

**UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

Federal Rules of Appellate Procedure

Local Rules of the Fourth Circuit

Internal Operating Procedures

December 1, 2005

# FEDERAL RULES OF APPELLATE PROCEDURE

## LOCAL RULES and INTERNAL OPERATING PROCEDURES OF THE FOURTH CIRCUIT

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## ORGANIZATION OF THE COURT

### A. Judges of the United States Court of Appeals for the Fourth Circuit

Chief Judge:

WILLIAM W. WILKINS

GREENVILLE, SC

Circuit Judges:

H. EMORY WIDENER, JR.

ABINGDON, VA

J. HARVIE WILKINSON III

CHARLOTTESVILLE, VA

PAUL V. NIEMEYER

BALTIMORE, MD

J. MICHAEL LUTTIG

ALEXANDRIA, VA

KAREN J. WILLIAMS

ORANGEBURG, SC

M. BLANE MICHAEL

CHARLESTON, WV

DIANA GRIBBON MOTZ

BALTIMORE, MD

WILLIAM B. TRAXLER, JR.

GREENVILLE, SC

ROBERT B. KING

CHARLESTON, WV

ROGER L. GREGORY

RICHMOND, VA

DENNIS W. SHEDD

COLUMBIA, SC

ALLYSON K. DUNCAN

RALEIGH, NC

Senior Circuit Judges:

JOHN D. BUTZNER, JR. (retired)

RICHMOND, VA

J. DICKSON PHILLIPS, JR. (retired)

CHAPEL HILL, NC

ROBERT F. CHAPMAN (retired)

COLUMBIA, SC

CLYDE H. HAMILTON

COLUMBIA, SC

### B. Office of the Circuit Executive

Circuit Executive: Samuel W. Phillips  
(804) 916-2184

### C. Office of the Clerk of Court

Clerk: Patricia S. Connor  
(804) 916-2700

D. Office of Staff Counsel

Senior Staff Counsel: Robert W. Jaspen  
(804) 916-2900

E. Library

Librarian: Aly McClure  
(804) 916-2319

F. Office of the Circuit Mediator

Chief Circuit Mediator: William T. Howell  
(843) 521-4022



**Rule 1. Scope of Rules and 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) [Abrogated]**

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

**Rule 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).

### **Rule 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) 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.

***Local Rule 3(a). Filing and Docket Fees.***

*Upon filing a notice of appeal, appellant shall pay the clerk of the district court a fee of \$255, which includes a \$5.00 filing fee for the notice of appeal and a \$250 fee for docketing the appeal in this Court.*

***Local Rule 3(b). Docketing Statement.***

*To assist counsel in giving prompt attention to the substance of an appeal, to help reduce the ordering of unnecessary transcripts, to provide the Clerk of the Court of Appeals at the commencement of an appeal with the information needed for effective case management, and to provide necessary information for any mediation conference conducted under Local Rule 33, counsel filing a notice of appeal for any direct or cross-appeal must complete and file a docketing statement, using the form provided by the clerk of the district court. The Clerk of the Court of Appeals will provide a similar form for petitions for review, applications for enforcement, and Tax Court appeals.*

*Two copies of the docketing statement and attachments must be received and filed in the Court of Appeals within 14 days of filing the notice of appeal, with a copy served on the opposing party or parties. Docketing statements for petitions for review, applications for enforcement, and Tax Court appeals must be received and filed with the Clerk of the Court of Appeals within 14 days of docketing of the petition, application, or tax appeal. A copy of the docketing statement must be served on the opposing party or parties.*

*Each copy of the docketing statement served or filed shall have attached to it copies of:*

- (a) the notice of appeal, application for enforcement, or petition for review;*
- (b) the docket sheet of the court or agency from which the appeal is taken;*
- (c) the judgment or order sought to be reviewed and any opinion or findings;*
- (d) any opinion, findings, or recommendation of a magistrate judge, an administrative law judge, a Social Security Appeals Council, or a bankruptcy court underlying the order at issue; and*
- (e) any transcript order.*

*Although a party will not be precluded from raising additional issues, counsel will make every effort to include in the docketing statement all of the issues that will be presented to the Court. Failure to file the docketing statement within the time set forth above will cause the Court to initiate the process for dismissing a case under Local Rule 45.*

*If an opposing party concludes that the docketing statement is in any way inaccurate, incomplete, or misleading, the Clerk's Office should be informed in writing of any errors and any proposed additions or corrections within 7 days of service of the docketing statement, with copies to all other parties.*

***I.O.P.-3.1. Transmission of District Court Order.*** *The clerk of the district court shall transmit to the Clerk of the Court of Appeals a copy of the order appealed from, along with copies of the materials required by FRAP 3(d)(1).*

*Former I.O.P.-3.1 redesignated Local Rule 3(a) December 1, 1995; Local Rule 3(a) amended November 1, 2003.*

*Former I.O.P.-3.2 amended June 8, 1994, and September 28, 1994; amended and redesignated Local Rule 3(b) December 1, 1995; Local Rule 3(b) amended March 4, 1998.*

*Former I.O.P.-3.3 redesignated I.O.P.-3.1 December 1, 1995, and amended December 1, 1998.*

**Rule 3.1. Appeal from a Judgment Entered by a Magistrate Judge in a Civil Case**

**[Abrogated]**

## **Rule 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 the judgment or order appealed from is entered.
- (B) When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.
- (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 timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, 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 10 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 altered or amended 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 10 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 7 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 Rules of Civil Procedure 79(a); or
  - (ii) if Federal Rule of Civil Procedure 58(a)(1) 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)(1) 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 10 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 10 days after the entry of the order disposing of the last such remaining motion, or within 10 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 10 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 inmate confined in an institution 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. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

- (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 docketed 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.

## **Rule 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 7 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.** All papers must conform to Rule 32(c)(2). Except by the court's permission, a paper must not exceed 20 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 5(b)(1)(E). 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.

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

- (1) Within 10 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).

***Local Rule 5. Interlocutory Orders.***

*The Court of Appeals will initially enter a petition for permission to appeal upon the miscellaneous docket; a docket fee shall not be required unless the petition is granted. A Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation statement must be filed with the petition and answer. See FRAP 26.1, Local Rule 26.1 and Form A. Upon granting the petition, the Court of Appeals will notify the district court by copy of the order and transfer the case to the regular docket.*

*Former I.O.P.-5.1 redesignated Local Rule 5 December 1, 1995.*

**Rule 5.1. Appeals by Permission Under 28 U.S.C. § 636(c)(5)  
[Abrogated]**

**Rule 6. Appeal in a Bankruptcy Case from a Final Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel**

**(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) 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 there are 3 exceptions:

- (A) Rules 4(a)(4), 4(b), 9, 10, 11, 12(b), 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; and
- (C) when the appeal is from a bankruptcy appellate panel, the term “district court,” as used in any applicable rule, means “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 8015 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) Appellate review of the order disposing of the motion requires the party, in compliance with Rules 3(c) and 6(b)(1)(B), to amend a previously filed notice of appeal. A party intending to challenge an altered or amended judgment, order, or decree must file a notice of appeal or amended notice of appeal 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 10 days after filing the notice of appeal, the appellant must file with the clerk possessing the record assembled in accordance with Bankruptcy Rule 8006 — 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 sent to the circuit clerk.
- (ii) An appellee who believes that other parts of the record are necessary must, within 10 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) Forwarding the record.**

- (i) When the record is complete, the district clerk or bankruptcy appellate panel 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 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.
- (ii) All parties must do whatever else is necessary to enable the clerk to assemble and forward the record. The court of appeals may provide by rule or order that a certified copy of the docket entries be sent 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 sent.

- (D) Filing the record.** Upon receiving the record — or a certified copy of the docket entries sent in place of the redesignated record — the circuit clerk must file it and immediately notify all parties of the filing date.

***I.O.P.-6.1. Bankruptcy Appeals.*** *The Fourth Circuit has not established panels of three bankruptcy judges to hear appeals from bankruptcy courts pursuant to 28 U.S.C. § 158.*



**Rule 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.

## **Rule 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.

***Local Rule 8. Stay or Injunction Pending Appeal.***

*Filing a notice of appeal does not automatically stay the operation of the judgment, order or decision for which review is sought. If an application to the district court for temporary relief pending appeal is not practicable, counsel must make a specific showing of the reasons the application was not made to the district court in the first instance. Any motion to the Court of Appeals should include copies of all previous applications for relief and their outcome. A Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation statement must accompany the motion and any response unless the parties have previously filed disclosure statements with the Court in the case. See FRAP 26.1, Local Rule 26.1, and Form A. If any party deems that parts of the record or other materials are essential to a fair presentation of the issues regarding a motion, copies of these papers must be attached to each copy of the motion. Filing and assignment of emergency motions for stay or injunction pending appeal are governed by Local Rule 27(e). An order granting a stay or injunction pending appeal remains in effect until issuance of the mandate or further order of the Court and may be conditioned upon the filing of a supersedeas bond in the district court.*

*Former I.O.P.-8.1 redesignated Local Rule 8 December 1, 1995; Local Rule 8 amended February 1, 2001.*

## **Rule 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).

### ***Local Rule 9(a). Release Prior to Judgment of Conviction.***

*A criminal defendant may be released in accordance with the conditions set by the district court prior to judgment of conviction. If the district court refuses to release the prisoner, or sets conditions for release that cannot be met, the order is appealable as a matter of right and will be given prompt consideration by the Court of Appeals. Counsel should submit memoranda in support of their position on appeal and, in cases involving corporate defendants, Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation statements required by FRAP 26.1, Local Rule 26.1 and Form A. The appeal is usually decided without oral argument upon the materials presented by the parties. A motion for release pending determination of the appeal may be filed and will be assigned as provided in Local Rule 27(e).*

### ***Local Rule 9(b). Release After Conviction and Notice of Appeal.***

*After the district court has ruled on a motion for bail or reduction of bail pending appeal, the appellant may renew the motion for release, or for a modification of the conditions of release, before the Court of Appeals without noting an additional appeal. A copy of the district court statement of reasons should accompany the motion. The motion will be submitted to a three-judge panel for decision.*

***Local Rule 9(c). Recalcitrant Witnesses.***

*When an appeal arises from the incarceration of a witness who refuses to testify or produce evidence in any court or grand jury proceeding, the Court of Appeals is required by statute, 28 U.S.C. § 1826, to decide the appeal within 30 days of the filing of the notice of appeal. Therefore, counsel should immediately contact the Clerk's Office regarding all such witness contempt matters so that the appeal may be expedited for resolution within the statutory guidelines.*

*Former I.O.P.-9.1 redesignated Local Rule 9(a) December 1, 1995; Local Rule 9(a) amended February 1, 2001.*

*Former I.O.P.-9.2 redesignated Local Rule 9(b) December 1, 1995.*

*Former I.O.P.-9.3 redesignated Local Rule 9(c) December 1, 1995.*

## **Rule 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 10 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 10 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 10 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 10 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 10 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 10 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.

***Local Rule 10(a). Retention of the Record on Appeal in the District Court.***

*In cases in which all parties are represented by counsel on appeal, the district court clerk will transmit a certificate to the Clerk of the Court of Appeals as soon as the record on appeal is complete. The certificate will state that the record is complete and available to the Court of Appeals upon request. Receipt of the district court clerk's certificate will have the same effect as the receipt of the record on appeal. The district court will then retain the record on appeal until and unless a judge of this Court asks the Clerk of this Court to obtain it. Upon receipt of a request from the Clerk of the Court of Appeals, the clerk of the district court will assemble and transmit the record on appeal within 24 hours.*

***Local Rule 10(b). Records on Appeal.***

*The preparation and transmittal of the record on appeal is the obligation of the clerk of the lower court, board or agency, and any questions concerning form or content should be addressed to the trial forum in the first instance. A record on appeal consists of a specific number of volumes of pleadings, transcripts, and exhibits. Parties should check with the clerk of the lower court, board or agency to determine whether everything relevant to the issues on appeal will be included initially in the record on appeal in order to obviate motions to supplement the record. The record is transmitted to the appellate court as soon as it is complete, except as provided in Local Rule 10(a). Local Rule 10(a) does not apply to records in cases in which one or more parties are proceeding without counsel on appeal.*

***Local Rule 10(c). Transcripts.***

*(1) Responsibilities and designation. The appellant has the duty of ordering transcript of all parts of the proceedings material to the issues to be raised on appeal whether favorable or unfavorable to appellant's position. Transcript Order forms are provided to appellant by the clerk of the district court at the time the notice of appeal is filed. Appellant should complete the form and distribute the appropriate parts of the form to the Clerk of the Court of Appeals, the court reporter, the clerk of the district court, and the appellee.*

*Before the transcript order is mailed, appellant must make appropriate financial arrangements with the court reporter for either immediate payment in full or in other form acceptable to the court reporter, payment pursuant to the Criminal Justice Act, or at government expense pursuant to 28 U.S.C. § 753(f).*

*In cross-appeals each party must order those parts of the transcript pertinent to the issues of such appeals. The parties are encouraged to agree upon those parts of the transcript jointly needed and to apportion the cost, with additional portions being ordered and paid for by the party considering them essential to that party's appeal.*

*If the entire transcript of proceedings is not to be prepared, the appellant's docketing statement filed pursuant to Local Rule 3(b) may constitute the statement of issues required by FRAP 10(b)(3)(A).*

*(2) Monitoring and receipt by clerk. Failure to order timely a transcript, failure to make satisfactory financial arrangements with the court reporter, or failure to specify in adequate detail those proceedings to be transcribed will subject the appeal to dismissal by the clerk for want of*



prosecution pursuant to Local Rule 45. The Clerk's Office is charged with monitoring the status of transcripts pending with court reporters.

(3) **Statement in lieu of transcript.** The parties may prepare and sign a statement of the case in lieu of the transcript or the entire record on appeal. The use of a statement in lieu of a transcript of a hearing substantially accelerates the appellate process. The statement should contain a description of the essential facts averred and proved or sought to be proved and a summary of pertinent testimony.

(4) **Guidelines for preparation of appellate transcripts in the Fourth Circuit.** An appendix to these rules contains the guidelines adopted by the Fourth Circuit Judicial Council to define the obligations of appellants, appellees, clerks of the district court, court reporters and the Clerk of the Court of Appeals in the ordering, preparation, and filing of transcripts completed pursuant to these rules.

**Local Rule 10(d). Confidential Materials.**

(1) **Certificates of Confidentiality.** At the time of filing any motion, brief, appendix or other document containing or otherwise disclosing materials held under seal by another court or agency, counsel shall file a certificate of confidentiality.

(A) Record material held under seal by another court or agency remains subject to that seal on appeal unless modified or amended by the Court of Appeals.

(B) A certificate of confidentiality must accompany any filing which contains or would otherwise disclose sealed materials. The certificate of confidentiality shall:

- (i) identify the sealed material;
- (ii) list the dates of the orders sealing the material or, if there is no order, the lower court or agency's general authority to treat the material as sealed;
- (iii) specify the terms of the protective order governing the information; and
- (iv) identify the appellate document that contains the sealed information.

(2) **Motions to Seal.** Motions to seal all or any part of the record are presented to and resolved by the lower court or agency in accordance with applicable law during the course of trial, hearing, or other proceedings below.

