FEDERAL RULES OF APPELLATE PROCEDURE

Effective December 1, 2014

And

TENTH CIRCUIT RULES

Effective January 1, 2015

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FEDERAL RULES OF APPELLATE PROCEDURE

TITLE I. APPLICABILITY OF RULES

Fed. R. App. P. Rule 1. Scope of Rules; Title

(a) Scope of Rules.

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

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

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

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

(As amended Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 28, 2010, eff. Dec. 1, 2010.)

10th Cir. R. 1

1.1 Scope of rules.
These rules supplement the Federal Rules of Appellate Procedure for cases in this court. Parties must comply both with the Federal Rules of Appellate Procedure and with these rules.

1.2 Organization.
These rules have been organized and numbered to correspond to the Federal Rules of Appellate Procedure. Provisions having no direct relationship to a Federal Rule of Appellate Procedure are in Rule 47.

1.3 Citation.
These rules are known as the Tenth Circuit Rules. A particular rule should be cited as "10th Cir. R. ___."

1.4 Internal references.
In these rules, a Tenth Circuit Rule is referred to as "Rule ___." A Federal Rule of Appellate Procedure is referred to as "Fed. R.

App. P. ___." A Federal Rule of Civil Procedure is referred to as "Fed. R. Civ. P. ___."

1.5 Effective date.

These local rules are effective January 1, 2015, and apply to all procedures that have not been completed before that date.

Fed. R. App. P. 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).

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

10th Cir. R. 2

2.1 Suspension of local rules.
The court may suspend any part of these rules in a particular case on its own or on a party's motion.

TITLE II. APPEAL FROM A JUDGMENT OR ORDER OF A DISTRICT COURT

Fed. R. App. P. 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 the 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.

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

10th Cir. R. 3

3.1 Signing notice of appeal.
Every notice of appeal must be signed by the appellant's counsel or, if the appellant is proceeding pro se, by the appellant. Counsel's digital signature is sufficient under this Rule.

3.2 Preliminary record.

(A) Contents. When an appeal is filed, the district court clerk must promptly send the circuit clerk, electronically, copies of:

(1) the district court's docket entries;

(2) the notice of appeal;

(3) any motion for extension of time to file the notice of appeal and the dispositive order;

(4) pertinent written reports and recommendations, findings and conclusions, opinions, or orders of a district judge, bankruptcy judge, or magistrate judge;

(5) the district court's final judgment or order from which the appeal is taken; and

(6) all postjudgment motions to reconsider or motions questioning the judgment (*see* Fed. R. App. P. 4(a)(4) and Fed. R. Civ. P. 60(b)), and any order disposing of them.

(B) Later filed motions. The district court clerk must supplement the preliminary record with any later filed postjudgment motions to reconsider or motions questioning the judgment, copies of

orders disposing of those motions, and copies of the related docket entries. Sending the circuit clerk the preliminary record and any supplement satisfies the requirements of Fed. R. App. P. 11(e). *See* Rule 11.2(A) for procedures in pro se appeals.

3.3 Fees.

(A) Notification. The district court clerk must notify the circuit clerk when the fees are paid or when leave to proceed without prepayment of fees is granted or denied.

(B) Dismissal for failure to comply. An appeal may be dismissed immediately if, within 14 days after filing the notice of appeal, a party fails to:

(1) pay a required fee;

(2) file a timely motion for extension of time to pay the required fee; or

(3) file a timely motion for leave to proceed without prepayment of fees.

(C) Revocation of release. Release pending appeal may be revoked if the docket fee is not paid or if the appeal is not timely pursued. The district court must so advise the defendant and the defendant's attorney when release pending appeal is ordered.

3.4 Docketing statement.

(A) Filing. Within 14 days after filing the notice of appeal, the appellant must file with the circuit clerk a docketing statement on a court-approved form (*see* Appendix A, 10th Cir. Form 1). This requirement does not apply to appellants proceeding pro se.

(B) Omitted issue. An issue not raised in the docketing statement may be raised in the appellant's opening brief.

Fed. R. App. P. Rule 3.1 Appeal from a Judgment of a Magistrate Judge in a Civil Case

[Abrogated]

No local rule.

Fed. R. App. P. 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 entry of the judgment or order appealed from.

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

(i) the United States;

(ii) a United States agency;

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

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

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

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

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

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

(A) If a party 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 28 days after the judgment is entered.

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

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment 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 14 days after the date when the order granting the motion is entered, whichever is later.

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

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

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

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

(7) Entry Defined.

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

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

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

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

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

(b) Appeal in a Criminal Case.

(1) Time for Filing a Notice of Appeal.

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

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

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

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

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

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

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

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

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

(i) for judgment of acquittal under Rule 29;

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

(iii) for arrest of judgment under Rule 34.

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

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

(ii) the entry of the judgment of conviction.

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

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

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

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

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

(1) If an 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 dockets the first notice.

(3) When a defendant in a criminal case files a notice of appeal under this Rule 4(c), the 30-day period for the government to file its notice of appeal runs from

the entry of the judgment or order appealed from or from the district court's docketing of the defendant's notice of appeal, whichever is later.

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

(As amended Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 25, 2005, eff. Dec. 1, 2005; May 7, 2009, eff. Dec. 1, 2009; Apr. 28, 2010, eff. Dec. 1, 2010; Apr. 26, 2011, eff. Dec. 1, 2011.)

No local rule.

Fed. R. App. P. 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 10 days after the petition is served.

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

(c) Form of Papers; Number of Copies. 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 14 days after the entry of the order granting permission to appeal, the appellant must:

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

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

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

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

(As amended Apr. 29, 2002, eff. Dec. 1, 2002; May 7, 2009, eff. Dec. 1, 2009.)

10th Cir. R. 5

5.1 Reply briefs.

A party seeking to file a reply in support of a petition may file a motion to that effect. Replies may be no longer than six pages in length in a 13 point font. The motion must include the proposed reply. Motions filed under this rule must be submitted within 5 business days of service of the response.

Fed. R. App. P. Rule 5.1. Appeal by Leave under 28 U.S.C. § 636(c)(5)

[Abrogated]

No local rule.

Fed. R. App. P. Rule 6. Appeal in a Bankruptcy Case

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

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

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

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

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

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

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

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

(A) Motion for Rehearing.

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

(ii) If a party intends to challenge the order disposing of the motion – or the alteration or amendment of a judgment, order, or decree upon the

motion – then the party, in compliance with Rules 3(c) and 6(b)(1)(B), must file a notice of appeal or amended notice of appeal. The notice or amended notice must be filed within the time prescribed by Rule 4 – excluding Rules 4(a)(4) and 4(b) – measured from the entry of the order disposing of the motion.

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

(B) The Record on Appeal.

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

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

(iii) The record on appeal consists of:

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

(C) Making the Record Available.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(As amended Apr. 24, 1998, eff. Dec. 1, 1998; May 7, 2009, eff. Dec. 1, 2009, Apr. 25, 2014, eff. Dec. 1, 2014.)

10th Cir. R. 6

6.1 Appendices in bankruptcy appeals.

Rules 30.1, 30.2, and 30.3 apply to all bankruptcy appeals.

Fed. R. App. P. 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.

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

No local rule.

Fed. R. App. P. 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.

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

10th Cir. R. 8

8.1 Required showing.

No application for a stay or an injunction pending appeal will be considered unless the applicant addresses all of the following:

(A) the basis for the district court's or agency's subject matter jurisdiction and the basis for the court of appeals' jurisdiction, including citation to statutes and a statement of facts establishing jurisdiction;

(B) the likelihood of success on appeal;

(C) the threat of irreparable harm if the stay or injunction is not granted;

(D) the absence of harm to opposing parties if the stay or injunction is granted; and

(E) any risk of harm to the public interest.

8.2 Emergency or ex parte motions.

(A) Emergency relief. Any motion that requests a ruling within 48 hours after filing must be plainly marked "EMERGENCY" and accompanied by a certificate stating:

(1) the reason the motion was not filed earlier;

(2) the date the underlying order was entered;

(3) the time and date the order becomes effective;

(4) the telephone numbers and email addresses for all counsel of record and where available, unrepresented parties; and

(5) in immigration cases seeking a stay of removal or other emergency relief, the petitioner must attach to the motion a copy of the transcript from the Immigration Judge's ruling, if relevant, plus copies of the written rulings of the Immigration Judge and Board of Immigration Appeals.

(B) Ex parte relief. Any motion that requests the court to act ex parte must include a certificate stating the reason it was not possible to provide notice to the other parties.

(C) Notice to clerk. If a motion for emergency relief is contemplated, the movant must notify the clerk in advance at the earliest practical time so that arrangements can be made for timely submission to the court.

8.3 Applications made to a single judge.

(A) Emergency. Application to a single judge for a stay of a judgment or order pending appeal is disfavored except in an emergency.

(B) Contents. An application made to a single judge must demonstrate:

(1) that notice of the application – including when, where, and to which judge the application was made and the reason for submission to a single judge – was furnished to other parties; or

(2) what efforts were made to furnish notice to other parties and to contact the office of the clerk, or else the reasons why notice to the parties and/or to the clerk was not required and/or possible.

Fed. R. App. P. 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).

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

10th Cir. R. 9

9.1 Expedited proceedings.

(A) Release order. Review of a district court's release order is generally expedited.

(B) Deferred ruling. After reasonable notice, the court may defer ruling on a motion for release after a judgment of conviction until it disposes of the underlying direct appeal.

9.2 Procedures.
Within 14 days after filing the notice of appeal or motion for release, the party seeking relief must file:

(A) a memorandum containing:

(1) a statement of facts necessary for an understanding of the issues presented;

(2) the grounds for relief, including citation to relevant authorities; and

(3) a statement of the defendant's custodial status and reporting date as relevant – the court must be notified of any change in custody status pending the review process; and

(B) an electronic appendix containing the items noted below. (Please see the court's CM/ECF User Manual at Sections II(A)(3)(b), and Section III(7), for information regarding filing requirements and procedures for filing electronic appendices. It may be found on the court's website, www.ca10.uscourts.gov.) The appendix must include:

(1) all release orders or rulings, together with the reasons (findings and conclusions) given by the magistrate judge or the district judge for the action taken;

(2) any motion filed in the district court on the issue of release, and relevant memoranda in support or opposition;

(3) transcripts of any relevant proceeding if the factual basis for the action taken is questioned;

(4) the judgment of conviction, if review is sought under Fed. R. App. P. 9(b); and

(5) other relevant papers, affidavits, or portions of the district court record.

9.3 Response and date at issue.
Within 14 days after the Rule 9.2 memorandum is filed, the opposing party should file a response or notify the court that a response will not be filed. The matter will be considered at issue after the opposing party has been given reasonable notice and an opportunity to respond.

9.4 Ruling not law of the case.
Neither of the following constitutes law of the case:

(A) a decision on a motion for release; or

(B) a decision of an appeal from a district court's order on release made before final disposition of the direct criminal appeal.

Fed. R. App. P. 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 14 days after filing the notice of appeal or entry of an order disposing of the last timely remaining motion of a type specified in Rule 4(a)(4)(A), whichever is later, the appellant must do either of the following:

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

(i) the order must be in writing;

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

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

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

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

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

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

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

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

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

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

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

(e) Correction or Modification of the Record.

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

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

(A) on stipulation of the parties;

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

(C) by the court of appeals.

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

(As amended Apr. 24, 1998, eff. Dec. 1, 1998; May 7, 2009, eff. Dec. 1, 2009.)

10th Cir. R. 10

10.1 Transcripts.

(A) Appropriate transcripts.

(1) Appellant's duty. The appellant must provide all portions of the transcript necessary to give the court a complete and accurate record of the proceedings related to the issues on appeal.

(a) When sufficiency of the evidence is raised, the entire relevant trial transcript must be provided.

(b) When sufficiency of the evidence is not raised, the appellant should order only the relevant portions of the transcript and enter into stipulations that will avoid or reduce the need for transcripts.

(c) The appellant must omit the examination of jurors unless specifically at issue on appeal.

(**2) No transcript ordered.** An appellant who does not intend to order a transcript must so state on a transcript order form filed within 14 days after filing the notice of appeal, and must serve a copy on the appellee, the circuit clerk, and the district court clerk.

(B) Ordering transcripts.

(1) Order form. The transcript order must be made on a form provided by the district court and must comply with Fed. R. App. P. 10(b).

(2) Reporter's duty. Upon receipt of a properly completed transcript order, the reporter must:

(a) acknowledge receipt of the order;

(b) state on the form an anticipated date of completion within the time set by the Appellate Transcript Management Plan for the Tenth Circuit (*see* Appendix B); and

(c) promptly send a copy of the order form to the circuit clerk.

(3) Completion. A transcript order is not complete until satisfactory financial arrangements have been made with the reporter.

(C) Preparing, filing, and delivering transcripts.

(1) Preparation and filing. The Appellate Transcript Management Plan for the Tenth Circuit governs the preparation and filing of transcripts for cases on appeal. *See* Appendix B.

(2) Delivery. When the transcript is complete, the court reporter must:

(a) deliver the original to the requesting party or to counsel later appointed;

(b) file a certified copy with the district court clerk; and

(c) notify the circuit clerk.

10.2 Designation of record (when filed).

(A) Appointed counsel. In appeals in which any appellant is represented by appointed counsel – including companion and consolidated appeals – a designation of record must be filed in district court, with a copy filed with the circuit court. No Rule 30.1 appendix is required.

(1) Filing. The appellant's designation of record must be filed within 14 days after filing the notice of appeal.

(2) Appellee's designation. The appellee may file an additional designation within 14 days after service of the appellant's designation.

(B) Retained counsel. In appeals in which all appellants are represented by retained counsel – including companion and consolidated appeals – no designation is required and the record will be presented in an appendix prepared by the appellant. For requirements regarding the appendix, *see* 10th Cir. R. 30.1 (Appellant's appendix), 30.2 (Supplemental appendix), and 30.3 (Appendix exemptions). Retained counsel includes counsel for national, state, or local government entities. If the appellee's counsel is appointed, Rule 30.2(A) also applies.

(C) Pro se cases. In pro se cases, no designation is required. The district court clerk will prepare a pro se record. *See* Rule 11.2.

(D) Nonparties. A district court party who does not intend to file a brief on appeal may not file a designation of record.

10.3 Content of record.

(A) Essential items. Counsel must designate a record on appeal that is sufficient for considering and deciding the appellate issues. Only essential parts of the district court record should be designated for the record on appeal.

(B) Inadequate record. The court need not remedy any failure by counsel to designate an adequate record. When the party asserting an issue fails to provide a record sufficient for considering that issue, the court may decline to consider it.

(C) Required contents. Every record on appeal forwarded to this court must include:

(1) the last amended complaint and answer, or the indictment or information and any superseding indictment or information;

(2) the final pretrial order;

(3) pertinent written reports and recommendations, findings and conclusions, opinions, or orders of a district judge, bankruptcy judge, or magistrate judge, or, if the findings and conclusions were made orally, a copy of the transcript pages reproducing those findings and conclusions;

(4) in a social security appeal, the entire administrative record;

(5) the decision or order from which the appeal is taken;

(6) all jury instructions when an instruction is an issue on appeal, as well as proposed instructions that were refused; when a finding or conclusion is an issue on appeal, proposed findings and conclusions that were refused;

(7) the notice of appeal; and

(8) the district court's docket entries.

(D) Additional record items.

(1) Evidence; instructions. If an appeal is based on a challenge to the admission or exclusion of evidence, the giving or failure to give a jury instruction, or any other ruling or order, a copy of the pages of the reporter's transcript must be included in the record to show where the evidence, offer of proof, instruction, ruling or order, and any necessary objection are recorded.

(2) Documents. When the appeal is from an order disposing of a motion or other pleading, the motion, relevant portions of affidavits, depositions and other supporting documents (including any supporting briefs, memoranda, and points of authority), filed in connection with that motion or pleading, and any responses and replies filed in connection with that motion or pleading must be included in the record.

(3) Presentence report. The presentence investigation report must be included if the appeal is from a sentence imposed under 18 U.S.C. § 3742. *See* Rule 11.3(E).

(4) Other. Other items, such as trial exhibits and transcript excerpts, must be included when they are relevant to an issue raised on appeal and are referred to in the brief.

(5) Trial exhibits. Copies of relevant trial exhibits released by the district court before appeal but referred to in a party's brief may be presented in an appendix where one is filed, or may be submitted via motion as a supplement to the record on appeal in cases where the record is created via designation.

(E) Exclusions. The following items may not be included in the record on appeal unless they are relevant to the issues on appeal:

- appearances;
- bills of costs;
- briefs, memoranda, and points of authority, except as specified in (D)(2);
- certificates of service;
- depositions, interrogatories, and other discovery matters, unless used as evidence;
- lists of witnesses or exhibits;
- notices and calendars;
- procedural motions or orders;
- returns and acceptances of service;
- subpoenas;
- summonses;
- setting orders;
- unopposed motions granted by the trial court;
- non final pretrial reports or orders; and
- suggestions for voir dire.

Fed. R. App. P. 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.

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

10th Cir. R. 11

11.1 Record retained in district court.

(A) Notice from district court. In appeals in which an appendix is required by 10th Cir. R. 30.1, *see also* 10th Cir. R. 10.2(B), the district court clerk will notify the parties and the circuit clerk when the record is complete (i.e., when the appellant certifies that no transcript will be ordered or the transcript is filed).

(B) Appendix. The appendix must comply with all provisions of 10th Cir. R. 30.1. The appellee may file a supplemental appendix in accordance with 10th Cir. R. 30.2.

11.2 Record transmitted to court of appeals (when required).

(A) Record. In a pro se appeal and in an appeal in which an appellant is represented by appointed counsel, the district court clerk must forward the record to the circuit clerk as required by Fed. R. App. P. 11(b). The record must include any transcript that has been filed for the appeal.

(B) Original file. In a pro se appeal in which the district court denies the appellant permission to proceed without prepayment of fees

or denies a certificate of appealability, the district court clerk may transmit the district court's "original file" to the circuit clerk.

11.3 Form of record.
In those instances where the record, or portions of the record, are not available electronically, assembly of a paper record must be as follows:

(A) Fastening; cover. The record must be fastened together securely in one or more volumes. Each volume must have a cover page in the following form:

RECORD ON APPEAL

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

Court of Appeals No. _____

District Court No. _____

_____,

Plaintiff(s)-Appellant(s) or Appellee(s)

vs.

_____,

Defendant(s)-Appellant(s) or Appellee(s)

VOLUME

(B) Index. The record on appeal, other than the reporter's transcripts, need not be paginated. The first page of each document must bear a numbered index tab. A copy of the district court's docket sheet, which must appear immediately after the cover page of the first volume, will serve as the index.

(C) Transcript. Each volume of the reporter's transcript must be a separate volume of the record and must contain the complete reporter's index and reporter's pagination. The transcript must be paginated consecutively through all volumes. A heading – a brief description listing, for example, the last name of the witness and the type of examination – must appear on each page. The pages of each volume of the reporter's transcript must be securely fastened at the left side if in paper form. *See generally Volume 6, Guide to Judiciary Policy – Court Reporting, § 520*.

(D) Sealed materials.

(1) When materials sealed by district court order are forwarded as part of the record, the district court clerk must:

(a) separate the sealed materials from other portions of the record;

(b) enclose them in an envelope clearly marked "Sealed" if forwarded in hard copy or identify them as sealed in a separate electronic volume when transmitted; and

(c) affix a copy of the sealing order to the outside of the envelope if the sealed material is not available electronically.

(E) Presentence investigation reports. Presentence reports are confidential. If a presentence report needs to be forwarded as part of the record on appeal, the district court clerk must treat it like sealed material under (D).

11.4 Electronic submission.

When the district court clerk submits a record electronically, the various volumes shall be forwarded as separate *pdf* files. Pleadings must be bookmarked and sealed volumes shall be identified as such.

Fed. R. App. P. 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 14 days after filing the notice, file a statement with the circuit clerk naming the parties that the attorney represents on appeal.

(c) Filing the Record, Partial Record, or Certificate.

Upon receiving the record, partial record, or district clerk's certificate as provided in Rule 11, the circuit clerk must file it and immediately notify all parties of the filing date.

(As amended Apr. 24, 1998, eff. Dec. 1, 1998; May 7, 2009, eff. Dec. 1, 2009.)

No local rule.

Fed. R. App. P. Rule 12.1. Remand After an Indicative Ruling by the District Court on a Motion for Relief That Is Barred by a Pending Appeal

(a) Notice to the Court of Appeals.

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

(b) Remand After an Indicative Ruling.

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

(Eff. Dec. 1, 2009.)

No local rule.

TITLE III. APPEALS FROM THE UNITED STATES TAX COURT

Fed. R. App. P. Rule 13. Appeals from the Tax Court

(a) Appeal as of Right.

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

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

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

(2) Notice of Appeal; How Filed.

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

(3) Contents of the Notice of Appeal; Service; Effect of Filing and Service.

Rule 3 prescribes the contents of a notice of appeal, the manner of service, and the effect of its filing and service. Form 2 in the Appendix of Forms is a suggested form of a notice of appeal.

