

October 16, 2018



Pursuant to 28 U.S.C. § 2071(b), comments are invited on proposed revisions to Circuit Rules 27-13 and 27-14, Sealed Filings and Transmission of Physical Exhibits; and minor revisions to various other Miscellaneous Rules. The proposed changes are primarily designed to formalize the 2016 Interim Rule regarding the filing of sealed documents, and to clarify language and mirror existing practice with respect to various other rules. If ultimately approved by the Court, these rules would become effective June 1, 2019.

Please direct comments to Molly C. Dwyer, Clerk of Court at [Molly\\_Dwyer@ca9.uscourts.gov](mailto:Molly_Dwyer@ca9.uscourts.gov), and Susan V. Gelmis, Chief Deputy Clerk at [Susan\\_Gelmis@ca9.uscourts.gov](mailto:Susan_Gelmis@ca9.uscourts.gov). Comments must be submitted no later than December 31, 2018.

# ~~INTERIM~~ CIRCUIT RULE 27-13. SEALED DOCUMENTS<sup>‡</sup>

*(New 6/1/19)*

## (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 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

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<sup>‡</sup>~~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.~~

seal shall include the words “UNDER SEAL” on its cover and/or first page. Any publicly filed redacted version of a sealed document shall include the word “REDACTED” on the cover and/or first page of the document.

Because documents submitted under seal will not be viewable to the parties via CM/ECF Appellate Electronic Filing 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 with consent, via email. *See Fed. R. App. P. 25(e)(1)(D) Circuit Rule 25-5(f)(2).*

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 an original, revised, or amended presentence report, its attachments, and any confidential sentencing memoranda, a motion under subsection (e) is not required.

Instead, the document(s) 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 any 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 document filing event type, without an accompanying notice of filing under seal. These documents shall not be included in the excerpts of record. The party submitting the presentence report and related sealed memoranda shall separately notify the opposing party by email (or first class mail if the opposing party is exempt from electronic filing) of the specific documents submitted, and shall provide a copy upon request.

**(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. Where redaction of a document is feasible, the moving party shall highlight in the unredacted document all portions of the document that party is seeking to file under seal.

**(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 may 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.~~

**(h) 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.

**(i) 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.

#### (\*) **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 **\_Error! Bookmark not defined.**, specifically FRAP 25(a)(5), Privacy Protection
- Circuit Advisory Committee Note to Rule 3-5 on page **\_Error! Bookmark not defined.**

## **~~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. If the exhibit was submitted under seal in the district court, the party moving to transmit the exhibit must also file a notice or motion pursuant to Circuit Rule 27-13. (Rev. 6/1/19)

### ***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)*

## OTHER MISCELLANEOUS RULE REVISIONS

### 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

For any exhibits not otherwise available on the electronic district court docket, aAll physical and documentary 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; 6/1/19)*

#### 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 **Error! Bookmark not defined.**, specifically, Circuit Rule 22-1(b)

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

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

~~At the time the petitioner's opening brief is submitted, t~~The petitioner shall, unless exempt pursuant to Circuit Rule 17-1.2, submit the initial 4 copies of the excerpts of record at the time petitioner's opening brief is submitted~~bound separately from the briefs~~. The excerpts shall be separate from the brief and submitted electronically unless petitioner is exempt from the electronic filing requirement. On the same day the excerpts are submitted electronically, petitioner shall serve one paper copy of the excerpts on anyeach of the other parties 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 petitioner is exempt from the electronic filing requirement, petitioner 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 parties~~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; 6/1/19)*

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## CIRCUIT RULE 28-2. CONTENTS OF BRIEFS

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### 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. This statement constitutes a certificate of counsel, excluded from the page and word limitations pursuant to FRAP 32(f) and Circuit Rule 32-1(c). 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:

~~(k)~~(k) arise out of the same or consolidated cases in the district court or agency;

~~(l)~~(l) are cases previously heard in this Court which concern the case being briefed;

~~(m)~~(m) raise the same or closely related issues; or

~~(n)~~(n) involve the same transaction or event.

If no other cases in this Court are deemed related, ~~no~~ statement shall be ~~made to that effect~~required. The appellee need not include any case identified as related in the appellant's brief. (Rev. 6/1/19)

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## CIRCUIT RULE 28-5. MULTIPLE ~~REPLY~~ BRIEFS

A party or group of jointly represented parties is limited to filing a single principal or reply brief, even when responding to multiple briefs by other parties.

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; 6/1/19*)

Cross Reference:

Circuit Rule 32-2(b), Increased word limits for individual briefs responding to multiple briefs.

## **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~~7 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 21 days 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:**

## ***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.*

*Although FRAP 29(b) prohibits the timely filing of a non-government entity's 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 6/1/19)*

*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 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~~ comprisinge the excerpts of record, so that the prisoner can prepare the briefs on appeal. If the prisoner was granted leave to proceed in forma pauperis in the district court or on appeal, the copies will be produced at no charge to the prisoner. (Rev. 12/1/09; 6/1/19)

## CIRCUIT RULE 31-2. TIME FOR SERVICE AND FILING

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### 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; Rev. 6/1/19)*