(A) A motion to seal may be filed with the Court of Appeals when:

- (i) a change in circumstances occurs during the pendency of an appeal that warrants reconsideration of a sealing issue decided below;
- (ii) the need to seal all or part of the record on appeal arises in the first instance during the pendency of an appeal; or
- (iii) additional material filed for the first time on appeal warrants sealing.

(B) Any motion to seal filed with the Court of Appeals shall:

- (i) identify with specificity the documents or portions thereof for which sealing is requested;
- (ii) state the reasons why sealing is necessary;
- (iii) explain why a less drastic alternative to sealing will not afford adequate protection; and
- (iv) state the period of time the party seeks to have the material maintained under seal and how the material is to be handled upon unsealing.

(C) A motion to seal filed with the Court of Appeals will be placed on the public docket for at least 5 calendar days before the Court rules on the motion, but the materials subject to a motion to seal will be held under seal pending the Court's disposition of the motion.

**(3) Filing of Confidential Material.** Counsel should place sealed material in a separate, sealed supplement to a brief, appendix, or other document, thereby avoiding the need to seal the entire item.

(A) The first page of any document tendered or filed under seal pursuant to this rule shall be conspicuously marked *SEALED*, and all copies shall be placed in an envelope marked *SEALED*. If the material was sealed by another court or agency, the envelope will be accompanied by a certificate of confidentiality.

(B) If the confidential material is filed *ex parte*, the material and envelope will be marked *EX PARTE* in addition to *SEALED*. Absent such an *EX PARTE* notation, the material will be available to counsel of record in the case. A motion is required for release of sealed materials to anyone other than counsel of record.

(C) Only 4 copies of sealed portions of briefs, appendices or other documents shall be filed.

(D) The responsibility for following the required procedures in filing confidential materials rests solely with counsel and the parties. The clerk will not review each filing for compliance with this rule.

**Local Rule 10(e). Supplemental Records, Modification, or Correction.**

Disputes concerning the accuracy or composition of the record on appeal should be resolved in the trial court in the first instance, although the Court of Appeals has the power, either on motion or of its own accord, to require that the record be corrected or supplemented. It is unnecessary to seek permission of the Court of Appeals to supplement the record and the record may be supplemented by the parties by stipulation or by order of the district court at any time during the appellate process.

*Former Local Rule 10 redesignated Local Rule 10(a) December 1, 1995.*

*Former I.O.P.-10.1 redesignated Local Rule 10(b) December 1, 1995; Local Rule 10(b) amended December 1, 1998.*

*Former I.O.P.-10.2 redesignated Local Rule 10(c) December 1, 1995; Local Rule 10(c) amended December 1, 1998.*

*Former I.O.P.-10.3 redesignated Local Rule 10(d) December 1, 1995; Local Rule 10(d) amended December 1, 2000, and May 18, 2004.*

*Former I.O.P.-10.4 redesignated Local Rule 10(e) December 1, 1995.*

## **Rule 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.

***Local Rule 11(a). Transcript Acknowledgments.***

*Upon receipt of an order for a transcript, the Clerk of the Court of Appeals will prepare for the reporter a transcript order acknowledgment which will set forth the date the transcript order was received in the Clerk's Office and the transcript due date, computed from the order receipt date in accordance with the time limits set forth in the applicable district court reporter management plan. If the transcript order is correct in all respects, except for an order date error in the reporter's favor, no response will be required from the reporter. If the reporter believes that there is a problem with the transcript order, he or she must complete a copy of the acknowledgment form noting the problem and return it to the Court of Appeals within 7 days of receipt of the form by the reporter, or within such further time as the Court of Appeals allows. The time for completion of the transcript will automatically cease to run until the problem has been remedied. The Clerk of the Court of Appeals will send a new transcript order acknowledgment setting forth new transcript order and filing dates taking into account the delay caused by resolving the problem with the original transcript order.*

**Local Rule 11(b). Time Limits for Filing Transcripts.**

Although FRAP 11(b)(1)(B) requires that transcripts be completed within 30 days from the purchase order date, this Court routinely uses instead the time limits set forth in the district court reporter management plans. All of the plans establish a 60-day period for preparation of transcripts, with the following exceptions:

- (1) Special provisions adopted by the Fourth Circuit Judicial Council for appeals by incarcerated criminal defendants.
  - (a) transcripts of 1000 pages or less shall be filed within 30 days of transcript order and completion of satisfactory financial arrangements.
  - (b) transcripts of more than 1000 pages shall be filed within the time ordered by the Clerk of the Court of Appeals.
- (2) Special circumstances, such as
  - (a) bail appeals,
  - (b) death penalty cases, or
  - (c) other expedited procedures in which the transcript shall be filed within the time ordered by the Clerk of the Court of Appeals.

**Local Rule 11(c). Exhibits.**

Counsel should be aware that certain portions of the record will not be transmitted to the Court of Appeals as part of the record. If bulky documents and physical exhibits are required by a party for oral argument, the party must make advance arrangements with the clerks of both courts for their transportation and receipt. Such arrangements are best made after the completion of the briefing schedule on appeal and receipt of notice of oral argument.

**Local Rule 11(d). Access of Counsel to Original Record.**

Counsel desiring to use the record on appeal in preparing their case should make arrangements with the clerk of the district court for access to the record. Under Local Rule 10(a), records in cases in which all parties are represented by counsel are retained by the district court clerk during appeal unless a judge of the Court of Appeals requests that they be obtained. If the record is transmitted to the Court of Appeals, the record may be withdrawn upon proper application and returned to the trial court or the nearest district court clerk's office for counsel's review. Law professors representing indigents by Court appointment may request that the record be sent to the law school for their review.

**I.O.P.-11.1. Sanctions for Court Reporter's Failure to File a Timely Transcript.** The Fourth Circuit Judicial Council has implemented a resolution of the Judicial Conference of the United States which mandates sanctions for the late delivery of transcripts. For transcripts not delivered within the time limits set forth in Local Rule 11(b), the reporter may charge only 90 percent of the prescribed fee; for a transcript not delivered within 30 days after that time the reporter may charge only 80 percent of the prescribed fee. The time period in criminal proceedings for the preparation of transcripts that are ordered before sentencing shall not begin to run until after entry of the judgment and commitment order.

*Former Local Rule 11 redesignated Local Rule 11(a) December 1, 1995.*

*Former I.O.P.-11.1 redesignated Local Rule 11(b) December 1, 1995; Local Rule 11(b) amended December 1, 1998.*

*Former I.O.P.-11.3 redesignated Local Rule 11(c) December 1, 1995.*

*Former I.O.P.-11.4 redesignated Local Rule 11(d) December 1, 1995.*

*Former I.O.P.-11.2 amended and redesignated I.O.P.-11.1 December 1, 1995; I.O.P.-11.1 amended December 1, 2002.*

## **Rule 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 10 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.

### ***Local Rule 12(a). Appeals by Aggrieved Non-parties in the Lower Court.***

*If the appellant was not a party to the lower court proceeding, the appeal shall be styled "In re \_\_\_\_\_, Appellant," and the title of the action in the district court shall also be given.*

### ***Local Rule 12(b). Joint Appeals/Cross-appeals and Consolidations.***

*For the purpose of identifying consolidated appeals and cross-appeals, the earliest docketed appeal will be designated the lead case and identified by an "L" following its docket number. The parties should designate lead counsel for each side and communicate lead counsel's identity in writing to the clerk within 10 days of the consolidation order. Although most consolidations will be on the Court's own motion, a party is not precluded from filing a request.*

### ***Local Rule 12(c). Expedition of Appeals.***

*The Court on its own motion or on motion of the parties may expedite an appeal for briefing and oral argument. Any motion to expedite should state clearly the reasons supporting expedition, the ability of the parties to present the appeal on the existing record, and the need for oral argument.*

### ***Local Rule 12(d). Abeyance.***

*In the interest of docket control the Court may, either on its own motion or upon request, place a case in abeyance pending disposition of matters before this Court or other courts which may affect the ultimate resolution of an appeal. During the period of time a case is held in abeyance the appeal remains on the docket but nothing is done to advance the case to maturity and resolution. If a case is held in abeyance for cases other than a Fourth Circuit case, the parties will be required to make periodic status reports.*

### ***Local Rule 12(e). Intervention.***

*A party who appeared as an intervenor in a lower court proceeding shall be considered a party to the appeal upon filing a notice of appearance. Otherwise, a motion for leave to intervene must be filed with the Court of Appeals. Any notice of appearance or motion to intervene should indicate the side upon which the movant proposes to intervene. The provisions of FRAP 15(d) govern intervention in appeals from administrative agencies. Intervenors are required to join in the brief for the side which they support unless leave to file a separate brief is granted by the Court.*

*Former I.O.P.-12.2 redesignated Local Rule 12(a) December 1, 1995.*  
*Former I.O.P.-12.3 redesignated Local Rule 12(b) December 1, 1995.*  
*Former I.O.P.-12.4 redesignated Local Rule 12(c) December 1, 1995; Local Rule 12(c) amended December 1, 1998.*  
*Former I.O.P.-12.5 redesignated Local Rule 12(d) December 1, 1995.*  
*Former I.O.P.-12.6 redesignated Local Rule 12(e) December 1, 1995.*  
*Former I.O.P.-12.1 amended September 28, 1994, and December 7, 1995, and deleted December 1, 1998.*



## **Rule 13. Review of a Decision of the Tax Court**

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

- (1) Review of a decision of 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.
- (2) 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.

**(b) 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.

**(c) 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.

### **(d) The Record on Appeal; Forwarding; Filing.**

- (1) An appeal from the Tax Court 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. References in those rules and in Rule 3 to the district court and district clerk are to be read as referring to the Tax Court and its clerk.
- (2) If an appeal from a Tax Court decision 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.

**Rule 14. Applicability of Other Rules to the Review of a Tax Court Decision**

All provisions of these rules, except Rules 4-9, 15-20, and 22-23, apply to the review of a Tax Court decision.

## **Rule 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 20 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.

***Local Rule 15(a). Docketing Fee.***

*Upon filing a petition for review of an agency order, petitioner shall pay the prescribed docketing fee of \$250, payable to the Clerk, U.S. Court of Appeals, or submit a properly executed application for leave to proceed in forma pauperis.*

***Local Rule 15(b). Petitions for Review.***

*Whenever filing a petition for review or an application or cross-application for enforcement, the party shall attach to the petition, application or cross-application a copy of the agency order for which review or enforcement is sought. The petition, application or cross-application shall also be accompanied by a list of respondents specifically identifying the respondents' names and the addresses where respondents may be served with copies of the petition, application or cross-application.*

*Former I.O.P.-15.1 added September 28, 1994, and redesignated Local Rule 15 December 1, 1995; Local Rule 15 redesignated Local Rule 15(a) December 4, 1996, and amended November 1, 2003.  
Local Rule 15(b) added December 4, 1996.*

**Rule 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.

**Rule 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.

## **Rule 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.

## **Rule 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.

### ***Local Rule 18. Procedures.***

*This Court's local rules accompanying FRAP 8 and 27 apply also to applications for stays under FRAP 18.*

*Former I.O.P.-18.1 amended and redesignated Local Rule 18 December 1, 1995.*



**Rule 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 7 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.

**Rule 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.

## **Rule 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.** All papers must conform to Rule 32(c)(2). Except by the court's permission, a paper must not exceed 30 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 21(a)(2)(C). 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.

***Local Rule 21(a). Case Captions for Extraordinary Writs.***

*A petition for a writ of mandamus or writ of prohibition shall not bear the name of the district judge, but shall be entitled simply "In re \_\_\_\_\_, Petitioner." To the extent that relief is requested of a particular judge, unless otherwise ordered, the judge shall be represented pro forma by counsel for the party opposing the relief, who shall appear in the name of the party and not that of the judge.*

***Local Rule 21(b). Petitions for Mandamus or Prohibition.***

*Strict compliance with the requirements of FRAP 21 is required of all petitioners, even pro se litigants. Petitioner must pay the prescribed docket fee of \$250, payable to the Clerk, U.S. Court of Appeals; submit the forms required by Local Rule 21(c)(1) for cases subject to that Local Rule; or submit a properly executed application for leave to proceed in forma pauperis. The parties are required to submit Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation statements with the petition and answer. See FRAP 26.1, Local Rule 26.1, and Form A.*

*After docketing, the clerk shall submit the application to a three-judge panel. A motion for emergency relief pending determination of the petition may be filed and will be assigned in accordance with Local Rule 27(e).*

*If the Court believes the writ should not be granted, it will deny the petition without requesting an answer. Otherwise the Court will direct the clerk to obtain an answer. After an answer has been filed, the Court ordinarily will decide the merits of the petition on the materials submitted without oral argument. Occasionally, however, briefs may be requested and the matter set for oral argument.*

***Local Rule 21(c). Fees and Costs for Prisoner Petitions for Mandamus, Prohibition, or other Extraordinary Relief.***

*(1) Proceedings Arising out of Civil Matters. A prisoner filing a petition for writ of mandamus, prohibition, or other extraordinary relief in a matter arising out of a civil case must pay the full \$250 docket fee. A prisoner who is unable to prepay this fee may apply to pay the fee in installments by filing with the Court of Appeals (1) an application to proceed without prepayment of fees; (2) a certified copy of the prisoner's trust fund account statement for the six-month period immediately preceding the filing of the notice of appeal, obtained from the appropriate official of each prison at*

which the prisoner is or was confined; and (3) a form consenting to the collection of fees from the prisoner's trust account.

The Court of Appeals will assess an initial partial filing fee of 20% of the greater of:

(a) the average monthly deposits to the prisoner's account for the six-month period immediately preceding the filing of the petition; or

(b) the average monthly balance in the prisoner's account for the six-month period immediately preceding the filing of the petition.

The Court will direct the agency having custody of the prisoner to collect this initial partial fee from the prisoner's trust account, and to collect the remainder of the \$250 fee, as well as any other fees, costs, or sanctions imposed by the Court, in monthly installments of 20% of the preceding month's deposits credited to the prisoner's account. The agency having custody of the prisoner shall forward payments from the prisoner's account to the Clerk, U.S. Court of Appeals, each time the amount in the account exceeds \$10 until all fees, costs, and sanctions are paid for the petition.

If a prisoner proceeding under this rule fails to file the forms or make the payments required by the Court, the appeal will be dismissed pursuant to Local Rule 45.

(2) *Effect of Prior Actions and Appeals on Proceedings Arising out of Civil Matters.* A prisoner who has, on three or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it was frivolous, malicious, or failed to state a claim upon which relief could be granted, may not proceed in a matter arising out of a civil case without prepayment of fees unless the prisoner is under imminent danger of serious physical injury.

(3) *Proceedings Arising out of Criminal Matters.* A prisoner who is unable to prepay the full \$250 docket fee for a petition for writ of mandamus, prohibition, or other extraordinary relief arising out of a criminal case may apply to proceed without the prepayment of fees by filing an application for leave to proceed in forma pauperis.