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

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

time and manner of forwarding and filing, and the docketing in the court of appeals.

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

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

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

No local rule.

Fed. R. App. P. Rule 14. Applicability of Other Rules to Appeals from the Tax Court

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

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

10th Cir. R. 14

14.1 Tenth Circuit rules apply.

These rules – except Rules 8, 9, 15, 17, 20, and 22 – apply to review of a decision of the Tax Court. As used in any applicable Tenth Circuit rule, the term "district court" includes the Tax Court, the term "district judge" includes a judge of the Tax Court, and the term "district court clerk" includes the Tax Court clerk.

TITLE IV. REVIEW OR ENFORCEMENT OF AN ORDER OF AN ADMINISTRATIVE AGENCY, BOARD, COMMISSION, OR OFFICER

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

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

(c) Service of the Petition or Application.

The circuit clerk must serve a copy of the petition for review, or an application or cross-application to enforce an agency order, on each respondent as prescribed by Rule 3(d), unless a different manner of service is prescribed by statute. At the time of filing, the petitioner must:

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

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

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

(d) Intervention.

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

(e) Payment of Fees.

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

(As amended May 7, 2009, eff. Dec. 1, 2009.)

10th Cir. R. 15

15.1 Docketing statement.
Within 14 days after filing a petition for review or an application for enforcement, the filing party must file a docketing statement on a form provided by the court. *See* Appendix A, 10th Cir. Form 1.

15.2 Intervention.

(A) Notice of Intervention by a party. A party to an agency proceeding may intervene in a review of that proceeding by filing a notice of intervention in the court. The notice must state whether the party wishes to intervene as a petitioner in opposition to the agency order or as a respondent in support of the order.

(B) Motion to intervene.

(1) Content. In addition to the requirements of Fed. R. App. P. 15(d), a nonparty motion must state the reasons why the parties cannot adequately protect the interest asserted.

(2) Opposition. Opposition to a motion to intervene must be filed within 14 days after the motion is served.

15.3 Service on the Respondents.
At the time of making the filing required under Fed. R. App. P. 15(c)(2), the petitioner shall also include a list of those respondents requiring service of the petition.

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Fed. R. App. P. 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.

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

No local rule.

Fed. R. App. P. 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.

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

No local rule.

Fed. R. App. P. 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.

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

10th Cir. R. 17

17.1 Time for filing.
If a certified list is filed instead of the record, the entire record, or the parts designated by the parties, must be filed within 21 days after the respondent's brief is served.

17.2 Form.
If a hard copy of the record is filed, it must be assembled as required by Rule 11.3 and electronic copies forwarded per Rule 11.4 unless other arrangements are made with the clerk.

Fed. R. App. P. 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.

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

10th Cir. R. 18

18.1 Applications for stay.
Applications for stay must comply with Rule 8.

Fed. R. App. P. 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 10 days file with the clerk and serve the agency with a proposed judgment that the party believes conforms to the opinion. The court will settle the judgment and direct entry without further hearing or argument.

(As amended Apr. 24, 1998, eff. Dec. 1, 1998; May 7, 2009, eff. Dec. 1, 2009.)

No local rule.

Fed. R. App. P. 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.

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

10th Cir. R. 20

20.1 Tenth Circuit rules apply.

These rules – except Rules 3, 9, 10, 11.1, 11.2, 14, and 22 – apply to review or enforcement of agency orders. As used in any Tenth Circuit rule, the term "appellant" includes a petitioner and the term "appellee" includes a respondent in proceedings to review or enforce agency orders, and the term "district judge" includes an administrative law judge or hearing officer.

TITLE V. EXTRAORDINARY WRITS

Fed. R. App. P. 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.

(As amended Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002.)

10th Cir. R. 21

21.1 Fees.

The fee is due and payable to the circuit court clerk when the petition is filed. *See* 28 U.S.C. § 1913 note (Judicial Conference Schedule of Fees).

TITLE VI. HABEAS CORPUS; PROCEEDINGS IN FORMA PAUPERIS

Fed. R. App. P. 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 clerk must send to the court of appeals the certificate (if any) and the statement described in Rule 11(a) of the Rules Governing Proceedings Under 28 U.S.C. § 2254 or § 2255 (if any), along with the notice of appeal and the file of the district court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue it.

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

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

(As amended Apr. 24, 1998, eff. Dec. 1, 1998; May 7, 2009, eff. Dec. 1, 2009.)

10th Cir. R. 22

22.1 Certificate of appealability.

(A) Required form. Although a notice of appeal constitutes a request for a certificate of appealability, the appellant must also file a brief. The circuit clerk will provide pro se appellants a form for this purpose which serves as both a brief and a request for a certificate.

(B) Briefing. Respondents-appellees shall not file a brief until requested to do so by this court.

22.2 Procedures in death penalty cases.

(A) General Procedures.

(1) Upon receipt of the docketing statement in capital cases arising under 28 U.S.C. § 2254 or any federal criminal statute, the clerk shall enter a case management order directing the parties to schedule a video or phone conference with the chief deputy clerk or other designated court representative. Lead counsel for both parties must be available for the conference.

(2) At the designated time, counsel and the court shall address matters related to issues to be appealed, page limitations, record issues, and any other procedural matters which the parties believe are significant in the appeal. At the time of the conference, counsel shall be prepared to discuss and adopt a briefing schedule. In addition, where appropriate, the court may address issues regarding issuance of a certificate of appealability.

(3) The court will issue a scheduling order following the conference. In that order, the court will set all appropriate deadlines. Motions to amend those deadlines are

strongly discouraged and the court will deviate from the scheduling order only under extreme circumstances.

(B) Cases with a scheduled execution date.

(1) Notice of execution date. When a petitioner has a scheduled execution date at the time the notice of appeal is filed, a separate notice regarding the date must be filed with the circuit clerk. The notice must be filed immediately upon case opening. The notice must:

(a) certify the existence of a death sentence and state the execution date; and

(b) list any previous related cases in federal court and any related cases pending in any other court, including state courts.

(2) Immediate communication upon filing in district court. The district clerk must notify the circuit clerk immediately upon the filing of any new habeas petition, or any other new proceeding, which includes a scheduled execution date for the plaintiff/petitioner. Counsel for the petitioner must also notify this court immediately if any new proceeding is filed in the district court involving a case with a scheduled execution date.

(C) Motion for stay.

(1) Initial motion in district court. A motion for a stay of execution must ordinarily be made in the district court first. *See* Fed. R. App. P. 8(a)(2)(A)(i).

(2) Lodged with court of appeals. In anticipation of jurisdiction, a motion for stay and supporting documents may be forwarded to the circuit clerk before a notice of appeal is filed. Counsel should also contact the circuit clerk via phone as soon as is feasible regarding anticipated motions for stay. Written materials may be forwarded electronically to 10th_Circuit_Clerk@ca10.uscourts.gov.

22.3 Other rules applicable.

All other Tenth Circuit rules apply in death penalty cases unless they are inconsistent with this rule.

Fed. R. App. P. 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.

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

No local rule.

Fed. R. App. P. 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 from the United States Tax Court or on Appeal or Review of an Administrative-Agency Proceeding.

A party may file in the court of appeals a motion for leave to proceed on appeal in forma pauperis with an affidavit prescribed by Rule 24(a)(1);

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

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

(c) Leave to Use Original Record.

A party allowed to proceed on appeal in forma pauperis may request that the appeal be heard on the original record without reproducing any part.

(As amended Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 16, 2013, eff. Dec. 1, 2013.)

10th Cir. R. 24.1

24.1 Prison Litigation Reform Act.

All prisoners bringing civil actions or appeals must pay the full amount of filing and docketing fees. 28 U.S.C. § 1915(b)(1). Consequently, if a prisoner tenders less than full fees when a notice of appeal is filed, the district court shall obtain sufficient information to determine the prisoner's eligibility to make partial payments of the full fee, and, if the prisoner is eligible, assess a partial filing fee under the Act. If the prisoner has sufficient funds, the district court shall assess the entire fee immediately. A prisoner who was permitted to proceed in forma pauperis in the district court is not automatically entitled to proceed on appeal

without prepayment of full fees, but must file a motion specifically seeking such permission. The partial payment determination must take place regardless of whether the prisoner's status was examined at the time the complaint or other pleading was submitted to the district court. If the district court denies in forma pauperis status, the prisoner must file a renewed motion in the court of appeals. The appeal should be processed and submitted to this court in the normal course, as required by Federal Rule of Appellate Procedure 3(d), without waiting for the determination of the prisoner's eligibility for making partial payments. When the district court makes its determination, it shall enter an order and forward a copy to this court. If the in forma pauperis application reveals the eligible prisoner has no assets and no means to make an initial partial payment, 28 U.S.C. § 1915(b)(4), the district court's order must reflect that finding.

24.2 Duty of Prisoner Appellant.

The appellant must authorize the custodian to deduct payments from the institutional account, and the custodian shall pay the assessment. Any failure to file the proper trust account statement and authorization shall be grounds for dismissal under 10th Cir. R. 3.3(B) and 42.1. Filing fee payments shall be made to the clerk of the district court pursuant to Fed. R. App. P. 3(e).

TITLE VII. GENERAL PROVISIONS

Fed. R. App. P. 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 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 or require papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A local rule may require filing by electronic means only if reasonable exceptions are allowed. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules.

(3) Filing a Motion with a Judge. If a motion requests relief that may be granted by a single judge, the judge may permit the motion to be filed with the judge; the judge must note the filing date on the motion and give it to the clerk.

(4) Clerk's Refusal of Documents. The clerk must not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rule or practice.

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

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

(c) Manner of Service.

(1) Service may be any of the following:

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

(B) by mail;

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

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

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

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

(4) Service by mail or by commercial carrier is complete on mailing or delivery to the carrier. Service by electronic means is complete on

transmission, unless the party making service is notified that the paper was not received by the party served.

(d) Proof of Service.

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

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

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

(i) the date and manner of service;

(ii) the names of the persons served; and

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

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

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

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

(As amended Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 30, 2007, eff. Dec. 1, 2007; May 7, 2009, eff. Dec. 1, 2009.)

10th Cir. R. 25

25.1 File stamped copies of papers.
For pro se parties submitting hard copies, file stamped copies of papers filed with the court will be sent to the filer only if that party provides necessary copies and a self-addressed envelope bearing sufficient postage.

25.2 Papers subject to being stricken.
If papers submitted to the circuit clerk do not comply with the Federal Rules of Appellate Procedure and these rules, they may be stricken.

25.3 Electronic filing.
As authorized by Fed. R. App. P. 25(a)(2)(D), the court has converted to *mandatory* electronic case filing (ECF) for all counsel of record. All pleadings filed electronically shall be submitted in compliance with the procedures adopted by the court and set forth in the CM/ECF User Manual at Sections II and III. Consistent with Rule 25(a)(2)(D), any party may move to be exempt from electronic filing requirements, including the filing of an electronic appendix. *See* 10th Cir. R. 30.3(A). Copies of, and information regarding, the court's User Manual and training materials may be obtained by contacting the office of the clerk or by visiting the court's website at www.ca10.uscourts.gov .

25.4 Electronic service.
In accordance with Fed. R. App. P. 25(c)(2), filers may use the court's ECF system to serve pleadings, including an appendix (please see www.ca10.uscourts.gov to view the court's CM/ECF User Manual regarding electronic filing—in particular, please see section II(D) for information regarding service requirements). Filers must, however, continue to include a certificate of service with all papers and materials submitted, and shall identify in the certificate the method of service used. The filer is responsible for making service in another manner on persons entitled to notice who are not electronic filers in the case.

25.5 Privacy redaction requirements.

All filers are required to follow the privacy and redaction requirements of Fed. R. App. P. 25(a)(5), as well as the applicable federal rules of civil procedure, criminal procedure, and the relevant bankruptcy rule. *See* Fed. R. Civ. P. 5.2; Fed. R. Crim. P. 49.1; Fed. R. Bankr. P. 9037. Required redactions include social security numbers and tax identification numbers (filers may disclose the last four digits of a social security or tax identification number), birth dates (use year of birth only), minors' names (initials may be used), and financial account numbers (except those identifying property allegedly subject to forfeiture in a forfeiture proceeding). It is the sole responsibility of the filer to redact pleadings appropriately.

Fed. R. App. P. Rule 26. Computing and Extending Time

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) Additional Time after Service. When a party may or must act within a specified time after service, 3 days are added after the period would otherwise expire under Rule 26(a), unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service.

(As amended Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 25, 2005, eff. Dec. 1, 2005; May 7, 2009, eff. Dec. 1, 2009.)

No Local Rule.

Fed. R. App. P. 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.

(As amended Apr. 29, 2002, eff. Dec. 1, 2002.)

No Local Rule.

Fed. R. App. P. 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 10 days after service of the motion unless the court shortens or extends the time. A motion authorized by Rules 8, 9, 18, or 41 may be granted before the 10-day period runs only if the court gives reasonable notice to the parties that it intends to act sooner.

(B) Request for Affirmative Relief. A response may include a motion for affirmative relief. The time to respond to the new motion, and to reply

to that response, are governed by Rule 27(a)(3)(A) and (a)(4). The title of the response must alert the court to the request for relief.

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

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

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

(d) Form of Papers; 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 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.

(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.

(As amended Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 25, 2005, eff. Dec. 1, 2005; May 7, 2009, eff. Dec. 1, 2009.)

10th Cir. R. 27

27.1 Certification of questions of state law.

(A) Certification; abatement. When state law permits, this court may:

(1) certify a question arising under state law to that state's highest court according to that court's rules; and

(2) abate the case in this court to await the state court's decision of the certified question.

(B) Motion. The court may certify on its own or on a party's motion.

(C) Time to file. A motion to certify should be filed at the same time as, but separately from, the moving party's brief on the merits.

(D) Response; time to file. A response may be filed at the same time as the answer or reply brief or within 14 days after the motion is served.

(E) When considered. A motion to certify is ordinarily referred to the panel of judges assigned to decide the appeal on the merits and is considered at the same time as the arguments on the merits.

27.2 Summary disposition on motion by a party or the court.

(A) Motions to dismiss or affirm.

(1) Types. A party may file only the following dispositive motions:

(a) a motion to dismiss the entire case for lack of appellate jurisdiction or for any other reason a dismissal is permitted by statute, the Federal Rules of Appellate Procedure or these rules;

(b) a motion for summary disposition because of a supervening change of law or mootness;

(c) a motion to remand for additional trial court or administrative proceedings; or

(d) a motion by the government to enforce an appeal waiver.

(2) Contents.

(a) The motion must discuss the grounds for the motion.

(b) A motion under (A)(1)(d) must include copies of the plea agreement and copies of transcripts for both the plea hearing and the sentencing hearing.

(3) Time to file.

(a) A motion under (A)(1)(a) through (c) should be filed within 14 days after the notice of appeal is filed, unless good cause is shown.

(b) A motion under (A)(1)(d) must be filed within 20 days after:

(i) the district court's notice, pursuant to 10th Cir. R. 11.1, that the record is complete, or;

(ii) the district court's notice that it is transmitting the record pursuant to 10th Cir. R. 11.2.

(c) Failure to file a timely motion to enforce an appeal waiver does not preclude a party from raising the issue in a merits brief.

(4) Time to respond. If a party chooses to respond to a motion, the response must be filed within 14 days after the motion is served.

(B) Action by the court. After giving notice to the parties, the court may summarily dispose of an appeal or a petition for review or enforcement.

(1) Memorandum briefs. The court may require parties to file memorandum briefs addressing specific dispositive issues.

(2) Contents. A memorandum brief need not contain an index or a table of cases, but it must include a list of prior and related appeals.

(3) Submission. A case with memorandum briefs will be considered without oral argument, unless a panel member decides that oral argument is needed. *See* 10th Cir. R. 34.1(G).

(C) Briefing stopped. The filing of a motion under (A) or notice of action by the court under (B) suspends the briefing schedule unless the court orders otherwise.

27.3 Clerk authorized to act on certain motions; required recitation; requirements regarding disclosure of opposing party's position.

(A) Motions. Subject to review by the court, the clerk is authorized to act for the court on any of the following motions:

(1) to extend time to file a pleading or perform an act required by Fed. R. App. P. 10, 11, 12, 13(d), 17, 24, 27, 29, 30, 31, 39, or 40, or by 10th Cir. R. 3, 10, 11, 14, 15, 17, 20, 24, 27, 30, 31, 40, or 46;

(2) to correct a brief or pleading;

(3) to supplement or correct records or to incorporate records from previous appeals;

(4) to consolidate appeals;

(5) to substitute parties;

(6) to appear as amicus curiae;

(7) to expedite or continue cases;

(8) to withdraw or substitute counsel in a civil case or, after compliance with 10th Cir. R. 46.4, in a criminal case;

(9) by appellant to dismiss an appeal (in criminal and postconviction cases, *see* 10th Cir. R. 46.3(B)), or a stipulation for dismissal, with or without an agreement on payment of costs (if an appeal is dismissed, the clerk may issue a copy of the dismissal order as the mandate);

(10) for extension of time to file a petition for rehearing, limited to one extension of 15 days or less;

(11) a motion under 10th Cir. R. 30.2 or 30.3; or

(12) any other motion the court may authorize.

(B) **Opposed motions.** If any motion listed in (A) is opposed, the clerk will submit the matter to the court.

(C) **Disclosure of opponent's position.** Every motion filed under Fed. R. App. P. 27 and this rule must contain a statement of the opposing party's position on the relief requested or why the moving party was unable to learn the opposing party's position. In this regard, parties should make reasonable efforts to contact opposing parties well in advance of filing a motion. Motions filed in direct criminal appeals or post-conviction proceedings to

withdraw, appoint, or substitute counsel need not state opposing counsel's position.

27.4 Motions to extend time.

(A) Disfavored. Extensions of time to file briefs are disfavored.

(B) Content. A motion to extend time must:

(1) state the brief's due date;

(2) contain a statement of the opposing party's position on the relief requested or why the moving party was unable to learn the opposing party's position. In this regard, parties should make reasonable efforts to contact opposing parties well in advance of filing a motion; and

(3) list any such prior motion filed and the court's action on it.

(C) Requirements. The motion must establish that it will not be possible to file the brief on time, even if the party exercises due diligence and gives priority to preparing the brief.

(1) All factual statements must be set forth with specificity.

(2) Generalities – such as assertions that the purpose of the motion is not for delay and that counsel is too busy – are not sufficient.

(3) If the reason for the extension is that the transcript is not available, the motion must show that the transcript was timely ordered and paid for, or must explain why not.

(D) Reasons. Reasons that may merit consideration are that:

(1) other litigation presents a scheduling conflict, in which case the motion must:

(a) identify the litigation by caption, number, and court;

(b) describe the action taken in the other litigation on a request for continuance or deferment;

(c) state reasons why the other litigation should receive priority over the case in which the motion is filed;

(d) state reasons why other associated counsel cannot prepare the brief for timely filing or relieve movant's counsel of the other litigation; and

(e) recite any other relevant circumstances;

(2) the case is so complex that an adequate brief cannot reasonably be prepared by the due date, in which case the motion must state facts demonstrating the complexity; and

(3) counsel will suffer extreme hardship, in which case the motion must state the nature of the hardship.

(E) Criminal cases. A motion to extend time to file a brief in a criminal case must also state the custody status of the defendant.

(F) Time to file. A motion to extend time to file a brief must be filed at least 5 days before the brief's due date, unless the reasons for the request did not exist or were unknown earlier.

27.5 Orders.

(A) Panel Judge. When a case has been assigned, a designated panel judge may issue any interlocutory order and act on any motion filed under Fed. R. App. P. 8, 9(b), 22(a), or 22(b).

(B) Procedural orders. Orders are entered when the clerk dockets them. The docket entry will:

(1) describe briefly and succinctly the nature of the order; and

(2) either be entered by the clerk or state the name of the judge or judges directing its entry.

Fed. R. App. P. 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 concise statement of the case setting out the facts relevant to the issues submitted for review, describing the relevant procedural history, and identifying the rulings presented for review, with appropriate references to the record (Rule 28(e));

(7) a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief, and which must not merely repeat the argument headings;

(8) the argument, which must contain:

(A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies; and

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

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

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

(b) Appellee's Brief. The appellee's brief must conform to the requirements of Rule 28(a)(1)-(8) and (10), except that none of the following need appear unless the appellee is dissatisfied with the appellant's statement:

(1) the jurisdictional statement;

(2) the statement of the issues;

(3) the statement of the case; and

(4) the statement of the standard of review.

(c) Reply Brief. The appellant may file a brief in reply to the appellee's brief. Unless the court permits, no further briefs may be filed. A reply brief must contain a table of contents, with page references, and a table of authorities – cases (alphabetically arranged), statutes, and other authorities – with references to the pages of the reply brief where they are cited.

(d) References to Parties. In briefs and at oral argument, counsel should minimize use of the terms "appellant" and "appellee." To make briefs clear, counsel should use the parties' actual names or the designations used in the lower court or agency proceeding, or such descriptive terms as "the employee," "the injured person," "the taxpayer," "the ship," "the stevedore."

