding or conclusion was delivered orally, that specific portion of the reporter's transcript recording any discussion by court or counsel in which the assignment of error is alleged to rest;

(ix) where an issue on appeal is based upon a challenge to the allowance or rejection of jury instructions, that specific portion of the reporter's transcript recording any discussion by court or counsel involving the instructions at issue, including the ruling or order, and objections;

(x) where an issue on appeal is based on written exhibits (including affidavits), those specific portions of the exhibits necessary to resolve the issue; and

(xi) any other specific portions of any documents in the record that are cited in appellant's briefs and necessary to the resolution of an issue on appeal.

(b) In addition to the items required by Circuit Rule 30-1.4(a), in all criminal appeals and motions for relief under 28 U.S.C. § 2255, the excerpts of record shall also include:

(i) the final indictment; and

(ii) where an issue on appeal concerns matters raised at a suppression hearing, change of plea hearing or sentencing hearing, the relevant portions of reporter's transcript of that hearing.

(c) In addition to the items required by Circuit Rule 30-1.4(a), in civil appeals the excerpts of record shall also include: *(Rev. 7/1/03)*

(i) the final pretrial order, or, if the final pretrial order does not set out the issues to be tried, the final complaint and answer, petition and response, or other pleadings setting out those issues, and;

(ii) where the appeal is from the grant or denial of a motion, those specific portions of any affidavits, declarations, exhibits or similar attachments submitted in support of or in opposition to the motion that are essential to the resolution of an issue on appeal; and

(iii) where the appeal is from a district court order reviewing an agency's benefits determination, the entire reporter's transcript of proceedings before the administrative law judge if such transcript was filed with the district court. *(New 7/1/03)*

Cross Reference:

- Circuit Rule 28-2. Contents of Briefs on page 109, specifically, 28-2.5. Reviewability and Standard of Review on page 109

30-1.5. Items Not to Be Included in the Excerpts of Record

The excerpts of record shall not include briefs or other memoranda of law filed in the district court unless necessary to the resolution of an issue on appeal, and shall include only those pages necessary therefor. The presentence report, documents attached to the report, and any sentencing memoranda filed under seal in the district court shall not be included in the excerpts of record. *See* Cir. R. 27-13(d). *(Rev. 3/23/16)*

Cross Reference:

- Circuit Rule 30-2. Sanctions for Failure to Comply with Circuit Rule 30-1 on page 128

30-1.6. Format of Excerpts of Record

(a) Excerpts of record that exceed 75 pages

The first volume of the excerpts of record shall be limited to specific portions of the transcript containing any oral statements of decisions, the orders to be reviewed, any reports, opinions, memoranda or findings of fact or conclusions of law prepared by the district, magistrate, bankruptcy judge, bankruptcy appellate panel, and, in proceedings governed by 28 U.S.C. § 2254, the state reviewing court disposition, that relate to the issues being appealed. All additional documents shall be included in subsequent volumes of the excerpts. The documents in the first volume of the excerpts normally shall be arranged by file date in chronological order beginning with the document with the most

recent file date. The documents in subsequent volumes also normally shall be arranged by file date in chronological order beginning with the document with the most recent file date. Reporter's transcripts or portions thereof shall be placed according to the date of the hearing. The trial court docket shall always be the last document in the excerpts. The 4 copies of the excerpts are to be reproduced on letter size light paper by any duplicating or copying process capable of producing a clear black image. Each copy must be securely bound on the left side and must have a white cover styled as described in FRAP 32(a), except that the wording "Excerpts of Record" shall be substituted for "Brief of Appellant." The cover shall include the volume number. The excerpts must be either consecutively paginated beginning with page 1, or the documents marked with tabs corresponding to the tab number, if any, of the documents in the clerk's record. If tabs are used, the pages within the tabs must be consecutively paginated. The excerpts must begin with an index organized in the order the documents are presented describing the documents, exhibits and portions of the reporter's transcript contained therein, the location where the documents and exhibits may be found in the district court record, and the page where the documents, exhibits or transcript portions may be found in the excerpts. The excerpts shall be filed in multiple volumes, with each volume containing three hundred (300) pages or fewer. *(Rev. 7/1/98; 12/02; 7/1/07; 12/1/09)*

(b) Excerpts of Record that do not exceed 75 pages

The documents in the excerpts normally shall be arranged by file date in chronological order beginning with the document with the most recent file date. Reporter's transcripts or portions thereof shall be placed according to the date of the hearing. The document with the most recent file date should appear under the first tab or should be paginated beginning with page 1. The trial court docket shall always be the last document in the excerpts. The 4 copies of the excerpts are to be reproduced on letter size light paper by any duplicating or copying process capable of producing a clear black image. Each copy must be securely bound on the left side and must have a white cover styled as described in FRAP 32(a), except that the wording "Excerpts of Record" shall be substituted for "Brief of Appellant." The excerpts must be either consecutively paginated beginning with page 1, or the documents marked with tabs corresponding to the tab number, if any, of the documents in the clerk's record. If tabs are used, the pages within the tabs must be consecutively paginated. The excerpts must begin with an index organized in the order the documents are presented describing the documents, exhibits and portions of the reporter's transcript contained therein, the location where the documents and exhibits may be found in the district court record, and the page where the documents, exhibits or transcript portions may be found in the excerpts. *(Rev. 7/1/98, 12/02, 7/1/07; 12/1/09)*

(c) Excerpts of Record that include materials to be sealed

When the excerpts of record include documents: (1) required to be sealed pursuant to statute or rule and submitted under Ninth Circuit Rule 27-13(d); or (2) that are being submitted provisionally under seal pursuant to Ninth Circuit Rule 27-13(e) or (f); those documents shall be submitted in a separate, final volume of the excerpts. That volume is exempt from the chronological sequence set forth in subsections (a) and (b). If the prior volumes of the excerpts are consecutively paginated, that pagination shall continue in the final separate volume. *(Rev. 3/23/16)*

Cross Reference:

- Interim Circuit Rule 27-13. Sealed Documents on page 101, specifically, Circuit Rule 27-13(c), Form of Documents

CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 30-1.6

Although presentation of the excerpts' contents in chronological order is the customary method to proffer the documents, the parties may employ an alternative method of organization if that method seems better suited to the arguments offered in the brief. (New 7/1/07)

30-1.7. Appellee's Supplemental Excerpts of Record

If appellee believes that the excerpts of record filed by appellant exclude items which are required under this rule, or if argument in the answering brief requires review of portions of the reporter's transcript or other documents not included by appellant in the excerpts, appellee shall, unless exempt pursuant to Circuit Rule 30-1.2, at the time appellee's brief is submitted, submit supplemental excerpts of record, prepared pursuant to this rule, comprised of the omitted items. The supplemental excerpts shall be separate from the brief and submitted electronically unless appellee is exempt from the electronic filing requirement. On the same day the excerpts are submitted electronically, appellee shall serve one paper copy of the supplemental excerpts of record on any other party that is not registered for electronic filing, but shall defer submission of the paper copies of the excerpts to the Court until directed by the Clerk to do so. If appellee is exempt from the electronic filing requirement, appellee shall file the 4 paper copies of the supplemental excerpts at the time the brief is submitted, bound separately from the brief, and serve one paper copy on each of the other parties. *(Rev. 12/1/09, 3/23/16)*

If appellant did not file excerpts of record under subsection 30-1.3 of this rule, the contents of appellee's supplemental excerpts are limited to the district court docket sheet, the notice of appeal, the judgment or order appealed from, and any specific portions of the record cited in appellee's brief. *(New 1/1/05)*

Cross Reference:

- Circuit Rule 25-5. Electronic Filing on page 84, specifically, Circuit Rule 25-5(a), Parties exempt from electronic filing requirement

30-1.8. Further Excerpts of Record

(a) If the reply brief requires review of portions of the reporter's transcript or other documents not included in the previously filed excerpts, appellant shall, unless exempt pursuant to Circuit Rule 30-1.2, at the time the reply brief is submitted, submit further excerpts of record. The further excerpts shall be separate from the brief and submitted electronically unless appellant is exempt from the electronic filing requirement. On the same day the further excerpts are submitted electronically, appellant shall serve one paper copy of such excerpts of record on any other party that is not registered for electronic

filing, but shall defer submission of the paper copies of the excerpts to the Court until directed by the Clerk to do so. If appellant is exempt from the electronic filing requirement, appellant shall file the 4 paper copies of the excerpts at the time the brief is submitted, bound separately from the brief, and serve one paper copy on each of the other parties. *(Rev. 12/1/09, 3/23/16)*

(b) If a supplemental brief filed pursuant to court order requires review of portions of the reporter's transcript or other documents not included in any previously filed excerpts, the party filing the supplemental brief, shall, at the time the supplemental brief is submitted, submit further excerpts of record. The further excerpts shall be separate from the brief and submitted electronically unless the filing party is exempt from the electronic filing requirement. On the same day the excerpts are submitted electronically, the filing party shall serve one paper copy of such excerpts of record on any other party that is not registered for electronic filing, but shall defer submission of the paper copies of the excerpts to the Court until directed by the Clerk to do so. If the filing party is exempt from the electronic filing requirement, the party shall file the 4 paper copies of the excerpts at the time the brief is submitted, bound separately from the brief, and serve one paper copy on each of the other parties. *(Eff. 7/1/98; Rev. 12/1/09, 3/23/16)*

Cross Reference:

- Circuit Rule 25-5. Electronic Filing on page 84, specifically, Circuit Rule 25-5(a), Parties exempt from electronic filing requirement

30-1.9. Additional Copies of the Excerpts of Record

Should the Court of Appeals consider a case en banc, the Clerk of the Court of Appeals will require counsel to submit an additional 20 copies of the excerpts of record.

30-1.10. Presentence Reports

[Abrogated 3/23/16]

CIRCUIT RULE 30-2. SANCTIONS FOR FAILURE TO COMPLY WITH CIRCUIT RULE 30-1

If materials required to be included in the excerpts under these rules are omitted, or irrelevant materials are included, the Court may take one or more of the following actions:

(a) strike the excerpts and order that they be corrected and resubmitted;

(b) order that the excerpts be supplemented;

(c) if the Court concludes that a party or attorney has vexatiously or unreasonably increased the cost of litigation by inclusion of irrelevant materials, deny that portion of the costs the Court deems to be excessive; and/or

(d) impose monetary sanctions.

Counsel will be provided notice and have an opportunity to respond before sanctions are imposed.