*Former Local Rule 21 redesignated Local Rule 21(a) December 1, 1995.*

*Local Rule 21(b) amended September 25, 1996; February 1, 2001; and November 1, 2003.*

*Local Rule 21(c) added September 25, 1996, and amended November 1, 2003.*

*Former I.O.P.-21.1 redesignated Local Rule 21(b) December 1, 1995.*

## **Rule 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 judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue. The district clerk must send the certificate or statement to the court of appeals 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 the certificate.
- (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.

### **Local Rule 22(a). Certificates of Appealability.**

*(1) The following procedures apply in cases in which the district court has not granted a certificate of appealability ("certificate"):*

*(A) The appellant may submit a request for a certificate with the Court of Appeals specifying the issues on which the appellant seeks authorization to appeal and giving a statement of the reasons why a certificate should be issued. The request shall be submitted either in the form prescribed by Fed. R. App. P. 27 for motions or on a form provided by the clerk. The clerk shall refer the request and other relevant materials to a three-judge panel. If the panel denies a certificate, the appeal will be dismissed. If the panel grants a certificate, the clerk shall enter a briefing order specifying the issues the Court will review.*

NOTE: Subsection (1)(A) allows an appellant to request a certificate before a briefing order is entered. With respect to the form of the request, the Rule largely tracks former Fourth Circuit Rule 22(a). Because briefing orders are entered promptly after the appeal is docketed, this subsection is likely to affect relatively few appellants. However, when an appellant does file a request before a briefing order is entered, the most efficient course for the Court is to consider that request without waiting for a brief.

*(B) If no express request for a certificate has been filed pursuant to Subsection (1)(A) of this Rule, the notice of appeal will be treated as a request for a certificate. See Fed. R. App. P. 22(b)(2). To assist the Court in resolving this request, the clerk shall enter a Preliminary Briefing Order directing the appellant to file a brief on the merits and, if required by applicable rules, an appendix. The Preliminary Briefing Order shall neither require nor authorize a brief from the appellee, nor shall it make any statement regarding a reply brief by the appellant, but in all other respects it shall be substantially identical to a standard briefing order entered pursuant to Local Rule 31(b) or Local Rule 34(b), as appropriate. The clerk shall refer the appellant's brief and other relevant materials to a three-judge panel for a determination of whether the appellant has made a substantial showing of the denial of a constitutional right as to any claim presented in the brief. If the panel denies a certificate, the appeal will be dismissed. If the panel grants a certificate, the clerk shall enter a Final Briefing Order stating that a certificate has been granted and directing the appellee to file a brief addressing the issue or issues that the Court has accepted for review, and providing for the filing of a reply brief by the appellant.*

NOTE: Subsection (1)(B) sets forth the procedures that are likely to be followed in most cases. Under these procedures, the Court, having not received any request for a certificate, will direct the appellant to file a brief on the merits. Although not expressly stated in the Rule, the appellant may also file a separate request for a certificate along with his brief; this ensures that the appellant will not be prevented from making arguments relating to the certificate that are separate from the arguments on the merits. Regardless of whether a separate request is filed, the Court will look at the brief but will not use it to make a final decision; instead, as stated in this section, the Court will only determine whether the appellant has made the showing required by 28 U.S.C. § 2253(c)(2). If a certificate is granted, the Court will enter an order directing the appellee to file a brief addressing the issues the Court has accepted for review.

*(2) The following procedures apply in cases in which the district court has granted a certificate of appealability as to at least one issue:*

*(A) The appellant may submit a request for a certificate as to additional issues, along with a statement of the reasons why the expanded certificate should be issued. The request shall be submitted either in the form prescribed by Fed. R. App. P. 27 for motions or on a form provided by the clerk. The clerk shall refer the request and other relevant materials to a three-judge panel. After the panel has granted or denied such a request, the clerk shall enter a briefing order directing the parties to file briefs addressing the issues the Court will review.*

NOTE: Section (2) of this Rule parallels Section (1). Just as Section (1) prescribes separate procedures depending on whether the appellant files a request for a certificate before a briefing order is entered, Section (2) makes different provisions depending on whether a request to expand the certificate is filed before a briefing order is entered.

Subsection (2)(A) addresses the situation in which the request is filed, and provides that the request will be considered before the Court enters its briefing order. In both language and effect, this section is substantially identical to Subsection (1)(A) of the Rule.

*(B) If no express request to expand the certificate has been filed pursuant to Subsection (2)(A) of this Rule, the clerk shall enter a briefing order directing the parties to file briefs addressing the issues certified for review by the district court. If the appellant's brief on the merits addresses issues beyond the scope of the certificate granted by the district court, this Court will not review those additional issues unless the appellant files, simultaneously with the brief on the merits, a statement containing the names of the parties, the case number, and a list of the issues that the*

*appellant wishes to add to the certificate. Such statement may also, but need not, present reasons why the certificate should be expanded. Upon receipt of the statement, the clerk shall suspend briefing and refer the brief, the statement, and other relevant materials to a three-judge panel. Once the panel has determined whether to expand the certificate, the clerk shall enter a Final Briefing Order specifying the issue or issues the Court will review.*

NOTE: Subsection (2)(A) governs the situation in which the district court grants a certificate as to some issues and the appellant wishes to raise additional issues but does not request expansion of the certificate before a briefing order is entered. Under this subsection, the appellant must brief all the issues he wishes to raise and then file a separate statement identifying the issues he has addressed that were not certified by the district court. If the appellant does not file an appropriate statement, the Court will not review any issues beyond the scope of the certificate granted by the district court. *Cf. Valerio v. Crawford*, 306 F.3d 742, 764-65 (9th Cir. 2002) (en banc) (discussing circuit rule barring expansion of certificate absent express request). When, however, the appellant files a proper statement, the Court will suspend briefing and decide whether to expand the certificate before requiring the appellee to file its brief; this process parallels the process for granting a certificate *ab initio*, as described in Subsection (1)(B).

The purpose of the statement described in Subsection (2)(A) is to trigger the pause in the briefing process during which the Court will consider whether to expand the certificate. This pause will assist the Court in complying with *Miller-El v. Cockrell*, 123 S. Ct. 1029 (2003), by ensuring a separation between the certification inquiry and the final inquiry into the merits.

The statement required by this subsection need not be long or detailed in order to serve its underlying purpose. On the contrary, the Court will accept a simple list of issues addressed in the brief but not certified for review by the district court, although the appellant is also permitted to present a more extended discussion. The clerk may provide appellants with an explanation of the statement requirement along with a warning that failure to file an appropriate statement will result in forfeiture of all issues beyond the scope of the certificate granted by the district court.

*(3) A request to grant or expand a certificate, including a brief filed pursuant to Subsection (1)(B) of this Rule or a brief and statement filed pursuant to Subsection (2)(B), shall be referred to a panel of three judges. If any judge of the panel is of the opinion that the applicant has made the showing required by 28 U.S.C. § 2253(c), the certificate will issue.*

NOTE: Section (3) retains our current practice of referring requests for certification to three-judge panels. While Fed. R. App. P. 22(a) may afford the Court some flexibility in this matter, the use of three-judge panels is consistent with Fed. R. App. P. 27(c), which provides that a single judge “may not dismiss or otherwise determine an appeal or other proceeding.”

The authority for a single judge to issue a certificate derives from § 2253. *See* 28 U.S.C. § 2253(c)(1) (providing that certain appeals may not proceed “[u]nless a circuit justice or judge issues a certificate of appealability”).

*(4) In considering a request to grant or expand a certificate, including a brief filed pursuant to Subsection (1)(B) of this Rule or a brief and statement filed pursuant to Subsection (2)(B), the panel or any judge of the panel may request additional submissions from either party.*

NOTE: This section allows the panel to either rule on a certificate based on the materials already received or seek additional information from the parties. Although the Rule does not limit panel discretion, it is likely that panels will seek additional submissions in relatively few cases and will instead issue (or expand) a certificate if the appellant has made a sufficient showing to justify further inquiry.

*(5) Notwithstanding any other statement within this Rule, whenever the Court appoints counsel for a pro se appellant, counsel shall have an opportunity to file a brief on the merits addressing all*



issues as to which the district court or this Court has granted a certificate, unless the Court directs otherwise.

NOTE: This section reflects our current practice of ordering a second round of briefing whenever the Court appoints counsel in a pro se case. This section will prevent any inference that the new Rule has either altered that practice or reduced the discretion of the Court to follow a different procedure in a particular case.

**Local Rule 22(b). Death Penalty Cases and Motions for Stay of Execution.**

(1) **Statement Certifying Existence of Sentence of Death.** Whenever a petition for writ of habeas corpus or motion to vacate a federal sentence in which a sentence of death is involved is filed in the district court or the Court of Appeals, the petitioner shall file with the petition a statement certifying the existence of a sentence of death and the emergency nature of the proceedings and listing any proposed date of execution, any previous cases filed by petitioner in federal court and any cases filed by petitioner pending in any other court. The clerk of the district court shall immediately forward to the Court of Appeals a copy of any such statement filed, and shall immediately notify by telephone the Court of Appeals upon issuance of a final order in that case. If a notice of appeal is filed, the clerk of the district court shall transmit the available record forthwith. The clerk of the Court of Appeals will maintain a special docket for such cases and these cases shall be presented to the Court of Appeals on an expedited basis.

(2) **Lodging of Documents.** In cases in which an execution date has been set, counsel shall lodge with the clerk of the Court of Appeals all district court documents as they are filed and any pertinent state court materials. If an execution date is imminent, counsel may also lodge proposed appellate papers in anticipation of having to seek emergency appellate relief.

(3) **Motion for Stay of Execution.** Any motion for stay of execution shall be considered initially in conjunction with any pending application for a certificate of appealability. Should a party file a motion to stay execution or a motion to vacate an order granting a stay of execution, the following documents shall accompany such motion:

- (a) The habeas petition or motion to vacate filed in the district court;
- (b) Each brief or memorandum of authorities filed by either party in the district court;
- (c) Any available transcript of proceedings before the district court;
- (d) The memorandum opinion giving the reasons advanced by the district court for denying relief;
- (e) The district court judgment denying relief;
- (f) The application to the district court for stay;
- (g) Any certificate of appealability or order denying a certificate of appealability;
- (h) The district court order granting or denying a stay and a statement of reasons for its action; and
- (i) A copy of the docket entries of the district court.

**Local Rule 22(c). Petitions for Rehearing in Death Penalty Cases.**

Once the Court's mandate has issued in a death penalty case, any petition for panel or en banc rehearing should be accompanied by a motion to recall the mandate and motion to stay the execution.

Generally, the Court will not enter a stay of execution solely to allow for additional time for counsel to prepare, or for the Court to consider, a petition for rehearing. Consequently, counsel should take all possible steps to assure that any such petition is filed sufficiently in advance of the

*scheduled execution date to allow it to be considered by the Court. Counsel should notify the Clerk's Office promptly of their intention to file a petition for rehearing so that arrangements can be made in advance for the most expeditious consideration of the matter by the Court.*

***Local Rule 22(d). Motions for Authorization.***

*Any individual seeking to file in the district court a second or successive application for relief pursuant to 28 U.S.C. § 2254 or § 2255 shall first file a motion with the Court of Appeals for authorization as required by 28 U.S.C. § 2244, on the form provided by the clerk for such motions. The motion shall be entitled "In re \_\_\_\_\_, Movant." The motion must be accompanied by copies of the § 2254 or § 2255 application which movant seeks authorization to file in the district court, as well as all prior § 2254 or § 2255 applications challenging the same conviction and sentence, all court opinions and orders disposing of those applications, and all magistrate judge's reports and recommendations issued on those applications. The movant shall serve a copy of the motion with attachments on the respondent named in the proposed application and shall file an original and three copies of the motion with attachments in the Court of Appeals. Failure to provide the requisite information and attachments may result in denial of the motion for authorization.*

*If the Court requires a response to the motion, it will direct that the response be received by the clerk for filing within no more than seven calendar days. The Court will enter an order granting or denying authorization within 30 days of receipt of the motion by the clerk for filing, and the clerk will certify a copy of the order to the district court. If authorization is granted, a copy of the application will be attached to the certified order for filing in the district court. No motion or request for reconsideration, petition for rehearing, or any other paper seeking review of the granting or denial of authorization will be allowed.*

***I.O.P.-22.1. Death Penalty Cases.*** *Once a notice of appeal has been filed in a case involving a sentence of death where an execution date has been set, a panel of three judges will be promptly identified for consideration of all matters related to the case. The position of coordinator of case information in death penalty cases has been established in the Clerk's Office of the Court of Appeals for the purpose of establishing personal liaison with district court personnel and counsel to aid in the expeditious treatment of appeals involving a sentence of death. An expedited briefing schedule will be established when necessary to allow the Court the opportunity to review all issues presented.*

*Local Rule 22(a) amended December 1, 1995; June 5, 1996; December 1, 1998; and July 8, 2003.*

*Local Rule 22(b) amended December 1, 1995, and June 5, 1996.*

*Former I.O.P.-22.3 redesignated Local Rule 22(c) December 1, 1995; Local Rule 22(c) amended December 1, 1998, and December 1, 2002.*

*Local Rule 22(d) added June 5, 1996, and amended December 1, 2002.*

*Former I.O.P.-22.1 deleted December 1, 1995.*

*Former I.O.P.-22.2 redesignated I.O.P.-22.1 December 1, 1995, and amended June 1, 1999.*

## **Rule 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.

## **Rule 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 or Review of an Administrative-Agency Proceeding.** When an appeal or review of a proceeding before an administrative agency, board, commission, or officer (including for the purpose of this rule the United States Tax Court) proceeds directly in a court of appeals, 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).
- (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.

**Local Rule 24. Prisoner Appeals.**

**(a) Payment of Fees and Costs Required.** *A prisoner appealing a judgment in a civil action must pay in full the \$255 fee required for commencement of the appeal. A prisoner who is unable to prepay this fee may apply to pay the fee in installments by filing with the Court of Appeals (1) an application to proceed without prepayment of fees; (2) a certified copy of the prisoner's trust fund account statement or institutional equivalent for the six-month period immediately preceding the filing of the notice of appeal, obtained from the appropriate official of each prison at which the prisoner is or was confined; and (3) a form consenting to the collection of fees from the prisoner's trust account.*

*The Court of Appeals will assess an initial partial filing fee of 20% of the greater of:*

*(1) the average monthly deposits to the prisoner's account for the six-month period immediately preceding the filing of the notice of appeal; or*

*(2) the average monthly balance in the prisoner's account for the six-month period immediately preceding the filing of the notice of appeal.*

*Based upon the prisoner's consent, the Court will direct the agency having custody of the prisoner to collect this initial partial fee from the prisoner's trust account, and to collect the remainder of the \$255 filing fee, as well as any other fees, costs, or sanctions imposed by the Court of Appeals, in monthly installments of 20% of the preceding month's deposits credited to the prisoner's account. The agency having custody of the prisoner shall forward payments from the prisoner's account to the clerk of the district court each time the amount in the account exceeds \$10 until all fees, costs, and sanctions are paid for the appeal.*

*If a prisoner proceeding under this rule fails to file the forms or make the payments required by the Court, the appeal will be dismissed pursuant to Local Rule 45.*

**(b) Effect of Prior Actions and Appeals.** *A prisoner who has, on three or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it was frivolous, malicious, or failed to state a claim upon which relief could be granted, may not proceed on appeal without prepayment of fees unless the prisoner is under imminent danger of serious physical injury.*

*Local Rule 24 added September 25, 1996, and amended November 1, 2003.*

## **Rule 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 calendar days.
    - (C) **Inmate filing.** A paper filed by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.
    - (D) **Electronic filing.** A court of appeals may by local rule permit 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 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.
- (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 calendar 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.