(e) References to the Record. References to the parts of the record contained in the appendix filed with the appellant's brief must be to the pages of the appendix. If the appendix is prepared after the briefs are filed, a party referring to the record must follow one of the methods detailed in Rule 30(c). If the original record is used under Rule 30(f) and is not consecutively paginated, or if the brief refers to an unreproduced part of the record, any reference must be to the page of the original document. For example:

- Answer p. 7;
- Motion for Judgment p. 2;
- Transcript p. 231.

Only clear abbreviations may be used. A party referring to evidence whose admissibility is in controversy must cite the pages of the appendix or of the transcript at which the evidence was identified, offered, and received or rejected.

(f) Reproduction of Statutes, Rules, Regulations, etc. If the court's determination of the issues presented requires the study of statutes, rules, regulations, etc., the relevant parts must be set out in the brief or in an addendum at the end, or may be supplied to the court in pamphlet form.

(g) [Reserved]

(h) [Reserved]

(i) Briefs in a Case Involving Multiple Appellants or Appellees. In a case involving more than one appellant or appellee, including consolidated cases, any number of appellants or appellees may join in a brief, and any party may adopt by reference a part of another's brief. Parties may also join in reply briefs.

(j) Citation of Supplemental Authorities. If pertinent and significant authorities come to a party's attention after the party's brief has been filed – or after oral argument but before decision – a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations. The letter must state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 350 words. Any response must be made promptly and must be similarly limited.

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

10th Cir. R. 28

28.1 References to appendix or record.

(A) Appendix. References to the appendix should be by page number (e.g., Aplt. App. at 27, or Aplee. Supp. App. at 14).

(B) Record. In cases without an appendix, references to the record should be through identification of the district court document (i.e., the title), the district court document or docket number, the record volume if available and then the page number within that document (e.g., *Plaintiff's Motion In Limine* dated 4/5/2010, Vol. II, docket number 32, at 6). References to the transcript should be by page number. Counsel are encouraged to include a footnote in the briefs at the point of the first record citation to confirm the citation convention.

28.2 Additional requirements.

(A) Appellant's brief. In addition to all other requirements of the Federal Rules of Appellate Procedure and these rules, the appellant's brief must include as an attachment the following (even though they are also included in the appendix):

(1) copies of all pertinent written findings, conclusions, opinions, or orders of a district judge, bankruptcy judge, or magistrate judge (if the district court adopts a magistrate's report and recommendation, that report must also be included);

(2) if any judicial pronouncement listed in (1) is oral, a copy of the transcript pages;

(3) in social security cases, copies of the decisions of the administrative law judge and the appeals council; and

(4) in immigration cases, a copy of the transcript from the Immigration Judge's oral ruling, plus copies of the written rulings of the Immigration Judge and the Board of Immigration Appeals.

(B) Appellee's brief. If the appellant's brief fails to include all the rulings required by (A), the appellee's brief must include them.

(C) All principal briefs.

(1) Statement of related cases. At the end of the table of cases, the first brief filed by each party must list all prior or related appeals, with appropriate citations, or a statement that there are no prior or related appeals.

(2) Record references. For each issue raised on appeal, all briefs must cite the precise reference in the record where the issue was raised and ruled on. *See* 10th Cir. R. 28.1.

(3) Particular record references. Briefs must cite the precise reference in the record where a required objection was made and ruled on, if the appeal is based on:

(a) a failure to admit or exclude evidence;

(b) the giving of or refusal to give a particular jury instruction; or

(c) any other act or ruling for which a party must record an objection to preserve the right to appeal.

(4) Oral argument statement. The front cover of each party's first brief must state whether oral argument is requested. If argument is requested, a statement of the reasons why argument is necessary must follow the brief's conclusion.

(5) Name of court, judge, and originating case number. The front cover of each brief must contain the name of the court, the judge whose judgment is being appealed, and the originating case number.

(6) Glossary. All briefs containing acronyms or abbreviations not in common use (other than names of parties) must include a Glossary on a page immediately following the Table of Cases.

28.3 Motions to exceed word count disfavored.
Motions to exceed the word count will be denied unless extraordinary and compelling circumstances can be shown. A motion filed within 14 days of the brief's due date must show why earlier filing was not possible.

28.4 Incorporating by reference disapproved.
Incorporating by reference portions of lower court or agency briefs or pleadings is disapproved and does not satisfy the requirements of Fed. R. App. P. 28(a) and (b).

Fed. R. App. P. 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 unless the appellee is dissatisfied with the appellant's statement.

(3) Appellant's Response and Reply Brief. The appellant must file a brief that responds to the principal brief in the cross-appeal and may, in the same brief, reply to the response in the appeal. That brief must comply with Rule 28(a)(2)-(8) and (10), except that none of the following need appear unless the appellant is dissatisfied with the appellee's statement in the cross-appeal:

(A) the jurisdictional statement;

(B) the statement of the issues;

(C) the statement of the case; and

(D) the statement of the standard of review.

(4) Appellee's Reply Brief. The appellee may file a brief in reply to the response in the cross-appeal. That brief must comply with Rule 28(a)(2)-(3) and (10) and must be limited to the issues presented by the cross-appeal.

(5) No Further Briefs. Unless the court permits, no further briefs may be filed in a case involving a cross-appeal.

(d) Cover. Except for filings by unrepresented parties, the cover of the appellant's principal brief must be blue; the appellee's principal and response brief, red; the appellant's response and reply brief, yellow; the appellee's reply brief, gray; 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 7 days before argument unless the court, for good cause, allows a later filing.

(As amended Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 25, 2005, eff. Dec. 1, 2005, May 7, 2009, eff. Dec. 1, 2009; Apr. 16, 2013, eff. Dec. 1, 2013)

No Local Rule.

Fed. R. App. P. Rule 29. Brief of an Amicus Curiae

(a) When Permitted. The United States or its officer or agency or a state may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.

(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. An amicus brief need not comply with Rule 28, but must include the following:

(1) if the amicus is a corporation, a disclosure statement like that required of parties 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 concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;

(5) unless the amicus curiae is one listed in the first sentence of Rule 29(a), a statement that indicates whether:

(A) a party's counsel authored the brief in whole or in part;

(B) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and

(C) a person – other than the amicus curiae, its members, or its counsel – contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person;

(6) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review; and

(7) 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.

(As amended Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 28, 2010, eff. Dec. 1, 2010.)

10th Cir. R. 29

29.1 Amicus briefs on rehearing.

The court will receive but not file proposed amicus briefs on rehearing. Filing will be considered shortly before the oral argument on rehearing en banc if granted, or before the grant or denial of panel rehearing. Except by the court's permission, an amicus brief filed at the rehearing stage may be no more than 3,000 words in length and shall include a certification of the word count in conformance with Fed. R. App. P. 32(a)(7)(C). Proposed amicus briefs in support of the petition must be tendered within 7 days from the date the rehearing petition is filed. Proposed amicus briefs in opposition to rehearing are not allowed unless the court has directed that a response be filed. *See* Fed. R. App. P. 40(a)(3). In that event, any proposed amicus brief must be tendered on the due date for the response.

Fed. R. App. P. 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 14 days after the record is filed, serve on the appellee a designation of the parts of the record the appellant intends to include in the appendix and a statement of the issues the appellant intends to present for review. The appellee may, within 14 days after receiving the designation, serve on the appellant a designation of additional parts to which it wishes to direct the court's attention. The appellant must include the designated parts in the appendix. The parties must not engage in unnecessary designation of parts of the record, because the entire record is available to the court. This paragraph applies also to a cross-appellant and a cross-appellee.

(2) Costs of Appendix. Unless the parties agree otherwise, the appellant must pay the cost of the appendix. If the appellant considers parts of the record designated by the appellee to be unnecessary, the appellant may advise the appellee, who must then advance the cost of including those parts. The cost of the appendix is a taxable cost. But if any party causes unnecessary parts of the record to be included in the appendix, the court may impose the cost of those parts on that party. Each circuit must, by local rule, provide for sanctions against attorneys who unreasonably and vexatiously increase litigation costs by including unnecessary material in the appendix.

(c) Deferred Appendix.

(1) Deferral Until After Briefs are Filed. The court may provide by rule for classes of cases or by order in a particular case that preparation of the appendix may be deferred until after the briefs have been filed and that the appendix may be filed 21 days after the appellee's brief is served. Even though the filing of the appendix may be deferred, Rule 30(b) applies; except that a party must designate the parts of the record it wants included in the appendix when it serves its brief, and need not include a statement of the issues presented.

(2) References to the Record.

(A) If the deferred appendix is used, the parties may cite in their briefs the pertinent pages of the record. When the appendix is prepared, the record pages cited in the briefs must be indicated by inserting record page numbers, in brackets, at places in the appendix where those pages of the record appear.

(B) A party who wants to refer directly to pages of the appendix may serve and file copies of the brief within the time required by Rule 31(a), containing appropriate references to pertinent pages of the record. In that event, within 14 days after the appendix is filed, the party must serve and file copies of the brief, containing references to the pages of the appendix in place of or in addition to the references to the pertinent pages of the record. Except for the correction of typographical errors, no other changes may be made to the brief.

(d) Format of the Appendix. The appendix must begin with a table of contents identifying the page at which each part begins. The relevant docket entries must follow the table of contents. Other parts of the record must follow chronologically. When pages from the transcript of proceedings are placed in the appendix, the

transcript page numbers must be shown in brackets immediately before the included pages. Omissions in the text of papers or of the transcript must be indicated by asterisks. Immaterial formal matters (captions, subscriptions, acknowledgments, etc.) should be omitted.

(e) Reproduction of Exhibits. Exhibits designated for inclusion in the appendix may be reproduced in a separate volume, or volumes, suitably indexed. Four copies must be filed with the appendix, and one copy must be served on counsel for each separately represented party. If a transcript of a proceeding before an administrative agency, board, commission, or officer was used in a district-court action and has been designated for inclusion in the appendix, the transcript must be placed in the appendix as an exhibit.

(f) Appeal on the Original Record Without an Appendix. The court may, either by rule for all cases or classes of cases or by order in a particular case, dispense with the appendix and permit an appeal to proceed on the original record with any copies of the record, or relevant parts, that the court may order the parties to file.

(As amended Apr. 24, 1998, eff. Dec. 1, 1998, May 7, 2009, eff. Dec. 1, 2009.)

10th Cir. R. 30

30.1 Appellant's appendix.

In appeals from a district court, except pro se appeals and appeals in which an appellant is represented by appointed counsel, the record on appeal is retained in the district court. Instead of the Fed. R. App. P. 30(b) appendix, the appellant must electronically file an appendix containing record excerpts, and must also forward a single hard copy of that appendix to the office of the clerk. The hard copy must be an exact replica of the electronically-filed appendix. This rule also applies to appeals from the Tax Court.

In pro se appeals, the district court clerk prepares a pro se record. *See* 10th Cir. R. 10.2(C). In appeals in which an appellant is represented by appointed counsel, the district court clerk prepares a designated record. *See* 10th Cir. R. 10.2(A).

(A) Timing.

(1) Electronic filing. The appendix must be filed electronically at the same time the opening brief is filed. *See* 10th Cir. R. 31.1(A)(noting the brief and appendix must be filed within 40 days after the district court clerk notifies the parties and the circuit clerk that the record is complete).

(2) Required hard copy filing. Within 2 business days of the electronic filing, a single hard copy of the appendix must be received in the office of the clerk, along with the required number of hard copies of the opening brief. *See* 10th Cir. R. 31.5.

(3) Deferred appendix. Parties seeking to submit a deferred appendix under Fed. R. App. P. 30(c) may file a motion seeking an exception to these requirements.

(B) Content.

(1) Appellant's duty. Unless pro se**,** the appellant must electronically file an appendix sufficient for considering and deciding the issues on appeal. The requirements of Rule 10.3 for the contents of a record on appeal apply to appellant's appendix. *See* Rule 10.1(A) (addressing appropriate transcripts).

(2) Social security cases. In social security cases, the entire administrative record must be included in the appendix. In appropriate situations, the appellant may file a motion seeking an exemption from electronic filing of the administrative record, and/or for a waiver of service requirements for the administrative record. If an exemption from electronic filing is granted, the appellant must submit a hard copy of the appendix. *See* 10th Cir. R. 30.1(A)(2).

(3) Court not obliged. The court need not remedy any failure of counsel to provide an adequate appendix. *See* 10th Cir. R. 10.3(B).

(C) Multiple appellants. When multiple appellants are allowed to file separate briefs under 10th Cir. R. 31.3(B), separate appendices may be filed. But counsel must avoid duplication of items included in a previously filed appendix; duplicative items

may be adopted by reference. A single agreed appendix is preferred.

(D) Form.

Important Note: Counsel should review the Court's CM/ECF User Manual at Sections II and III for important technical information and instructions regarding the electronic appendix. These sections also include important information regarding submission of the required single hard copy of the appendix. *See* www.ca10.uscourts.gov.

(1) Pagination; index or table of contents. With the exception of social security appeals, the appendix must be paginated consecutively. All appendices must include an index of documents, which includes page numbers noting where the documents appear.

(2) File stamped. Documents in the appendix should show the district court's electronic stamp, but they need not be certified.

(3) District court docket entries. A copy of the district court's docket entries should always be the first document in the appendix.

(4) Order of documents. Documents should be arranged in chronological order according to the filing date; other papers such as exhibits and transcript excerpts should be at the end.

(5) Separate volumes. Where the appendix is large, separate volumes should be created to allow for manageable review of the materials. For specific information regarding technical requirements, please refer to the court's CM/ECF User Manual. Individual volumes should not exceed 300 pages in length. For the single hard copy, the court strongly encourages the use of spiral binding.

(6) Sealed documents. Copies of documents under seal in the district court, such as presentence reports, should be filed in a separate volume, under seal.

(E) Service of the Appendix. The electronic appendix must be served on every other party to the appeal. Parties may use the

court's CM/ECF system to accomplish that service. *See* 10th Cir. R. 25.4. If served electronically, a hard copy need not be served on other parties. If an exemption is allowed under 10th Cir. R. 30.3(A) and only hard copies of the appendix are filed, a hard copy of the appendix must be served on every other party to the appeal. *See* 10th Cir. R. 25.3 (regarding seeking exemptions to electronic filing requirements); 10th Cir. R. 30.3(A).

(F) Order appealed must be submitted with brief. Filing an appendix does not relieve counsel of the requirements of Rule 28.2(A).

30.2 Supplemental appendix.

(A) Appellee's appendix.

(1) Filing. An appellee who believes that the appellant's appendix omits items that should be included may file a supplemental appendix with the answer brief. Supplemental appendices shall be filed electronically and served in the same manner as is described in 10th Cir. R. 30.1(E).

(2) Appointed counsel. If all appellants are represented by retained counsel, appointed counsel for an appellee may file a supplemental appendix and apply for reimbursement when the voucher or the statement of hours and expenses is filed.

(B) No other appendix. No other appendix may be filed except by order of the court.

30.3 Appendix exemptions.

(A) Waiver of electronic appendix requirement. Any appellant may move to be exempt from the electronic appendix requirement upon the filing of a motion at least 7 days prior to the due date for filing the opening brief and appendix. If an exemption is granted, hard copies of the required appendix must be filed. Two hard copies must be received in the office of the clerk within 2 business days of the electronic filing of the brief,

and the appendix must be served via hard copy on all other parties to the appeal.

(B) Particular documents. A party may file a motion to exempt certain documents from the appendix if:

(1) the documents themselves cannot be readily copied or put in electronic form;

(2) essential excerpts of the reporter's transcript are so voluminous that copying or creating electronic access is excessively burdensome or costly; or

(3) if an exemption to the electronic appendix requirement is sought and obtained under subsection (A) of this rule, those cases in which making 2 copies of the administrative record would be too costly.

(C) Waiver of appendix requirement in pro bono cases. In pro bono cases, if production or creation of an appendix is too costly for the appellant to bear, the appellant may file a motion to proceed on a record on appeal.

Fed. R. App. P. 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 7 days before argument, unless the court, for good cause, allows a later filing.

(2) A court of appeals that routinely considers cases on the merits promptly after the briefs are filed may shorten the time to serve and file briefs, either by local rule or by order in a particular case.

(b) Number of Copies. Twenty-five copies of each brief must be filed with the clerk and 2 copies must be served on each unrepresented party and on counsel for each separately represented party. An unrepresented party proceeding in forma pauperis must file 4 legible copies with the clerk, and one copy must be served on each unrepresented party and on counsel for each separately represented party. The court may by local rule or by order in a particular case require the filing or service of a different number.

(c) Consequence of Failure to File. If an appellant fails to file a brief within the time provided by this rule, or within an extended time, an appellee may move to dismiss the appeal. An appellee who fails to file a brief will not be heard at oral argument unless the court grants permission.

(As amended Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; May 7, 2009, eff. Dec. 1, 2009.)

10th Cir. R. 31

31.1 Opening brief for appellant/petitioner.

(A) Appeals from district court.

(1) Retained Counsel. When the appellant is required to file an appendix, the appellant's brief and appendix must be filed within 40 days after the date the district court clerk (as required by Rule 11.1) notifies the parties and the circuit clerk that the record is complete for purposes of appeal.

(2) Appointed counsel; pro se. In all other cases, appellant's opening brief must be filed and served according to Fed. R. App. P. 31(a).

(B) Review and enforcement proceedings. In cases seeking review or enforcement of agency orders, petitioner's opening brief must be filed within 40 days after the date when the certified list is filed or the date when the record is filed, whichever occurs first.

31.2 Joint briefing in criminal appeals.

Codefendants in criminal appeals may each file a brief or may join in a single brief. Joint briefs must bear all the appellate case numbers and captions of all appeals. The United States is encouraged to file a single brief.

31.3 Joint briefing in civil appeals.

(A) Multiple parties. In civil cases involving more than one appellant or appellee, including consolidated cases, all parties on a side (including intervenors) must – to the extent practicable – file a single brief. Where, however, multiple response briefs are filed pursuant to 10th Cir. R. 31.3(B), the appellant may file only one reply except upon motion to the court seeking an exemption.

(B) Certificate of counsel. Any brief filed separately by one of multiple parties on a side must contain a certificate plainly stating

the reasons why the separate brief is necessary. The only exception to this requirement is if the only other party on a side filing separately is a government entity under 10th Cir. R. 31.3(D).

(C) Extension of time. On motion, the clerk may extend the time for briefing to allow the parties time to coordinate a single brief.

(D) Government entities exempt. This rule does not apply to government entities.

31.4 Extensions.

Extensions of time to file briefs are disfavored. *See* Rule 27.4.

31.5 Number of copies.

Parties, including amicus curiae, must provide the court with 7 hard copies of all briefs filed. This requirement is in addition to the court's ECF (Electronic Case Filing) requirements. In addition, a parties and amicus curiae must provide a copy of all submissions to each unrepresented party and all counsel for each separately represented party. Service may be provided electronically through the court's ECF system to attorneys and pro se filers who have received permission to file electronically and who are registered ECF users. For more information regarding filing briefs, please see the court's CM/ECF User Manual at Section III(5). The Manual can be found on the court's website, www.ca10.uscourts.gov.

Fed. R. App. P. 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; 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 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 10 ½ 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.

(As amended Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 25, 2005, eff. Dec. 1, 2005.)

10th Cir. R. 32

32(a) Font sizes in briefs.
The court prefers 14-point type as required by Fed. R. App. P. 32(a)(5)(A), but 13-point type is acceptable.

32(b) Word count where glossary included.
In calculating the number of words and lines that *do not* count toward the word and line limitations, the glossary required by 10th Cir. R. 28.2(C)(6) may be excluded, in addition to the items listed in Fed. R. App. P. 32(a).

Fed. R. App. P. 32.1. Citing Judicial Dispositions

(a) Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been:

(i) designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like; and

(ii) issued on or after January 1, 2007.

(b) Copies Required. If a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited.

(Eff. Dec. 1, 2006.)

10th Cir. R. 32.1

32.1 Citing judicial dispositions

(A) Precedential value. The citation of unpublished decisions is permitted to the full extent of the authority found in Fed. R. App. P. 32.1. Unpublished decisions are not precedential, but may be cited for their persuasive value. They may also be cited under the doctrines of law of the case, claim preclusion, and issue preclusion. Citation to unpublished opinions must include an appropriate parenthetical notation. *E.g., United States v. Wilson,* No. 10-2047, 2010 WL 3072766 (10th Cir. Oct. 31, 2010) (unpublished); *United States v. Keeble,* 184 F. App'x 756 (10th Cir. 2011) (unpublished).

(B) Reference. If an unpublished decision cited in a brief or other pleading is not available in a publicly accessible electronic database, a copy must be attached to the document when it is filed and must be provided to all other counsel and pro se parties. Where possible, references to unpublished dispositions should include the appropriate electronic citation.

(C) Retroactive effect. Parties may cite unpublished decisions issued prior to January 1, 2007, in the same manner and under

the same circumstances as are allowed by Fed. R. App. P. 32.1(a)(i) and part (A) of this local rule.

Fed. R. App. P. 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.