CIRCUIT RULE 30-3. PRISONER APPEALS WITHOUT REPRESENTATION BY COUNSEL

In cases involving appeals by prisoners not represented by counsel, the clerk of the district court shall, within 21 days from the receipt of the prisoner's written request, forward to the prisoner copies of the documents to comprise the excerpts of record. *(Rev. 12/1/09)*

FRAP 31. SERVING AND FILING BRIEFS

(a) Time to Serve and File a Brief.

(1) The appellant must serve and file a brief within 40 days after the record is filed. The appellee must serve and file a brief within 30 days after the appellant's brief is served. The appellant may serve and file a reply brief within 14 days after service of the appellee's brief but a reply brief must be filed at least 7 days before argument, unless the court, for good cause, allows a later filing.

(2) A court of appeals that routinely considers cases on the merits promptly after the briefs are filed may shorten the time to serve and file briefs, either by local rule or by order in a particular case.

(b) Number of Copies. Twenty-five copies of each brief must be filed with the clerk and 2 copies must be served on each unrepresented party and on counsel for each separately represented party. An unrepresented party proceeding in forma pauperis must file 4 legible copies with the clerk, and one copy must be served on each unrepresented party and on counsel for each separately represented party. The court may by local rule or by order in a particular case require the filing or service of a different number.

(c) Consequence of Failure to File. If an appellant fails to file a brief within the time provided by this rule, or within an extended time, an appellee may move to dismiss the appeal. An appellee who fails to file a brief will not be heard at oral argument unless the court grants permission.

(As amended Mar. 30, 1970, eff. July 1, 1970; Mar. 10, 1986, eff. July 1, 1986; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; Mar. 26, 2009, eff. Dec. 1, 2009.)

CIRCUIT RULE 31-1. NUMBER OF BRIEFS

In lieu of the 25 copies required by FRAP 31(b), an original and 7 copies of each brief shall be filed. Parties submitting a brief electronically shall defer submission of paper copies of the brief pending a directive from the Clerk to do so, but must serve any unregistered party or exempt counsel with one paper copy of the brief on the day that the brief is submitted electronically. If a petition for hearing or rehearing en banc is granted, each party shall file 20 additional copies of its briefs. The appellant shall also file 20 additional copies of the excerpts of record. *(Rev. 12/1/09)*

CIRCUIT RULE 31-2. TIME FOR SERVICE AND FILING

31-2.1. Requirement of Timely Filing

(a) Parties shall observe the briefing schedule set by an order of the Court of Appeals. Specific due dates set by Court order are not subject to the additional 3-day allowance for service of previous papers by mail set forth in FRAP 26(c) or Circuit Rule 26-2. The filing of the appellant's brief before the due date shall not advance the due date for the appellee's brief. *(Rev. 12/1/09)*

(b) *[Abrogated 12/1/09]*

(c) *[Abrogated 1/99]*

31-2.2. Extensions of Time for Filing Briefs

(a) Streamlined Extensions of Time: If a party has not previously filed a motion for an extension of time to file an opening, answering, reply or cross-appeal brief under subsection (b) of this rule, that party may obtain a single streamlined extension of time to file that brief not to exceed 30 days. The streamlined extension of time is not available:

(1) if a case has been previously expedited;

(2) when a Notice of Oral Argument has issued; or

(3) for any brief filed in a Preliminary Injunction Appeal (Ninth Circuit Rule 3-3), an Incarcerated Recalcitrant Witness Appeal (28 U.S.C. § 1826; Ninth Circuit Rule 3-5) or a Class Action Fairness Act appeal (28 U.S.C. § 1453(c)).

Parties registered for electronic filing may request a streamlined extension of time online via the Appellate CM/ECF system using the "File Streamlined Request to Extend Time to File Brief" event. A request must be made on or before the brief's due date.

Parties not registered for electronic filing may request a streamlined extension of time by completing Form 13 and placing the form in the mail to the Clerk on or before the brief's due date.

The Clerk will approve requests that comply with the rule and will provide the parties with a new schedule. The Clerk will inform parties not eligible for relief under this subsection as to the appropriate method to obtain relief. *(Rev. 1/1/15)*

(b) Written Motions for Extension of Time to File a Brief: In all other cases, an extension of time may be granted only upon written motion supported by a showing of diligence and substantial need. *(Rev. 1/1/15)*

The motion shall be filed at least 7 days before the expiration of the time prescribed for filing the brief, and shall be accompanied by a declaration stating: *(Rev. 12/1/09)*

(1) when the brief is due;

(2) when the brief was first due;

(3) the length of the requested extension;

(4) the reason an extension is necessary;

(5) movant's representation that movant has exercised diligence and that the brief will be filed within the time requested;

(6) whether any other party separately represented objects to the request, or why the moving party has been unable to determine any such party's position; and

(7) that the court reporter is not in default with regard to any designated transcripts. *(Rev. 12/1/09)*

A conclusory statement as to the press of business does not constitute a showing of diligence and substantial need. *(Rev. 1/96)*

Cross Reference: *(Rev. 12/1/09; Rev. 1/1/15; Rev. 7/1/16)*

- Circuit Rule 11-1. Filing the Reporter's Transcript on page 38, specifically, 11-1.2. Notice of Reporter Defaults on page 39
- Circuit Rule 27-11. Motions; Effect on Schedule on page 100
- Circuit Advisory Committee Note to Rule 32-2 (effect on schedule of motion for leave to file longer brief) on page 138

CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 31-2.2

If a party files a motion for a first extension of time to file a brief on or before the due date for the brief, and the Court does not rule on the motion until shortly before the due date, or on or after the due date for the brief, the Court ordinarily will grant some additional time to file the brief even if the Court does not grant the motion in full. Multiple motions for extension of time to file a brief are disfavored, however, and the Court may decline to grant relief if a successive motion fails to demonstrate diligence and substantial need.

If the Court does not act on a motion for extension of time to file a brief before the requested due date, the Court nonetheless expects the moving party to file the brief within the time requested in the motion. The brief should be accompanied by a letter stating that a motion for an extension of time is pending.

The streamlined extension of time is available only for opening, answering, reply and cross-appeal briefs. A request to extend any other deadline must be made by way of written motion. The streamlined extension of time is intended to be the sole extension of time to file a brief; parties should file a written motion if 30 days is not sufficient time to prepare the brief. If a streamlined extension of time is approved, any further request for an extension of time to file a brief must be made in writing pursuant to Circuit Rule 31-2.2(b). The Clerk's approval of a party's streamlined extension of time to file an initial brief does not prevent that party from obtaining a streamlined extension of time to file a subsequent brief.

The streamlined extension of time replaces the former 14-day telephonic extension of time. (New 01/01; Rev. 12/1/09; Rev. 1/1/15)

31-2.3. Failure to File Briefs

If the appellant fails to file a brief within the time allowed by FRAP 31(a) or an extension thereof, the Court may dismiss the appeal pursuant to Circuit Rule 42-1. If appellee does not elect to file a brief, appellee shall notify the Court by letter on or before the due date for the answering brief. Failure to file the brief timely or advise the Court that no brief will be filed will subject counsel to sanctions. *(Rev. 7/93; 12/1/09)*

Cross Reference:

- Circuit Rule 42-1. Dismissal for Failure to Prosecute on page 165

FRAP 32. FORM OF BRIEFS, APPENDICES, AND OTHER PAPERS

(a) Form of a Brief.

(1) Reproduction.

(A) A brief may be reproduced by any process that yields a clear black image on light paper. The paper must be opaque and unglazed. Only one side of the paper may be used.

(B) Text must be reproduced with a clarity that equals or exceeds the output of a laser printer.

(C) Photographs, illustrations, and tables may be reproduced by any method that results in a good copy of the original; a glossy finish is acceptable if the original is glossy.

(2) Cover. Except for filings by unrepresented parties, the cover of the appellant's brief must be blue; the appellee's, red; an intervenor's or amicus curiae's, green; any reply brief, gray and any supplemental brief, tan. The front cover of a brief must contain:

(A) the number of the case centered at the top;

(B) the name of the court;

(C) the title of the case (*see* Rule 12(a));

(D) the nature of the proceeding (e.g., Appeal, Petition for Review) and the name of the court, agency, or board below;

(E) the title of the brief, identifying the party or parties for whom the brief is filed; and

(F) the name, office address, and telephone number of counsel representing the party for whom the brief is filed.

(3) Binding. The brief must be bound in any manner that is secure, does not obscure the text, and permits the brief to lie reasonably flat when open.

(4) Paper Size, Line Spacing, and Margins. The brief must be on 8½ by 11 inch paper. The text must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all four sides. Page numbers may be placed in the margins, but no text may appear there.

(5) Typeface. Either a proportionally spaced or a monospaced face may be used.

(A) A proportionally spaced face must include serifs, but sans-serif type may be used in headings and captions. A proportionally spaced face must be 14-point or larger.

(B) A monospaced face may not contain more than 10½ characters per inch.

(6) **Type Styles.** A brief must be set in a plain, roman style, although italics or boldface may be used for emphasis. Case names must be italicized or underlined.

(7) **Length.**

(A) **Page limitation.** A principal brief may not exceed 30 pages, or a reply brief 15 pages, unless it complies with Rule 32(a)(7)(B).

(B) **Type-volume limitation.**

(i) A principal brief is acceptable if it:

- contains no more than 13,000 words; or
- uses a monospaced face and contains no more than 1,300 lines of text.

(ii) A reply brief is acceptable if it contains no more than half of the type volume specified in Rule 32(a)(7)(B)(i).

(iii) Headings, footnotes, and quotations count toward the word and line limitations. The corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, any addendum containing statutes, rules or regulations, and any certificates of counsel do not count toward the limitation.

(C) **Certificate of compliance.**

(i) A brief submitted under Rules 28.1(e)(2) or 32(a)(7)(B) must include a certificate by the attorney, or an unrepresented party, that the brief complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the brief. The certificate must state either:

- the number of words in the brief; or
- the number of lines of monospaced type in the brief.

(ii) Form 6 in the Appendix of Forms is a suggested form of a certificate of compliance. Use of Form 6 must be regarded as sufficient to meet the requirements of Rules 28.1(e)(3) and 32(a)(7)(C)(i).

(b) **Form of an Appendix.** An appendix must comply with Rule 32(a)(1), (2), (3), and (4), with the following exceptions:

(1) The cover of a separately bound appendix must be white.

(2) An appendix may include a legible photocopy of any document found in the record or of a printed judicial or agency decision.