**Local Rule 25(a). Paper Size, Number of Copies, Attachments.**

(1) **Paper Size.** *The Judicial Conference of the United States has adopted 8 ½ x 11 inch letter-size paper as the standard for use throughout the federal judiciary. All documents and other papers submitted to this Court must conform to this standard.*

(2) **Number of Copies, Attachments.** *Unless otherwise provided by rule, all papers except briefs and appendices submitted to the Fourth Circuit for filing and for consideration by the Court must be in the form of an original paper and three copies. Any attachments to motions which are necessary to an understanding of the matters set forth in the motion must be submitted with three copies and conform to the standard paper size unless advance permission is sought to submit oversized materials.*

**Local Rule 25(b). Filing Papers, Service, Certificate of Service.**

(1) **Filing Papers.** *Papers except briefs and appendices are not timely filed unless actually received by the Clerk's Office within the time fixed for filing. Papers are deemed filed upon receipt by the Clerk's Office and papers may be presented either in person or by mail.*

*Papers may be transmitted for filing by use of telephonic facsimile transmission equipment. In such cases, the original document signed by counsel need not be filed. Although the Clerk's Office has a fax machine, material may be transmitted directly to the Clerk's Office only when an emergency situation exists and advance permission has been obtained to use the Clerk's Office machine. Several printing services in Richmond will accept papers by fax for filing with the Court. Their telephone numbers may be obtained from the Clerk's Office.*

(2) **Service.** *Service on a party represented by counsel must be on all counsel of record.*

(3) **Certificate of Service.** *All papers must be accompanied by a valid certificate of service. The certificate of service of a brief should be bound with the brief as the last, unnumbered page. A certificate of service can be prepared in advance of actual mailing or hand delivery of the paper served. If service is not actually accomplished in the manner and on the date stated in the certificate, an amended certificate of service is required.*



## **Rule 26. Computing and Extending Time**

**(a) Computing Time.** The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:

- (1) Exclude the day of the act, event, or default that begins the period.
- (2) Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days, unless stated in calendar days.
- (3) Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or — if the act to be done is filing a paper in court — a day on which the weather or other conditions make the clerk’s office inaccessible.
- (4) As used in this rule, “legal holiday” means 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, Christmas Day, and any other day declared a holiday by the President, Congress, or the state in which is located either 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 is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period 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 not treated as delivered on the date of service stated in the proof of service.

### ***Local Rule 26. State Holidays and Inclement Weather.***

*Whenever a party in computing a filing or service date relies upon an extension of time due to the inaccessibility of the Clerk's Office because of inclement weather or other conditions, or due to a state holiday, counsel must certify such reliance in the certificate of service or by separate written declaration.*

*Former I.O.P.-26.1 redesignated Local Rule 26 December 1, 1995.*

## **Rule 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.

### ***Local Rule 26.1. Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation.***

*(a) All parties to a civil or bankruptcy case, and all corporate defendants in a criminal case, whether or not they are covered by the terms of FRAP 26.1, shall file a corporate affiliate/financial interest disclosure statement. This rule does not apply to the United States, to state and local governments in cases in which the opposing party is proceeding without counsel, or to parties proceeding in forma pauperis.*

*(b) The statement shall set forth the information required by FRAP 26.1 and the following:*

*(1) A trade association shall identify in the disclosure statement all members of the association, their parent corporations, and any publicly held companies that own 10% or more of a member's stock.*

*(2) All parties shall identify any publicly held corporation, whether or not a party to the present litigation, that has a direct financial interest in the outcome of the litigation by reason of a franchise, lease, other profit sharing agreement, insurance, or indemnity agreement.*

*(3) Whenever required by FRAP 26.1 or this rule to disclose information about a corporation that has issued shares to the public, a party shall also disclose information about similarly situated master limited partnerships, real estate investment trusts, or other legal entities whose shares are publicly held or traded.*

*(c) The disclosure statement shall be on a form provided by the clerk. A negative statement is required if a party has no disclosures to make.*

*(d) The disclosure statement shall be filed within 10 days of receipt of the notice of docketing and the disclosure form, unless earlier pleadings are submitted for the Court's consideration, in which case the disclosure statement shall be filed at that time. The parties are required to amend their disclosure statements when necessary to maintain their current accuracy.*

*Local Rule 26.1 amended September 28, 1994, and December 1, 1998.*

## **Rule 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 8 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 8-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 5 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; Page Limits; and 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) **Page Limits.** A motion or a response to a motion must not exceed 20 pages, exclusive of the corporate disclosure statement and accompanying documents authorized by Rule 27(a)(2)(B), unless the court permits or directs otherwise. A 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.

**Local Rule 27(a). Content of Motions; Notification and Consent.**

*In cases where all parties are represented by counsel, all motions shall contain a statement by counsel that counsel for the other parties to the appeal have been informed of the intended filing of the motion. The statement shall indicate whether the other parties consent to the granting of the motion, or intend to file responses in opposition.*

**Local Rule 27(b). Procedural Orders Acted on by Clerk; Reconsideration Thereof.**

*Motions and applications for orders if consented to, or if unopposed after due notice to all interested parties has been given or waived, or if the orders sought are procedural or relate to the preparation or printing of the appendix and briefs on appeal, or are such as are ordinarily granted as of course and without notice or hearing, need not be submitted to the Court, or to a judge thereof. Such orders may be entered for the Court by the clerk, who shall forthwith send copies thereof to the parties.*

*Any party adversely affected by an order entered by the clerk pursuant to this rule shall be entitled to request reconsideration of the clerk's action by the Court, if within 14 days after entry of the order, such party shall file with the clerk and serve upon the parties to the proceedings a request, in writing, for reconsideration, vacation or modification of the order, stating the grounds for such request. The clerk shall thereupon submit to the Court the request for reconsideration, vacation or modification, the motion or application upon which the order was entered, and any responses by other parties which may have been filed in support or opposition to the request. The Court may thereafter take such action as may be proper.*

**Local Rule 27(c). Form of Papers; Number of Copies.**

*All motions should be filed with the clerk and comply with FRAP 27(d). Three copies must be filed with the original. A Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation statement must accompany the motion unless previously filed with the Court. See FRAP 26.1, Local Rule 26.1, and Form A. Counsel should always review carefully the specific rule which authorizes relief to ascertain the requirements, and any motion should contain or be accompanied by any supporting documents required by a specific rule. If a motion is supported by attachments, these materials should also be served and filed with each copy of the motion. The parties should not make requests for procedural and substantive relief in a single motion, but should make each request in a separate motion.*

**Local Rule 27(d). Responses; Replies.**

(1) **Responses.** *Although any party may file a response to a motion, a party need not respond to a motion until requested to do so by the Court. The three-day mailing period permitted by FRAP 26(c) does not apply to responses requested by the Court or clerk by letter wherein a response date is set forth in the request. A Disclosure of Corporate Affiliations and Other Financial Entities with a Direct Financial Interest in Litigation statement must accompany any response to a motion unless previously filed with the Court. See FRAP 26.1, Local Rule 26.1, and Form A. If the Court acts*

*upon a motion without a response, any party adversely affected by such action may by application to the Court request reconsideration, vacation or modification of the Court's action.*

*(2) **Replies.** The Court will not ordinarily await the filing of a reply before reviewing a motion and response. If movant intends to file a reply and does not want the Court to actively consider the motion and response until a reply is filed, movant shall notify the clerk in writing of the intended filing of the reply and request that this Court not act on the motion until the reply is received.*

***Local Rule 27(e). Panel Assignments and Emergency Motions.***

*There is a strong presumption that the Court will act, in all but routine procedural matters, through panels or en banc, as prescribed by 28 U.S.C. § 46(c). Ordinarily, counsel shall present all motions to the clerk for presentation to the Court. Application to a single judge should be made only in exceptional circumstances where action by a panel would be impractical due to the requirements of time. In such exceptional circumstances, counsel shall attempt to notify the clerk's office that application is being made directly to a single judge, and copies of all papers presented to the judge shall be presented to the clerk as soon as practical for filing.*

*When a single judge determines to act, the matter will be referred to a panel as early in the process as is practical. As soon as a matter has been assigned to a panel, any action in the matter will be decided by the panel.*

*The selection of motion panels is similar to the process set forth in I.O.P. 34.1 for hearing panels. In a case where a request for single judge action is made to the clerk and action by a panel is not feasible, the clerk will assign the matter to a judge selected at random. In cases where a single judge, selected at random, has found it necessary to act, the clerk will fill out the panel with the at-random selection of two additional judges. In cases in which a single judge, selected by counsel, has found it necessary to act, the clerk will assign the matter to a three-judge panel selected at random, which may or may not include the single judge who acted in the case.*

***Local Rule 27(f). Motions for Summary Disposition.***

*Motions for summary affirmance, reversal or dismissal are reserved for extraordinary cases only and should not be filed routinely. Counsel contemplating filing a motion to dispose summarily of an appeal should carefully consider whether the issues raised on appeal are in fact manifestly unsubstantial and appropriate for disposition by motion. Motions for summary affirmance or reversal are seldom granted.*

*Motions for summary disposition should be made only after briefs are filed. If such motions are submitted before the completion of the briefing schedule, the Court will defer action on the motion until the case is mature for full consideration.*

*Motions to dismiss based upon the ground that the appeal is not within the jurisdiction of the Court or for other procedural grounds may be filed at any time. The Court may also sua sponte summarily dispose of any appeal at any time.*

*Former Local Rule 27(a) deleted December 1, 1998.*

*Former Local Rule 27(b) redesignated Local Rule 27(a) December 1, 1998.*

*Former Local Rule 27(c) amended and redesignated Local Rule 27(b) December 1, 1998.*

*Former I.O.P.-27.1 redesignated Local Rule 27(d) December 1, 1995; Local Rule 27(d) amended and redesignated Local Rule 27(c) December 1, 1998.*

*Former I.O.P.-27.2, -27.3, and -27.4 amended and redesignated Local Rule 27(e) December 1, 1995; Local Rule 27(e) amended and redesignated Local Rule 27(d) December 1, 1998.*

*Former I.O.P.-27.5 amended and redesignated Local Rule 27(f) December 1, 1995; Local Rule 27(f) redesignated Local Rule 27(e) December 1, 1998; Local Rule 27(e) amended February 1, 2001.*

*Former I.O.P.-27.6 redesignated Local Rule 27(g) December 1, 1995; Local Rule 27(g) redesignated Local Rule 27(f) December 1, 1998.*

## **Rule 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 statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below;
- (7) a statement of facts relevant to the issues submitted for review with appropriate references to the record (see Rule 28(e));
- (8) 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;
- (9) 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);

(10) a short conclusion stating the precise relief sought; and

(11) the certificate of compliance, if required by Rule 32(a)(7).

**(b) Appellee’s Brief.** The appellee’s brief must conform to the requirements of Rule 28(a)(1)-(9) and (11), 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;

(4) the statement of the facts; and

(5) the statement of the standard of review.

**(c) Reply Brief.** The appellant may file a brief in reply to the appellee’s brief. An appellee who has cross-appealed may file a brief in reply to the appellant’s response to the issues presented by the cross-appeal. 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) *Briefs in a Case Involving a Cross-Appeal.*** If a cross-appeal is filed, the party who files a notice of appeal first is the appellant for the purposes of this rule and Rules 30, 31, 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 agreement of the parties or by court order. With respect to appellee's cross-appeal and response to appellant's brief, appellee's brief must conform to the requirements of Rule 28(a)(1)-(11). But an appellee who is satisfied with appellant's statement need not include a statement of the case or of the facts.

**(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.

***Local Rule 28(a). Consolidated Cases and Briefs.***

*Related appeals or petitions for review will be consolidated in the Office of the Clerk, with notice to all parties, at the time a briefing schedule is established. One brief shall be permitted per side, including parties permitted to intervene, in all cases consolidated by Court order, unless leave to the contrary is granted upon good cause shown. In consolidated cases lead counsel shall be selected by the attorneys on each side and that person's identity made known in writing to the clerk within 10 days of the date of the order of consolidation. In the absence of an agreement by counsel, the clerk shall designate lead counsel. The individual so designated shall be responsible for the coordination, preparation and filing of the briefs and appendix.*

***Local Rule 28(b). Attachments to Briefs.***

*Each party shall include, in the body of the brief or in an addendum thereto, the verbatim text of the relevant portion of any constitutional provision, treaty, statute, ordinance, rule or regulation cited in the brief, if its construction is sought, there is controversy among the parties concerning its proper application to the case, or it is otherwise pertinent to the substantive issues on appeal. Each*

party shall also include in the addendum any unpublished opinion cited pursuant to Local Rule 36(c). Should a party wish to supplement the brief with matters other than those enumerated above, the additional material shall be presented to the Court under separate cover, accompanied by a motion for leave to file that specifically identifies the proposed material, indicates whether it is a matter of record, and sets forth good cause for deviating from the general prohibition of attachments to briefs.

**Local Rule 28(c). Responsibilities of Counsel Listed on a Brief.**

The Court will interpret the listing of an attorney on a brief as a representation that he or she is capable of arguing the appeal if lead counsel is unavailable.

**Local Rule 28(d). Joint Appeals and Consolidations.**

Where multiple parties are directed to file a consolidated brief, counsel on the same side of the case should confer and agree upon a means for assuring that the positions of all parties are addressed within the length limits allowed and that each counsel will have an opportunity to review and approve the consolidated brief before it is filed.

Motions to file separate briefs are not favored by the Court and are granted only upon a particularized showing of good cause, such as, but not limited to, cases in which the interests of the parties are adverse. Generally unacceptable grounds for requests to file separate briefs include representations that the issues presented require a brief in excess of the length limitations established by FRAP 32(a)(7) (appropriately addressed by a motion to exceed length limit), that counsel cannot coordinate their efforts due to different geographical locations, or that the participation of separate counsel in the proceedings below entitles each party to separate briefs on appeal.

If a motion to file separate briefs is granted, the length of such briefs may be limited by the Court. The parties shall continue to share the time allowed for oral argument.

**Local Rule 28(e). Citation of Additional Authorities.**

Counsel may, without leave of Court, present a letter drawing the Court's attention to supplemental authorities under Rule 28(j). An original and three copies of the letter should be filed with the clerk and a copy of the letter should be mailed to all counsel of record. The Court may grant leave for or direct the filing of additional memoranda, which may include additional argument before, during or after oral argument.

**Local Rule 28(f). Statement of Facts.**

Every opening brief filed by appellants in this Court shall include a separate section, the title of which is STATEMENT OF FACTS. In this section the attorneys will prepare a narrative statement of all of the facts necessary for the Court to reach the conclusion which the brief desires. The said STATEMENT OF FACTS will include exhibit, record, transcript, or appendix references showing the source of the facts stated. An appellee's brief shall also include a STATEMENT OF FACTS so prepared unless appellee is satisfied with appellant's statement of facts.