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

10th Cir. R. 33

33.1 Mediation conference.

(A) Circuit mediation office; purpose of mediation conference. The circuit mediation office may schedule and conduct mediation conferences in any matter pending before the court. The primary purpose of a conference is to explore settlement, but case management matters may also be addressed.

(B) Participation of counsel and parties. Counsel must participate in every scheduled mediation conference and in related discussions. Generally a party may participate but need not unless required by the circuit mediation office. Conferences are conducted by telephone unless the circuit mediation office directs otherwise.

(C) Preparation of counsel for mediation conference; settlement authority. Counsel must consult with their clients and obtain as much authority as feasible to settle the case and agree on case management matters in preparing for the initial conference. These obligations continue throughout the mediation process.

(D) Confidentiality. Statements made during the conference and in related discussions, and any records of those statements, are confidential and must not be disclosed by anyone (including the circuit mediation office, counsel, or the parties, and their agents

or employees), to anyone not participating in the mediation process. Proceedings under this rule may not be recorded by counsel or the parties.

(E) Conference order; mediator authority. The circuit mediation office may cause a judgment or order to be entered controlling the course of the case or the mediation proceedings. The circuit mediation office and its mediators are delegates of this court. Any conference orders or other communications from the circuit mediation office must be treated the same as any other court directive.

(F) Extensions for ordering transcript or filing brief. The time allowed by Fed. R. App. P. 10(b)(1) for ordering a transcript and by Rule 31.1 for filing briefs is not automatically tolled pending a conference. If a conference has been scheduled, counsel may contact the circuit mediation office for an extension of time to order a transcript or to file a brief.

(G) Request for mediation conference by counsel. Counsel may request a mediation conference by contacting the circuit mediation office. The office will determine whether a conference will be held.

(H) Sanctions. The court may impose sanctions if counsel or a party violates this rule or an order entered under it.

33.2 Counsel conference.

(A) Counsel conference required. Unless a mediation conference under Rule 33.1 has been conducted, counsel must discuss settlement in all civil matters except those involving pro se litigants, relief from criminal convictions, and social security appeals.

(B) Counsel for appellant to initiate. In cases to which Rule 33.2(A) applies, counsel for the appellant or petitioner must initiate a conference with opposing counsel to fully explore settlement no later than 30 days after the filing of the last brief. The conference may be conducted by telephone.

(C) Report of counsel conference. No later than 10 days after the initiation of the conference, counsel for appellant or petitioner must mail a report to the circuit mediation office on a form provided by the clerk. Service of this report upon opposing counsel is not required.

(D) Confidentiality. Statements made during a conference, the Rule 33.2(C) report, and related discussions are covered by the confidentiality provision of Rule 33.1(D).

Fed. R. App. P. 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.

(As amended Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 25, 2005, eff. Dec. 1, 2005.)

10th Cir. R. 34

34.1 Oral argument.

(A) Responsibilities of counsel.

(1) Presence of counsel. Counsel for each party must be present for oral argument unless excused by the court. The established argument time is allocated by counsel as they see fit.

(2) Motion to waive oral argument. After the principal briefs have been filed, a party may file a motion to waive oral argument and to submit a case on the briefs. If filed within 10 days of the scheduled argument date, the motion must show why an earlier filing was not possible.

(3) Postponement. Only in extraordinary circumstances will an argument be postponed. Except in an emergency, a motion to postpone must be made more than 10 days before the scheduled argument date.

(4) Recovery of expenses. A party prejudiced by the granting of a motion to waive or postpone oral argument filed within 10 days of the scheduled argument date may move for recovery of expenses.

(B) Joint appeals. Cases that have been consolidated for briefing purposes will be treated as one case for oral argument. The

court disfavors divided arguments on behalf of a single party or multiple parties with the same interests.

(C) **Multiple counsel.** If more than one counsel argues on the same side, the time allowed is divided as they agree. If counsel do not agree, the court will allocate the time.

(D) **Preparation.** In preparing for oral argument, counsel should remember that the judges read the briefs before oral argument.

(E) **Recording and transcription.**

(1) Recording. Oral arguments are recorded electronically for the use of the court. Parties or others seeking access to the recordings may, however, file a motion to obtain a copy. The motion must state the reason or reasons access is sought. Upon issuance of an order from the hearing panel granting the request, the clerk will be directed to forward the mp3 recording via email.

(2) Transcription. Counsel or parties may move for permission to arrange, at their own expense, for a qualified court reporter to be present and to report and transcribe oral argument. A copy of the transcript must be filed with the circuit clerk.

(F) **No oral argument on petitions or motions.** Oral argument on petitions or motions is not ordinarily permitted.

(G) **Submission on briefs.** Except in pro se appeals or when both parties have waived oral argument, the court will advise the parties when a panel decides that oral argument is not necessary. That advisement may be at the time a decision is issued.

Fed. R. App. P. 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.

(As amended Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 25, 2005, eff. Dec. 1, 2005.)

10th Cir. R. 35

35.1 En banc consideration.

(A) Extraordinary procedure. A request for en banc consideration is disfavored. Before seeking rehearing en banc litigants should be aware and take account of the fact that, before any published panel opinion issues, it is generally circulated to the full court and every judge on the court is given an opportunity to comment. En banc review is an extraordinary procedure intended to focus the entire court on an issue of exceptional public importance or on a panel decision that conflicts with a decision of the United States Supreme Court or of this court.

(B) Petition not required. Filing a petition for rehearing or for rehearing en banc is not required before filing a petition for certiorari in the United States Supreme Court.

(C) No reconsideration. The court will not reconsider either the denial of an en banc petition or an en banc disposition.

35.2 Request in petition for rehearing.

(A) Cover. The request for en banc consideration must appear on the cover page and in the title of the document requesting rehearing.

(B) Form of request. A copy of the opinion or order and judgment that is the subject of a request for rehearing en banc must be attached to every copy of the petition. *See* 10th Cir. R. 40.2.

35.3 Untimely request.
Untimely en banc requests will be transmitted to the full court only upon express order of the hearing panel.

35.4 Number of copies.
A party seeking en banc review must file 12 hard copies of a petition for en banc consideration. This requirement is in addition to all ECF (Electronic Case Filing) requirements. For information regarding filing petitions for rehearing en banc, please see the court's CM/ECF User Manual at section III(11). *See* www.ca10.uscourts.gov. A pro se party proceeding without prepayment of fees may file an original and 3 copies.

35.5 Who may vote; en banc panel.
A majority of the active judges who are not disqualified may order rehearing en banc. The en banc panel consists of this court's active judges who are not disqualified and any senior judge who was a member of the hearing panel, unless he or she elects not to sit.

35.6 Effect of rehearing en banc.
The grant of rehearing en banc vacates the judgment, stays the mandate, and restores the case on the docket as a pending appeal. The panel decision is not vacated unless the court so orders.

35.7 Matters not considered en banc.
The en banc court does not consider procedural and interim matters such as stay orders, injunctions pending appeal, appointment of counsel, leave to appeal in forma pauperis, and leave to appeal from a nonfinal order. En banc requests in these

matters are referred to the judge or panel that entered the order, in the same manner as a petition for rehearing.

Fed. R. App. P. 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.

(As amended Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002.)

10th Cir. R. 36

36.1 Orders and judgments.
The court does not write opinions in every case. The court may dispose of an appeal or petition without written opinion. Disposition without opinion does not mean that the case is unimportant. It means that the case does not require application of new points of law that would make the decision a valuable precedent.

36.2 Publication.
When the opinion of the district court, an administrative agency, or the Tax Court has been published, this court ordinarily designates its disposition for publication.

Fed. R. App. P. 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.

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

No local rule.

Fed. R. App. P. 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.

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

No local rule.

Fed. R. App. P. 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 14 days after service of the bill of costs, unless the court extends the time.

(3) The clerk must prepare and certify an itemized statement of costs for insertion in the mandate, but issuance of the mandate must not be delayed for taxing costs. If the mandate issues before costs are finally determined, the district clerk must – upon the circuit clerk's request – add the statement of costs, or any amendment of it, to the mandate.

(e) Costs on Appeal Taxable in the District Court. The following costs on appeal are taxable in the district court for the benefit of the party entitled to costs under this rule:

(1) the preparation and transmission of the record;

(2) the reporter's transcript, if needed to determine the appeal;

(3) premiums paid for a supersedeas bond or other bond to preserve rights pending appeal; and

(4) the fee for filing the notice of appeal.

(As amended Apr. 24, 1998, eff. Dec. 1, 1998; May 7, 2009, eff. Dec. 1, 2009.)

10th Cir. R. 39

39.1 Maximum rates.
Costs of making necessary copies of briefs, appendices, or other records are taxable at the actual cost, but no more than 20 cents per page.

Fed. R. App. P. 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, unless an order shortens or extends the time, the petition may be filed by any party within 45 days after entry of judgment if one of the parties is:

(A) the United States;

(B) a United States agency;

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

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

(2) Contents. The petition must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition. Oral argument is not permitted.

(3) Answer. Unless the court requests, no answer to a petition for panel rehearing is permitted. But ordinarily rehearing will not be granted in the absence of such a request.

(4) Action by the Court. If a petition for panel rehearing is granted, the court may do any of the following:

(A) make a final disposition of the case without reargument;

(B) restore the case to the calendar for reargument or resubmission; or

(C) issue any other appropriate order.

(b) Form of Petition; Length. The petition must comply in form with Rule 32. Copies must be served and filed as Rule 31 prescribes. Unless the court permits or a local rule provides otherwise, a petition for panel rehearing must not exceed 15 pages.

(As amended Apr. 24, 1998, eff. Dec. 1, 1998); Apr. 26, 2011, eff. Dec. 1, 2011.)

10th Cir. R. 40

40.1 Reasons for petition.

(A) Not routine. A petition for rehearing should not be filed routinely. Rehearing will be granted only if a significant issue has been overlooked or misconstrued by the court.

(B) Sanctions. If a petition for rehearing is found to be frivolous, vexatious, or filed for delay, the court may impose a money penalty of up to $500. Counsel may be required to pay the penalty personally to the opposing party. *See* 28 U.S.C. § 1927.

40.2 Form; copies.

If a petition for panel rehearing is accompanied by a request for rehearing en banc, the petitioner must file 12 hard copies with the clerk, in addition to satisfying all ECF (Electronic Case Filing) requirements. For information regarding filing petitions for panel rehearing and rehearing en banc, please see the CM/ECF User Manual at Section III(11). *See* www.ca10.uscourts.gov A pro se party proceeding without prepayment of fees may file an original and 3 copies.

40.3 Successive petitions.

The court will accept only one petition for rehearing from any party to an appeal. No motion to reconsider the court's ruling on a petition for rehearing may be filed.

Fed. R. App. P. 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 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.

(c) Effective Date. The mandate is effective when issued.

(d) Staying the Mandate.

(1) On Petition for Rehearing or Motion. The timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise.

(2) Pending Petition for Certiorari.

(A) A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the certiorari petition would present a substantial question and that there is good cause for a stay.

(B) The stay must not exceed 90 days, unless the period is extended for good cause or unless the party who obtained the stay files a petition for the writ and so notifies the circuit clerk in writing within the period of the stay. In that case, the stay continues until the Supreme Court's final disposition.

(C) The court may require a bond or other security as a condition to granting or continuing a stay of the mandate.

(D) The court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed.

(As amended Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; May 7, 2009, eff. Dec. 1, 2009.)

10th Cir. R. 41

41.1 Stay not routinely granted.

(A) Criminal cases. To minimize delay in the administration of justice, after the affirmance of a conviction the mandate will issue and bail will be revoked. A motion to stay the mandate will not be granted unless the court finds that it is not frivolous or filed merely for delay. The court – or a judge of the hearing panel – may revoke bail before the mandate is issued. *See* 18 U.S.C. § 3141(b).

(B) Civil cases. A motion to stay the mandate in a civil case will not be granted unless the court finds there is a substantial possibility that a petition for writ of certiorari would be granted.

41.2 Motion to recall mandate.

When a motion to recall the mandate is tendered for filing more than one year after issuance of the mandate, the clerk shall not accept the motion for filing unless the motion states with specificity why it was not filed sooner. The court will not grant the request unless the movant has established good cause for the delay in filing the motion.

Fed. R. App. P. 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.

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

10th Cir. R. 42

42.1 Dismissal for failure to prosecute.
When an appellant fails to comply with the Federal Rules of Appellate Procedure or these rules, the clerk will notify the appellant that the appeal may be dismissed for failure to prosecute unless the failure to comply is remedied within a designated time. If the appellant fails to comply within that time, the clerk will enter an order dismissing the appeal and issue a copy of the order as the mandate. The appellant may not remedy the failure to comply after the appeal is dismissed, unless the court orders otherwise.

42.2 Reinstatement.
A motion to reinstate an appeal dismissed for failure to prosecute may not be filed unless the failure is remedied or the remedy for the failure accompanies the motion.

Fed. R. App. P. 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.

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

No local rule.

Fed. R. App. P. 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.

(As amended Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002.)

No local rule.

Fed. R. App. P. 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.

(As amended Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 25, 2005, eff. Dec. 1, 2005.)

10th Cir. R. 45

45.1 Duties.

(A) Funds. The clerk must account for all court funds.

(B) Court sessions. The clerk or a deputy must attend court sessions.

45.2 Chief deputy clerk.
In the absence of the clerk, the chief deputy clerk is acting clerk.

45.3 Office location.
The clerk's office is in the Byron White United States Courthouse, 1823 Stout Street, Denver, Colorado 80257. The telephone number is (303) 844-3157. The clerk's office email address is "10th_Circuit_Clerk@ca10.uscourts.gov." The court's website can be found at www.ca10.uscourts.gov.

Fed. R. App. P. 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.

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

10th Cir. R. 46

46.1 Entry of appearance.

(A) Attorneys. Within 14 days after an appeal or other proceeding is filed, counsel for the parties must file written appearances in a form approved by the court (*see* Appendix A, Form 2). Other attorneys whose names subsequently appear on filed papers must also file written appearances.

While the court requires a separate, formal entry of appearance from all attorneys in the appeal or other proceeding, counsel should also note that attorneys who authorize their names to appear on filed papers have technically entered an appearance and are therefore responsible for the contents of such papers, and also for following all court rules and requirements. Attorneys who appear in a case in this court may not withdraw absent entry of a court order allowing them to do so.

(B) Pro se. A party appearing without counsel may notify the clerk in writing of that status by filing an entry of appearance on a form approved by the court (*see* Appendix A, Form 3).

(C) Change of address. Once an appearance has been entered, the clerk must be notified of any subsequent change in address. This requirement applies to changes in both street addresses and changes made to email addresses. In particular, counsel should note that any changes in contact information will require an update to that attorney's ECF registration with the PACER Service Center. *See* pacer.psc.uscourts.gov.

(D) Certification of interested parties.

(1) Certificate. Each entry of appearance must be accompanied by a certificate listing the names of all interested parties not in the caption of the notice of appeal so that the judges may evaluate possible disqualification or recusal.

(2) List. The certificate must list all persons, associations, firms, partnerships, corporations, guarantors, insurers, affiliates, and other legal entities that are financially interested in the outcome of the litigation. For corporations, *see* Fed. R. App. P. 26.1.

(3) Generic description. An individual listing is not necessary if a large group of persons or firms can be specified by a generic description.

(4) Attorneys. Attorneys not entering an appearance in this court must be listed if they have appeared for any party in a proceeding sought to be reviewed, or in related proceedings that preceded the original action being pursued in this court.

(5) No additional parties. If there are no additional parties, entities, or attorneys in any of these categories not previously reported to the court, a report to that effect also is required.

(6) Obligation to amend. The certificate must be kept current.

46.2 Admission to Tenth Circuit bar.

(A) Prerequisite to practice. Upon filing a case or entering an appearance in this court, an attorney who is not admitted to the Tenth Circuit bar must apply for admission. Forms (as well as other information) are available on the court's website at www.ca10.uscourts.gov.

(B) Method of admission and fees. Fed. R. App. P. 46 applies to admission to the Tenth Circuit bar. The amount of the admission fee will be set by the court and is payable to the clerk as trustee. The admission fee is waived for any attorney representing the United States or a federal agency or for any attorney appointed by the court to represent a party on appeal. Per the court's Plan For Attorney Disciplinary Enforcement, any lawyer disbarred

from practice before the Circuit will be required to pay the fee prior to being readmitted.

(C) Trust account. The clerk will hold all admission fees in a trust account known as the "Attorney Admission Fund." The clerk will disburse money from this account as the chief judge or a delegated judicial committee directs to defray expenses of the annual judicial conference and support other activities and purchases that will benefit the bench and the bar. The clerk must account to the court annually for the trust funds.

46.3 Responsibilities in criminal and postconviction cases.

(A) Prosecution of appeal. Trial counsel must continue to represent the defendant until either the time for appeal has elapsed and no appeal has been taken or this court has relieved counsel of that duty. An attorney who files a notice of appeal in a criminal case or a postconviction proceeding under 28 U.S.C. § 2254 or § 2255, or who has not obtained an order from the district court granting permission to withdraw from further representation prior to the filing of a pro se notice of appeal, has entered an appearance in this court and may not withdraw without the court's permission. Before filing a proper motion to withdraw under 10th Cir. R. 46.4 counsel must file, at a minimum, an entry of appearance and docketing statement.

(B) Voluntary dismissal. A voluntary motion to dismiss a criminal appeal or an appeal in a postconviction proceeding must contain a statement, signed by the appellant, demonstrating knowledge of the right to appeal and expressly electing to withdraw the appeal. If the statement is not included, counsel must show that exceptional circumstances prevented its inclusion. Proof of service must include service on the appellant him or herself.

46.4 Withdrawal.

(A) Motion requirements. Every motion to withdraw in a criminal appeal or in an appeal in a postconviction proceeding must include:

(1) the reasons for withdrawal;

(2) a statement that counsel has advised the client to obtain other counsel promptly, unless the client wishes to proceed pro se;

(3) if the client intends to proceed pro se, a statement noting that intention, as well as a statement that counsel has advised the client of the right to representation, if any, and of any pending obligations under the Federal Rules of Appellate Procedure or these rules;

(4) proof of service on the client and on all opposing parties; and

(5) one of the following:

(a) a showing that new counsel has been retained or appointed;

(b) a showing that the defendant has been granted leave to proceed on appeal without prepayment of fees or has been found eligible for benefits under 18 U.S.C. § 3006A, or that a completed motion for leave to proceed without prepayment of fees or for a finding of eligibility under 18 U.S.C. § 3006A has been filed in the district court, including appropriate explanation of the exact status of that motion and the date it was filed;

(c) a signed statement from the client demonstrating knowledge of the right to retain new counsel or apply for appointment of counsel and expressly electing to appear without counsel; or

(d) a showing that exceptional circumstances prevent counsel from meeting any of the other requirements of this subsection.

(B) Frivolous appeals.

(1) Duty of counsel. In a direct criminal appeal, counsel who believes the appeal is frivolous and moves to withdraw or who believes opposition to a motion to dismiss would be frivolous must file an *Anders* brief and advise the court of the defendant's current address. *See Anders v. California*, 386 U.S. 738 (1967).

(2) Notice to defendant. Except as provided in (3), the clerk will send the defendant by certified mail, return receipt

requested, a copy of the *Anders* brief, the motion to withdraw, and a notice in the form set out in Appendix A, Form 4.

(3) Incompetent defendant. If the defendant has been found incompetent or there is reason to believe that the defendant is incompetent, the motion to withdraw must so state, and the matter will be referred to the court for appropriate action.

(C) Attorney withdrawal in civil cases.

Where counsel of record for any party files a motion to withdraw after the mandate has issued, the court will treat the motion as a notice of withdrawal. This rule applies in civil cases only and does not apply in postconviction proceedings filed under 28 U.S.C. § 2254 or § 2255.

46.5 Signing briefs, motions, and other papers; representations to court; sanctions.

(A) Signature. Every brief, motion, or other paper must be signed by at least one attorney of record – or, in a pro se case, by the party personally. The paper must state the signer's mailing address, email address, and telephone number. Unless a rule or statute provides otherwise, a paper need not be verified or accompanied by an affidavit. Counsel must follow the requirements of the court's CM/ECF User Manual with respect to electronic filing. *See* www.ca10.uscourts.gov . In particular, please see Sections II(H)(1) and (2) of the Manual for general information on the use of digital signatures.

(B) Representations to court. By presenting to the court – whether by signing (electronically or through an original signature), filing, submitting, or later advocating – a brief, motion, or other paper, an attorney or unrepresented party certifies that, to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) the paper is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or expense in the litigation;

(2) the issues presented are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or establishing new law; and

(3) the factual contentions or denials are supported in the record.

(C) Electronic Signature. An electronic signature is an original signature under this rule.

(D) Sanctions. If a brief, motion, or other paper is signed in violation of this rule, the court – on its own or on a party's motion – may impose upon the person who signed it, a represented party, or both, an appropriate sanction, including:

(1) dismissal or affirmance of the appeal;

(2) monetary sanctions;

(3) initiation of disciplinary proceedings under the Plan for Attorney Disciplinary Enforcement; and

(4) an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the paper, including reasonable attorney's fees.