(3) When necessary to facilitate inclusion of odd-sized documents such as technical drawings, an appendix may be a size other than 8½ by 11 inches, and need not lie reasonably flat when opened.

(c) Form of Other Papers.

(1) Motion. The form of a motion is governed by Rule 27(d).

(2) Other Papers. Any other paper, including a petition for panel rehearing and a petition for hearing or rehearing en banc, and any response to such a petition, must be reproduced in the manner prescribed by Rule 32(a), with the following exceptions:

(A) A cover is not necessary if the caption and signature page of the paper together contain the information required by Rule 32(a)(2). If a cover is used, it must be white.

(B) Rule 32(a)(7) does not apply.

(d) Signature. Every brief, motion, or other paper filed with the court must be signed by the party filing the paper or, if the party is represented, by one of the party's attorneys.

(e) Local Variation. Every court of appeals must accept documents that comply with the form requirements of this rule and the length limits set by these rules. By local rule or order in a particular case, a court of appeals may accept documents that do not meet all of the form requirements of this rule or the length limits set by these rules.

(f) Items Excluded From Length. In computing any length limit, headings, footnotes, and quotations count toward the limit but the following items do not:

- the cover page;
- a corporate disclosure statement;
- a table of contents;
- a table of citations;
- a statement regarding oral argument;
- an addendum containing statutes, rules, or regulations;
- certificates of counsel;
- the signature block;
- the proof of service; and
- any item specifically excluded by these rules or by local rule.

(g) Certificates of Compliance.

(1) Briefs and Papers That Require a Certificate.

A brief submitted under Rules 28.1(e)(2), 29(b)(4), or 32(a)(7)(B)—and a paper submitted under Rules 5(c)(1), 21(d)(1), 27(d)(2)(A), 27(d)(2)(C), 35(b)(2)(A), or 40(b)(1)—must include a certificate by the attorney, or an unrepresented party,

that the document complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the document. The certificate must state the number of words—or the number of lines of monospaced type—in the document.

(2) Acceptable Form.

Form 6 in the Appendix of Forms meets the requirements for a certificate of compliance.

(As amended Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 25, 2005, eff. Dec. 1, 2005; Apr. 28, 2016, eff. Dec. 1, 2016.)

CIRCUIT RULE 32. FORM OF BRIEF

[Abrogated 1/1/99]

See FRAP 32. Form of Briefs, Appendices, and Other Papers on page134, effective December 1, 1998.

CIRCUIT RULE 32-1. LENGTH AND FORM OF BRIEFS, CERTIFICATE OF COMPLIANCE

(a) **Principal Briefs:** The opening and answering briefs filed by appellant and appellee, respectively, may not exceed 14,000 words. *(New 12/1/16)*

(b) **Reply Brief:** The reply brief filed by appellant may not exceed half of the length set forth in (a) above. *(New 12/1/16)*

(c) **Exclusions:** The portions of the brief required by FRAP 32(f) are excluded from the length limit calculation. *(New 12/1/16)*

(d) **Form:** FRAP 32(a)(1) – (6) otherwise governs the brief's form. *(New 12/1/16)*

(e) **Certificate of Compliance:** A brief using a word count calculation of its length must be accompanied by Form 8, found on the Court's website. *(New 12/1/16)*

(f) **Handwritten or Typewritten Briefs:** A handwritten or typewritten opening or answering brief may not exceed 50 pages. A handwritten or typewritten reply brief may not exceed 25 pages. *(New 12/1/16)*

(Rev. 12/1/02; Rev. 12/1/16)

CIRCUIT RULE 32-2. REQUESTS TO EXCEED THE PAGE OR TYPE-VOLUME LIMITS

(a) **Motions:** The Court looks with disfavor on motions to exceed the applicable page or type-volume limits. Such motions will be granted only upon a showing of diligence and substantial need. A motion for permission to exceed the applicable page or type-volume limits must be filed on or before the brief's due date and must be accompanied by a declaration stating in detail the reasons for the motion.

Any such motions shall be accompanied by a single copy of the brief that the applicant proposes to file and a Form 8 certification as required by Circuit Rule 32-1 as to the word count. The cost of preparing and revising the brief will not be considered by the Court in ruling on the motion.

(b) **When Longer Briefs are Allowed Automatically:** If no order lengthening the page or type-volume limit has been obtained previously, the Court will allow an extra 5 pages or 1,400 words to separately represented parties that are filing a joint brief. That same longer limit also will be provided to a party or parties that file a single brief answering or replying to either (1) multiple briefs or (2) a longer joint brief filed pursuant to this subsection. Briefs submitted under this subsection must be accompanied by Form 8. (*New 7/1/16*)

CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 32-2

If the Court does not grant a motion for leave to file a longer brief, or grants the motion only in part, the Court ordinarily will provide the party or parties a reasonable interval after the entry of the order to file a brief as directed by the Court. Any order that decides a motion will make adjustments to the due date(s) for any further briefing.

Rule 32-2(b) encourages separately represented parties to file a joint brief to avoid burdening the Court with repetitive presentations of common facts and issues. The routine lengthening of page or type-volume provided by the rule is intended to accommodate the additional length that may be necessary to permit preparation of a joint brief. A litigant responding to the opposing party's brief as well as an amicus curiae brief filed under FRAP 29(a) is also eligible to file a longer brief automatically.

If a brief that exceeds the usual length limits is submitted by a party or parties ineligible for relief under Rule 32-2(b), the Clerk will provide the parties with an interval within which to file a motion under Rule 32-2(a). (Rev. 1/1/07; Rev. 7/1/16)

CIRCUIT RULE 32-3. PAGE/WORD COUNT CONVERSION FORMULA FOR BRIEFS AND OTHER DOCUMENTS

All briefs filed pursuant to court order must conform to the format requirements of FRAP 32(a)(1) – (6).

If an order or rule of this Court sets forth a page limit for a brief or other document, the affected party may comply with the limit by:

(1) filing a monospaced brief of the designated number of pages, or

(2) filing a monospaced or proportionally spaced brief or other document in which the word count divided by 280 does not exceed the designated page limit. *(Rev. 12/1/16)*

CIRCUIT RULE 32-4. BRIEFS AND EXCERPTS OF RECORD IN CAPITAL CASES

Briefs. The requirements of FRAP 32(a)(1) – (6) apply to appeals from district court judgments which finally dispose of a capital case, except that the following type-volume limitation also applies: a principal brief may not exceed 21,000 words and a reply brief may not exceed 9,800 words. The length limit excludes the materials listed at FRAP 32(f). The brief must be accompanied by the Form 8 certificate of compliance. *(Rev. 12/1/16)*

Excerpts. The appellant shall prepare and file excerpts of record in compliance with Circuit Rule 30-1. An appellant unable to obtain all or parts of the record shall so notify the Court.

In addition to the documents listed in Circuit Rule 30-1.3, excerpts of record in capital cases shall contain all final orders and rulings of all state courts in appellate and post-conviction proceedings. Excerpts of record shall also include all final orders involving the conviction or sentence issued by the Supreme Court of the United States.

CIRCUIT RULE 32-5. UNREPRESENTED LITIGANTS

(Abrogated 12/1/16)

Cross Reference:

- Circuit Rule 28-1. Briefs, Applicable Rules on page 108
- Circuit Rule 32-1. Length and Form of Briefs, Certificate of Compliance on page 137

FRAP 32.1. CITING JUDICIAL DISPOSITIONS

(a) **Citation Permitted.** A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been:

(i) designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like; and

(ii) issued on or after January 1, 2007.

(b) **Copies Required.** If a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited.

(As added Apr. 12, 2006, eff. Dec. 1, 2006.)

FRAP 33. APPEAL CONFERENCES

The court may direct the attorneys—and, when appropriate, the parties—to participate in one or more conferences to address any matter that may aid in disposing of the proceedings, including simplifying the issues and discussing settlement. A judge or other person designated by the court may preside over the conference, which may be conducted in person or by telephone. Before a settlement conference, the attorneys must consult with their clients and obtain as much authority as feasible to settle the case. The court may, as a result of the conference, enter an order controlling the course of the proceedings or implementing any settlement agreement.

(As amended Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998.)

CIRCUIT RULE 33-1. CIRCUIT MEDIATION OFFICE

(Rev. 12/1/09, Rev. 7/1/13)

(a) **Purpose.** The function of the Circuit Mediation Office is to facilitate the voluntary resolution of cases.

(b) **Attendance at Mediation Conferences.** A judge or circuit mediator may require the attendance of parties, and counsel at a conference or conferences to explore settlement-related issues.

(c) **Confidentiality.** To encourage efficient and frank settlement discussions, the Court establishes the following rules to achieve strict confidentiality of the mediation process.

(1) The Circuit Mediators will not disclose mediation related communications to the judges or court staff outside the mediation unit.

(2) Documents, e-mail and other correspondence sent only to the Circuit Mediators or to the mediation unit are maintained separately from the court's electronic filing and case management system and are not made part of the public docket.

(3) Should a Circuit Mediator confer separately with any participant in a mediation, those discussions will be maintained in confidence from the other participants in the settlement discussions to the extent that that participant so requests.

(4) Any person, including a Circuit Mediator, who participates in the Circuit Mediation Program must maintain the confidentiality of the settlement process. The confidentiality provisions that follow apply to any communication made at any time in the Ninth Circuit mediation process, including all telephone conferences. Any written or oral communication made by a Circuit Mediator, any party, attorney, or other participant in the settlement discussions:

(A) except as provided in (B), may not be used for any purpose except with the agreement of all parties and the Circuit Mediator; and

(B) may not be disclosed to anyone who is not a participant in the mediation except

(i) disclosure may be made to a client or client representative, an attorney or co-counsel, an insurance representative, or an accountant or other agent of a participant on a need-to-know basis, but only upon receiving assurance from the recipient that the information will be kept confidential;

(ii) disclosure may be made in the context of a subsequent confidential mediation or settlement conference with the agreement of all parties. Consent of the Circuit Mediator is not required.

(5) Written settlement agreements are not confidential except as agreed by the parties.

(6) This rule does not prohibit disclosures that are otherwise required by law. *(New 7/1/13)*

(d) **Binding Determinations by Appellate Commissioner.** In the context of a settlement or mediation in a civil appeal, the parties who have otherwise settled the case may stipulate to have one or more issues in the appeal submitted to an appellate commissioner for a binding determination.

CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 33-1

(a) ***Mediation Conferences.*** *The Circuit Mediation Office is staffed with experienced attorney mediators and is an independent unit in the Court. In any case, the Court may direct that a conference be held, in-person or over the telephone, with counsel, or with counsel and the parties or key personnel. A judge who conducts a settlement conference pursuant to this rule will not participate in the decision on any aspect of the case, except that he or she may vote on whether to take a case en banc. (Rev. 12/1/09; Rev. 7/1/13)*

Requests by counsel for a conference will be accommodated whenever possible. Parties may request conferences confidentially, either by telephone or by letter directed to the Chief Circuit Mediator. (Rev. 12/1/09)

The briefing schedule established by the Clerk's office at the time the appeal is docketed remains in effect unless adjusted by a court mediator to facilitate settlement, or by the Clerk's office pursuant to Circuit Rule 31-2.2.

Counsel should discuss settlement with their principals prior to a conference scheduled under this rule. (Rev. 12/1/09)

(b) ***Appeal Case Management Conference.*** *In any case the Court may direct either sua sponte or upon request of a party that a telephone or in-person case management conference be held before an Appellate Commissioner, a senior staff member in the Clerk's office, or a staff attorney. The purpose of a case management conference is to manage the appeal effectively and develop a briefing plan for complex appeals. If a case is selected for a case management conference, counsel shall be notified by order of the date and time of the conference. Case management conferences are held only in exceptional circumstances, such as complex cases involving numerous separately represented litigants or extensive district court/agency proceedings. (Rev. 1/97)*

(c) ***Binding Determinations by Appellate Commissioner.*** *Where the parties enter into such a stipulation as set forth at (d) above, the matter may be handled with abbreviated and accelerated briefing and a guaranteed opportunity for in-person or telephonic oral argument before the Appellate Commissioner. The Appellate Commissioner will issue a determination and, if requested, a written statement of reasons. The determination will have no precedential effect and will be final and nonreviewable. Cases will ordinarily be referred to the Appellate Commissioner through the Court's mediation program. In some instances, the Court's pro se unit may also alert parties to the availability of this program. For further information, please contact the Circuit Mediation Office at (415) 355-7900. (New 7/1/01; Rev. 7/1/13)*

FRAP 34. ORAL ARGUMENT

(a) In General.

(1) Party's Statement. Any party may file, or a court may require by local rule, a statement explaining why oral argument should, or need not, be permitted.

(2) Standards. Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for any of the following reasons:

(A) the appeal is frivolous;

(B) the dispositive issue or issues have been authoritatively decided; or

(C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

(b) Notice of Argument; Postponement. The clerk must advise all parties whether oral argument will be scheduled, and, if so, the date, time, and place for it, and the time allowed for each side. A motion to postpone the argument or to allow longer argument must be filed reasonably in advance of the hearing date.

(c) Order and Contents of Argument. The appellant opens and concludes the argument. Counsel must not read at length from briefs, records, or authorities.

(d) Cross-Appeals and Separate Appeals. If there is a cross-appeal, Rule 28.1(b) determines which party is the appellant and which is the appellee for purposes of oral argument. Unless the court directs otherwise, a cross-appeal or separate appeal must be argued when the initial appeal is argued. Separate parties should avoid duplicative argument.

(e) Nonappearance of a Party. If the appellee fails to appear for argument, the court must hear appellant's argument. If the appellant fails to appear for argument, the court may hear the appellee's argument. If neither party appears, the case will be decided on the briefs, unless the court orders otherwise.

(f) Submission on Briefs. The parties may agree to submit a case for decision on the briefs, but the court may direct that the case be argued.

(g) Use of Physical Exhibits at Argument; Removal. Counsel intending to use physical exhibits other than documents at the argument must arrange to place them in the courtroom on the day of the argument before the court convenes. After the argument, counsel must remove the exhibits from the courtroom, unless the court directs otherwise. The clerk may destroy or dispose of the exhibits if counsel does not reclaim them within a reasonable time after the clerk gives notice to remove them.

(As amended Apr. 1, 1979, eff. Aug. 1, 1979; Mar. 10, 1986, eff. July 1, 1986; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 25, 2005, eff. Dec. 1, 2005.)

CIRCUIT RULE 34-1. PLACE OF HEARING

Appeals, applications for original writs, and petitions to review or enforce orders or decisions of administrative agencies may be heard at any session of the Court in the circuit, as designated by the Court. Cases are generally heard in the administrative units where they arise. Petitions to enforce or review orders or decisions of boards, commissions or other administrative bodies shall be heard in the administrative unit in which the person affected by the order or decision is a resident, unless another place of hearing is ordered by the Court.

CIRCUIT RULE 34-2. CHANGE OF TIME OR PLACE OF HEARING

No change of the day or place assigned for hearing will be made except by order of the Court for good cause. Only under exceptional circumstances will the Court grant a request to vacate a setting within 14 days of the date set.

CIRCUIT RULE 34-3. PRIORITY CASES

Any party who believes the case before the Court is entitled to priority in hearing date by virtue of any statute or rule, shall so inform the Clerk in writing no later than the filing of the first brief.

Criminal appeals shall have first priority in hearing or submission date.

Civil appeals in the following categories will receive hearing or submission priority:

(1) Recalcitrant witness appeals brought under 28 U.S.C. § 1826;

(2) Habeas corpus petitions brought under Chapter 153 of Title 28;

(3) Applications for temporary or permanent injunctions;

(4) Appeals alleging deprivation of medical care to the incarcerated or other cruel or unusual punishment;

(5) Appeals entitled to priority on the basis of good cause under 28 U.S.C. § 1657.

Any party who believes the case is entitled to priority in scheduling the date of hearing or submission solely on the basis of good cause under 28 U.S.C. § 1657 shall file a motion for expedition with the clerk at the earliest opportunity.

CIRCUIT RULE 34-4. CLASSES OF CASES TO BE SUBMITTED WITHOUT ORAL ARGUMENT

[Abrogated 1/1/99]

(*See* FRAP 34(a)(2))

CIRCUIT ADVISORY COMMITTEE NOTE TO RULES 34-1 TO 34-3

(1) ***Appeals Raising the Same Issues.*** *When other pending cases raise the same legal issues, the Court may advance or defer the hearing of an appeal so that related issues can be heard at the same time. Cases involving the same legal issue are identified during the Court's inventory process. The first panel to whom the issue is submitted has priority. Normally, other panels will enter orders vacating submission and advise counsel of the other pending case when it appears that the first panel's decision is likely to be dispositive of the issue .*

Panels may also enter orders vacating submission when awaiting the decision of a related case before another court or administrative agency. (Rev. 12/1/09)

(2) ***Oral Argument.*** *Any party to a case may request, or all parties may agree to request, a case be submitted without oral argument. This request or stipulation requires the approval of the panel. Oral argument will not be vacated if any judge on the panel desires that a case be heard. See FRAP 34(f). The Court thoroughly reviews the briefs before oral argument. Counsel therefore should not unnecessarily repeat information and arguments already sufficiently covered in their briefs. Counsel should be completely familiar with the factual record, so as to be prepared to answer relevant questions.*

(3) ***Disposition.*** *One judge prepares a draft disposition. The draft is sent to the other two judges for the purpose of obtaining their comments, concurrences, or dissents. Upon adoption of a majority disposition, the author sends it to the Clerk along with any separate concurring or dissenting opinions.*

(4) ***Mandate.*** *The mandate of the Court shall issue to the lower tribunal 7 days after expiration of the period to file a petition for rehearing unless the time is shortened or extended by order. (See FRAP 41.) This allows time for filing a petition for rehearing, petition for rehearing en banc, and motion for stay of mandate pending application for writ of certiorari. (Rev. 12/1/09; Rev. 7/1/16)*

FRAP 35. EN BANC DETERMINATION

(a) **When Hearing or Rehearing En Banc May Be Ordered.** A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:

(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or

(2) the proceeding involves a question of exceptional importance.

(b) **Petition for Hearing or Rehearing En Banc.** A party may petition for a hearing or rehearing en banc.

(1) The petition must begin with a statement that either:

(A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or

(B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.

(2) Except by the court's permission:

(A) a petition for an en banc hearing or rehearing produced using a computer must not exceed 3,900 words; and

(B) a handwritten or typewritten petition for an en banc hearing or rehearing must not exceed 15 pages.

(3) For purposes of the limits in Rule 35(b)(2), if a party files both a petition for panel rehearing and a petition for rehearing en banc, they are considered a single document even if they are filed separately, unless separate filing is required by local rule.

(c) Time for Petition for Hearing or Rehearing En Banc. A petition that an appeal be heard initially en banc must be filed by the date when the appellee's brief is due. A petition for a rehearing en banc must be filed within the time prescribed by Rule 40 for filing a petition for rehearing.

(d) **Number of Copies.** The number of copies to be filed must be prescribed by local rule and may be altered by order in a particular case.

(e) **Response.** No response may be filed to a petition for an en banc consideration unless the court orders a response. (f) Call for a Vote. A vote need not be taken to determine whether the case will be heard or reheard en banc unless a judge calls for a vote.

(As amended Apr. 1, 1979, eff. Aug. 1, 1979; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 25, 2005, eff. Dec. 1, 2005; Apr. 28, 2016, eff. Dec. 1, 2016.)

CIRCUIT RULE 35-1. PETITION FOR REHEARING EN BANC

Where a petition for rehearing en banc is made pursuant to FRAP 35(b) in conjunction with a petition for panel rehearing, a reference to the petition for rehearing en banc, as well as to the petition for panel rehearing, shall appear on the cover of the petition. *(Rev. 12/1/09)*

When the opinion of a panel directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity, the existence of such conflict is an appropriate ground for petitioning for rehearing en banc. *(Rev. 12/1/09)*

CIRCUIT RULE 35-2. OPPORTUNITY TO RESPOND

Where a party petitions for hearing or rehearing en banc, the Court will not order a hearing or rehearing en banc without giving the other parties an opportunity to express their views whether hearing or rehearing en banc is appropriate. Where no petition for en banc review is filed, the Court will not ordinarily order a hearing or rehearing en banc without giving counsel an opportunity to respond on the appropriateness of such a hearing. *(Rev. 12/1/09)*

CIRCUIT RULE 35-3. LIMITED EN BANC COURT

The en banc court, for each case or group of related cases taken en banc, shall consist of the Chief Judge of this circuit and 10 additional judges to be drawn by lot from the active judges of the Court. In the absence of the Chief Judge, an 11th active judge shall be drawn by lot, and the most senior active judge on the panel shall preside. *(Rev. 1/1/06, 7/1/07)*

The drawing of the en banc court will be performed by the Clerk or a deputy clerk of the Court in the presence of at least one judge and shall take place on the first working day following the date of the order taking the case or group of related cases en banc.