*Local Rule 28(b) amended December 1, 1998.*

*Former Local Rule 28(c) deleted September 28, 1994.*

*Former Local Rule 28(d) redesignated Local Rule 28(c) September 28, 1994.*

*Former I.O.P.-28.1 amended January 1, 1994, and redesignated Local Rule 28(d) December 1, 1995; Local Rule 28(d) amended and redesignated Local Rule 32(b) December 1, 1998.*

*Former I.O.P.-28.2 amended and redesignated Local Rule 28(e) December 1, 1995; Local Rule 28(e) amended and redesignated Local Rule 28(d) December 1, 1998.*

*Former I.O.P.-28.3 redesignated Local Rule 28(f) December 1, 1995; Local Rule 28(f) redesignated Local Rule 28(e) December 1, 1998; Local Rule 28(e) amended December 1, 2002.*

*Former Local Rule 28(g) added June 5, 1996, amended December 4, 1996, and amended and redesignated Local Rule 28(f) December 1, 1998.*

## **Rule 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 or a statement of the facts 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)-(9) and (11), except that none of the following need appear unless 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;
    - (D) the statement of the facts; and
    - (E) 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 (11) 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; an 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) and (3), 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:

(i) it contains no more than 14,000 words; or

(ii) it 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:

(i) it contains no more than 16,500 words; or

(ii) it 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 3 days before argument unless the court, for good cause, allows a later filing.

## **Rule 29. Brief of an Amicus Curiae**

- (a) When Permitted.** 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. 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 state:
- (1) the movant's interest; and
  - (2) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.
- (c) 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. If an amicus curiae is a corporation, the brief must include a disclosure statement like that required of parties by Rule 26.1. An amicus brief need not comply with Rule 28, but must include the following:
- (1) a table of contents, with page references;
  - (2) a table of authorities — cases (alphabetically arranged), statutes and other authorities — with references to the pages of the brief where they are cited;
  - (3) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;
  - (4) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review; and
  - (5) a certificate of compliance, if required by Rule 32(a)(7).
- (d) 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.
- (e) 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.
- (f) Reply Brief.** Except by the court's permission, an amicus curiae may not file a reply brief.

**(g) Oral Argument.** An amicus curiae may participate in oral argument only with the court's permission.

*Former I.O.P.-29.1 redesignated Local Rule 29 December 1, 1995, and deleted December 1, 1998.*



## **Rule 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 10 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 10 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.

***Local Rule 30(a). Attorney Sanctions for Unnecessary Appendix Designations.***

*The Court, on its own motion or on motion of any party, may impose sanctions against attorneys who unreasonably and vexatiously increase the costs of litigation through the inclusion of unnecessary material in the appendix. Attorneys shall receive reasonable notice and opportunity to respond before the imposition of any sanction. A party's motion for the imposition of sanctions will be entertained only if filed within 14 days after entry of judgment and only if counsel for the moving party previously objected to the designation of the allegedly unnecessary material in writing to opposing counsel within 10 days of the material's designation.*

***Local Rule 30(b). Appendix Contents; Number of Copies.***

*Although there is no limit on the length of the appendix except as provided in Local Rule 32(a), it is unnecessary to include everything in the appendix. The appendix should contain only those parts of the record vital to the understanding of the basic issues on appeal. The use of a selectively abridged record allows the judges to refer easily to relevant parts of the record and saves the parties the considerable expense of reproducing the entire record.*

*In all criminal appeals seeking review of the application of the sentencing guidelines, appellant shall include the sentencing hearing transcript and presentence report in the appendix.*

*Pursuant to the authority granted by FRAP 30(a)(3), the Court requires that only six copies of the appendix must be filed with appellant's opening brief and a copy served on counsel for each party separately represented. Appointed counsel may file five copies and any party proceeding in forma pauperis who is not represented by Court-appointed counsel may file four copies. If the Court allows a deferred appendix the parties routinely file four page-proof copies of the brief in lieu of the requisite number of copies. After the deferred appendix is filed, the parties must replace their page-proof copies with the requisite number of copies of their final brief, which must contain proper references to the appendix.*

***Local Rule 30(c). Responsibility of Parties.***

*Notwithstanding that FRAP 30 provides that the appellant shall prepare and file the appendix, the Court considers the coordination of preparing the appendix to be the responsibility of both sides. The failure of a side to designate does not absolve the other side from the responsibility.*

*Except under the most extraordinary circumstances, supplementary appendices will not be accepted. If the appellant omits from the appendix the portions designated by the appellee, the appellant will be required to file a corrected appendix incorporating such material, and to bear the cost regardless of the outcome of the appeal.*

*If a party files a motion for leave to file a supplemental appendix, the motion must specifically identify the contents of the supplemental appendix, state that the items are matters of record, and set forth good cause why the original appendix should not be returned for insertion of the additional materials.*

***Local Rule 30(d). Dispensing with Appendix.***

*Motions to proceed on the original record pursuant to FRAP 30(f) are carefully reviewed in the Fourth Circuit and are not usually granted unless the appellant is proceeding in forma pauperis, the*

*record is short, or the appeal is expedited. Even if the motion is granted, counsel must include an abbreviated appendix consisting of:*

- i. pertinent district court docket entries,*
- ii. indictment or complaint,*
- iii. judgment or order being appealed,*
- iv. notice of appeal,*
- v. any crucial portions of the transcript of proceedings referred to in appellant's brief, and*
- vi. a copy of the order granting leave to proceed on the original record.*

*The requisite number of copies of the abbreviated appendix as set forth in Local Rule 30(b) must be filed with the brief, but it may be included as part of the brief rather than being reproduced separately.*

*Former Local Rule 30 redesignated Local Rule 30(a) December 1, 1995.*

*Former I.O.P.-30.1 amended and redesignated Local Rule 30(b) December 1, 1995; Local Rule 30(b) amended December 1, 1998.*

*Former I.O.P.-30.2 redesignated Local Rule 30(c) December 1, 1995.*

*Former I.O.P.-30.3 redesignated Local Rule 30(d) December 1, 1995.*

## **Rule 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 3 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.

### ***Local Rule 31(a). Shortened Time for Service and Filing of Briefs in Criminal Cases.***

*Pursuant to the authority conferred by FRAP 31(a)(2), the time for serving and filing briefs in criminal appeals is shortened as follows: the appellant shall serve and file appellant's brief and appendix within thirty-five days after the date on which the briefing order is filed; the appellee shall serve and file appellee's brief within twenty-one days after service of the brief of the appellant; the appellant may serve and file a reply brief within ten calendar days after service of the brief of the appellee.*

### ***Local Rule 31(b). Briefing Orders.***

*A formal briefing schedule shall be sent to the parties upon receipt of the record, notification that the record is complete pursuant to Local Rule 10(a), or when the Clerk determines that no hearing was held for which a transcript is necessary -- whichever occurs first. Thus, the time for designating the contents of the joint appendix and the filing of briefs is controlled by the briefing order and not the receipt of the record as provided in FRAP 31(a)(1).*

### ***Local Rule 31(c). Filing and Service.***

*Briefs and appendices are deemed filed on the date of mailing if first class mail or other classes of mail at least as expeditious are used. If a courier service is used, the briefs and appendices are deemed timely filed if the briefs and appendices are given to the courier service on or before the due date to be dispatched to the Clerk's Office for delivery within three calendar days. Filing must be within the time allowed by the briefing order. A brief must be accompanied by a valid certificate of*

*service, which should be bound with the brief as the last, unnumbered page. A certificate of service can be prepared in advance of actual mailing or hand delivery of the paper served. If service is not actually accomplished in the manner and on the date stated in the certificate, an amended certificate of service is required.*

*Extensions will be granted only when extraordinary circumstances exist. A motion for an extension of time to file a brief must be filed well in advance of the date the brief is due and must set forth the additional time requested and the reasons for the request. The Court discourages these motions and may deny the motion entirely or grant a lesser period of time than the time requested.*

***Local Rule 31(d). Number of Copies.***

*Each party must file eight copies of the brief with the clerk and serve two copies on counsel for each party separately represented. Appointed counsel may file six copies and serve one copy on counsel for each party separately represented. Any party proceeding in forma pauperis who is not represented by Court-appointed counsel may file four copies, with service of one copy on counsel for each party separately represented. If an en banc hearing or rehearing en banc is scheduled, additional copies of briefs may be requested.*

*Former Local Rule 31 amended and redesignated Local Rule 31(a) December 1, 1995; Local Rule 31(a) amended December 1, 1998, and December 1, 2002.*

*Former I.O.P.-31.1 amended and redesignated Local Rule 31(b) December 1, 1995; Local Rule 31(b) amended December 1, 1998.*

*Former I.O.P.-31.2 redesignated Local Rule 31(c) December 1, 1995; Local Rule 31(c) amended December 4, 1996.*

*Former I.O.P.-31.3 redesignated Local Rule 31(d) December 1, 1995; Local Rule 31(d) amended December 1, 1998.*

## **Rule 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; and 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 8 ½ 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) and (C).
- (B) **Type-volume limitation.**
- (i) A principal brief is acceptable if:
- it contains no more than 14,000 words; or
  - it 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 8 ½ 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. 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.

***Local Rule 32(a). Reproduction of Appendices.***

*Double-sided copying of appendices is preferred in all cases. If an appendix is prepared by a commercial printer in a court-appointed case, the materials contained in the appendix should be reproduced on both sides of a sheet because reimbursement for copying expenses will be limited to 35 cents per double-sided sheet of the joint appendix. No joint appendix in a court-appointed case should exceed 250 sheets without advance permission from the Court; unless such permission is granted, reimbursement of copy expenses will be limited to 250 sheets.*

***Local Rule 32(b). Length of Briefs.***

*The Fourth Circuit encourages short, concise briefs. Under no circumstances may a brief exceed the limits set forth in FRAP 32(a)(7) without the Court's advance permission.*

*A motion for permission to submit a longer brief must be made to the Court of Appeals at least 10 calendar days prior to the due date of the brief and must be supported by a statement of reasons. These motions are not favored and will be granted only for exceptional reasons.*

***Local Rule 32(c). Correction of Briefs and Appendices.***

*If briefs, appendices, or other papers are illegible or are not in the form required by the federal rules or by this Court's local rules or standards when filed, counsel will be required to file corrected copies of the document. If the corrected copies are not submitted within the time allowed by the clerk, they must be accompanied by a motion to file out of time.*

*Former I.O.P.-32.2 amended September 28, 1994, and redesignated Local Rule 32(a) December 1, 1995; Local Rule 32(d) deleted December 1, 1998.*

*Former I.O.P.-32.1 amended December 1, 1992, and amended and redesignated Local Rule 32(b) December 1, 1995; Local Rule 32(b) amended and redesignated Local Rule 32(a) December 1, 1998; Local Rule 32(a) amended December 1, 2002.*

*Former Local Rule 28(d) amended and redesignated Local Rule 32(b) December 1, 1998; Local Rule 32(b) amended December 1, 2002.*

*Former I.O.P.-32.3 redesignated Local Rule 32(c) December 1, 1995; former Local Rule 32(c) deleted December 1, 1998.*

*Local Rule 32(d) added December 1, 1995, and redesignated Local Rule 32(c) December 1, 1998.*

*Former I.O.P.-32.4 deleted December 1, 1995.*

### **Rule 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.

#### ***Local Rule 33. Circuit Mediation Conferences.***

*All civil and agency cases in which all parties are represented by counsel on appeal will be reviewed by a circuit mediator after the filing of the docketing statements required by Local Rule 3(b). The circuit mediator will determine whether a mediation conference may assist either the Court or the parties. Counsel for a party may also request a conference if counsel believes it will be of assistance to the Court or the parties. Counsel's participation is required at any scheduled conference. Mediation conferences will generally be conducted by telephone but may be conducted in person in the discretion of a circuit mediator. Mediation conferences may be adjourned from time to time by a circuit mediator. Purposes of the mediation conference include:*

- (a) Jurisdictional review;*
- (b) Simplification, clarification, and reduction of issues;*
- (c) Discussion of settlement; and*
- (d) Consideration of any other matter relating to the efficient management and disposition of the appeal.*

*Although the time allowed for filing of briefs is not automatically tolled by proceedings under this local rule, if the parties wish to pursue, or are engaged in, settlement discussions, counsel for any party may move to extend the briefing schedule. The mediator, through the Clerk of the Court, may enter orders which control the course of proceedings and, upon agreement of the parties, dispose of the case.*

*Statements and comments made during all mediation conferences, and papers or electronic information generated during the process, are not included in Court files except to the extent disclosed by orders entered under this local rule. Information disclosed in the mediation process shall be kept confidential and shall not be disclosed to the judges deciding the appeal or to any other person outside the mediation program participants. Confidentiality is required of all participants in the mediation proceedings. All statements, documents, and discussions in such proceedings shall be kept confidential. The mediator, attorneys, and other participants in the mediation shall not disclose such statements, documents, or discussions without prior approval of the Standing Panel on Attorney Discipline. Any alleged violations of this rule shall be referred to the Court's Standing Panel on Attorney Discipline for a determination pursuant to Local Rule 46(g) of whether imposition of discipline is warranted. All proceedings before the Standing Panel on Attorney Discipline involving confidential information under this procedure shall be confidential.*

*Local Rule 33 added June 8, 1994, and amended December 1, 1995, March 4, 1998, and December 11, 2001.*

## **Rule 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.

**Local Rule 34(a). Oral Argument; Pre-argument Review and Summary Disposition of Appeals; Statement Regarding the Need for Oral Argument.**

*In the interest of docket control and to expedite the final disposition of pending cases, the chief judge may designate a panel or panels to review any pending case at any time before argument for disposition under this rule.*

*In reviewing pending cases before argument, the panel will utilize the minimum standards set forth in FRAP 34(a)(2). If all of the judges of the panel to which a pending appeal has been referred conclude that oral argument is not to be allowed, they may make any appropriate disposition without oral argument including, but not limited to, affirmance or reversal.*

*Because any case may be decided without oral argument, all major arguments should be fully developed in the briefs. In furtherance of the disposition of pending cases under this rule, parties may include in their briefs at the conclusion of the argument a statement setting forth the reasons why, in their opinion, oral argument should be heard.*

**Local Rule 34(b). Informal Briefs.**

*Whenever the Court determines pursuant to Local Rule 22(a) that briefing is appropriate on an appeal in a non-capital case from the denial of a writ of habeas corpus or of a motion under 28 U.S.C. § 2255, or whenever any pro se appeal is filed from any other type of judgment or order, the clerk shall notify the appellant that appellant shall file, within twenty-one days after receipt of such notice, an informal brief, listing the specific issues and supporting facts and arguments raised on appeal. Appellant's informal brief and any informal brief filed by appellee shall be considered, together with the record and other relevant papers, by the panel to which the proceeding has been referred. The Court will limit its review to the issues raised in the informal brief.*