46.6 Discipline of counsel or parties.

(A) Sanctions for increasing cost of litigation. After giving notice and an opportunity to respond, this court may impose sanctions against parties and attorneys who unreasonably increase the cost of litigation. Examples of unreasonable cost increases include, but are not limited to, putting unnecessary material in records, briefs, appendices, addenda, and other papers.

(B) Court-appointed counsel. If court-appointed counsel for an appellant fails to comply with the Federal Rules of Appellate Procedure or with these rules, the clerk may issue an order requiring counsel to show cause why disciplinary action should not be taken. Action by the court may include monetary sanctions.

(C) Inadequate representation. After giving notice, the court may take disciplinary action against attorneys for inadequate representation on appeal.

46.7 Student practice.

(A) Appearance by law students.

(1) Consent of party. An eligible law student may enter an appearance in the court on behalf of a party if the party has filed a statement of consent.

(2) Agreement of supervising attorney. A member of the Tenth Circuit bar must file an agreement to supervise the student. The agreement must contain:

(a) a certification by the supervising attorney that the student has satisfied the requirements of (C); and

(b) a copy of the law school certification required by (C)(3).

(B) Student participation.

(1) Briefs. A law student who has entered an appearance in a case under (A) may appear on a brief if the supervising attorney also appears on the brief.

(2) Oral argument. An eligible student may participate in oral argument if the supervising attorney is present in court.

(3) Other. The student may take part in other activities in connection with the case, subject to the direction of the supervising attorney.

(C) Student eligibility. To be eligible to make an appearance under this rule, the law student must provide a letter as described in Rule 46.7(D) or otherwise document that he or she:

(1) is enrolled and in good standing in a law school accredited by the American Bar Association; or is a recent law school graduate awaiting the first bar examination after the student's graduation or the result of that examination;

(2) has completed the equivalent of 4 semesters of legal studies;

(3) is certified to be of good character and competent legal ability, and is qualified to provide the legal representation permitted by this rule, by either the law school's dean or a faculty member designated by the dean; and

(4) is familiar with the Federal Rules of Civil, Criminal, and Appellate Procedure, the Federal Rules of Evidence, the American Bar Association Code of Professional Responsibility, and the rules of this court.

(D) Dean's letter. A letter from the law school's dean or the designated faculty member describing the student's qualifications under (C) may demonstrate eligibility.

(E) Supervising attorney. An attorney who supervises an eligible law student under this rule must:

(1) be a member in good standing of the Tenth Circuit bar;

(2) assume personal professional responsibility for the quality of the student's work;

(3) guide and assist the student as necessary or appropriate under the circumstances;

(4) sign all documents filed with the court (the student may also sign documents, but the attorney's signature is required);

(5) appear with the student in any oral presentations before the court;

(6) file a written agreement to supervise the student; and

(7) supplement any written or oral statement made by the student to this court or opposing counsel if the court so requests.

Fed. R. App. P. 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.

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

10th Cir. R. 47

47.1 Advisory committee.
As required by 28 U.S.C. § 2077(b), there is an advisory committee on procedures for the court of appeals.

(A) Membership. The committee consists of ten members: one circuit judge, one district judge, one United States attorney or assistant United States attorney, one federal public defender or assistant federal public defender, and one actively practicing member of the Tenth Circuit bar from each of the six states in the

circuit. The committee may appoint ad hoc committees consisting of persons who are not members of the advisory committee.

(B) Selection of members; organization.

(1) Circuit judge. The circuit judge member is the chief judge of the circuit or a circuit judge designated by the chief judge. This member serves as chair.

(2) District judge; United States attorney; federal public defender. The district judge member and representatives of the United States attorneys' offices and federal public defenders' offices are selected by their respective associations within the circuit.

(3) Bar members. The members of the bar are selected by the circuit judges residing in each respective state. Candidates must have substantial and active federal practices.

(4) Terms. Members serve 3 year terms, with a third of the terms expiring each year. Terms begin on April 1. No member, except the chief judge or a designee, may serve successive terms. But a person selected to fill an unexpired term may serve a successive term.

(5) Reporter; secretary. The chief staff counsel serves as reporter; the circuit executive, or a designee, serves as secretary.

(C) Meetings. The committee shall meet as called by the chair, and may meet and act in person, by telephone, or through other electronic means.

(D) Duties. The committee advises the court about its operating procedures and rules. Among other things, the committee may:

(1) provide a forum for continuous study of the operating procedures and published rules of the court;

(2) serve as a liaison between the bar, the public, and the court on procedural matters and suggestions for changes;

(3) consider and recommend amendments to the rules for adoption by the court;

(4) make suggestions for and assist with programs at the circuit judicial conference; and

(5) make any other studies, reports, and recommendations that the court requests or that the committee determines are appropriate.

47.2 Circuit library.

The circuit's central library and most satellite law libraries are open to all members of the Tenth Circuit bar. Books and materials may not be removed without the librarian's permission.

47.3 Judicial conference.

(A) Authorization. As permitted by 28 U.S.C. § 333, a judicial conference will be convened every other year, at a time and place designated by the chief judge, or at another court-determined interval that the law permits. In alternate years, the circuit may hold a conference for judges only.

(B) Purpose. The conference will consider the business of the circuit's federal courts and devise ways of improving the administration of justice within the circuit.

(C) Duties of circuit executive. The circuit executive, who serves as secretary of the conference, is responsible for all records and accounts of the conference, and may perform other conference duties as the chief judge or circuit judicial council may require.

(D) Agenda. During judicial conferences, all judges of the Tenth Circuit will meet to discuss the dockets and the administration of justice in the circuit's judicial districts. The chief judge of each district will report on the condition of judicial business in that district and make recommendations about judicial business. In those years in which an open conference is held, all general meetings are open to attorney attendees and are devoted to improving the administration of justice in the Tenth Circuit.

(E) **Registration fee.** A registration fee, set by the judicial council, will be collected from each attorney attendee of the conference. The money collected must be used as directed by the chief judge to defray the expense of the conference. The circuit executive must maintain a judicial conference bank account and keep a record of all receipts and disbursements. During the year after each conference, the circuit executive must make a fiscal report to the judicial council.

Fed. R. App. P. 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.

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

No local rule.

APPENDIX A

FORMS

Form 1. Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court

UNITED STATES DISTRICT COURT

for the

<_____> DISTRICT OF <_____>

<Name(s) of plaintiff(s)>, Plaintiff(s) v. <Name(s) of defendant(s)>, Defendant(s)	)	Case No. <Number>

NOTICE OF APPEAL

Notice is hereby given that <Name all parties taking the appeal>, [plaintiffs] [defendants] in the above named case <See Rule 3(c) for permissible ways of identifying appellants.>, hereby appeal to the United States Court of Appeals for the <_____> Circuit [from the final judgment] [from an order <describing it>] entered in this action on <Date>.

Date: <Date>

<Signature of the attorney or unrepresented party>

_____

<Printed name>
Attorney for <party>
<Address>
<E-mail address>
<Telephone number>

See Fed. R. App. P. 3(c) for permissible ways of identifying appellants.
(As amended Apr. 22, 1993, eff. Dec. 1, 1993; Mar. 27, 2003, eff. Dec. 1, 2003.)

Form 2. Notice of Appeal to a Court of Appeals From a Decision of the United States Tax Court

UNITED STATES TAX COURT

Washington, DC

<Name of petitioner>, Petitioner v. Commissioner of Internal Revenue, Respondent	)	Docket No. <Number>

NOTICE OF APPEAL

Notice is hereby given that <Name all parties taking the appeal>, <See Rule 3(c) for permissible ways of identifying appellants.>, hereby appeal to the United States Court of Appeals for the <_____> Circuit from <that part of> the decision of this court entered in the above captioned proceeding on <Date> <relating to _____>.

Date: <Date>

<Signature of the attorney or unrepresented party>

_____

<Printed name>
<Counsel for _____>
<Address>
<E-mail address>
<Telephone number>

See Fed. R. App. P. 3(c) for permissible ways of identifying appellants.
(As amended Apr. 22, 1993, eff. Dec. 1, 1993; Mar. 27, 2003, eff. Dec. 1, 2003.)

Form 3. Petition for Review of Order of an Agency, Board, Commission or Officer

United States Court of Appeals

for the

<_____> CIRCUIT

<Name of petitioner>,	)
	)
Petitioner	)
	)
v.	)
	)
<XYZ Commission>,	)
	)
Respondent	)
	)
	)
	)

PETITION FOR REVIEW

<Here name all parties bringing the petition> hereby petition the court for review of the Order of the <XYZ Commission> <describe the order> entered on <Date>.

Date: <Date>

<Signature of the attorney or unrepresented party>

_____

<Printed name>
<Attorney for Petitioners>
<Address>
<E-mail address>
<Telephone number>

See Fed. R. App. P. 15.
(As amended Apr. 22, 1993, eff. Dec. 1, 1993; Mar. 27, 2003, eff. Dec. 1, 2003.)

Form 4. Affidavit to Accompany Motion for Leave to Appeal in Forma Pauperis

UNITED STATES DISTRICT COURT

for the

<_____> DISTRICT OF <_____>

<Name(s) of plaintiff(s)>, Plaintiff(s) v. <Name(s) of defendant(s)>, Defendant(s)	)	Case No. <Number>

AFFIDAVIT ACCOMPANYING MOTION

FOR PERMISSION TO APPEAL IN FORMA PAUPERIS

Affidavit in Support of Motion	**Instructions**
I swear or affirm under penalty of perjury that, because of my poverty, I cannot prepay the docket fees of my appeal or post a bond for them. I believe I am entitled to redress. I swear or affirm under penalty of perjury under United States laws that my answers on this form are true and correct. (28 U.S.C. § 1746; 18 U.S.C. § 1621.)	Complete all questions in this application and then sign it. Do not leave any blanks: if the answer to a question is "0," "none," or "not applicable (N/A)," write that response. If you need more space to answer a question or to explain your answer, attach a separate sheet of paper identified with your name, your case's docket number, and the question number.
Signed: _____	Date: _____

My issues on appeal are:

1. *For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.*

Income source	**Average monthly amount during the past 12 months**		**Amount expected next month**	
	You	Spouse	You	Spouse
Employment	$	$	$	$
Self-employment	$	$	$	$
Income from real property (such as rental income)	$	$	$	$
Interest and dividends	$	$	$	$
Gifts	$	$	$	$
Alimony	$	$	$	$
Child support	$	$	$	$
Retirement (such as social security, pensions, annuities, insurance)	$	$	$	$
Disability (such as social security, insurance payments)	$	$	$	$
Unemployment payments	$	$	$	$

Public-assistance (such as welfare)	$	$	$	$
Other (specify):	$	$	$	$
Total monthly income:	**$**	**$**	**$**	**$**

2. *List your employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)*

Employer	**Address**	**Dates of employment**	**Gross monthly pay**
			$
			$
			$

3. *List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)*

Employer	**Address**	**Dates of employment**	**Gross monthly pay**
			$
			$
			$

4. *How much cash do you and your spouse have? $_____*

Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial Institution	**Type of Account**	**Amount you have**	**Amount your spouse has**
		$	$
		$	$
		$	$

If you are a prisoner seeking to appeal a judgment in a civil action or proceeding, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

5. *List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.*

Home	**Other real estate**	**Motor vehicle #1**
(Value) $	(Value) $	(Value) $
		Make and year:
		Model:
		Registration #:

Motor vehicle #2	**Other assets**	**Other assets**
(Value) $	(Value) $	(Value) $
Make and year:		
Model:		
Registration #:		

6. *State every person, business, or organization owing you or your spouse money, and the amount owed.*

Person owing you or your spouse money	**Amount owed to you**	**Amount owed to your spouse**
	$	$
	$	$
	$	$
	$	$

7. *State the persons who rely on you or your spouse for support.*

Name [or, if under 18, initials only]	**Relationship**	**Age**

8. *Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate.*

	You	**Your Spouse**
Rent or home-mortgage payment (including lot rented for mobile home) Are real estate taxes included? [ ] Yes [ ] No Is property insurance included? [ ] Yes [ ] No	$	$
Utilities (electricity, heating fuel, water, sewer, and telephone)	$	$
Home maintenance (repairs and upkeep)	$	$
Food	$	$
Clothing	$	$
Laundry and dry-cleaning	$	$
Medical and dental expenses	$	$
Transportation (not including motor vehicle payments)	$	$
Recreation, entertainment, newspapers, magazines, etc.	$	$
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's:	$	$
Life:	$	$
Health:	$	$
Motor vehicle:	$	$
Other:	$	$
Taxes (not deducted from wages or included in mortgage payments) (specify):	$	$
Installment payments		
Motor Vehicle:	$	$

Credit card (name):	$	$
Department store (name):	$	$
Other:	$	$
Alimony, maintenance, and support paid to others	$	$
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$	$
Other (specify):	$	$
Total monthly expenses:	**$**	**$**

9. *Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?*

[ ] Yes [ ] No If yes, describe on an attached sheet.

10. *Have you spent – or will you be spending – any money for expenses or attorney fees in connection with this lawsuit?* [ ] Yes [ ] No

If yes, how much? $ _____

11. *Provide any other information that will help explain why you cannot pay the docket fees for your appeal.*

12. *State the city and state of your legal residence.*

Your daytime phone number: (____) _____

Your age: _____ *Your years of schooling*: _____

Last four digits of your social-security number: _____

(As amended Apr. 28, 2010, eff. Dec. 1, 2010; Apr. 16, 2013, eff. Dec. 1, 2013).

Form 5. Notice of Appeal to a Court of Appeals from a Judgment or Order of a District Court or a Bankruptcy Appellate Panel

UNITED STATES DISTRICT COURT

for the

<_____> DISTRICT OF <_____>

In re <Name of debtor>, Debtor <Name of plaintiff>, Plaintiff v. <Name of defendant>, Defendant	)	File No. <Number>

NOTICE OF APPEAL TO UNITED STATES COURT

OF APPEALS FOR THE <_____> CIRCUIT

<Name of party>, the [plaintiff] [defendant] [other party], appeals to the United States Court of Appeals for the <_____> Circuit from the [final judgment] [order] [decree] of the [district court for the district of <_____>] [bankruptcy appellate panel of the <_____> circuit], entered in this case on <Date>.

<Here describe the judgment, order, or decree.>

The parties to the [judgment] [order] [decree] appealed from and the names and addresses of their respective attorneys are as follows:

Date: <Date>

<Signature of the attorney for appellant>

_____

<Printed name>
Attorney for Appellant
<Address>
<E-mail address>
<Telephone number>

(Added Apr. 25, 1989, eff. Dec. 1, 1989; amended Mar. 27, 2003, eff. Dec. 1, 2003.)

Form 6. Certificate of Compliance With Rule 32(a)

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance With Type-Volume Limitation,

Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

   [ ] this brief contains <state the number of> words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or

   [ ] this brief uses a monospaced typeface and contains <state the number of> lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   [ ] this brief has been prepared in a proportionally spaced typeface using <state name and version of word processing program> in <state font size and name of type style>, *or*

   [ ] this brief has been prepared in a monospaced typeface using <state name and version of word processing program> with <state number of characters per inch and name of type style>.

Date: <Date>

<Signature of the attorney>

_____

<Printed name>
Attorney for <_____>
<Address>
<E-mail address>
<Telephone number>

TENTH CIRCUIT FORMS

10th CIR. FORM 1. DOCKETING STATEMENT INSTRUCTIONS AND FORM

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157
www.ca10.uscourts.gov

DOCKETING STATEMENT INSTRUCTIONS

PLEASE FOLLOW THE INSTRUCTIONS REGARDING CONTENT CAREFULLY. IN PARTICULAR, PLEASE NOTE THE ATTACHMENT REQUIREMENTS HAVE CHANGED EFFECTIVE JANUARY 1, 2015.

I. APPEALS FROM DISTRICT COURT

The appellant must complete a Docketing Statement and file it in the court of appeals within 14 days after filing the notice of appeal. The docketing statement must be filed via the court's Electronic Case Filing System (ECF). Instructions and information regarding ECF may be found on the court's website, www.ca10.uscourts.gov

The following documents must be included with the Docketing Statement:

A. The final judgment or order appealed;

B. All pertinent findings and conclusions, opinions, or orders which form the basis for the appeal;

C. Any motion filed under Fed. R. Civ. P. 50(b), 52(b), 59, or 60, including any motion for reconsideration, and in a criminal appeal, any motion for judgment of acquittal, for arrest of judgment or for a new trial, with the certificate of service and the dispositive order(s); and

D. Any motion for extension of time to file the notice of appeal and the dispositive order.

Please complete all sections of the Docketing Statement form except Sections I-B and I-C. Section V should only be completed in criminal appeals.

II. PETITIONS FOR REVIEW OR APPLICATIONS FOR ENFORCEMENT OF AGENCY ORDERS

The petitioner must complete a Docketing Statement and file it in the court of appeals within 14 days after filing a petition for review or application for enforcement. The docketing statement must be filed via the court's Electronic Case Filing System (ECF). Instructions and information regarding ECF may be found on the court's website, www.ca10.uscourts.gov

The following documents must be included with the Docketing Statement:

A. The agency docket sheet reflecting entry of the order to be reviewed;

B. The order to be reviewed; and

C. The petition for review or application for enforcement.

Please complete all sections of the Docketing Statement except Sections I-A, I-C, and V.

III. APPEALS FROM UNITED STATES TAX COURT

The appellant must complete a Docketing Statement and file it in the court of appeals within 14 days after the appeal is docketed. The docketing statement must be filed via the court's Electronic Case Filing System (ECF). Instructions and information regarding ECF may be found on the court's website, www.ca10.uscourts.gov .

The following documents must be included with the Docketing Statement:

A. The decision appealed;

B. The judgment appealed; and

C. If the notice of appeal was filed by mail, proof of the postmark.

Please complete all sections of the Docketing Statement form except Sections I-A, I-B, and V.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DOCKETING STATEMENT

Case Name:_____

Appeal No. (if available) : _____

Court/Agency Appeal From: _____

Court/Agency Docket No.: _____District Judge: _____

Party or Parties filing Notice of Appeal/Petition: _____

_____

I. TIMELINESS OF APPEAL OR PETITION FOR REVIEW

A. **APPEAL FROM DISTRICT COURT**

1. Date notice of appeal filed:_____

a. Was a motion filed for an extension of time to file the notice of appeal? If so, give the filing date of the motion, the date of any order disposing of the motion, and the deadline for filing notice of appeal:
_____
_____

b. Is the United States or an officer or an agency of the United States a party to this appeal? _____

2. Authority fixing time limit for filing notice of appeal:

Fed. R. App. 4 (a)(1)(A) ____ Fed. R. App. 4(a)(6) ____

Fed. R. App. 4 (a)(1)(B) ____ Fed. R. App. 4(b)(1) ____

Fed. R. App. 4 (a)(2) ____ Fed. R. App. 4(b)(3) ____

Fed. R. App. 4 (a)(3) ____ Fed. R. App. 4(b)(4) ____

Fed. R. App. 4 (a)(4) ____ Fed. R. App. 4(c) ____

Fed. R. App. 4 (a)(5) ____

Other: _____

3. Date final judgment or order to be reviewed was filed and **entered** on the district court docket: _____

4. Does the judgment or order to be reviewed dispose of **all** claims by and against **all** parties? *See* Fed. R. Civ. P. 54(b).
_____

(If your answer to Question 4 above is no, please answer the following questions in this section.)

a. If not, did district court direct entry of judgment in accordance with Fed. R. Civ. P. 54(b)? When was this done?
_____

b. If the judgment or order is not a final disposition, is it appealable under 28 U.S.C. § 1292(a)? _____

c. If none of the above applies, what is the **specific** statutory basis for determining that the judgment or order is appealable? _____

5. Tolling Motions. *See* Fed. R. App. P. 4(a)(4)(A); 4(b)(3)(A).

a. Give the filing date of any motion under Fed. R. Civ. P. 50(b), 52(b), 59, or 60, including any motion for reconsideration, and in a criminal appeal any motion for judgment of acquittal, for arrest of judgment or for new trial, filed in the district court:
_____

b. Has an order been entered by the district court disposing of any such motion, and, if so, when?

_____

B. **REVIEW OF AGENCY ORDER** (To be completed only in connection with petitions for review or applications for enforcement filed directly with the Court of Appeals.)

1. Date petition for review was filed: _____

2. Date of the order to be reviewed: _____

3. Specify the statute or other authority granting the court of appeals jurisdiction to review the order: _____

_____

4. Specify the time limit for filing the petition (cite specific statutory section or other authority): _____

_____

C. **APPEAL OF TAX COURT DECISION**

1. Date notice of appeal was filed: _____
(If notice was filed by mail, attach proof of postmark.)

2. Time limit for filing notice of appeal: _____

3. Date of entry of decision appealed: _____

4. Was a timely motion to vacate or revise a decision made under the Tax Court's Rules of Practice, and if so, when? *See* Fed. R. App. P.