If a judge whose name is drawn for a particular en banc court is disqualified, recused, or knows that he or she will be unable to sit at the time and place designated for the en banc case or cases,

the judge will immediately notify the Chief Judge who will direct the Clerk to draw a replacement judge by lot. *(Rev. 1/1/06)*

In appropriate cases, the Court may order a rehearing by the full court following a hearing or rehearing en banc.

Cross Reference:

- FRAP 40. Petition for Panel Rehearing on page 160

CIRCUIT ADVISORY COMMITTEE NOTE TO RULES 35-1 TO 35-3

(1) ***Calculation of Filing Deadline.*** *Litigants are reminded that a petition for rehearing en banc must be received by the clerk in San Francisco on the due date. See FRAP 25(a)(1) and (2)(A) and Circuit Rule 25-2; see also United States v. James, 146 F.3d 1183 (9th Cir. 1998). (Rev. 12/1/02; 12/1/09; 1/1/12)*

(2) ***Petition for Rehearing En Banc.*** *When the clerk receives a timely petition for rehearing en banc, copies are sent to all active judges. If the panel grants rehearing it so advises the other members of the Court, and the petition for rehearing en banc is deemed rejected without prejudice to its renewal after the panel completes action on the rehearing. Cases are rarely reheard en banc.*

If no petition for rehearing en banc has been submitted and the panel votes to deny rehearing an order to that effect will be prepared and filed.

If a petition for rehearing en banc has been made, any judge may, within 21 days from receipt of the en banc petition, request the panel to make known its recommendation as to en banc consideration. Upon receipt of the panel's recommendation, any judge has 14 days to call for en banc consideration, whereupon a vote will be taken. If no judge requests or gives notice of an intention to request en banc consideration within 21 days of the receipt of the en banc petition, the panel will enter an order denying rehearing and rejecting the petition for rehearing en banc.

Any active judge who is not recused or disqualified and who entered upon active service before the request for an en banc vote is eligible to vote. A judge who takes senior status after a call for a vote may not vote or be drawn to serve on the en banc court. This rule is subject to two exceptions: (1) a judge who takes senior status during the pendency of an en banc case for which the judge has already been chosen as a member of the en banc court may continue to serve on that court until the case is finally disposed of; and (2) a senior judge may elect to be eligible, in the same manner as an active judge, to be selected as a member of the en banc court when it reviews a decision of a panel of which the judge was a member.

The En Banc Coordinator notifies the judges when voting is complete. If the

recommendation or request fails of a majority, the En Banc Coordinator notifies the judges and the panel resumes control of the case. The panel then enters an appropriate order denying en banc consideration. The order will not specify the vote tally.

(3) ***Grant of Rehearing En Banc.*** *When the Court votes to rehear a matter en banc, the Chief Judge will enter an order so indicating. The vote tally is not communicated to the parties. The three-judge panel opinion shall not be cited as precedent by or to this Court or any district court of the Ninth Circuit, except to the extent adopted by the en banc court. (Rev. 1/1/00)*

After the en banc court is chosen, the judges on the panel decide whether there will be oral argument or additional briefing. If there is to be oral argument, the Chief Judge (or the next senior active judge as the case may be) will enter an order designating the date, time and place of argument. If no oral argument is to be heard, the Chief Judge will designate a date, time, and place for a conference of the en banc court. That date will ordinarily be the submission date of the case. If any issues have been isolated for specific attention, the order may also set forth those issues and additional briefing may be ordered. (Rev. 1/03; 12/1/09)

Cross Reference:

- FRAP 32. Form of Briefs, Appendices, and Other Papers on page 134, specifically, FRAP 32(c)(2)
- FRAP 40. Petition for Panel Rehearing on page 160

CIRCUIT RULE 35-4. FORMAT; NUMBER OF COPIES

(a) Format/Length of Petition and Answer

The format and length of a petition for rehearing en banc and any answer shall be governed by Circuit Rule 40-1(a).

The petition or answer must be accompanied by the completed certificate of compliance found at Form 11. *(New 7/1/00)*

(b) Number of Copies

If the petition is not required to be filed electronically, a petition for rehearing en banc shall be filed in an original. *(Rev. 12/1/09)*

FRAP 36. ENTRY OF JUDGMENT; NOTICE

(a) **Entry.** A judgment is entered when it is noted on the docket. The clerk must prepare, sign, and enter the judgment:

(1) after receiving the court's opinion—but if settlement of the judgment's form is required, after final settlement; or

(2) if a judgment is rendered without an opinion, as the court instructs.

(b) **Notice.** On the date when judgment is entered, the clerk must serve on all parties a copy of the opinion—or the judgment, if no opinion was written—and a notice of the date when the judgment was entered.

(As amended Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002.)

CIRCUIT RULE 36-1. OPINIONS, MEMORANDA, ORDERS; PUBLICATION

Each written disposition of a matter before this Court shall bear under the number in the caption the designation OPINION, or MEMORANDUM, or ORDER. A written, reasoned disposition of a case or motion which is designated as an opinion under Circuit Rule 36-2 is an OPINION of the Court. It may be an authored opinion or a per curiam opinion. A written, reasoned disposition of a case or a motion which is not intended for publication under Circuit Rule 36-2 is a MEMORANDUM. Any other disposition of a matter before the Court is an ORDER. A memorandum or order shall not identify its author, nor shall it be designated "Per Curiam."

All opinions are published; no memoranda are published; orders are not published except by order of the court. As used in this rule, the term PUBLICATION means to make a disposition available to legal publishing companies to be reported and cited.

CIRCUIT RULE 36-2. CRITERIA FOR PUBLICATION

A written, reasoned disposition shall be designated as an OPINION if it:

(a) Establishes, alters, modifies or clarifies a rule of federal law, or

(b) Calls attention to a rule of law that appears to have been generally overlooked, or

(c) Criticizes existing law, or

(d) Involves a legal or factual issue of unique interest or substantial public importance, or

(e) Is a disposition of a case in which there is a published opinion by a lower court or administrative agency, unless the panel determines that publication is unnecessary for clarifying the panel's disposition of the case, or

(f) Is a disposition of a case following a reversal or remand by the United States Supreme Court, or

(g) Is accompanied by a separate concurring or dissenting expression, and the author of such separate expression requests publication of the disposition of the Court and the separate expression.

(Rev. 1/1/12)

CIRCUIT RULE 36-3. CITATION OF UNPUBLISHED DISPOSITIONS OR ORDERS

(a) **Not Precedent.** Unpublished dispositions and orders of this Court are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion.

(b) **Citation of Unpublished Dispositions and Orders Issued on or after January 1, 2007.** Unpublished dispositions and orders of this Court issued on or after January 1, 2007 may be cited to the courts of this circuit in accordance with FRAP 32.1.

(c) **Citation of Unpublished Dispositions and Orders Issued before January 1, 2007.** Unpublished dispositions and orders of this Court issued before January 1, 2007 may not be cited to the courts of this circuit, except in the following circumstances.

(i) They may be cited to this Court or to or by any other court in this circuit when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion.

(ii) They may be cited to this Court or by any other courts in this circuit for factual purposes, such as to show double jeopardy, sanctionable conduct, notice, entitlement to attorneys' fees, or the existence of a related case.

(iii) They may be cited to this Court in a request to publish a disposition or order made pursuant to Circuit Rule 36-4, or in a petition for panel rehearing or rehearing en banc, in order to demonstrate the existence of a conflict among opinions, dispositions, or orders.

CIRCUIT RULE 36-4. REQUEST FOR PUBLICATION

Publication of any unpublished disposition may be requested by letter addressed to the Clerk, stating concisely the reasons for publication. Such a request will not be entertained unless received within 60 days of the issuance of this Court's disposition. A copy of the request for publication must be served on the parties to the case. The parties will have 14 days from the date of service to notify the Court of any objections they may have to the publication of the disposition. If such a request is granted, the unpublished disposition will be redesignated an opinion. *(Rev. 12/1/09)*

CIRCUIT RULE 36-5. ORDERS FOR PUBLICATION

An order may be specially designated for publication by a majority of the judges acting and when so published may be used for any purpose for which an opinion may be used. Such a designation should be indicated when filed with the Clerk by the addition of the words "FOR PUBLICATION" on a separate line.

CIRCUIT RULE 36-6. PERIODIC NOTICE TO PUBLISHING COMPANIES

[Abrogated 12/1/09]

CIRCUIT ADVISORY COMMITTEE NOTE TO RULES 36-1 TO 36-5

The clerk's office is not given advance notice as to when a disposition will be delivered by the judges for filing and, therefore, cannot supply such information to counsel. When a disposition is filed, the Clerk mails or electronically transmits notice of entry of judgment and a copy of the disposition to counsel and the district judge from whom the appeal was taken. All dispositions are public unless ordered sealed by the Court. Once a disposition is filed with the Clerk, anyone may obtain copies of printed decisions by making a written request to the clerk's office, accompanied by a $2.00 fee and self-addressed envelope. Opinions are also available on the day of filing on the Court's website at www.ca9.uscourts.gov and by subscription to the Court's RSS feed at http://www.ca9.uscourts.gov/rss/. Opinions are subject to typographical error. The cooperation of the Bar in calling apparent errors to the attention of the clerk's office is solicited. (Rev. 12/1/09)

FRAP 37. INTEREST ON JUDGMENT

(a) **When the Court Affirms.** Unless the law provides otherwise, if a money judgment in a civil case is affirmed, whatever interest is allowed by law is payable from the date when the district court's judgment was entered.

(b) **When the Court Reverses.** If the court modifies or reverses a judgment with a direction that a money judgment be entered in the district court, the mandate must contain instructions about the allowance of interest.

(As amended Apr. 24, 1998, eff. Dec. 1, 1998.)

FRAP 38. FRIVOLOUS APPEAL—DAMAGES AND COSTS

If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

(As amended Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998.)

FRAP 39. COSTS

(a) **Against Whom Assessed.** The following rules apply unless the law provides or the court orders otherwise:

(1) if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise;

(2) if a judgment is affirmed, costs are taxed against the appellant;

(3) if a judgment is reversed, costs are taxed against the appellee;

(4) if a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as the court orders.

(b) **Costs For and Against the United States.** Costs for or against the United States, its agency, or officer will be assessed under Rule 39(a) only if authorized by law.