*The informal brief may be submitted on a form provided by the clerk and shall provide the specific information required by the form. The parties need not limit their briefs solely to the form. An additional supporting memorandum may be attached if a party deems it necessary in order to address adequately the issues raised, but the briefs with any attachments shall not exceed the length limitations established by FRAP 32(a)(7). It is not necessary to cite cases in an informal brief. Two copies of the brief and attachments, if any, must be filed with the Court and a copy mailed to opposing counsel.*

*Once an informal briefing schedule has been established the parties may file a formal brief only with the permission of the Court. The Court initially reviews cases that are informally briefed under its procedures set forth in Local Rule 34(a) pertaining to pre-argument review.*

*If the panel reviewing an informal brief submitted by an indigent pro se litigant determines that further briefing and possible oral argument would be of assistance, counsel will be appointed and directed to file additional formal briefs. In any appeal that has been informally briefed, the Court may direct that additional briefs be filed prior to oral argument.*

**Local Rule 34(c). Court Sessions and Notification to Counsel.**

*The Court sits in Richmond, Virginia, for five consecutive days in October, November, December, February, March, April, May and June for its regular court terms. Court sessions are usually the first full week of each month, but adjustments are made because of holidays and elections, and special sessions may be scheduled at any time, anywhere in the circuit. Panels of the Court also regularly sit in the first full week of a scheduled month in Baltimore, Maryland, usually at least three times per year. On specified days during the summer months, panels sit in various cities throughout the circuit.*

*The Court initially hears and decides cases in panels consisting of three judges with the Chief Judge or most senior active judge presiding. Each panel regularly hears oral argument in four cases each day during court week; additional cases are added as required.*

*Attorneys appearing for oral argument must register with the Clerk's Office on the morning of argument to learn of courtroom assignment, order of appearance, and allocation of oral argument time. Counsel not already a member of the Fourth Circuit bar will be admitted to practice before the Court at that time upon compliance with the provisions of Local Rule 46(b). Registration commences at 8:15 a.m. and must be completed by 8:30 a.m., with the exception of Friday, when registration commences at 7:15 a.m. and must be completed by 7:45 a.m.*

*The Court convenes at 9:30 a.m., with the exception of Friday, when it convenes at 8:30 a.m.*

*Preparation for the argument calendar begins in the Clerk's Office approximately two months prior to argument. Immediately upon receiving notice that a case has been tentatively assigned to an argument session, counsel must inform the clerk of any conflict or other matter that would affect scheduling of the case for that session. Once a case has been scheduled for argument, it will be removed from the argument calendar only for extreme unforeseeable problems. Excusal from an established oral argument date is not granted because of a prior professional commitment. Although a case will not be removed from the calendar because of a scheduling conflict by counsel after the notification of oral argument has been issued, the Court may direct another lawyer from the same firm to argue the appeal if counsel of record cannot be present.*

**Local Rule 34(d). Argument Time.**

*Briefs for the cases assigned to a hearing panel are distributed by the clerk to the judges on a hearing panel at the time the hearing panel assignments are made. The members of the Court hearing oral argument will have read the briefs before the hearing and therefore will be familiar with the case. In oral argument, counsel should emphasize the dispositive issues.*

*Since the appellant is allowed to open and close the argument, counsel for appellant should indicate at registration before oral argument how much time counsel wants to reserve for rebuttal. It is recommended that no more than two attorneys argue per side. Each side is normally allowed 20 minutes, even in consolidated cases, but counsel may not need the full time allotted or the Court may shorten or extend the time allotted. In social security disability cases, black lung cases, and labor cases where the primary issue is whether the agency's decision is supported by substantial evidence and in criminal cases where the primary issue involves the application of the sentencing guidelines, each side is limited to 15 minutes. In black lung cases in which the Director, Office of Workers' Compensation Programs, has been granted leave to file a separate brief, the Director will share argument time with whichever side the Director's brief supports.*

*If counsel believes that more time is needed for oral argument, a written motion setting forth the reasons for additional time and whether the other parties consent must be submitted well in advance of the hearing date. The Court may sua sponte extend the allotted time during the argument or it may terminate the argument whenever in its judgment further argument is unnecessary.*

**Local Rule 34(e). Motion to Submit on Briefs.**

*As soon as possible upon completion of the briefing schedule or within 10 calendar days of tentative notification of oral argument, whichever is earlier, any party may file a motion to submit the case on the briefs without the necessity of oral argument. Such motions are not granted as a matter of course. A motion to submit on briefs should not be used to alleviate a scheduling conflict after the notification of oral argument has been issued.*

***I.O.P.-34.1. Calendar Assignments and Panel Composition.*** *The Clerk of Court maintains a list of mature cases available for oral argument and on a monthly basis merges those cases with a list of three-judge panels provided by a computer program designed to achieve total random selection.*

*The composition of each panel usually changes each day during court week except on those occasions where only one panel is sitting in a given geographical location. Every effort is made to assign cases for oral argument to judges who have had previous involvement with the case on appeal through random assignment to a preargument motion or prior appeal in the matter, but there is no guarantee that any of the judges who have previously been involved with an appeal will be assigned to a hearing panel. The varied assignment of judges to panels and the independent assignment of varied cases to panels is designed, insofar as practicable, to assure the opportunity for each judge to sit with all other judges an equal number of times, and to assure that both the appearance and the fact of presentation of particular types of cases to particular judges is avoided.*

***-34.2. Disposition Without Oral Argument.*** *A decision against oral argument must be unanimous, and if a case is decided without oral argument the decision on the merits must be unanimous also. Whenever at least one member of the review panel determines that oral argument would be of assistance, the panel notifies the clerk who places the case on the oral argument calendar.*

*Local Rule 34(a) amended December 1, 1995, and December 1, 1998.*

*Local Rule 34(b) amended December 1, 1995; June 5, 1996; September 25, 1996; December 1, 1998; and October 9, 2003.*

*Former I.O.P.-34.1 amended and redesignated Local Rule 34(c) December 1, 1995.*

*Former I.O.P.-34.3 amended and redesignated Local Rule 34(d) December 1, 1995; Local Rule 34(d) amended December 1, 1998, and June 1, 1999.*

*Former I.O.P.-34.5 redesignated Local Rule 34(e) December 1, 1995; Local Rule 34(e) amended December 1, 1998, and December 1, 2002.*

*Former I.O.P.-34.2 redesignated I.O.P.-34.1 December 1, 1995; I.O.P.-34.1 amended February 1, 2001.*

*Former I.O.P.-34.4 amended and redesignated I.O.P.-34.2 December 1, 1995.*

*Former I.O.P.-34.6 deleted December 1, 1995.*

## **Rule 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 petition for an en banc hearing or rehearing must not exceed 15 pages, excluding material not counted under Rule 32.
- (3) For purposes of the page limit 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.

**Local Rule 35. En Banc Proceedings.**

**(a) Petition for Rehearing En Banc.** *A petition for rehearing en banc must be made at the same time, and in the same document, as a petition for rehearing. The request for en banc consideration shall be stated plainly in the title of the petition. Petitions for rehearing en banc will be distributed to all active and senior judges of the Court, and to any visiting judge who may have heard and decided the appeal.*

**(b) Decision to Hear or Rehear a Case En Banc.** *A majority of the circuit judges who are in regular active service and who are not disqualified may grant a hearing or rehearing en banc. A poll on whether to rehear a case en banc may be requested, with or without a petition, by an active judge of the Court or by a senior or visiting judge who sat on the panel that decided the case originally. Unless a judge requests that a poll be taken on the petition, none will be taken. If no poll is requested, the panel's order on a petition for rehearing will bear the notation that no member of the Court requested a poll. If a poll is requested and hearing or rehearing en banc is denied, the order will reflect the vote of each participating judge. A judge who joins the Court after a petition has been submitted to the Court, and before an order has been entered, will be eligible to vote on the decision to hear or rehear a case en banc.*

**(c) Decision of Cases Heard or Reheard En Banc.** *An en banc hearing will be before all eligible, active and participating judges of the Court. An en banc rehearing will be before all eligible and participating active judges, and any senior judge of the Court who sat on the panel that decided the case originally. An active judge who takes senior status after a case is heard or reheard by an en banc Court will be eligible to participate in the en banc decision. A judge who joins the Court after argument of a case to an en banc Court will not be eligible to participate in the decision of the case. A judge who joins the Court after submission of a case to an en banc Court without oral argument will participate in the decision of the case. Granting of rehearing en banc vacates the previous panel judgment and opinion; the rehearing is a review of the judgment or decision from which review is sought and not a review of the judgment of the panel. (The circuit takes the position that the change of wording in 28 U.S.C. § 46(c) referring to participation in en banc decisions does not alter the long-standing rule that the en banc court reviews the decision from which review is sought in this Court, not the decision of a panel.)*

**(d) Additional Copies of Briefs and Appendix for En Banc Hearing or Rehearing.** *The Court's order granting hearing or rehearing en banc may require the parties to file additional copies of the briefs and appendix. Each party will bear the initial cost of additional copies of its own briefs. The party that requested the hearing or rehearing en banc will bear the initial cost of filing additional copies of the appendix. In the event that cross petitions for hearing or rehearing en banc are granted, the parties will share equally the initial cost of preparing additional copies of the appendix.*

*Local Rule 35 amended March 31, 1993, March 9, 1994, December 4, 1996, December 1, 1998, December 1, 2003, and December 1, 2005.*

## **Rule 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.

### ***Local Rule 36(a). Publication of Decisions.***

*Opinions delivered by the Court will be published only if the opinion satisfies one or more of the standards for publication:*

- i. It establishes, alters, modifies, clarifies, or explains a rule of law within this Circuit; or*
- ii. It involves a legal issue of continuing public interest; or*
- iii. It criticizes existing law; or*
- iv. It contains a historical review of a legal rule that is not duplicative; or*
- v. It resolves a conflict between panels of this Court, or creates a conflict with a decision in another circuit.*

*The Court will publish opinions only in cases that have been fully briefed and presented at oral argument. Opinions in such cases will be published if the author or a majority of the joining judges believes the opinion satisfies one or more of the standards for publication, and all members of the Court have acknowledged in writing their receipt of the proposed opinion. A judge may file a published opinion without obtaining all acknowledgments only if the opinion has been in circulation for ten calendar days.*

### ***Local Rule 36(b). Unpublished Dispositions.***

*Unpublished opinions give counsel, the parties, and the lower court or agency a statement of the reasons for the decision. They may not recite all of the facts or background of the case and may simply adopt the reasoning of the lower court. They are sent only to the trial court or agency in which the case originated, to counsel for all parties in the case, and to litigants in the case not represented by counsel. Any individual or institution may receive copies of all published opinions of the Court by paying an annual subscription fee for this service. In addition, copies of such opinions are sent to all circuit judges, district judges, bankruptcy judges, magistrate judges, clerks of district court, United States Attorneys, and Federal Public Defenders upon request. Copies of published and unpublished opinions are available from the Clerk's Office for \$2.00 per opinion. Published and unpublished opinions issued since January 1, 1996 are available free of charge at [www.ca4.uscourts.gov](http://www.ca4.uscourts.gov).*

*Counsel may move for publication of an unpublished opinion, citing reasons. If such motion is granted, the unpublished opinion will be published without change in result.*

**Local Rule 36(c). Citation of Unpublished Dispositions.**

*In the absence of unusual circumstances, this Court will not cite an unpublished disposition in any of its published opinions or unpublished dispositions. Citation of this Court's unpublished dispositions in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case.*

*If counsel believes, nevertheless, that an unpublished disposition of this Court has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited if counsel serves a copy thereof on all other parties in the case and on the Court. Such service may be accomplished by including a copy of the disposition in an attachment or addendum to the brief pursuant to the procedures set forth in Local Rule 28(b).*

**I.O.P.-36.1. Opinion Preparation Assignments.** *The custom of the Fourth Circuit is to reserve judgment at the conclusion of oral argument. A conference of the panel is held promptly after oral argument, usually immediately after the presentation of the case. Although a tentative decision may be reached at this conference, additional conferences are sometimes necessary. Opinion assignments are made by the Chief Judge on the basis of recommendations from the presiding judge of each panel on which the Chief Judge did not sit.*

**-36.2. Circulation of Opinions in Argued Cases and Announcement of Decision.** *Although one judge writes the opinion, every panel member is equally involved in the process of decision. An appeal may be heard and decided by two of the three judges assigned to a panel, when one judge becomes unavailable. If a panel is reduced to two and the two cannot agree, however, the case will be reargued before a new three-judge panel which may or may not include prior panel members.*

*When a proposed opinion in an argued case is prepared and submitted to other panel members, copies are provided to the non-sitting judges, including the senior judges, and their comments are solicited. The opinion is then finalized. The Clerk's Office never receives advance notice of when a decision will be rendered, so counsel should not call for such information.*

*It is the policy of the Fourth Circuit to mail a copy of the opinion to counsel on the day judgment is entered. Upon written request, counsel will be called on that day and informed of the disposition of the case; the text of the opinion will not be read over the telephone.*

**-36.3. Summary Opinions.** *If all judges on a panel of the Court agree following oral argument that an opinion in a case would have no precedential value, and that summary disposition is otherwise appropriate, the Court may decide the appeal by summary opinion. A summary opinion identifies the decision appealed from, sets forth the Court's decision and the reason or reasons therefor, and resolves any outstanding motions in the case. It does not discuss the facts or elaborate on the Court's reasoning.*

*Former I.O.P.-36.4 redesignated Local Rule 36(a) December 1, 1995; Local Rule 36(a) amended December 1, 2002.  
Former I.O.P.-36.5 amended January 1, 1994, and amended and redesignated Local Rule 36(b) December 1, 1995;  
Local Rule 36(b) amended December 1, 2002.*

*Former I.O.P.-36.6 redesignated Local Rule 36(c) December 1, 1995; Local Rule 36 (c) amended October 1, 2002.  
I.O.P.-36.2 amended January 1, 1994, and December 1, 1995.*

### **Rule 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.

**Rule 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.

## **Rule 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 10 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.

**Local Rule 39(a). Printing Costs.**

*The cost of printing or otherwise producing necessary copies of briefs and appendices shall be taxable as costs at a rate equal to actual cost, but not higher than \$4.00 per page of photographic reproduction of typed material.*

**Local Rule 39(b). Bill of Costs.**

*The verified bill of costs may be that of a party or counsel, and should be accompanied by the printer's itemized statement of charges. When costs are sought for or against the United States, counsel should cite the statutory authority relied upon. Taxation of costs will not be delayed by the filing of a petition for rehearing or other postjudgment motion. A late affidavit for costs must be accompanied by a motion for leave to file. The clerk rules on all bills of costs and objections in the first instance.*

**Local Rule 39(c). Recovery of Costs in the District Court.**

*The only costs generally taxable in the Court of Appeals are: (1) the docketing fee if the case is reversed; and (2) the cost of printing or reproducing briefs and appendices, including exhibits.*

*Although some costs are "taxable" in the Court of Appeals, all costs are recoverable in the district court after issuance of the mandate. If the matter of costs has not been settled before issuance of the mandate, the clerk will send a supplemental "Bill of Costs" to the district court for inclusion in the mandate at a later date.*

*Various costs incidental to an appeal must be settled at the district court level. Among such items are: (1) the cost of the reporter's transcript; (2) the fee for filing the notice of appeal; (3) the fee for preparing and transmitting the record; and (4) the premiums paid for any required appeal bond. Application for recovery of these expenses by the successful party on appeal must be made in the district court, and should be made only after issuance of the mandate by the Court of Appeals. These costs, if erroneously applied for in the Court of Appeals, will be disallowed without prejudice to the right to reapply for them in the district court.*

*Former Local Rule 39 redesignated Local Rule 39(a) December 1, 1995; Local Rule 39(a) amended December 1, 1998.*

*Local Rule 39(b) added December 1, 1995.*

*Local Rule 39(c) added December 1, 1995.*

*Former I.O.P.-39.1 deleted December 1, 1995.*

## **Rule 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, if the United States or its officer or agency is a party, the time within which any party may seek rehearing is 45 days after entry of judgment, unless an order shortens or extends the time.
- (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. Unless the court permits or a local rule provides otherwise, a petition for panel rehearing must not exceed 15 pages.