13(a) _____

II. LIST ALL RELATED OR PRIOR RELATED APPEALS IN THIS COURT WITH APPROPRIATE CITATION(S). If none, please so state.

III. GIVE A BRIEF DESCRIPTION OF THE NATURE OF THE PRESENT ACTION AND RESULT BELOW.

IV. ISSUES RAISED IN THIS APPEAL.

V. ADDITIONAL INFORMATION IN CRIMINAL APPEALS.

A. Does this appeal involve review under 18 U.S.C. § 3742(a) or (b) of the sentence imposed? _____

B. If the answer to A (immediately above) is yes, does the defendant also challenge the judgment of conviction? _____

C. Describe the sentence imposed. _____

_____

D. Was the sentence imposed after a plea of guilty? _____

E. If the answer to D (immediately above) is yes, did the plea agreement include a waiver of appeal and/or collateral challenges?

_____

F. Is defendant on probation or at liberty pending appeal? _____

G. If the defendant is incarcerated, what is the anticipated release date if the judgment of conviction is fully executed?

_____

H. Does this appeal involve the November 1, 2014 retroactive amendments to §§ 2D1.1 and 2D1.11 of the U.S. Sentencing Commission's Guidelines Manual, which reduced offense levels for certain drug trafficking offenses?

_____

NOTE: In the event expedited review is requested and a motion to that effect is filed, the defendant shall consider whether a transcript of any portion of the trial court proceedings is necessary for the appeal. Necessary transcripts must be ordered by completing and delivering the transcript order form to the clerk of the district court with a copy filed in the court of appeals.

VI. ATTORNEY FILING DOCKETING STATEMENT:

Name**:** _____ Telephone: _____

Firm: _____

Email Address:_____

Address: _____

_____

_____

PLEASE IDENTIFY ON WHOSE BEHALF THE DOCKETING STATEMENT IS FILED:

A. ☐ Appellant

☐ Petitioner

☐ Cross-Appellant

B. **PLEASE IDENTIFY WHETHER THE FILING COUNSEL IS**

☐ Retained Attorney

☐ Court-Appointed

☐ Employed by a government entity

(please specify_____)

☐ Employed by the Office of the Federal Public Defender.

_____ _____

Signature Date

☐ Attorney at Law

NOTE: A copy of the final judgment or order appealed from, any pertinent findings and conclusions, opinions, or orders, any motion filed under Fed. R. Civ. P. 50(b), 52(b), 59, or 60, including any motion for reconsideration, for judgment of acquittal, for arrest of judgment, or for new trial, and the dispositive order(s), any motion for extension of time to file notice of appeal and the dispositive order **must be submitted with the Docketing Statement.**

The Docketing Statement must be filed with the Clerk via the court's Electronic Case Filing System (ECF). Instructions and information regarding ECF may be found on the court's website, www.ca10.uscourts.gov .

This Docketing Statement must be accompanied by proof of service.

The following Certificate of Service may be used.

CERTIFICATE OF SERVICE

I, _____ hereby certify that on

[appellant/petitioner or attorney therefor]

_____ I served a copy of the foregoing **Docketing Statement,**

[date]

to:

_____, at _____

[counsel for/or appellee/respondent]

_____

_____, the last known

address/email address, by _____.

[state method of service]

_____

Signature

_____

Date

_____

_____

_____

_____

[Full name and address of attorney]

10th CIR. FORM 2. ENTRY OF APPEARANCE AND CERTIFICATE OF INTERESTED PARTIES UNDER 10th Cir. R. 46.1

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Entry of Appearance and Certificate of Interested Parties

v.	Case No.

INSTRUCTIONS: COUNSEL FOR A PARTY MUST FORTHWITH EXECUTE AND FILE THIS FORM, INDICATING METHOD(S) OF SERVICE ON ALL OTHER PARTIES. MULTIPLE COUNSEL APPEARING FOR A PARTY OR PARTIES AND WHO SHARE THE SAME MAILING ADDRESS MAY ENTER THEIR APPEARANCES ON THE SAME FORM BY EACH SIGNING INDIVIDUALLY.

In accordance with 10th Cir. R. 46.1, the undersigned attorney(s) hereby appear(s) as counsel for

_____

Party or Parties

_____, in the subject case(s).

Appellant/Petitioner or Appellee/Respondent

Further, in accordance with 10th Cir. R. 46.1, the undersigned certify(ies) as follows: **(Check one.)**

☐ On the reverse of this form is a completed certificate of interested parties and/or attorneys not otherwise disclosed, who are now or have been interested in this litigation or any related proceeding.

Specifically, counsel should not include in the certificate any attorney or party identified immediately above.

☐ There are no such parties, or any such parties have heretofore been disclosed to the court.

_____	_____
Name of Counsel	Name of Counsel
_____	_____
Signature of Counsel	Signature of Counsel
_____	_____
Mailing Address and Telephone Number	Mailing Address and Telephone Number
_____	_____
E-Mail Address	E-Mail Address

I hereby certify that a copy of this Entry of Appearance and Certificate of Interested Parties was served on

(please insert date) _____ via (state method of service)

_____

to _____

(*See* Fed. R. App. P. 25(b)) (Signature) _____

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

v.	Case No.

Certificate of Interested Parties

The following are not direct parties in this appeal but do have some interest in or a relationship with the litigation or the outcome of the litigation. *See* 10th Cir. R. 46.1(D). In addition, attorneys not entering an appearance in this court but who have appeared for any party in prior trial or administrative proceedings, or in related proceedings, are noted below.

(Attach additional pages if necessary.)

10th CIR. FORM 3. ENTRY OF APPEARANCE – PRO SE

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Entry of Appearance - Pro Se

v.	Case No.

INSTRUCTIONS: A PARTY DESIRING TO APPEAR WITHOUT COUNSEL SHALL NOTIFY THE CLERK BY COMPLETING AND SIGNING THIS FORM. THE FEDERAL RULES OF APPELLATE PROCEDURE AND TENTH CIRCUIT RULES REQUIRE THAT ALL PAPERS SUBMITTED TO THE COURT FOR FILING BE SIGNED BY THE FILING PARTY AND THAT COPIES BE SERVED ON OPPOSING PARTIES OR THEIR COUNSEL, IF REPRESENTED BY COUNSEL. THE ORIGINAL OF EVERY PAPER SUBMITTED FOR FILING MUST CONTAIN PROOF OF SERVICE IN A FORM SIMILAR TO THAT ON THE REVERSE OF THIS FORM. ANY PAPER THAT DOES NOT CONTAIN THE REQUIRED PROOF OF SERVICE MAY BE DISREGARDED BY THE COURT OR RETURNED.

I hereby notify the clerk that I am appearing pro se as the

_____in

(Appellant, Petitioner, Appellee or Respondent)

this case. All notices regarding the case should be sent to me at the address below. If my mailing address changes, I will promptly notify the clerk in writing of my new address.

Further, in accordance with 10th Cir. R. 46.1, I certify: **(Check one.)**

☐ All parties to this litigation, including parties who are now or have been interested in this litigation, are revealed by the caption on appeal, or

☐ There are parties interested in this litigation that do not appear in the caption for this appeal, and they are listed on the back of this form.

_____ _____

Signature Name

_____

Mailing Address

_____

City State Zip Code

CERTIFICATE OF SERVICE

I hereby certify that on _____ I sent a copy of

[date]

the Pro Se Entry of Appearance Form to: _____

at_____

_____, the last known

address/email address, by _____.

[state method of service]

_____

Date

_____

Signature

CERTIFICATE OF INTERESTED PARTIES

(attach additional pages if necessary)

10th CIR. FORM 4. NOTICE THAT COUNSEL HAS MOVED TO WITHDRAW UNDER 10th CIR. R. 46.4(B)(2)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

	NOTICE THAT COUNSEL HAS MOVED TO WITHDRAW
v.	No.

TO: _____

(Name)

_____

(Street Address or Prison Box)

_____

(City, State, Zip Code)

Your attorney filed a brief on _____, 20__, stating a belief that your appeal is frivolous and requesting permission to withdraw from the case. Please be advised:

(1) You have 30 days from the date this notice was mailed to raise any points to show why your conviction should be set aside.

(2) If you do not respond within the 30 days, the court may affirm your conviction or dismiss your appeal. An affirmance or dismissal would mean that your case would be finally decided against you.

(3) If you want to make a showing why the court should not affirm your conviction or dismiss your appeal, and you believe that there is a very good reason why you will not be able to file your objections to affirmance or dismissal with the court within the 30-day limit, you should write immediately to the court and ask for up to 30 more days. If additional time is granted, you must file your objections and state the reasons why the court should not affirm your conviction or dismiss your appeal before your additional time expires.

(4) You do not have a right to another attorney unless this court finds, based upon your objections and the reasons for them, that your case requires further briefing or argument. If the court finds that your case requires further briefing or argument, an attorney will be appointed to handle your appeal.

If you want to write to this court, you should address your letter to:

Clerk of the Court
United States Court of Appeals
Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257

Be sure to show the name and number of your case clearly on any material you send to the court.

Notice mailed _____ _____

Date Deputy Clerk, U.S. Court of Appeals

10th CIR. FORM 5. REPORT OF COUNSEL CONFERENCE UNDER 10th CIR. R. 33.2

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

	REPORT OF RULE 33.2 COUNSEL CONFERENCE
v.	No.

INSTRUCTIONS: Counsel for appellant/petitioner must complete this form in those **civil** cases in which a counsel conference is required by 10th Circuit Rule 33.2(A). The report must be mailed, within 10 days of initiating a counsel conference under 10th Circuit Rule 33.2(C), to:

Circuit Mediation Office
United States Court of Appeals
for the Tenth Circuit
1823 Stout Street
Denver, CO 80257
(303) 844-6017

Counsel for appellant/petitioner certifies that settlement was discussed with opposing counsel on _____ or that it was impossible for counsel to discuss settlement because _____

_____

_____

Settlement of the appeal ❑ was ❑ was not reached.

Counsel ❑ do ❑ do not plan to have further settlement discussions.

Date: _____

Attorney for Appellant/Petitioner

Address:

Telephone:

APPENDIX B

APPELLATE TRANSCRIPT MANAGEMENT PLAN FOR THE TENTH CIRCUIT

The Court Reporter Management Plans adopted by the district courts within this circuit and approved by the Judicial Council are incorporated and made a part of this Plan to the extent that they provide for the production of appellate transcripts. To further promote the prompt production of transcripts, which contributes to the timely processing of appeals, the Judicial Council of the Tenth Circuit adopts the following guidelines:

1. ***District Court Reporter Coordinators***

Each district court must appoint a Court Reporter Coordinator within the clerk's office, who will be responsible for:

a) monitoring the preparation and filing of transcripts, and ensuring compliance with this Plan.

b) bringing to the attention of the clerk of the court of appeals violations of this Plan, which cannot be resolved locally, and

c) ensuring that communications are forwarded to and received by the appropriate parties.

2. ***Calculation of Times***

No transcript order will be deemed complete for purposes of calculation of delivery dates until satisfactory financial arrangements have been made with the court reporter. The Tenth Circuit Transcript Order Form contains the reporter's certification that arrangements for payment have been made. If the arrangements subsequently fail, the burden will be on reporters to notify this court in writing that the litigant has failed to abide by the arrangements for payment. This notification shall include copies of letters requesting payment or deposit. The court will enforce reporters' legitimate requests for payment by threat of dismissal of appeals for failure to prosecute.

3. ***Extensions of Time***

An extension of time pursuant to Federal Rule of Appellate Procedure 11(b)(1)(B) does not waive the mandatory fee reduction. To obtain a waiver, a separate request alleging appropriate circumstances **must** be made.

4. ***Waiver of Mandatory Fee Reduction***

The clerk of the court of appeals may waive the mandatory fee reduction or other sanctions imposed by this Plan, upon receipt of a timely request, in circumstances such as the following:

(a) *Illness or Incapacity of the Reporter*

A reporter requesting a waiver of the fee reduction due to illness or other incapacity must provide a letter from the district court reporter coordinator which verifies the nature and expected duration of the illness or other incapacity. This certification must be attached to a request for extension and will be kept confidential. The request must include the date by which the transcript will be completed.

(b) *Planned Vacation*

The reporter must submit a vacation schedule approved by the trial judge. The request must include the date by which the transcript will be completed.

(c) *Lengthy or Complex Litigation, Excessive Pages Ordered*

When the transcript in a particular case will require additional time, the reporter must provide a certification from the district court judge stating the reason additional time is required. When multiple orders are received at the same time, the reporter may request an extension in all cases, but must provide copies of the orders and the estimated length of the transcripts involved. The request must include the date by which each transcript will be completed.

A form for requesting an extension of time and/or waiver is attached as Exhibit 1. The Judicial Council prefers that this form be used.

No provision is made for extensions of time for transcript backlog. Transcript production is considered by the Administrative Office to be compensated by transcript fees. Reporters are expected to hire note readers or substitutes when transcripts cannot be completed within specified times. The hiring of note readers and/or substitutes does not excuse reporters, however, from

requesting extensions of time under Fed. R. App. P. 11(b) when a transcript cannot be completed within the prescribed time.

Occasionally, counsel may request that a reporter suspend production of a transcript. Transcript production may be stopped only by order of the court of appeals. It is the responsibility of the party who ordered the transcript to move for suspension of production.

5. *Substitute Court Reporters*

Pursuant to Judicial Conference policy, reporters are expected to hire substitutes when they are unable to complete transcripts on time. A reporter who cannot file a transcript before the ninetieth day after it is ordered must remove him or herself from courtroom duties and provide a substitute.

Official reporters are responsible for transcript production by their substitutes. Requests for extensions received from substitute reporters will be returned to the district court reporter coordinator so the appropriate official reporter can make a proper request.

6. *Court Reporters' Manual*

The *Court Reporters' Manual*, Volume 6 of the *Guide to Judiciary Policy* is incorporated into these guidelines. Reporters in this circuit are expected to know and abide by the rules, regulations and policies contained in it.

The pages of a transcript are to be numbered in a single series of consecutive numbers for each proceeding, regardless of the number of days involved. Pages in a multiple-volume transcript must be numbered consecutively for an entire multiple-volume transcript. *See Volume 6, Guide to Judiciary Policy, Chapter 5, § 520 et. seq. See also United States v. Davis*, 953 F.2d 1482, 1487 n.2 (10th Cir. 1992).

7. *Miscellaneous Provisions*

Where there are multiple reporters responsible for a single transcript order, one must take the lead. The lead reporter must be an official court reporter. When a transcript is being paid for under the Criminal Justice Act the lead reporter must assist in obtaining the district judge's signature on the completed form CJA 24. If a transcript order form is incomplete or inaccurate, the lead reporter must give written notice of the deficiency to the ordering party with a copy to this court.

EXHIBIT 1

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

Court of Appeals Docket Number(s): _____

Short Title: _____

District Court Docket Number(s): _____

REQUEST FOR EXTENSION OF TIME TO FILE TRANSCRIPT

I request an extension of time to file the transcript until _____. This extension is necessary because _____

_____

_____

Attach letter from court reporter coordinator if necessary.

I understand that the grant of an extension does not waive the mandatory fee reduction.

Signature: _____
Official Court Reporter

REQUEST FOR WAIVER OF MANDATORY FEE REDUCTION

I request waiver of the mandatory fee reduction for (check one):

___ Illness or other incapacity – I have attached the required certification.
___ Planned vacation – I have attached the required certification.
___ Lengthy or Complex Litigation or Excessive Pages Ordered – I have attached the required documentation.

Signature: _____
Official Court Reporter

ATTACH PROOF OF SERVICE ON ALL COUNSEL

APPENDIX C

GENERAL ORDER REGARDING SCHEDULING CONFLICTS

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

In re:

Guidelines for Resolving Scheduling Conflicts with Oklahoma Courts

---

GENERAL ORDER
FILED May 21, 1998

Before **SEYMOUR,** Chief Judge, **PORFILIO, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, KELLY, HENRY, BRISCOE, LUCERO,** and **MURPHY.**

For the purpose of resolving conflicts that arise in scheduling between this court and the federal district courts in Oklahoma or the Oklahoma state courts, the court adopts the following guidelines:

(A) An attorney shall not be deemed to have a conflict unless:

(1) the attorney is lead counsel in two or more of the actions affected, and

(2) the attorney certifies that the matters cannot be adequately handled, and the client's interest adequately protected, by other counsel for the party in the action or by other attorneys in lead counsel's firm; certifies compliance with this rule and has nevertheless been unable to resolve the conflicts; and certifies in the notice a proposed resolution by list of such cases in the order of priority specified by this rule.

(B) When an attorney is scheduled for a day certain by trial calendar, special setting or court order to appear in two or more courts (trial or appellate; state or federal), the attorney shall give prompt written notice, as specified in (A) above, of the conflict to opposing counsel, to the clerk of each court and to the judge before whom each action is set for hearing (or to an appropriate judge if there has been no designation of a presiding judge). The written notice shall contain the attorney's proposed resolution of the appearance conflicts in accordance with the priorities established by this rule and shall set forth the order of cases to be tried with a listing of the date and data required by (B)(1)-(4) as to each case arranged in the order in which the cases should prevail under this rule. Attorneys confronted by such conflicts are expected to give written notice as soon as the conflict arises but in any event at least seven (7) days prior to the date of the conflicting settings. In resolving scheduling conflicts, the follow priorities should ordinarily prevail:

(1) Criminal (felony) actions shall prevail over civil actions set for trial or appellate proceedings;

(2) Jury trials shall prevail over non-jury matters, including trials and administrative proceedings;

(3) Trials shall prevail over appellate arguments, hearing and conferences;

(4) Appellate proceedings prevail over all trial hearings, other than actual trials;

(5) Within each of the above categories only, the action which was first set shall take precedence.

(C) In addition to the above priorities, consideration should be given to the comparative age of the cases, their complexity, the estimated trial time, the number of attorneys and parties involved, whether the trial involves a jury, and the difficulty or ease of rescheduling.

(D) The judges of the courts involved in a scheduling conflict shall promptly confer, resolve the conflict, and notify counsel of the resolution. The judge presiding over the older case (i.e., the earliest filed case) will be responsible for initiating this communication.

(E) Conflict resolution shall not require the continuance of the other matter or matters not having priority. In the event the matter determined to have priority is disposed of prior to the scheduled time set, the attorney shall immediately notify all affected parties, including the court affected, of the disposal and shall, absent good cause shown to the court, proceed with the

remaining case or cases which did not have priority if the setting was not vacated.

(F) Nothing in these guidelines is intended to prevent courts from voluntarily yielding a favorable scheduling position, and judges of all courts are urged to communicate with each other in an effort to lessen the impact of conflicts and continuances on all courts.

Entered for the Court

Patrick Fisher
Clerk of Court

ADDENDUM I

CRIMINAL JUSTICE ACT PLAN
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PREAMBLE

Pursuant to the Criminal Justice Act (Act), 18 U.S.C. § 3006A(b), the court adopts the following plan for furnishing representation in criminal cases on appeal. This amends the plan adopted by the Circuit Council on February 11, 1971 and which was last amended on January 1, 1996. When requested, representation will be provided to every person who is entitled to representation under the Act.

I. Appointment of Counsel in the Tenth Circuit

Absent a change in financial conditions, any determination that a person is eligible for Criminal Justice Act counsel made in the district court shall continue on appeal. In its discretion, the court of appeals may appoint the attorney who represented the eligible person in the district court, the special appellate division of the Federal Public Defender's office for the District of Colorado, another Federal Public Defender's office from the circuit, or it may appoint a lawyer from the court's Appellate Criminal Justice Act Panel.

Appointed counsel must continue to represent the appellant until relieved by the court of appeals. 10th Cir. R. 46.3(A). If filed in compliance with 10th Cir. R. 46.4(A), trial counsel's request to be relieved from representation on appeal shall be given due consideration. While the court recognizes there may be benefits to maintaining continuity of counsel, it also recognizes that the skills necessary to proceed as appellate counsel may differ from those required for trial counsel. Substitution of counsel shall not reflect negatively in any way on the conduct of the lawyer involved. The court will require, however, that trial counsel perfect the appeal prior to seeking withdrawal.

II. Composition of Panel of Private Attorneys

A. *Appellate Criminal Justice Act Panel*

The Court has established a panel of private attorneys (the Appellate CJA Panel) who are eligible and willing to accept appointments in cases where representation is required under 18 U.S.C. § 3006A. These attorneys, along with the lawyers from the Appellate Division of the Federal Public Defender's Office

for the District of Colorado, shall constitute the core group from which appointments shall be made. The Court shall approve private attorneys for membership on the Appellate CJA Panel after receiving recommendations from the Standing CJA Committee, established pursuant to Section III of this Plan.

B. *Size*

The Appellate CJA Panel will not have a size limitation, but will include adequate attorney representation from each of the districts in the circuit. The Standing Committee will view applications for membership on the panel with an eye towards identifying qualified appellate counsel from each state in the Tenth Circuit.

C. *Eligibility*

To be eligible for service on the Appellate CJA Panel, lawyers must be or become, and remain, members of the Tenth Circuit bar in good standing. They must certify that they have a working knowledge of the Federal Rules of Appellate Procedure and federal criminal law, the United States Sentencing Guidelines, the CJA Guidelines (see Section IX below) and this CJA Plan. Counsel on the list must be available to accept at least one CJA appellate appointment each year.