(c) **Costs of Copies.** Each court of appeals must, by local rule, fix the maximum rate for taxing the cost of producing necessary copies of a brief or appendix, or copies of records authorized by Rule 30(f). The rate must not exceed that generally charged for such work in the area where the clerk's office is located and should encourage economical methods of copying.

(d) **Bill of Costs: Objections; Insertion in Mandate.**

(1) A party who wants costs taxed must—within 14 days after entry of judgment—file with the circuit clerk, with proof of service, an itemized and verified bill of costs.

(2) Objections must be filed within 14 days after service of the bill of costs, unless the court extends the time.

(3) The clerk must prepare and certify an itemized statement of costs for insertion in the mandate, but issuance of the mandate must not be delayed for taxing costs. If the mandate issues before costs are finally determined, the district clerk must—upon the circuit clerk's request—add the statement of costs, or any amendment of it, to the mandate.

(e) **Costs on Appeal Taxable in the District Court.** The following costs on appeal are taxable in the district court for the benefit of the party entitled to costs under this rule:

(1) the preparation and transmission of the record;

(2) the reporter's transcript, if needed to determine the appeal;

(3) premiums paid for a supersedeas bond or other bond to preserve rights pending appeal; and

(4) the fee for filing the notice of appeal.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Mar. 10, 1986, eff. July 1, 1986; Apr. 24, 1998, eff. Dec. 1, 1998; Mar. 26, 2009, eff. Dec. 1, 2009.)

CIRCUIT RULE 39-1. COSTS AND ATTORNEYS FEES ON APPEAL

39-1.1. Bill of Costs

The itemized and verified bill of costs required by FRAP 39(d) shall be submitted on the standard form provided by this Court. It shall include the following information: *(Rev. 1/1/05)*

(1) The number of copies of the briefs or excerpts of record reproduced; and *(Rev. 1/1/05)*

(2) The actual cost per page for each document.

39-1.2. Number of Briefs and Excerpts

Costs will be allowed for the required number of paper copies of briefs and one additional copy. Costs will also be allowed for any paper copies of the briefs that the eligible party was required to serve. *(Rev. 1/1/05; 1/1/09; 12/1/09)*

If excerpts of record were filed, costs will be allowed for 5 copies of the excerpts of record plus 1 copy for each party required to be served, unless the Court shall direct a greater number of excerpts to be filed than required under Circuit Rules 30-1.3 and 17-1.3. *(Rev. 12/1/09)*

39-1.3. Cost of Reproduction

In taxing costs for photocopying documents, the clerk shall tax costs at a rate not to exceed 10 cents per page, or at actual cost, whichever is less. *(Rev. 1/1/05; 12/1/09)*

39-1.4. Untimely Filing

Untimely cost bills will be denied unless a motion showing good cause is filed with the bill. *(Rev. 7/93)*

39-1.5. Objection to Bill of Costs

If a response opposing a cost bill is filed, the cost bill shall be treated as a motion under FRAP 27. *(Rev. 12/1/09)*

The Clerk or a deputy clerk may prepare and enter an order disposing of a cost bill, subject to reconsideration by the Court if exception is filed within 14 days after the entry of the order. *(Rev. 7/93, 12/02; 12/1/09)*

39-1.6. Request for Attorneys Fees

(a) Time Limits *(Rev. 7/1/07)*

Absent a statutory provision to the contrary, a request for attorneys' fees shall be filed no later than 14 days after the expiration of the period within which a petition for rehearing may be filed, unless a timely petition for rehearing is filed. If a timely petition for rehearing is filed, the request for attorneys fees shall be filed no later than 14 days after the Court's disposition of the petition. *(Rev. 12/1/09)*

(b) Contents *(Rev. 7/1/07)*

A request for an award of attorneys fees must be supported by a memorandum showing that the party seeking fees is legally entitled to them and must be accompanied by Form 9 (appended to these rules) or a document that contains substantially the same information, along with:

(1) a detailed itemization of the tasks performed each date and the amount of time spent by each lawyer and paralegal on each task;

(2) a showing that the hourly rates claimed are legally justified; and

(3) an affidavit or declaration attesting to the accuracy of the information. All applications must include a statement that sets forth the application's timeliness. The request must be filed separately from any cost bill. *(New 7/01; Rev. 7/1/07)*

CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 39-1.6

Forms for attorneys' fees and cost bills are found as Appendices 9 and 10 to these Rules. The forms are also available from the Clerk's Office or may be accessed via the Court's Website (www.ca9.uscourts.gov). (Rev. 7/1/07)

Calculation of Cost Bill Filing Deadline. *Litigants are reminded that a cost bill must be received by the Clerk in San Francisco by the due date. See FRAP 25(a)(1) and (2)(A) and Circuit Rule 25-2; but see FRAP 25(a)(2)(C) (document filed by inmate timely if deposited in institution's internal mailing system on or before due date). The deadline is strictly enforced. See Mollura v. Miller, 621 F.2d 334 (9th Cir. 1980). (New 1/1/05, Rev. 7/1/07)*

Equal Access to Justice Act Applications. *Counsel filing applications under 28 U.S.C. § 2412 should carefully review the statutory requirements concerning the timeliness and the contents of the application. In computing the applicable hourly rate under the Equal Access to Justice Act, adjusted for cost-of-living increases, counsel should be aware of the formula set forth in Thangaraja v. Gonzales, 428 F.3d 870, 876-77 (9th Cir. 2005). (New 7/1/07)*

39-1.7. Opposition to Request for Attorneys Fees

Any party from whom attorneys fees are requested may file an objection to the request. The party seeking fees may file a reply to the objection. The time periods set forth in FRAP 27(a)(3)(A) and (4) for responses and replies to motions govern the intervals for filing an objection to the request and reply to an objection. *(Rev. 7/1/06)*

39-1.8. Request for Transfer

Any party who is or may be eligible for attorneys fees on appeal to this Court may, within the time permitted in Circuit Rule 39-1.6, file a motion to transfer consideration of attorneys fees on appeal to the district court or administrative agency from which the appeal was taken.

39-1.9. Referral to Appellate Commissioner

When the Court has awarded attorneys fees on appeal or on application for extraordinary writ, and a party opposes the amount of attorneys fees requested by the prevailing party, the Court may refer to the Appellate Commissioner the determination of an appropriate amount of attorneys fees.

Within 14 days after the entry of an Appellate Commissioner's order awarding or denying attorneys fees, a party may file a motion for reconsideration. The motion is directed initially to the Appellate Commissioner. If the Appellate Commissioner is disinclined to grant reconsideration, the Appellate Commissioner will refer the motion to the Court.

No response to a motion for reconsideration of a fee order is permitted unless requested by the Appellate Commissioner or the Court, but ordinarily neither the Appellate Commissioner nor the Court will grant reconsideration without requesting a response. *(Rev. 1/97; 12/1/09; 7/1/16)*

Cross Reference:

- Circuit Rule 27-10. Motions for Reconsideration on page 99

CIRCUIT RULE 39-2. ATTORNEYS FEES AND EXPENSES UNDER THE EQUAL ACCESS TO JUSTICE ACT

39-2.1. Applications for Fees

[Abrogated 7/1/07]

39-2.2. Petitions by Permission

[Abrogated 1/96]

FRAP 40. PETITION FOR PANEL REHEARING

(a) Time to File; Contents; Answer; Action by the Court if Granted.

(1) Time. Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment. But in a civil case, unless an order shortens or extends the time, the petition may be filed by any party within 45 days after entry of judgment if one of the parties is:

(A) the United States;

(B) a United States agency;

(C) a United States officer or employee sued in an official capacity; or

(D) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf—including all instances in which the United States represents that person when the court of appeals' judgment is entered or files the petition for that person.

(2) Contents. The petition must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition. Oral argument is not permitted.

(3) Answer. Unless the court requests, no answer to a petition for panel rehearing is permitted. But ordinarily rehearing will not be granted in the absence of such a request.

(4) Action by the Court. If a petition for panel rehearing is granted, the court may do any of the following:

(A) make a final disposition of the case without reargument;

(B) restore the case to the calendar for reargument or resubmission; or

(C) issue any other appropriate order.

(b) Form of Petition; Length. The petition must comply in form with Rule 32. Copies must be served and filed as Rule 31 prescribes. Except by the court's permission:

(1) a petition for panel rehearing produced using a computer must not exceed 3,900 words; and

(2) a handwritten or typewritten petition for panel rehearing must not exceed 15 pages.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 26, 2011, eff. Dec. 1, 2011; Apr. 28, 2016, eff. Dec. 1, 2016.)

CIRCUIT RULE 40-1. FORMAT; NUMBER OF COPIES

[Previous text Abrogated 1/1/99]

(a) Format/Length of Petition and Answer

The format of a petition for panel rehearing or rehearing en banc and any answer is governed by FRAP 32(c)(2). The petition may not exceed 15 pages unless it complies with the alternative length limitation of 4,200 words. An answer, when ordered by the Court, must comply with the same length limits as the petition.

If an unrepresented litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with FRAP 32.

The petition or answer must be accompanied by the completed certificate of compliance found at Form 11. *(New 7/1/00; Rev. 12/1/16)*

(b) Number of Copies

If the petition is not required to be filed electronically, an original shall be filed. *(Rev. 12/1/09)*

(c) Copy of Panel Decision

The petition for panel or en banc rehearing shall be accompanied by a copy of the panel's order, memorandum disposition or opinion being challenged. *(New 7/1/06)*

Cross Reference:

- FRAP 32. Form of Briefs, Appendices, and Other Papers on page 134, specifically, FRAP 32(c)(2)
- Circuit Rule 28-1. Briefs, Applicable Rules on page 108

CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 40-1

Litigants are reminded that a petition for rehearing must be received by the Clerk in San Francisco on the due date. See FRAP 25(a)(1) and (2)(A) and Circuit Rule 25-2; see also United States v. James, 146 F.3d 1183 (9th Cir. 1998). (Rev. 12/1/02; 12/1/09; 1/1/12)

CIRCUIT RULE 40-2. PUBLICATION OF PREVIOUSLY UNPUBLISHED DISPOSITION

An order to publish a previously unpublished memorandum disposition in accordance with Circuit Rule 36-4 extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. If the mandate has issued, the petition for rehearing shall be accompanied by a motion to recall the mandate. *(Rev. 1/96)*

FRAP 41. MANDATE: CONTENTS; ISSUANCE AND EFFECTIVE DATE; STAY

(a) **Contents.** Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.

(b) **When Issued.** The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.

(c) **Effective Date.** The mandate is effective when issued.

(d) **Staying the Mandate.**

(1) **On Petition for Rehearing or Motion.** The timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise.