### ***Local Rule 40(a). Filing of Petition.***

*Although petitions for rehearing are filed in a great many cases, few are granted. Filing a petition solely for purposes of delay or in order merely to reargue the case is an abuse of privilege.*

*Whenever a request for rehearing en banc is contained in a petition, such fact must be stated plainly on the cover of and in the title of the document.*

*The Court requires 4 copies of the petition. If the petition contains a request for rehearing en banc, the Court requires 20 copies. A copy of the Court's opinion must be attached to each copy of the petition for rehearing or petition for rehearing en banc.*

### ***Local Rule 40(b). Statement of Purpose.***

*A petition for rehearing must contain an introduction stating that, in counsel's judgment, one or more of the following situations exist:*

- i. A material factual or legal matter was overlooked in the decision.*
- ii. A change in the law occurred after the case was submitted and was overlooked by the panel.*
- iii. The opinion is in conflict with a decision of the United States Supreme Court, this Court, or another court of appeals and the conflict is not addressed in the opinion.*
- iv. The proceeding involves one or more questions of exceptional importance.*



*A petition should only be made to direct the Court's attention to one or more of the above situations. The points to be raised should be succinctly listed in counsel's statement of purpose.*

**Local Rule 40(c). Time Limits for Filing Petitions.**

*The Court strictly enforces the time limits for filing petitions for rehearing and petitions for rehearing en banc. The Clerk's Office will deny as untimely any petition received in the Clerk's Office later than 45 days after entry of judgment in any civil case where the United States, or an agency or officer thereof is a party, or 14 days after the entry of judgment in any other case. The only grounds for an extension of time to file a petition, or to accept an untimely petition, are as follows:*

- i. the death or serious illness of counsel, or of a member of counsel's immediate family (or in the case of a party proceeding without counsel, the death or serious illness of the party or a member of the party's immediate family); or*
- ii. an extraordinary circumstance wholly beyond the control of counsel or of a party proceeding without counsel.*

*Petitions for rehearing and petitions for en banc rehearing from incarcerated persons proceeding without the assistance of counsel are deemed filed when they are delivered to prison or jail officials. All other such petitions are deemed filed only when received in the Clerk's Office.*

**Local Rule 40(d). Papers Filed After Denial of a Petition for Rehearing.**

*Except for timely petitions for rehearing en banc, cost and attorney fee matters, and other matters ancillary to the filing of an application for writ of certiorari with the Supreme Court, the Office of the Clerk shall not receive motions or other papers requesting further relief in a case after the Court has denied a petition for rehearing or the time for filing a petition for rehearing has expired.*

**I.O.P.-40.1. Submission of Petitions for Rehearing to the Court.** *The Clerk's Office will hold any petition for rehearing or petition for rehearing en banc until the time for filing all such petitions, or any extension thereof granted in the particular case, has run. Thereafter, all petitions for rehearing in the same case will be distributed to the Court simultaneously.*

**-40.2. Panel Rehearing.** *The panel of judges who heard and decided the appeal will rule on the petition for rehearing. Such panel may include a senior circuit judge or a visiting judge sitting in the Fourth Circuit by designation.*

*If a petition for rehearing is granted, the original judgment and opinion of the Court are vacated and the case will be reheard before the original panel. The Court may direct the filing of additional briefs, or the parties may seek leave of Court to file additional briefs.*

*Former I.O.P.-40.1 redesignated Local Rule 40(a) December 1, 1995; Local Rule 40(a) amended December 1, 1998, and October 5, 2004.*

*Former I.O.P.-40.2 amended December 1, 1994 and redesignated Local Rule 40(c) December 1, 1995; Local Rule 40(c) amended December 1, 1998.*

*Former I.O.P.-40.5 redesignated former I.O.P.-40.4 December 1, 1994, and redesignated Local Rule 40(b) December 1, 1995; Local Rule 40(b) amended December 1, 1998.*

*Former I.O.P.-40.7 amended January 1, 1994, redesignated former I.O.P.-40.6 December 1, 1994, and redesignated Local Rule 40(d) December 1, 1995; Local Rule 40(d) amended December 1, 1998.*

*Former I.O.P.-40.4 redesignated former I.O.P.-40.3 December 1, 1994, and redesignated I.O.P. 40.1 December 1, 1995; I.O.P.-40.1 amended December 1, 1998.*

*Former I.O.P.-40.6 redesignated former I.O.P.-40.5 December 1, 1994, and amended and redesignated I.O.P.-40.2 December 1, 1995.*

*Former I.O.P.-40.3 deleted December 1, 1994.*

## **Rule 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 calendar days after the time to file a petition for rehearing expires, or 7 calendar 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.

### ***Local Rule 41. Motion for Stay of the Mandate.***

*A motion for stay of the issuance of the mandate shall not be granted simply upon request. Ordinarily the motion shall be denied unless there is a specific showing that it is not frivolous or filed merely for delay. The motion must present a substantial question or set forth good or probable cause for a stay. Stay requests are normally acted upon without a request for a response.*

***I.O.P.-41.1. Issuance of the Mandate.*** *On the date of issuance of the mandate, the Clerk of the Court will issue written notice to the parties and the clerk of the lower court that the judgment of the Court of Appeals takes effect that day. The trial court record will be returned to the clerk of that court once the mandate has issued.*

***-41.2. Petitions for Writs of Certiorari.*** *A petition for a writ of certiorari must be filed with the Supreme Court within 90 days of the entry of judgment in a criminal case or a civil case. The time for the petition does not run from the issuance of the mandate, but from the date of judgment which is also the opinion date. If a petition for rehearing or a petition for rehearing en banc is timely filed, the time runs from the date of denial of that petition. Counsel should consult the Rules of the Supreme Court for details on how to proceed with the petition.*

*The Rules of the Supreme Court do not require that the record accompany a petition for certiorari and the record will not be forwarded unless specifically requested by the petitioner or counsel. Requests to certify and transmit the record to the Supreme Court prior to action on the petition for a writ of certiorari are disfavored by the Supreme Court. The Clerk of the Supreme Court will request the record from the Court of Appeals when review of the record is desired by the Supreme Court prior to action on a petition for writ of certiorari or upon granting certiorari if the record has not been transmitted earlier. The same procedures are followed for Supreme Court review by certification pursuant to 28 U.S.C. § 1254(2).*

*If a case is remanded to the Court of Appeals from the Supreme Court, the case shall be reopened under the original docket number and the Court of Appeals may require additional briefs and oral argument, summarily dispose of the case, or take any other action consistent with the Supreme Court's opinion.*

*Former I.O.P.-41.2 amended and redesignated Local Rule 41 December 1, 1995.*

*I.O.P.-41.1 amended December 1, 1995.*

*Former I.O.P.-41.3 amended and redesignated I.O.P.-41.2 December 1, 1995; I.O.P.-41.2 amended December 1, 1998.*

## **Rule 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.

### ***Local Rule 42. Voluntary Dismissals.***

*In civil cases, the stipulation of dismissal or motion for voluntary dismissal may be signed by counsel. In criminal cases, however, the agreement or motion must be signed or consented to by the individual party appellant personally or counsel must file a statement setting forth the basis for counsel's understanding that the appellant wishes to dismiss the appeal and the efforts made to obtain the appellant's written consent. Counsel must serve a copy of this statement on appellant.*

*Former I.O.P. 42.1 amended and redesignated Local Rule 42 December 1, 1995.*

## **Rule 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.

**Rule 44. Case 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.

## **Rule 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.



**Local Rule 45. Dismissals for Failure to Prosecute.**

*When an appellant in either a docketed or non-docketed appeal fails to comply with the Federal Rules of Appellate Procedure or the rules or directives of this Court, the clerk shall notify the appellant or, if appellant is represented by counsel, appellant's counsel that upon the expiration of 15 days from the date thereof the appeal will be dismissed for want of prosecution, unless prior to that date appellant remedies the default. Should the appellant fail to comply within said 15-day period, the clerk shall then enter an order dismissing said appeal for want of prosecution, and shall issue a certified copy thereof to the clerk of the district court as and for the mandate. In no case shall the appellant be entitled to reinstate the case and remedy the default after the same shall have been dismissed under this rule, unless by order of this Court for good cause shown. The dismissal of an appeal shall not limit the authority of this Court, in an appropriate case, to take disciplinary action against defaulting counsel.*

**I.O.P.-45.1. Clerk's Office.** *The Clerk's Office is located on the fifth floor of the United States Courthouse Annex in Richmond, Virginia, and is open from 8:30 a.m. to 5:00 p.m. every weekday, except federal holidays. All correspondence concerning cases pending before the Court should be addressed to:*

*Clerk, United States Court of Appeals  
for the Fourth Circuit  
1100 East Main Street, Suite 501  
Richmond, Virginia 23219-3517  
Telephone 804/916-2700*

**-45.2. Public Information.** *The Court's opinions, rules, procedures, forms, and argument calendar are available at [www.ca4.uscourts.gov](http://www.ca4.uscourts.gov). Docket information is also available at [www.ca4.uscourts.gov](http://www.ca4.uscourts.gov) to users with a log-in name and password for the Judiciary's PACER system (Public Access to Court Electronic Records). Information concerning the status of appeals and the operation of rules and procedures may be obtained from the Clerk's Office by telephone inquiry. Matters of public record may be reviewed upon request at the Clerk's Office and case documents may be transmitted to the district court for review by counsel upon proper application to the Clerk's Office.*

*Local Rule 45 amended December 1, 1995, and December 1, 1998.  
Former I.O.P.-45.3 deleted December 1, 1995.  
I.O.P. -45.2 amended December 1, 2002.*

## **Rule 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.

**Local Rule 46(a). Legal Assistance to Indigents by Law Students.**

*An eligible law student with the written consent of an indigent and the attorney of record may appear in this Court on behalf of that indigent in any case. An eligible law student with the written consent of the United States Attorney or authorized representative may also appear in this Court on behalf of the United States in any case. An eligible law student with the written consent of the State Attorney General or authorized representative may also appear in this Court on behalf of that state in any case. In each case, the written consent shall be filed with the clerk.*

*An eligible law student may assist in the preparation of briefs and other documents to be filed in this Court, but such briefs or documents must be signed by the attorney of record. The student may also participate in oral argument with leave of the Court, but only in the presence of the attorney of record. The attorney of record shall assume personal professional responsibility for the law student's work and for supervising the quality of that work. The attorney should be familiar with the case and prepared to supplement or correct any written or oral statement made by the student.*

*In order to make an appearance pursuant to this rule, the law student must:*

- 1. Be duly enrolled in a law school approved by the American Bar Association;*
- 2. Have completed legal studies amounting to at least four (4) semesters, or the equivalent if the school is on some basis other than a semester basis;*
- 3. Be certified by the dean of the student's law school as being of good character and competent legal ability which certification shall be filed with the clerk. This certification may be withdrawn by the dean at any time by mailing notice to the clerk or by termination by this Court without notice of hearing and without any showing of cause;*
- 4. Be introduced to the Court by an attorney admitted to practice before this Court;*
- 5. Neither ask for nor receive any compensation or remuneration of any kind from the person on whose behalf the student renders services, but this shall not prevent an attorney, legal aid bureau, law school, public defender agency, a State, or the United States from paying compensation to the eligible law student, nor shall it prevent any agency from making such charges for its services as it may otherwise properly require;*
- 6. Certify in writing that he or she has read and is familiar with the Code of Professional Responsibility or Rules of Professional Conduct in force in the state in which the student's law school is located.*

**Local Rule 46(b). Admission to Practice.**

*Only attorneys admitted to the bar of this Court may practice before the Court. An attorney may be named on a brief filed in this Court without being admitted to the bar of the Fourth Circuit, provided that at least one lawyer admitted to practice in this Court also appears on the brief. Any other document submitted by an attorney who is not a member of the bar of the Fourth Circuit will be accepted for filing conditioned on his or her qualifying for membership within a reasonable time.*

*Each applicant for admission to the bar of this Court shall file with the clerk an application on the form approved by the Court and furnished by the clerk. Thereafter, upon written or oral motion of a member of the bar of the Court, the Court will act upon the application. A qualified attorney may be admitted upon personal appearance in open court. It is not necessary that an applicant appear in open court for the purpose of being admitted unless the Court shall otherwise order.*

*The requisite \$170.00 fee must accompany the application, but attorneys appointed by the Court to represent a party in forma pauperis, counsel for the United States and any agency thereof who has a case pending before this Court, and law clerks to the judges of the Court and to the district judges, magistrate judges, and bankruptcy judges within this Circuit shall be admitted to the bar of*

*this Court without the payment of an admission fee. The clerk shall credit \$150 of each \$170 fee to the Judiciary's fee account and designate the remaining \$20 for deposit to a fund maintained by the Court for the benefit of the bench and bar in the administration of justice.*

*A certificate indicating that an attorney has been admitted to practice before the Fourth Circuit will be sent to counsel by mail after admission.*

***Local Rule 46(c). Appearance of Counsel; Withdrawal; Substitutions.***

*Each attorney of record must file a written appearance with the clerk within 14 days after the appeal is docketed or after being retained or appointed. At the time of docketing, the clerk will send to each counsel or party in the trial court a "designation of counsel" form. This form should be filled out and returned to the Clerk of the Fourth Circuit within 14 days. Thereafter, the Court will send correspondence, notices of oral argument, and copies of final decisions only to those attorneys who have filed their appearance forms. More than one attorney of the same firm may sign the same form. This form does not affect the credit line listed on printed opinions, as that information is furnished to publishing firms from those names listed on the briefs.*

*Once an appearance in an appeal has been filed, an attorney may not withdraw from representation without notice to the party he or she is representing and consent of the Court. A motion to withdraw should state fully the reason for the request. Substitution of counsel of record can be accomplished by submitting a counsel of record form or written appearance for new counsel along with existing counsel's motion to withdraw or strike appearance.*

***Local Rule 46(d). Appointment of Counsel.***

*In any appeal in which appointment of counsel is mandated by section (a)(1) of the Criminal Justice Act, 18 U.S.C. § 3006A(a)(1), counsel is appointed upon the docketing of the appeal without prior notice to the attorney who represented the indigent in the case below. The duty of counsel appointed under the CJA extends through advising an unsuccessful appellant in writing of the right to seek review in the Supreme Court. If the appellant requests in writing that a petition for a writ of certiorari be filed and in counsel's considered judgment there are grounds for seeking Supreme Court review, counsel shall file such a petition. If appellant requests that a petition for a writ of certiorari be filed but counsel believes that such a petition would be frivolous, counsel may file a motion to withdraw with the Court of Appeals. The motion must reflect that a copy was served on the client and that the client was informed of the right to file a response to the motion within seven days. The Clerk will hold the motion after filing for fifteen days before submitting it to the Court to allow time for appellant's response, if any, to be received.*

*Assignment of counsel is discretionary in other indigent cases. Therefore, such cases receive a preliminary review before a decision is made regarding appointment of counsel. In assigning counsel, the Court may direct counsel to brief a particular issue, but counsel is free to address any additional issues which appear to be meritorious.*

*Payment of counsel appointed under the CJA is governed by 18 U.S.C. § 3006A(d) and this Circuit's Plan in Implementation of the Criminal Justice Act. Unless compensation for legal services becomes available to assigned counsel by statute, the Court will pay counsel assigned for appellate representation not covered by the CJA a maximum fee of \$750 plus expenses from the Attorney Admission Fund.*

*To receive payment from the Court, court-appointed or court-assigned counsel in all cases must submit to the Clerk's Office an itemized statement of expenses, with receipts, within sixty days of final disposition of the case. Depending upon the course of the case, this may be sixty days from (1) the date of judgment, (2) dismissal of the appeal, or (3) denial of a petition for rehearing. Before the*

expiration of the sixty-day time period the Court, for good cause shown, may grant counsel an extension of time to file the application for compensation and reimbursement. If court-appointed counsel files a petition for writ of certiorari with the Supreme Court, the 60-day period for applying for compensation and reimbursement runs from the date of filing the petition for writ of certiorari.