D. *Term of Service*

There are no fixed terms for panel membership. Lawyers will remain on the panel until they resign or are removed in accordance with the procedure established in Section II(G).

E. *Application for Membership*

Applications for membership on the panel will be available on the circuit's website at www.ca10.uscourts.gov/CJA . Completed applications must be submitted to the Clerk of Court for transmittal to the court's Standing Committee on the Criminal Justice Act.

F. *Maintenance of the List*

The Clerk of Court shall maintain a public list in the clerk's office of the members of the Appellate CJA Panel.

G. *Removal from the Panel*

The court is very appreciative of the time and commitment required to accept appellate appointments. Membership on the panel is not a property right, however, and the refusal to accept appointments on a consistent basis will lead the court to assume the lawyer has resigned from the panel. Counsel will be notified in writing of any change in status resulting from the failure to accept appointments. The Standing Committee may also recommend removal from the panel for other reasons. That recommendation must be in writing and will be forwarded to the court for consideration. If the court decides to accept the recommendation, counsel will be given notice of the proposed basis for removal and will be provided an opportunity to respond in writing. The court of appeals will make all final decisions regarding removal. If a panel attorney is removed, he or she will receive a letter of explanation from the court. Any attorney whose resignation is assumed because he or she has not accepted cases may file a request to return to active status. The request must include an explanation regarding the refusal to accept appointments. The Standing Committee will make a recommendation to the court on those types of requests. Attorneys removed for any other reason may file a renewed application no earlier than one year from the date of removal. In the application, counsel must note the earlier removal and explain why they believe they should be allowed to return to the panel.

III. Standing Committee On The Criminal Justice Act

A. *Membership and Structure*

The Chief Judge, or the Chief Judge's delegate, shall appoint the Standing Committee. It shall be composed of two lawyers from Oklahoma, and one lawyer each from the remaining states in the circuit. Members may be private attorneys or lawyers from the various Federal Public Defenders' offices. These attorneys shall serve staggered three year terms, and may serve two consecutive terms. In addition to these seven members, the Federal Public Defender for the Districts of Colorado and Wyoming shall be a permanent member of the Standing Committee. One of the other positions on the Committee must be filled with one of the other Federal Public Defenders from the circuit. The Chief Judge may also appoint a liaison to the Committee from the court's legal staff. That person will not be a Committee member, but will be available to both the court and members for committee support and consultation.

B. *Duties*

The Standing Committee shall review the qualifications of applicants for the panel, conduct further inquiries as may be indicated, and shall make recommendations to the court of appeals for placement of lawyers on the panel. The Standing Committee shall also review the operation of the appellate panel on a periodic basis and shall make recommendations to the court regarding any necessary changes. This review may include investigation of complaints concerning panel attorneys. The Committee may make recommendations regarding removal of a lawyer from the list to the court of appeals. The Standing Committee's recommendations to the court shall remain confidential. The Appellate CJA Panel list, however, will be public information.

IV. Change in Financial Conditions

If a party becomes financially unable to employ counsel on appeal, a motion seeking a finding that the party is eligible for the appointment of counsel must be made in district court. *See* 18 U.S.C. § 3006A. Because the district court must make factual findings regarding the defendant's financial eligibility, appropriate forms, particularly a CJA 23 form or the local equivalent, should be filed in that court first. Upon issuance of an order finding the person financially eligible, counsel may file a motion in this court for appointment of counsel under the statute. The court may, at any time, examine or re-examine the financial status of the defendant. If a court finds that the defendant is financially able to obtain counsel or make partial payments for representation, the court may deny or terminate an appointment pursuant to subsection (c) of the Act or require partial payment to be made pursuant to subsection (f) of the Act.

V. Death Penalty Cases

Pursuant to the CJA Guidelines (see Section IX below), the court may, in an appropriate death penalty case, appoint and compensate under the Act an attorney or attorneys from a state or local public defender organization or from a legal aid agency or other non-profit organization.

VI. Petition For Writ of Certiorari

If the judgment of this court is adverse to the client, counsel must inform the client of the right to petition the Supreme Court of the United States for a writ of certiorari. Counsel must file a petition for a writ of certiorari if the client requests that such a review be sought, and, in counsel's considered judgment, there are

grounds for seeking Supreme Court review that are not frivolous and are consistent with the standards for filing a petition contained in the Rules of the Supreme Court and applicable case law. If, on the other hand, the client requests that counsel file a petition for a writ of certiorari and, in counsel's considered judgment, there are no such grounds for seeking Supreme Court review that are non-frivolous and for filing a petition as defined in the Rules of the Supreme Court and applicable case law, counsel should promptly so advise the client and, after the entry of judgment, submit to this court a written motion, pursuant to 10th Cir. R. 46.4, for leave to withdraw from the representation. If this court grants counsel's motion and terminates counsel's appointment, counsel must so advise the client in writing as soon as possible. The writing shall also advise the client of his or her right to file a pro se petition for a writ of certiorari.

VII. Quality of Representation

Attorneys appointed pursuant to any provisions of the Act must conform to the highest standards of professional conduct, including, but not limited to, the provisions of the American Bar Association's Code of Professional Responsibility.

VIII. Compensation

A. *Claims*

All claims for compensation and expenses must be submitted to the clerk, on the forms and in the manner found on the court's website. *See* http://www.ca10.uscourts.gov/CJA. All claims must be supported as required by the CJA Guidelines and the court's Advice to CJA Counsel letter(s). In each case, the court will fix the compensation to be paid the attorney as provided in the Act. Counsel appointed in direct criminal appeals and non-death penalty 28 U.S.C. §§ 2254 and 2255 matters should review the Court's general *Advice To Counsel* letter for detailed information and guidelines regarding compensation issues. Counsel appointed in death penalty matters should review the court's separate *Death Penalty Advice To Counsel* letter. Copies of those letters are available online at http://www.ca10.uscourts.gov/CJA.

Although the Act provides for limited compensation, the court recognizes that the compensation afforded often does not reflect the true value of the services rendered. Consequently, it is the court's policy not to cut or reduce claims which are reasonable and necessary. If the court intends to reduce a claim for compensation it will provide the attorney prior notice of the proposed reduction with a brief statement of the reason(s) for it, and will provide an opportunity to

address the matter. CJA Guidelines, § 230.36. Notice will not be given where the reduction is based on mathematical or technical errors.

B. *Other Payments*

Except as authorized or directed by the court, no appointed attorney and no person or organization authorized by the court to furnish representation under the Act may request or accept any payment or promise of payment for representation of a defendant.

IX. Application of CJA Guidelines

Appointment of counsel under the Act will be governed generally by the Guidelines for Administering the CJA and related statutes. *See* Volume 7, Guide to Judiciary Policy, Appointment and Payment of Counsel, Part A. Online at: http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel/CJAGuidelinesForms/GuideToJudiciaryPolicyVolume7.aspx.

ADDENDUM II

PLAN FOR APPOINTMENT OF COUNSEL IN SPECIAL CIVIL APPEALS

PURPOSE:

To provide representation in special cases for persons who are financially unable to obtain the services of counsel.

CRITERIA:

Under this plan, the court may appoint counsel to represent a party or parties to a civil matter pending before the court when:

1. the person is financially unable to obtain the services of counsel;

2. the person is not entitled to appointed counsel under the provisions of the Criminal Justice Act or other source of legal assistance;

3. the litigation presents complex and significant legal issues, the outcome of which may have wide impact;

4. it is manifestly clear that the services of counsel are necessary for the effective presentation of the issues to the court; and

5. the interests of justice require that counsel be assigned to assist the litigant who would otherwise be compelled to proceed *pro se*.

PROCEDURE:

When, upon the application of a party or upon the court's motion, it is determined that in an appeal or other proceeding criteria required by this plan are satisfied, a judge may order the appointment of counsel to represent the eligible party.

The assignment of counsel under this plan may be made from a panel of attorneys maintained pursuant to the court's plan to implement the provisions of the Criminal Justice Act or otherwise.

The appointment will remain effective throughout all stages of a proceeding in this court, including the filing of a petition for writ of certiorari to the Supreme Court, if requested to do so by the client, but subject to the provisions of Section VI of the Court's Criminal Justice Act Plan.

PRO BONO SERVICES AND EXPENSES:

The court is very appreciative of the service of the attorneys taking appointments under this plan. Due to limited resources, however, the court is generally unable to compensate counsel for either attorney time or expenses. Appointments are made with the understanding that services will be provided pro bono and that expenses will be absorbed by counsel. In an exceptional case counsel may submit a motion seeking limited reimbursement of out-of-pocket costs or expenses. Any motion filed must address the exceptional nature of the case.

If a motion is filed and granted, reimbursement for reasonable and necessary out-of-pocket expenses will be subject to the limitations applicable to counsel appointed under the Criminal Justice Act. Those limitations are outlined in Section X of the court's CJA *Advice to Counsel* guidelines, and in the *Guidelines for Administering the Criminal Justice Act and Related Statutes*. Both documents may be found on the court's website. The chief judge, or any judge on the panel assigned to the appeal or other proceeding, may address a motion for expenses and may authorize payment of expenses from the Attorney Admission Fund.

Counsel appointed and compensated under this plan may not accept payment for their services from their clients or anyone on their behalf.

ADDENDUM III

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

PLAN FOR ATTORNEY DISCIPLINARY ENFORCEMENT

Section 1. Definitions.

1.1 "The Court" means the United States Court of Appeals for the Tenth Circuit.

1.2 "Another Court" means any court of the United States, the District of Columbia, or any state, territory, or commonwealth of the United States.

1.3 "Serious Crime" means any felony or any lesser crime involving false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy or solicitation of another to commit such a lesser crime.

1.4 "Disciplinary Panel" means a panel of judges specially constituted to consider an attorney disciplinary matter.

1.5 "Attorney" means any attorney admitted to practice or who has appeared before this court.

Section 2. Grounds for Discipline.

An attorney may be disciplined by this court as a result of:

2.1 conviction in another court of a serious crime;

2.2 disbarment or suspension or reprimand by another court, with or without the attorney's consent, or the resignation from the bar of another court while an investigation into allegations of misconduct is pending;

2.3 any act or omission which violates the federal laws or federal statutes or Federal Rules of Appellate Procedure, the rules of this court, orders or other instructions of this court, or the Code of Professional Responsibility adopted by the highest court of any state to which the attorney is admitted to practice.

Section 3. Disciplinary Sanctions.

3.1 Discipline may consist of (a) disbarment, (b) suspension from practice before the court for a definite or indefinite period, (c) reprimand, (d) monetary sanction, (e) removal from the roster of attorneys eligible for appointment as court-appointed counsel, or (f) any other sanction that the court may deem appropriate.

3.2 The identical discipline imposed by another court may be appropriate for discipline imposed as a result of that other court's suspension or disbarment or reprimand of an attorney; however, any discipline imposed by another court will not limit the range of disciplinary sanctions available to the disciplinary panel or a panel of the court of appeals.

3.3 A monetary sanction imposed on disciplinary grounds is the personal responsibility of the attorney disciplined, and may not be reimbursed by a client directly or indirectly. Notice to that effect is to be sent to the client by the Clerk whenever a monetary sanction is imposed.

3.4 Proceedings for the award of damages, costs, expenses, or attorney's fees under 28 U.S.C. § 1927, Fed. R. App. P. 38, or 10th Cir. R. 46.5(D)(4) are not covered by this Plan.

Section 4. Discipline Imposed by a Panel of the Court or by a Disciplinary Panel

4.1 A panel of the court may impose in a case pending before it any sanction other than suspension or disbarment in accordance with Section 4.2.

4.2 Before imposing a sanction, a panel of the court will notify the attorney of the alleged conduct which may justify sanction and afford the attorney an opportunity to be heard, in writing or in person, at the option of the panel.

4.3 Any matter of attorney discipline in which suspension or disbarment may be considered an appropriate sanction will be referred to a disciplinary panel or, in the case of an uncontested matter, to the chief judge or chief judge's designee. The disciplinary panel consists of three circuit judges appointed by the chief judge. The judge most senior in service on the court will be designated and

serve as chair. If any member of the disciplinary panel is unable to hear a particular matter, the chief judge will designate another active circuit judge as a member of the panel to hear that matter.

4.4 The disciplinary panel may at any time appoint counsel to investigate or to prosecute a disciplinary matter. Generally, the court will appoint as disciplinary counsel the disciplinary agency of the highest court of the state in which the attorney maintains his or her principal office. If no such disciplinary agency exists or such disciplinary agency declines appointment or such appointment is clearly inappropriate, this court will appoint as disciplinary counsel one or more members of the bar of this court to investigate allegations of misconduct or to prosecute disciplinary proceedings.

4.5 The disciplinary panel may designate a special master for purposes of conducting an evidentiary hearing. The special master may establish whatever procedural and evidentiary rules are appropriate. At the conclusion of the evidentiary hearing, the special master must promptly make a report of findings to the disciplinary panel.

Section 5. Duties of Clerk.

5.1 Upon being informed that an attorney admitted to practice before this court has been either convicted of any crime or subjected to discipline by another court, the clerk will determine whether a copy of the judgment of conviction or disciplinary judgment or order has been forwarded to this court. If not, the clerk will promptly obtain a copy of the judgment of conviction or disciplinary judgment or order and file it with this court.

5.2 Whenever any person is disbarred, suspended, or reprimanded, on consent or otherwise, or otherwise disciplined by this court and is shown on the records of the court to be admitted to practice in any other jurisdiction or before any other court, the clerk will, within ten days of that disbarment, suspension, reprimand, or imposition of discipline transmit to the disciplinary authorities in such other jurisdiction or for such other court, a certified copy of the judgment or order of disbarment, suspension, censure, reprimand or discipline, as well as the last known office address of the attorney.

5.3 The clerk shall refer to the disciplinary panel or the chief judge or the chief judge’s designee all information received concerning disbarments, suspensions, resignations during the pendency of misconduct investigations, and

other conduct sufficient to cast doubt upon the continuing qualification of a member of the bar to practice before it.

Section 6. Initiation of Disciplinary Proceedings.

6.1 Upon the receipt of a copy of a judgment, order, or other court document demonstrating that an attorney has been convicted of a serious crime, has been either suspended or disbarred or reprimanded by another court, or has resigned from the bar of another court during the pendency of a misconduct investigation, the clerk shall issue an order directing the attorney to show cause why the court should not impose upon the attorney the discipline described in Section 3. With the order to show cause, the clerk also may send a copy of the judgment of conviction or disciplinary judgment, order, or other court document indicating the form of disciplinary action.

6.2 When misconduct or allegations of misconduct concerning the appellate process which, if substantiated, would warrant discipline on the part of an attorney comes to the attention of the clerk or a judge, whether by complaint, grievance, or otherwise, the clerk shall issue an order to show cause why discipline should not be imposed by this court. The order will set forth the alleged conduct which is the subject of the proceeding and the reason the conduct may justify such discipline. If the disciplinary panel determines that cause does not exist for disciplinary action, the proceeding will be dismissed with appropriate notice.

6.3 All orders to show cause under this section will require the attorney to respond within twenty (20) days. In the response to the order to show cause, the attorney must include a declaration of the other bars to which the attorney is admitted.

Section 7. Uncontested Proceedings.

7.1 If an attorney fails to timely respond to an order to show cause the clerk will notify the chief judge or the chief judge's designee. The judge may then direct entry of an order imposing discipline as indicated.

7.2 Any attorney who is the subject of an investigation by this court into allegations of misconduct may consent to disbarment by filing with the clerk an affidavit stating that the attorney desires to consent to disbarment.

Section 8. Contested Proceedings.

All contested matters, except those before a panel under Section 4.1, will be referred to a disciplinary panel.

8.1 If an attorney's response to an order to show cause specifically requests to be heard in person in defense or in mitigation, the disciplinary panel may set the matter for a hearing before a special master. If an evidentiary hearing is held before the special master, findings of fact must be promptly prepared and forwarded to the disciplinary panel and the attorney. Exceptions to the special master's findings may be filed within ten (10) days of the date the findings are transmitted by the special master to the disciplinary panel. After the disciplinary panel has resolved any timely exceptions, it may then make a decision.

8.2 If an attorney's response to an order to show cause does not specifically request to be heard in person, the disciplinary panel may then direct entry of an order imposing discipline or take other appropriate action.

8.3 A certified copy of a judgment of conviction for any crime will be prima facie evidence of the commission of that crime in any disciplinary proceeding instituted against an attorney based upon the conviction. If the conviction is subsequently reversed or vacated, any discipline imposed on the basis thereof will be promptly reviewed by the disciplinary panel, the chief judge or the chief judge's designee upon submission of a certified copy of the relevant mandate.

8.4 A certified copy of a disciplinary judgment or order demonstrating that a member of the bar has been disbarred or suspended or reprimanded by another court will be prima facie evidence that the conduct for which the discipline was imposed in fact occurred.

8.5 An attorney to whom an order to show cause is issued pursuant to Section 6 may be represented by counsel at all hearings.

8.6 The disciplinary panel may compel by subpoena the attendance of witnesses, including the attorney whose conduct is the subject of the proceeding, and the production of pertinent documents. If a hearing is held, the disciplinary panel may compel by subpoena the attendance of any witness and the production of any document reasonably designated by the disciplinary counsel and the attorney as relevant for adequate prosecution or defense or mitigation.

8.7 If disciplinary action is imposed by this court on an attorney who has entered an appearance in a representational capacity in any type of proceeding in this court, the disciplinary panel may require the attorney to:

(a) promptly notify all clients who are represented by the attorney in this court of the nature of the disciplinary action imposed; and

(b) furnish sufficient evidence of compliance with (a).

Section 9. Suspension During Pendency of a Disciplinary Proceeding.

9.1 Upon a sufficient showing that an attorney has been convicted of a serious crime, disbarred, suspended or reprimanded, the disciplinary panel may summarily suspend the attorney's privilege to practice before this court pending the determination of appropriate discipline.

9.2 The court or the disciplinary panel, after notice and an opportunity to be heard, may suspend an attorney's privilege to practice before this court during the course of any disciplinary investigation and proceeding.

Section 10. Reinstatement.

10.1 An attorney suspended for six months or less is automatically reinstated at the end of the period of suspension upon the filing of an affidavit of compliance with the provisions of the disciplinary order. An attorney suspended for more than six months or disbarred may not resume practice until reinstated by order of the court.

10.2 An attorney who has been disbarred may not apply for reinstatement until the expiration of five years from the effective date of the disbarment.

10.3 No petition for reinstatement may be filed within one year following an adverse determination on the attorney's petition for reinstatement.

10.4 Any attorney who has been disbarred by a district court must provide proof of reinstatement to that court or demonstrate the futility of making an application to the district court.

10.5 The clerk refers petitions for reinstatement to the disciplinary panel. If the disciplinary panel is satisfied that reinstatement is appropriate based upon the findings of another court or otherwise, it will grant the petition. If the disciplinary panel is not so satisfied, the disciplinary panel may schedule a hearing by a special master on the petition. At the hearing, the petitioner has the burden of demonstrating by clear and convincing evidence that he or she has the moral qualifications, competency, and learning in the law required for admission to practice before this court and that his or her resumption of the practice of law will

not be detrimental to the integrity and standing of the bar or to the administration of justice, or contrary to the public interest. The special master must submit a report and recommendation to the disciplinary panel who will act upon the petition.

10.6 Reinstatement may be on such terms and conditions as the disciplinary panel directs. If the attorney has been disbarred or suspended for five years or more, this may include certification by the bar examiners of a state or other jurisdiction of the attorney's successful completion of an examination for admission to practice.

10.7 A condition precedent to reinstatement under this rule is payment of the prevailing attorney admission fee. That requirement is in addition to any other terms and conditions imposed by the disciplinary panel.

Section 11. Service of Papers and Other Notices.

11.1 Service of an order to show cause instituting formal disciplinary proceedings will be made by personal service or by certified mail addressed to the attorney at the last known office address as shown on the records or in the most recent pleading or other document filed by the attorney in the course of any proceeding before this court. Service also will be deemed complete if the notice is addressed to counsel for the attorney.

Section 12. Payment of Fees and Costs.

12.1 At the conclusion of any disciplinary investigation or prosecution, if any, under these rules, disciplinary counsel may make application to this court for an order awarding reasonable attorney's fees and reimbursing costs expended in the course of such disciplinary investigation or prosecution. The court may require the attorney to pay such reasonable attorney's fees and costs.

Section 13. Access to Disciplinary Information.

13.1 Subject to 13.3 of this plan, orders to show cause why discipline should not be imposed, orders imposing discipline, records created by the disciplinary panel, are public records and are accessible to the public in the same manner as other records of the court.

13.2 Subject to 13.3 of this plan, hearings before the special master are open to the public.

13.3 The court or the disciplinary panel may, upon application and for good cause, issue a protective order prohibiting the disclosure of specific information otherwise privileged or confidential and direct that the proceedings be conducted so as to implement the order.