(2) **Pending Petition for Certiorari.**

(A) A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the certiorari petition would present a substantial question and that there is good cause for a stay.

(B) The stay must not exceed 90 days, unless the period is extended for good cause or unless the party who obtained the stay files a petition for the writ and so notifies the circuit clerk in writing within the period of the stay. In that case, the stay continues until the Supreme Court's final disposition.

(C) The court may require a bond or other security as a condition to granting or continuing a stay of the mandate.

(D) The court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed.

(As amended Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; Mar. 26, 2009, eff. Dec. 1, 2009.)

CIRCUIT RULE 41-1. STAY OF MANDATE

In the interest of minimizing unnecessary delay in the administration of criminal justice, a motion for stay of mandate pursuant to FRAP 41(b), pending petition to the Supreme Court for certiorari, will not be granted as a matter of course, but will be denied if the Court determines that the petition for certiorari would be frivolous or filed merely for delay.

In other cases, including National Labor Relations Board proceedings, the Court may likewise deny a motion for stay of mandate upon the basis of a similar determination.

CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 41-1

Only in exceptional circumstances will a panel order the mandate to issue immediately upon the filing of a disposition. Such circumstances include cases where a petition for rehearing, or petition for writ of certiorari would be legally frivolous; or where an emergency situation requires that the action of the Court become final and mandate issue at once. The mandate will not be stayed automatically upon the filing of an application to the Supreme Court for writ of certiorari. However, a stay may be granted upon motion.

A motion to stay or recall the mandate will not be routinely granted; it will be denied if the Court determines that the application for certiorari would be frivolous or is made merely for delay. (Rev. 12/1/09)

In general, a party has 90 days from the entry of judgment or the denial of a timely petition for rehearing, whichever is later, in which to petition for a writ of certiorari. A circuit court cannot extend this period; application for an extension must be made to the Supreme Court. Counsel should be mindful that the judgment is entered on the day of the Court's decision and not when the mandate -- i.e., a certified copy of the judgment -- is issued. (New 1/1/03; Rev. 7/1/16)

CIRCUIT RULE 41-2. TIMING OF MANDATE

In cases disposed of by an order of a motions panel, a mandate will issue 7 days after the time to file a motion for reconsideration expires pursuant to Circuit Rule 27-10, or 7 days after entry of an order denying a timely motion for such relief, whichever is later. *(New 1/1/04; Rev. 12/1/09)*

Cross Reference:

- FRAP 35. En Banc Determination on page 147, specifically, FRAP 35(c)
- FRAP 40. Petition for Panel Rehearing on page 160, specifically, FRAP 40(a)(1)

FRAP 42. VOLUNTARY DISMISSAL

(a) **Dismissal in the District Court.** Before an appeal has been docketed by the circuit clerk, the district court may dismiss the appeal on the filing of a stipulation signed by all parties or on the appellant's motion with notice to all parties.

(b) **Dismissal in the Court of Appeals.** The circuit clerk may dismiss a docketed appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that are due. But no mandate or other process may issue without a court order. An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court.

(As amended Apr. 24, 1998, eff. Dec. 1, 1998.)

CIRCUIT RULE 42-1. DISMISSAL FOR FAILURE TO PROSECUTE

When an appellant fails to file a timely record, pay the docket fee, file a timely brief, or otherwise comply with rules requiring processing the appeal for hearing, an order may be entered by the clerk dismissing the appeal. In all instances of failure to prosecute an appeal to hearing as required, the Court may take such other action as it deems appropriate, including imposition of disciplinary and monetary sanctions on those responsible for prosecution of the appeal.

CIRCUIT RULE 42-2. TERMINATION OF BAIL FOLLOWING DISMISSAL

Upon dismissal of an appeal in any case in which an appellant has obtained a release from custody upon a representation that he is appealing the judgment of the district court, the Clerk will notify the appropriate district court that the appeal has been dismissed and that the basis for the continued release on bail or recognizance no longer exists.

FRAP 43. SUBSTITUTION OF PARTIES

(a) Death of a Party.

(1) After Notice of Appeal Is Filed. If a party dies after a notice of appeal has been filed or while a proceeding is pending in the court of appeals, the decedent's personal representative may be substituted as a party on motion filed with the circuit clerk by the representative or by any party. A party's motion must be served on the representative in accordance with Rule 25. If the decedent has no representative, any party may suggest the death on the record, and the court of appeals may then direct appropriate proceedings.

(2) Before Notice of Appeal Is Filed—Potential Appellant. If a party entitled to appeal dies before filing a notice of appeal, the decedent's personal representative—or, if there is no personal representative, the decedent's attorney of record—may file a notice of appeal within the time prescribed by these rules. After the notice of appeal is filed, substitution must be in accordance with Rule 43(a)(1).

(3) Before Notice of Appeal Is Filed—Potential Appellee. If a party against whom an appeal may be taken dies after entry of a judgment or order in the district court, but before a notice of appeal is filed, an appellant may proceed as if the death had not occurred. After the notice of appeal is filed, substitution must be in accordance with Rule 43(a)(1).

(b) Substitution for a Reason Other Than Death. If a party needs to be substituted for any reason other than death, the procedure prescribed in Rule 43(a) applies.

(c) Public Officer: Identification; Substitution.

(1) Identification of Party. A public officer who is a party to an appeal or other proceeding in an official capacity may be described as a party by the public officer's official title rather than by name. But the court may require the public officer's name to be added.

(2) Automatic Substitution of Officeholder. When a public officer who is a party to an appeal or other proceeding in an official capacity dies, resigns, or otherwise ceases to hold office, the action does not abate. The public officer's successor is automatically substituted as a party. Proceedings following the substitution are to be in the name of the substituted party, but any misnomer that does not affect the substantial rights of the parties may be disregarded. An order of substitution may be entered at any time, but failure to enter an order does not affect the substitution.

(As amended Mar. 10, 1986, eff. July 1, 1986; Apr. 24, 1998, eff. Dec. 1, 1998.)

FRAP 44. CASES INVOLVING A CONSTITUTIONAL QUESTION WHEN THE UNITED STATES OR THE RELEVANT STATE IS NOT A PARTY

(a) **Constitutional Challenge to Federal Statute.** If a party questions the constitutionality of an Act of Congress in a proceeding in which the United States or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the Attorney General.

(b) **Constitutional Challenge to State Statute.** If a party questions the constitutionality of a statute of a State in a proceeding in which that State or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the attorney general of the State.

(As amended Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002.)

FRAP 45. CLERK'S DUTIES

(a) General Provisions.

(1) Qualifications. The circuit clerk must take the oath and post any bond required by law. Neither the clerk nor any deputy clerk may practice as an attorney or counselor in any court while in office.

(2) When Court Is Open. The court of appeals is always open for filing any paper, issuing and returning process, making a motion, and entering an order. The clerk's office with the clerk or a deputy in attendance must be open during business hours on all days except Saturdays, Sundays, and legal holidays. A court may provide by local rule or by order that the clerk's office be open for specified hours on Saturdays or on legal holidays other than New Year's Day, Martin Luther King, Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day.

(b) Records.

(1) The Docket. The circuit clerk must maintain a docket and an index of all docketed cases in the manner prescribed by the Director of the Administrative Office of the United States Courts. The clerk must record all papers filed with the clerk and all process, orders, and judgments.

(2) Calendar. Under the court's direction, the clerk must prepare a calendar of cases awaiting argument. In placing cases on the calendar for argument, the clerk must give preference to appeals in criminal cases and to other proceedings and appeals entitled to preference by law.

(3) Other Records. The clerk must keep other books and records required by the Director of the Administrative Office of the United States Courts, with the approval of the Judicial Conference of the United States, or by the court.

(c) Notice of an Order or Judgment. Upon the entry of an order or judgment, the circuit clerk must immediately serve a notice of entry on each party, with a copy of any opinion, and must note the date of service on the docket. Service on a party represented by counsel must be made on counsel.

(d) Custody of Records and Papers. The circuit clerk has custody of the court's records and papers. Unless the court orders or instructs otherwise, the clerk must not permit an original record or paper to be taken from the clerk's office. Upon disposition of the case, original papers constituting the record on appeal or review must be returned to the court or agency from which they were received. The clerk must preserve a copy of any brief, appendix, or other paper that has been filed.

(As amended Mar. 1, 1971, eff. July 1, 1971; Mar. 10, 1986, eff. July 1, 1986; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 25, 2005, eff. Dec. 1, 2005.)

FRAP 46. ATTORNEYS

(a) Admission to the Bar.

(1) Eligibility. An attorney is eligible for admission to the bar of a court of appeals if that attorney is of good moral and professional character and is admitted to practice before the Supreme Court of the United States, the highest court of a state, another United States court of appeals, or a United States district court (including the district courts for Guam, the Northern Mariana Islands, and the Virgin Islands).

(2) Application. An applicant must file an application for admission, on a form approved by the court that contains the applicant's personal statement showing eligibility for membership. The applicant must subscribe to the following oath or affirmation:
"I, _____, do solemnly swear [or affirm] that I will conduct myself as an attorney and counselor of this court, uprightly and according to law; and that I will support the Constitution of the United States."

(3) Admission Procedures. On written or oral motion of a member of the court's bar, the court will act on the application. An applicant may be admitted by oral motion in open court. But, unless the court orders otherwise, an applicant need not appear before the court to be admitted. Upon admission, an applicant must pay the clerk the fee prescribed by local rule or court order.

(b) Suspension or Disbarment.

(1) Standard. A member of the court's bar is subject to suspension or disbarment by the court if the member:

(A) has been suspended or disbarred from practice in any other court; or

(B) is guilty of conduct unbecoming a member of the court's bar.

(2) Procedure. The member must be given an opportunity to show good cause, within the time prescribed by the court, why the member should not be suspended or disbarred.

(3) Order. The court must enter an appropriate order after the member responds and a hearing is held, if requested, or after the time prescribed for a response expires, if no response is made.

(c) Discipline. A court of appeals may discipline an attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with any court rule. First, however, the court must afford the attorney reasonable notice, an opportunity to show cause to the contrary, and, if requested, a hearing.

(As amended Mar. 10, 1986, eff. July 1, 1986; Apr. 24, 1998, eff. Dec. 1, 1998.)