**Local Rule 46(e). Attorney's Fees and Expenses.**

The Court may award attorney's fees and expenses whenever authorized by statute. Any application for an award must include a reference to the statutory basis for the request and a detailed itemization of the amounts requested. Court-appointed counsel may apply for an award of fees and expenses, but any award by the Court is in lieu of the regular appointment fees provided by the Court. In certain agency cases, counsel may submit the standard government form for fees and expenses provided by the agency for approval by the Court.

**Local Rule 46(f). Proceeding Pro Se.**

An individual may proceed without the aid of counsel, but should so inform the Court at the earliest possible time. In any pro se appeal, the clerk shall notify the parties that they shall file informal briefs as provided by Local Rule 34(b). The Court will limit its review to the issues raised in the informal briefs and will consider the need for the appointment of counsel when reviewing the appeal under Local Rule 34(a). Cases involving pro se litigants are ordinarily not scheduled for oral argument.

**Local Rule 46(g). Rules of Disciplinary Enforcement.**

(1) A member of the bar of this Court may be disciplined by this Court as a result of

(a) Conviction in any court of the United States, the District of Columbia, or any state, territory or commonwealth of the United States, of any felony or of any lesser crime involving false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, or theft;

(b) Imposition of discipline by any other court of whose bar the attorney is a member, or an attorney's disbarment by consent or resignation from the bar of such court while an investigation into allegations of misconduct is pending;

(c) Conduct with respect to this Court which violates the rules of professional conduct or responsibility in effect in the state or other jurisdiction in which the attorney maintains his or her principal office, the Federal Rules of Appellate Procedure, the local rules of this Court, or orders or other instructions of this Court; or

(d) Any other conduct unbecoming a member of the bar of this Court.

(2) Discipline may consist of disbarment, suspension from practice before this Court, monetary sanction, removal from the roster of attorneys eligible for appointment as Court-appointed counsel, reprimand, or any other sanction that the Court may deem appropriate. Disbarment is the presumed discipline for conviction of a crime specified in paragraph (1)(a) above. The identical discipline imposed by another court is presumed appropriate for discipline taken as a result of that other court's action pursuant to paragraph (1)(b). A monetary sanction imposed on disciplinary grounds is the personal responsibility of the attorney disciplined, and may not be reimbursed by a client.

(3) The clerk reviews reports received from other courts concerning discipline imposed on members of the bar of this Court. He refers to the Court all disbarments, suspensions, resignations during the pendency of misconduct investigations, and other actions sufficient to cast doubt upon the member's continuing qualification to practice before this Court.

(4) The clerk issues a notice to show cause why a member of the bar shall not be disciplined by this Court upon receipt of official notification of an attorney's conviction of a crime specified in

paragraph (1)(a) or of the imposition of discipline by another court referred to this Court pursuant to paragraph (3) above, or upon the Court's determination that cause may exist for discipline pursuant to paragraphs (1)(c) or (1)(d). Such notice is sent by certified mail, directs that a response be filed within 30 days of the date of the notice, and directs that the attorney complete and return to the clerk within that time a declaration of the names and addresses of other bars to which he or she is admitted, using the form supplied by the clerk, whether or not the attorney chooses otherwise to respond to the notice. The clerk also appends a copy of Local Rule 46(g).

(5) Upon receiving official notification that a member of the bar has been convicted of a crime specified in paragraph (1)(a), the clerk automatically will issue an order suspending the attorney's privilege to practice before this Court pending the Court's determination of appropriate discipline.

(6) An attorney to whom a notice to show cause has been sent may consent to disbarment, by filing with the clerk an affidavit stating that the attorney desires to consent to disbarment and that:

(a) The attorney's consent is freely and voluntarily rendered; the attorney is not being subjected to coercion or duress; the attorney is fully aware of the implications of so consenting;

(b) The attorney is aware that there is a presently pending proceeding involving allegations that there exist grounds for the attorney's discipline, the nature of which the attorney shall specifically set forth;

(c) The attorney acknowledges that the material facts so alleged are true; and

(d) The attorney so consents because the attorney knows that he or she cannot successfully defend himself or herself.

The order disbarring the attorney on consent is a matter of public record. However, the affidavit will not be publicly disclosed or made available for use in any other proceeding except upon order of this Court.

(7) If the attorney fails to respond to the notice within 30 days, or such other time as the Court shall allow, the clerk enters an order imposing the presumptive discipline. If no presumptive discipline is specified for the conduct, the clerk notifies the Court of the attorney's non-response and the Court takes such action as it deems appropriate.

(8) All matters pertaining to discipline of attorneys are submitted to the Court's Standing Panel on Attorney Discipline, which consists of three active circuit judges, each of whom is appointed by the Chief Judge to serve on the Panel for a three-year term. The initial members of the Standing Panel are appointed for terms of one, two, and three years so that the Panel members' terms are staggered for continuity of decision making. If any member of the Standing Panel is unable to hear a particular matter, the clerk randomly designates another active circuit judge to the Panel for the purpose of disposing of that matter.

(9) The Standing Panel considers all materials submitted by an attorney to whom notice to show cause has issued. The Panel may request further information from a court that has previously imposed discipline on the attorney, or from its disciplinary agency. A copy of any such information is made available to the attorney or to his or her counsel. Should an attorney request a hearing on the matter it will be heard by the Standing Panel at a time and place of its choosing.

(10) The Court may at any time appoint counsel to investigate or prosecute a disciplinary matter, or to represent an indigent attorney instructed to show cause. The Court prefers to appoint as prosecuting counsel the disciplinary agency of the highest court of the state in which the attorney maintains his or her principal office. However, if the state disciplinary agency declines appointment, or the Court deems other counsel more appropriate, it may appoint any other member of the bar as prosecuting counsel. Counsel appointed either for prosecution or defense will be

*compensated for his or her services according to the Court's plan for appointment of counsel in criminal cases, from the attorney admission fund.*

*(11) The Court's order imposing discipline will set forth the nature of the discipline imposed; if disbarment or suspension from practice before the Court, the terms upon which reinstatement will occur or be considered by the Court; and any instructions to the clerk concerning the notification of the Court's action to be given to other courts or official bodies.*

*(12) The clerk is responsible for*

*(a) Automatically initiating show cause proceedings when official notice of an attorney's conviction of a crime specified in paragraph (1)(a) or discipline by another court pursuant to paragraph (3) is brought to his or her attention;*

*(b) Bringing to the attention of the Standing Panel instances of violations by members of the bar of this Court of the Federal Rules of Appellate Procedure, this Court's local rules or this Court's orders or other instructions that may warrant discipline;*

*(c) Obtaining declarations of the names and addresses of other bars of which an attorney possibly subject to discipline by this Court may be a member; and*

*(d) Unless directed otherwise by the Court, within 10 days of the imposition of discipline upon a member of the bar of this Court, notifying all other courts of those bars the attorney reports that he or she is a member, and the American Bar Association's National Disciplinary Data Bank, of the Court's action, enclosing a certified copy of the Court's order.*

*Former Local Rule 46 amended and redesignated Local Rule 46(a) December 1, 1995.*

*Former I.O.P.-46.1 redesignated Local Rule 46(b) December 1, 1995; Local Rule 46(b) amended September 30, 2003. Local Rule 46(b) amended September 30, 2003.*

*Former I.O.P.-46.2 amended and redesignated Local Rule 46(c) December 1, 1995; Local Rule 46(c) amended December 1, 2002.*

*Former I.O.P.-46.3 amended December 8, 1994, and October 5, 1995, and amended and redesignated Local Rule 46(d) December 1, 1995; Local Rule 46(d) amended February 1, 2001.*

*Former I.O.P.-46.4 redesignated Local Rule 46(e) December 1, 1995.*

*Former I.O.P.-46.5 redesignated Local Rule 46(f) December 1, 1995.*

*Former I.O.P.-46.6 amended and redesignated Local Rule 46(g) December 1, 1995.*

*Local Rule 46(f) amended September 25, 1996.*

## **Rule 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.

### ***Local Rule 47(a). Procedures for Adoption of Local Rules and Internal Operating Procedures.***

*Following tentative approval of an amendment to its local rules or internal operating procedures, and consultation with its Advisory Committee on Rules and Procedures, the Court of Appeals will provide public notice of the proposed amendment and an opportunity for comment.*

*The Court will set a period for comment for each proposed amendment, based upon the urgency of the matter involved. If the Court determines that there is an immediate need for a rule, the Court may provide that an amendment take immediate effect, and promptly thereafter afford notice and opportunity for comment.*

*Notice of a proposed amendment will be provided by distribution of the proposed change to all district judges, bankruptcy judges, magistrate judges, district and bankruptcy clerks, United States Attorneys, and state bar associations within the Circuit. Notice will also be sent to all legal newspapers and bar journals within the Circuit. Such notice shall include the text of a proposed amendment, unless it is lengthy. If the amendment is lengthy, the notice will describe the purpose and effect of the proposed amendment, and advise interested parties to obtain copies of the text of the proposed amendment from the clerk. Any person or organization requesting routine notice of proposed amendments to the Court's rules and internal operating procedures may, by letter to the clerk, be placed on the mailing list for such proposed changes.*

*All comments will be addressed to the Clerk of the Court of Appeals. If comments are received, they will be circulated to all members of the Court prior to the effective date of the proposed amendment, unless the amendment was given immediate effect.*



**Local Rule 47(b). Advisory Committee on Rules and Procedures.**

*The Court's Advisory Committee on Rules and Procedures shall consist of five attorneys, one from each of the states constituting the Fourth Circuit.*

*The members shall be appointed by the Chief Judge of the Circuit for three-year terms. The terms shall be staggered, so that no more than two members' terms expire in any year. No person may serve more than two full three-year terms.*

*The Chief Judge of the Circuit shall designate one of the members to serve as chair of the Committee. The clerk shall serve as the Court's principal liaison with the Committee.*

*The Committee shall study the Court's local rules and internal operating procedures, make recommendations concerning them, and advise the Court concerning all proposed changes to them.*

**I.O.P.-47.1. Judicial Conference.**

*(a) There shall be held pursuant to 28 U.S.C. § 333 a conference of all the circuit and district judges, all bankruptcy judges and all full-time magistrate judges of the Circuit for the purpose of considering the business of the courts, advising means of improving the administration of justice within such Circuit, and discussion of ideas with respect to the administration of justice. It shall be the duty of every judge of the Circuit in active service and every full-time magistrate judge to attend such conference.*

*(b) The first day of the conference shall be devoted to a session for the judges alone, in which there shall be discussed matters affecting the state of the dockets and the administration of justice in their respective districts.*

*(c) Members of the bar to be chosen, as hereafter set forth, shall be members of the conference and shall participate in its discussions and deliberations on the second and third days.*

*(d) Members of the conference from the bar shall be as provided in I.O.P. 47.2 as approved by the active circuit judges sitting from time to time in administrative session.*

*(e) The Circuit Executive of this Court shall be the secretary of the conference, and shall make and preserve an accurate record of its proceedings.*

*(f) Each member of the bar chosen to be a member of the conference shall pay an annual membership fee in an amount fixed by the Court of Appeals, to be applied to the payment of the expenses of the conference as approved by the Chief Judge of the Circuit. The payment of the annual membership fee by members of the bar is a condition to retention of conference membership. The Chief Judge may excuse the payment of the fee in individual cases.*

**-47.2. Bar Membership in the Judicial Conference of the Circuit.** *Commencing with the 2005 conference, the members of the conference of the bar are as follows:*

**A. Ex officio members.**

- 1. The Attorney General of the United States, or designee.*
- 2. The presidents of the state bar associations of the states of the Circuit. When two bar associations in the same state are both recognized under this rule, the president of each shall be entitled to attend, and the maximum number of members of the conference from the bar, from any state, under this provision, shall be limited to two. As long as there is only one state bar association in Maryland, the Bar Association of Baltimore City may be treated as a state bar association under this provision.*
- 3. All United States Attorneys in the Circuit.*
- 4. All Federal Public Defenders in the Circuit.*

5. *All Community Defenders in the Circuit.*
  6. *All Chief Justices of the courts of last resort of the states comprising this Circuit.*
  7. *All Attorneys General of the states comprising this Circuit.*
  8. *The Chief Judge of the United States Court of Appeals for the Armed Forces.*
  9. *The Chief Judge of the United States Tax Court.*
  10. *One representative of each accredited law school within the Circuit.*
- B. *Members designated by judges.*
1. *Lawyers who are not permanent members of the conference as set forth under (2) below are invited by the Chief Judge as guests of a scheduled conference upon designation by an active or senior circuit or district judge.*
    - (a) *In 2005, the number of designated guests per judge was reduced from two to one, with the reduction phased in to allow guests who had attended a conference prior to 2005 but not yet attained permanent membership to fulfill their attendance requirement.*
    - (b) *During the transition period, a judge may designate two guests for invitation only if both guests attended a conference prior to 2005.*
    - (c) *If a judge has no designated guests under the transition provision set forth in (b) above, or if a judge decides not to invite the guests designated under (b), a judge may designate one guest for invitation.*
  2. *By attending two conferences as a guest invited under (1) above, a lawyer becomes a permanent member of the conference, entitled to attend all conferences.*

*I.O.P.-47.1 amended February 16, 1993, and August 1, 2005.*

*I.O.P.-47.2 amended February 16, 1993; September 25, 1996; and August 1, 2005.*

## **Rule 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.