CIRCUIT RULE 46-1. ATTORNEYS

46-1.1. Forms for Written Motions

Written motions for admission to the bar of the Court shall be on the form approved by the Court and furnished by the Clerk. *(Rev. 7/93)*

46-1.2. Time for Application

Any attorney who causes a case to be docketed in this Court or who enters an appearance in this Court, and who is not already admitted to the Bar of the Court, shall simultaneously apply for admission. *(Rev. 7/93)*

CIRCUIT RULE 46-2. ATTORNEY SUSPENSION, DISBARMENT OR OTHER DISCIPLINE

(a) **Conduct Subject to Discipline.** This Court may impose discipline on any attorney practicing before this Court who engages in conduct violating applicable rules of professional conduct, or who fails to comply with rules or orders of this Court. The discipline may consist of disbarment, suspension, reprimand, counseling, education, a monetary penalty, restitution, or any other action that the Court deems appropriate and just.

(b) **Initiation of Disciplinary Proceedings Based on Conduct Before This Court.** The Chief Judge or a panel of judges may initiate disciplinary proceedings based on conduct before this Court by issuing an order to show cause under this rule that identifies the basis for imposing discipline.

(c) **Reciprocal Discipline.** An attorney who practices before this Court shall provide the Clerk of this Court with a copy of any order or other official notification that the attorney has been subjected to suspension or disbarment in another jurisdiction. When this Court learns that a member of the bar of this Court has been disbarred or suspended from the practice of law by any court or other competent authority or resigns during the pendency of disciplinary proceedings, the Clerk shall issue an order to show cause why the attorney should not be suspended or disbarred from practice in this Court.

(d) **Response.** An attorney against whom an order to show cause is issued shall have 28 days from the date of the order in which to file a response. The attorney may include in the response a request for a hearing pursuant to FRAP 46(c). The failure to request a hearing will be deemed a waiver of any right to a hearing. The failure to file a timely response may result in the imposition of discipline without further notice. *(Rev. 12/1/09)*

(e) **Hearings on Disciplinary Charges.** If requested, the Court will hold a hearing on the disciplinary charges, at which the attorney may be represented by counsel. In a matter based on an order to show cause why reciprocal discipline should not be imposed, an appellate commissioner will conduct the hearing. In a matter based on an order to show cause based on conduct before this Court, the Court may refer the matter to an appellate commissioner or other judicial officer to conduct the hearing. In appropriate cases, the Court may appoint an attorney to prosecute charges of misconduct. *(Rev. 1/1/12)*

(f) **Report and Recommendation.** If the matter is referred to an appellate commissioner or other judicial officer, that judicial officer shall prepare a report and recommendation. The report and recommendation shall be served on the attorney, and the attorney shall have 21 days from the date of the order within which to file a response. The report and recommendation together with any response shall be presented to a three-judge panel. *(Rev. 12/1/09)*

(g) **Final Disciplinary Action.** The final order in a disciplinary proceeding shall be issued by a three-judge panel. If the Court disbars or suspends the attorney, a copy of the final order shall be furnished to the appropriate courts and state disciplinary agencies. If the order imposes a sanction of $1,000 or more, the Court may furnish a copy of the order to the appropriate courts and state disciplinary agencies. If a copy of the final order is distributed to other courts or state disciplinary agencies, the order will inform the attorney of that distribution.

(h) **Reinstatement.** A suspended or disbarred attorney may file a petition for reinstatement with the Clerk. The petition shall contain a concise statement of the circumstances of the disciplinary proceedings, the discipline imposed by this Court, and the grounds that justify reinstatement of the attorney.

(i) **Monetary Sanctions.** Nothing in the rule limits the Court's power to impose monetary sanctions as authorized under other existing authority. *(New 1/1/02)*

CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 46-2

The Court may impose monetary sanctions as follows:

(1) *Against a party, its counsel, or both under FRAP 38, where the Court determines that "an appeal is frivolous, it may award just damages and single or double costs to the appellee."*

(2) *Against a party, its counsel, or both under 28 U.S.C. § 1912, "[w]here a judgment is affirmed by . . . a court of appeals, the Court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs."*

(3) *Under 28 U.S.C. § 1927, where counsel "so multiplies the proceedings in any case unreasonably or vexatiously," counsel "may be required by the Court to satisfy personally the excess costs, expenses and attorneys' fees reasonably incurred because of such conduct."*

(4) *Under Circuit Rules 17-2 and 30-2, against counsel who "vexatiously and unreasonably increases the cost of litigation by inclusion of unnecessary material in the excerpts of record."*

(5) *Under Circuit Rule 42-1, against counsel for "failure to prosecute an appeal to hearing as required by FRAP and the Circuit Rules.*

(6) *Against counsel for failure to comply with the requirements of FRAP 28 and Circuit Rules 28-1 through 28-3, dealing with the form and content of briefs on appeal. See, e.g., Mitchel v. General Electric Co., 689 F.2d 877 (9th Cir. 1982).*

(7) *Against counsel for conduct that violates the orders or other instructions of the Court, or for failure to comply with the Federal Rules of Appellate Procedure or any Circuit Rule.*

(8) *Under the inherent powers of the Court. See, e.g., Chambers v. Nasco, Inc., 501 U.S. 32, 45-50 (1991).*

(9) *As a form of discipline under FRAP 46(c) and Circuit Rule 46-2, with notice of such sanctions provided to the appropriate courts and state disciplinary agencies when the Court deems such notice to be justified. (Rev. 1/1/02)*

CIRCUIT RULE 46-3. CHANGE OF ADDRESS

Changes in the address of counsel and pro se litigants registered for the Appellate CM/ECF system must be reported by updating their account at: https://pacer.psc.uscourts.gov/pscof/login.jsf. Changes in the address of counsel and pro se litigants who are exempt from or who are not registered for the Appellate CM/ECF system must be reported to the Clerk of this Court immediately and in writing. *(Rev. 12/1/09)*

CIRCUIT RULE 46-4. PARTICIPATION OF LAW STUDENTS

An eligible law student acting under the supervision of a member of the bar of this Court may appear on behalf of any client in a case before this Court with the written consent of the client if the Requirements for Student Practice before this Court are met. The Requirements for Student Practice are available from the Clerk of Court and on the website at www.ca9.uscourts.gov.

CIRCUIT RULE 46-5. RESTRICTIONS ON PRACTICE BY FORMER COURT EMPLOYEES

No former employee of the Court shall participate or assist, by way of representation, consultation, or otherwise, in any case that was pending in the Court during the employee's period of employment. It shall be the responsibility of any former employee, as well as the

persons employing or associating with a former employee in the practice of law before this Court, to ensure compliance with this rule.

An attorney who is a former employee may apply to the Court for an exemption. The application must demonstrate that the attorney had no direct or indirect involvement with the case during employment with the Court, and that the attorney was not employed or assigned in the chambers of any judge who participated in the case during the attorney's employment with the Court. (Rev. 1/1/11; Rev. 7/1/13)

CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 46-5

The rule is intended to avoid the appearance of impropriety if a former court employee were to work on a matter that was pending in the court during the employee's period of employment.

With respect to attorneys employed or assigned in the chambers of any judge, an application for an exemption shall show that the judge did not participate in ruling on any motion or other aspect of the case, including making, responding to, or voting on an en banc call during the employee's period of employment. (New 7/1/13)

FRAP 47. LOCAL RULES BY COURTS OF APPEALS

(a) Local Rules.

(1) Each court of appeals acting by a majority of its judges in regular active service may, after giving appropriate public notice and opportunity for comment, make and amend rules governing its practice. A generally applicable direction to parties or lawyers regarding practice before a court must be in a local rule rather than an internal operating procedure or standing order. A local rule must be consistent with—but not duplicative of—Acts of Congress and rules adopted under 28 U.S.C. § 2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. Each circuit clerk must send the Administrative Office of the United States Courts a copy of each local rule and internal operating procedure when it is promulgated or amended.

(2) A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.

(b) Procedure When There Is No Controlling Law. A court of appeals may regulate practice in a particular case in any manner consistent with federal law, these rules, and local rules of the circuit. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local circuit rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

(As amended Apr. 27, 1995, eff. Dec. 1, 1995; Apr. 24, 1998, eff. Dec. 1, 1998.)

CIRCUIT RULE 47-1. EFFECTIVE DATE OF RULES

Amendments to these rules shall be effective on December 1 or June 1 following their adoption, unless otherwise directed by the Court. *(Rev. 12/1/16)*

CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 47-1

If members of the bar or public have suggestions for new rules or amendments to the rules, such suggestions should be directed to the Clerk of Court who shall take appropriate action. (New 7/1/00)

CIRCUIT RULE 47-2. ADVISORY COMMITTEE ON RULES

(a) **Function.** Pursuant to 28 U.S.C. § 2077(b), the Chief Judge shall appoint an advisory committee on Ninth Circuit Court of Appeals rules and internal operating procedures. The committee shall generally provide a forum for ongoing study of the Court's rules and internal operating procedures, including:

(1) proposing rule changes and commenting on changes proposed by the Court,

(2) considering public comments, including comments from the bar, and

(3) conducting periodic meetings with members of the bar throughout the circuit and reporting back to the committee and the Court the results and any recommendations arising from such meetings. *(Rev. 7/1/00)*

(b) **Membership.** The Chief Judge shall appoint three judges, twelve practitioners and one member of a law faculty to serve on the committee for three years. The attorney members shall be selected in a manner that seeks both representation of the various geographic areas in the circuit and the distinct types of litigation considered by the Court. A member of the Lawyer Representatives Coordinating Committee (LRCC) shall be appointed to a two-year term on the Rules committee. That member shall serve as a liaison between the LRCC and Advisory Rules Committee. In addition, if a member of the national Advisory Committee on Appellate Rules is appointed from within the jurisdiction of the Ninth Circuit, that member shall be invited to participate as an ex-officio voting member of the Advisory Rules Committee. *(Rev. 7/1/00)*

(c) **Meetings.** The committee shall meet at least once a year and shall have additional meetings as the committee deems appropriate. *(New 1/96)*

FRAP 48. MASTERS

(a) **Appointment; Powers.** A court of appeals may appoint a special master to hold hearings, if necessary, and to recommend factual findings and disposition in matters ancillary to proceedings in the court. Unless the order referring a matter to a master specifies or limits the master's powers, those powers include, but are not limited to, the following:

(1) regulating all aspects of a hearing;

(2) taking all appropriate action for the efficient performance of the master's duties under the order;

(3) requiring the production of evidence on all matters embraced in the reference; and

(4) administering oaths and examining witnesses and parties.

(b) **Compensation.** If the master is not a judge or court employee, the court must determine the master's compensation and whether the cost is to be charged to any party.

(As amended Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998.)