ADDENDUM IV

JUDICIAL CONFERENCE OF THE UNITED STATES

and the

TENTH CIRCUIT COURT OF APPEALS

RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS

National Rules adopted March 11, 2008
Tenth Circuit Local Rules adopted August 5, 2009

RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS

Preface to National Misconduct Rules

These Rules were promulgated by the Judicial Conference of the United States, after public comment, pursuant to 28 U.S.C. §§ 331 and 358, to establish standards and procedures for addressing complaints filed by complainants or identified by chief judges, under the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-364.

Preface to Tenth Circuit Misconduct Rules

These Tenth Circuit Misconduct Rules have been promulgated by the Judicial Council of the Tenth Circuit in accord with Rule 2(a) of the nationally-mandated *Rules for Judicial-Conduct and Judicial-Disability Proceedings* (the "National Rules"). These rules are supplemental to the National Rules, and are numbered to pertain to specific National Rules. These Tenth Circuit Misconduct Rules are hereby adopted effective August 5, 2009.

ARTICLE I. GENERAL PROVISIONS

1. Scope.

These Rules govern proceedings under the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-364 (the Act), to determine whether a covered judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts or is unable to discharge the duties of office because of mental or physical disability.

Commentary on Rule 1

In September 2006, the Judicial Conduct and Disability Act Study Committee, appointed in 2004 by Chief Justice Rehnquist and known as the "Breyer Committee," presented a report, known as the "Breyer Committee Report," 239 F.R.D. 116 (Sept. 2006), to Chief Justice Roberts that evaluated implementation of the Judicial Conduct and Disability Act of 1980, 28 U.S.C. §§ 351-364. The Breyer Committee had been formed in response to criticism from the public and the Congress regarding the effectiveness of the Act's implementation. The Executive Committee of the Judicial Conference directed the Judicial Conference Committee on Judicial Conduct and Disability to consider the recommendations made by the Breyer Committee and to report on their implementation to the Conference.

The Breyer Committee found that it could not evaluate implementation of the Act without establishing interpretive standards, Breyer Committee Report, 239 F.R.D. at 132, and that a major problem faced by chief judges in implementing the Act was the lack of authoritative interpretive standards. Id. at 212-15. The Breyer Committee then established standards to guide its evaluation, some of which were new formulations and some of which were taken from the "Illustrative Rules Governing Complaints of Judicial Misconduct and Disability," discussed below. The principal standards used by the Breyer Committee are in Appendix E of its Report. Id. at 238.

Based on the findings of the Breyer Committee, the Judicial Conference Committee on Judicial Conduct and Disability concluded that there was a need for the Judicial Conference to exercise its power under Section 358 of the Act to fashion standards guiding the various officers and bodies who must exercise responsibility under the Act. To that end, the Judicial Conference Committee

proposed rules that were based largely on Appendix E of the Breyer Committee Report and the Illustrative Rules.

The Illustrative Rules were originally prepared in 1986 by the Special Committee of the Conference of Chief Judges of the United States Courts of Appeals, and were subsequently revised and amended, most recently in 2000, by the predecessor to the Committee on Judicial Conduct and Disability. The Illustrative Rules were adopted, with minor variations, by circuit judicial councils, to govern complaints under the Judicial Conduct and Disability Act.

After being submitted for public comment pursuant to 28 U.S.C. § 358(c), the present Rules were promulgated by the Judicial Conference on March 11, 2008.

2. Effect and Construction.

(a) Generally.

These Rules are mandatory; they supersede any conflicting judicial-council rules. Judicial councils may promulgate additional rules to implement the Act as long as those rules do not conflict with these Rules.

(b) Exception.

A Rule will not apply if, when performing duties authorized by the Act, a chief judge, a special committee, a judicial council, the Judicial Conference Committee on Judicial Conduct and Disability, or the Judicial Conference of the United States expressly finds that exceptional circumstances render application of that Rule in a particular proceeding manifestly unjust or contrary to the purposes of the Act or these Rules.

Commentary on Rule 2

Unlike the Illustrative Rules, these Rules provide mandatory and nationally uniform provisions governing the substantive and procedural aspects of misconduct and disability proceedings under the Act. The mandatory nature of these Rules is authorized by 28 U.S.C. § 358(a) and (c). Judicial councils retain the power to promulgate rules consistent with these Rules. For example, a local rule may authorize the electronic distribution of materials pursuant to Rule 8(b).

Rule 2(b) recognizes that unforeseen and exceptional circumstances may call for a different approach in particular cases.

3. Definitions.

(a) Chief Judge.

"Chief judge" means the chief judge of a United States Court of Appeals, of the United States Court of International Trade, or of the United States Court of Federal Claims.

(b) Circuit Clerk.

"Circuit clerk" means a clerk of a United States Court of Appeals, the clerk of the United States Court of International Trade, the clerk of the United States Court of Federal Claims, or the circuit executive of the United States Court of Appeals for the Federal Circuit.

(c) Complaint.

A complaint is:

(1) a document that, in accordance with Rule 6, is filed by any person in his or her individual capacity or on behalf of a professional organization; or

(2) information from any source, other than a document described in (c)(1), that gives a chief judge probable cause to believe that a covered judge, as defined in Rule 4, has engaged in misconduct or may have a disability, whether or not the information is framed as or is intended to be an allegation of misconduct or disability.

(d) Courts of Appeals, District Court, and District Judge.

"Courts of appeals," "district court," and "district judge," where appropriate, include the United States Court of Federal Claims, the United States Court of International Trade, and the judges thereof.

(e) Disability.

"Disability" is a temporary or permanent condition rendering a judge unable to discharge the duties of the particular judicial office. Examples of disability include substance abuse, the inability to stay awake during court proceedings, or a severe impairment of cognitive abilities.

(f) Judicial Council and Circuit.

"Judicial council" and "circuit," where appropriate, include any courts designated in 28 U.S.C. § 363.

(g) Magistrate Judge.
"Magistrate judge," where appropriate, includes a special master appointed by the Court of Federal Claims under 42 U.S.C. § 300aa-12(c).

(h) Misconduct.
Cognizable misconduct:

(1) is conduct prejudicial to the effective and expeditious administration of the business of the courts. Misconduct includes, but is not limited to:

(A) using the judge's office to obtain special treatment for friends or relatives;

(B) accepting bribes, gifts, or other personal favors related to the judicial office;

(C) having improper discussions with parties or counsel for one side in a case;

(D) treating litigants or attorneys in a demonstrably egregious and hostile manner;

(E) engaging in partisan political activity or making inappropriately partisan statements;

(F) soliciting funds for organizations; or

(G) violating other specific, mandatory standards of judicial conduct, such as those pertaining to restrictions on outside income and requirements for financial disclosure.

(2) is conduct occurring outside the performance of official duties if the conduct might have a prejudicial effect on the administration of the business of the courts, including a substantial and widespread lowering of public confidence in the courts among reasonable people.

(3) does not include:

(A) an allegation that is directly related to the merits of a decision or procedural ruling. An allegation that calls into question the correctness of a judge's ruling, including a failure to recuse, without more, is merits-related. If the decision or ruling is alleged to be the

result of an improper motive, e.g., a bribe, ex parte contact, racial or ethnic bias, or improper conduct in rendering a decision or ruling, such as personally derogatory remarks irrelevant to the issues, the complaint is not cognizable to the extent that it attacks the merits.

(B) an allegation about delay in rendering a decision or ruling, unless the allegation concerns an improper motive in delaying a particular decision or habitual delay in a significant number of unrelated cases.

(i) Subject Judge.
"Subject judge" means any judge described in Rule 4 who is the subject of a complaint.

Commentary on Rule 3

Rule 3 is derived and adapted from the Breyer Committee Report and the Illustrative Rules.

Unless otherwise specified or the context otherwise indicates, the term "complaint" is used in these Rules to refer both to complaints identified by a chief judge under Rule 5 and to complaints filed by complainants under Rule 6.

Under the Act, a "complaint" may be filed by "any person" or "identified" by a chief judge. See 28 U.S.C. § 351(a) and (b). Under Rule 3(c)(1), complaints may be submitted by a person, in his or her individual capacity, or by a professional organization. Generally, the word "complaint" brings to mind the commencement of an adversary proceeding in which the contending parties are left to present the evidence and legal arguments, and judges play the role of an essentially passive arbiter. The Act, however, establishes an administrative, inquisitorial process. For example, even absent a complaint under Rule 6, chief judges are expected in some circumstances to trigger the process – "identify a complaint," see 28 U.S.C. § 351(b) and Rule 5 – and conduct an investigation without becoming a party. See 28 U.S.C. § 352(a); Breyer Committee Report, 239 F.R.D. at 214; Illustrative Rule 2(j). Even when a complaint is filed by someone other than the chief judge, the complainant lacks many rights that a litigant would have, and the chief judge, instead of being limited to the "four corners of the complaint," must, under Rule 11, proceed as though misconduct or disability has been alleged where the complainant reveals information of misconduct or disability but does not claim it as such. See Breyer Committee Report, 239 F.R.D. at 183-84.

An allegation of misconduct or disability filed under Rule 6 is a "complaint," and the Rule so provides in subsection (c)(1). However, both the nature of the process and the use of the term "identify" suggest that the word "complaint" covers more than a document formally triggering the process. The process relies on chief judges considering known information and triggering the process when appropriate. "Identifying" a "complaint," therefore, is best understood as the chief judge's concluding that information known to the judge constitutes probable cause to believe that misconduct occurred or a disability exists, whether or not the information is framed as, or intended to be an accusation. This definition is codified in (c)(2).

Rule 3(e) relates to disability and provides only the most general definition, recognizing that a fact-specific approach is the only one available.

The phrase "prejudicial to the effective and expeditious administration of the business of the courts" is not subject to precise definition, and subsection (h)(1) therefore provides some specific examples. Although the Code of Conduct for United States Judges may be informative, its main precepts are highly general; the Code is in many potential applications aspirational rather than a set of disciplinary rules. Ultimately, the responsibility for determining what constitutes misconduct under the statute is the province of the judicial council of the circuit subject to such review and limitations as are ordained by the statute and by these Rules.

Even where specific, mandatory rules exist – for example, governing the receipt of gifts by judges, outside earned income, and financial disclosure obligations – the distinction between the misconduct statute and the specific, mandatory rules must be borne in mind. For example, an inadvertent, minor violation of any one of these Rules, promptly remedied when called to the attention of the judge, might still be a violation but might not rise to the level of misconduct under the statute. By contrast, a pattern of such violations of the Code might well rise to the level of misconduct.

An allegation can meet the statutory standard even though the judge's alleged conduct did not occur in the course of the performance of official duties. The Code of Conduct for United States Judges expressly covers a wide range of extra-official activities, and some of these activities may constitute misconduct. For example, allegations that a judge solicited funds for a charity or participated in a partisan political event are cognizable under the Act.

On the other hand, judges are entitled to some leeway in extra-official activities. For example, misconduct may not include a judge being repeatedly and publicly discourteous to a spouse (not including physical abuse) even though this might cause some reasonable people to have diminished confidence in the courts. Rule 3(h)(2) states that conduct of this sort is covered, for example, when it might lead to a "substantial and widespread" lowering of such confidence.

Rule 3(h)(3)(A) tracks the Act, 28 U.S.C. § 352(b)(1)(A)(ii), in excluding from the definition of misconduct allegations "[d]irectly related to the merits of a decision or procedural ruling." This exclusion preserves the independence of judges in the exercise of judicial power by ensuring that the complaint procedure is not used to collaterally attack the substance of a judge's ruling. Any allegation that calls into question the correctness of an official action of a judge – without more – is merits-related. The phrase "decision or procedural ruling" is not limited to rulings issued in deciding Article III cases or controversies. Thus, a complaint challenging the correctness of a chief judge's determination to dismiss a prior misconduct complaint would be properly dismissed as merits-related – in other words, as challenging the substance of the judge's administrative determination to dismiss the complaint – even though it does not concern the judge's rulings in Article III litigation. Similarly, an allegation that a judge had incorrectly declined to approve a Criminal Justice Act voucher is merits-related under this standard.

Conversely, an allegation – however unsupported – that a judge conspired with a prosecutor to make a particular ruling is not merits-related, even though it "relates" to a ruling in a colloquial sense. Such an allegation attacks the propriety of conspiring with the prosecutor and goes beyond a challenge to the correctness – "the merits" – of the ruling itself. An allegation that a judge ruled against the complainant because the complainant is a member of a particular racial or ethnic group, or because the judge dislikes the complainant personally, is also not merits-related. Such an allegation attacks the propriety of arriving at rulings with an illicit or improper motive. Similarly, an allegation that a judge used an inappropriate term to refer to a class of people is not merits-related even if the judge used it on the bench or in an opinion; the correctness of the judge's rulings is not at stake. An allegation that a judge treated litigants or attorneys in a demonstrably egregious and hostile manner while on the bench is also not merits-related.

The existence of an appellate remedy is usually irrelevant to whether an allegation is merits-related. The merits-related ground for dismissal exists to protect judges' independence in making rulings, not to protect or promote the appellate process. A complaint alleging an incorrect ruling is merits-related even

though the complainant has no recourse from that ruling. By the same token, an allegation that is otherwise cognizable under the Act should not be dismissed merely because an appellate remedy appears to exist (for example, vacating a ruling that resulted from an improper ex parte communication). However, there may be occasions when appellate and misconduct proceedings overlap, and consideration and disposition of a complaint under these Rules may be properly deferred by a chief judge until the appellate proceedings are concluded in order to avoid, inter alia, inconsistent decisions.

Because of the special need to protect judges' independence in deciding what to say in an opinion or ruling, a somewhat different standard applies to determine the merits-relatedness of a non-frivolous allegation that a judge's language in a ruling reflected an improper motive. If the judge's language was relevant to the case at hand – for example a statement that a claim is legally or factually "frivolous" – then the judge's choice of language is presumptively merits-related and excluded, absent evidence apart from the ruling itself suggesting an improper motive. If, on the other hand, the challenged language does not seem relevant on its face, then an additional inquiry under Rule 11 is necessary.

With regard to Rule 3(h)(3)(B), a complaint of delay in a single case is excluded as merits-related. Such an allegation may be said to challenge the correctness of an official action of the judge – in other words, assigning a low priority to deciding the particular case. But, by the same token, an allegation of a habitual pattern of delay in a significant number of unrelated cases, or an allegation of deliberate delay in a single case arising out of an illicit motive, is not merits-related.

The remaining subsections of Rule 3 provide technical definitions clarifying the application of the Rules to the various kinds of courts covered.

4. Covered Judges.

A complaint under these Rules may concern the actions or capacity only of judges of United States courts of appeals, judges of United States district courts, judges of United States bankruptcy courts, United States magistrate judges, and judges of the courts specified in 28 U.S.C. § 363.

Commentary on Rule 4

This Rule tracks the Act. Rule 8(c) and (d) contain provisions as to the handling of complaints against persons not covered by the Act, such as other court personnel, or against both covered judges and noncovered persons.

ARTICLE II. INITIATION OF A COMPLAINT

5. Identification of a Complaint.
(a) Identification.
When a chief judge has information constituting reasonable grounds for inquiry into whether a covered judge has engaged in misconduct or has a disability, the chief judge may conduct an inquiry, as he or she deems appropriate, into the accuracy of the information even if no related complaint has been filed. A chief judge who finds probable cause to believe that misconduct has occurred or that a disability exists may seek an informal resolution that he or she finds satisfactory. If no informal resolution is achieved or is feasible, the chief judge may identify a complaint and, by written order stating the reasons, begin the review provided in Rule 11. If the evidence of misconduct is clear and convincing and no informal resolution is achieved or is feasible, the chief judge must identify a complaint. A chief judge must not decline to identify a complaint merely because the person making the allegation has not filed a complaint under Rule 6. This Rule is subject to Rule 7.

(b) Noncompliance with Rule 6(d).
Rule 6 complaints that do not comply with the requirements of Rule 6(d) must be considered under this Rule.

Commentary on Rule 5

This Rule is adapted from the Breyer Committee Report, 239 F.R.D. at 245-46.

The Act authorizes the chief judge, by written order stating reasons, to identify a complaint and thereby dispense with the filing of a written complaint. See 28 U.S.C. § 351(b). Under Rule 5, when a chief judge becomes aware of information constituting reasonable grounds to inquire into possible misconduct or disability on the part of a covered judge, and no formal complaint has been filed, the chief judge has the power in his or her discretion to begin an appropriate inquiry. A chief judge's decision whether to informally seek a resolution and/or to identify a complaint is guided by the results of that inquiry. If the chief judge concludes that there is probable cause to believe that misconduct has occurred or a disability exists, the chief judge may seek an informal resolution, if feasible, and if failing in that, may identify a complaint. Discretion is accorded largely for the

reasons police officers and prosecutors have discretion in making arrests or bringing charges. The matter may be trivial and isolated, based on marginal evidence, or otherwise highly unlikely to lead to a misconduct or disability finding. On the other hand, if the inquiry leads the chief judge to conclude that there is clear and convincing evidence of misconduct or a disability, and no satisfactory informal resolution has been achieved or is feasible, the chief judge is required to identify a complaint.

An informal resolution is one agreed to by the subject judge and found satisfactory by the chief judge. Because an informal resolution under Rule 5 reached before a complaint is filed under Rule 6 will generally cause a subsequent Rule 6 complaint alleging the identical matter to be concluded, see Rule 11(d), the chief judge must be sure that the resolution is fully appropriate before endorsing it. In doing so, the chief judge must balance the seriousness of the matter against the particular judge's alacrity in addressing the issue. The availability of this procedure should encourage attempts at swift remedial action before a formal complaint is filed.

When a complaint is identified, a written order stating the reasons for the identification must be provided; this begins the process articulated in Rule 11. Rule 11 provides that once the chief judge has identified a complaint, the chief judge, subject to the disqualification provisions of Rule 25, will perform, with respect to that complaint, all functions assigned to the chief judge for the determination of complaints filed by a complainant.

In high-visibility situations, it may be desirable for the chief judge to identify a complaint without first seeking an informal resolution (and then, if the circumstances warrant, dismiss or conclude the identified complaint without appointment of a special committee) in order to assure the public that the allegations have not been ignored.

A chief judge's decision not to identify a complaint under Rule 5 is not appealable and is subject to Rule 3(h)(3)(A), which excludes merits-related complaints from the definition of misconduct.

A chief judge may not decline to identify a complaint solely on the basis that the unfiled allegations could be raised by one or more persons in a filed complaint, but none of these persons has opted to do so.

Subsection (a) concludes by stating that this Rule is "subject to Rule 7." This is intended to establish that only: (i) the chief judge of the home circuit of a

potential subject judge, or (ii) the chief judge of a circuit in which misconduct is alleged to have occurred in the course of official business while the potential subject judge was sitting by designation, shall have the power or a duty under this Rule to identify a complaint.

Subsection (b) provides that complaints filed under Rule 6 that do not comply with the requirements of Rule 6(d), must be considered under this Rule. For instance, if a complaint has been filed but the form submitted is unsigned, or the truth of the statements therein are not verified in writing under penalty of perjury, then a chief judge must nevertheless consider the allegations as known information, and proceed to follow the process described in Rule 5(a).

6. Filing a Complaint.

(a) Form.

A complainant may use the form reproduced in the appendix to these Rules or a form designated by the rules of the judicial council in the circuit in which the complaint is filed. A complaint form is also available on each court of appeals' website or may be obtained from the circuit clerk or any district court or bankruptcy court within the circuit. A form is not necessary to file a complaint, but the complaint must be written and must include the information described in (b).

(b) Brief Statement of Facts.

A complaint must contain a concise statement that details the specific facts on which the claim of misconduct or disability is based. The statement of facts should include a description of:

(1) what happened;

(2) when and where the relevant events happened;

(3) any information that would help an investigator check the facts; and

(4) for an allegation of disability, any additional facts that form the basis of that allegation.

(c) Legibility.

A complaint should be typewritten if possible. If not typewritten, it must be legible. An illegible complaint will be returned to the complainant with a

request to resubmit it in legible form. If a resubmitted complaint is still illegible, it will not be accepted for filing.

(d) Complainant's Address and Signature; Verification.
The complainant must provide a contact address and sign the complaint. The truth of the statements made in the complaint must be verified in writing under penalty of perjury. If any of these requirements are not met, the complaint will be accepted for filing, but it will be reviewed under only Rule 5(b).

(e) Number of Copies; Envelope Marking.
The complainant shall provide the number of copies of the complaint required by local rule. Each copy should be in an envelope marked "Complaint of Misconduct" or "Complaint of Disability." The envelope must not show the name of any subject judge.

Commentary on Rule 6

The Rule is adapted from the Illustrative Rules and is self-explanatory.

Tenth Circuit Misconduct Rule 6.1 – Page Limitation
The "brief statement of facts" in support of a complaint described in National Rule 6(b) should not exceed five pages in length, whether typed or hand-written. If a complainant believes that more than five pages are needed to set out a "concise statement that details the specific facts on which the claim of misconduct or disability is based," *id.*, the complainant should submit a proposed statement of facts to the Circuit Executive, who will determine whether the complaint will be filed. If the Circuit Executive determines that the complaint will not be filed as proposed, the complainant will be provided an opportunity to cure the complaint, i.e. reduce the statement of facts to five pages.

Tenth Circuit Misconduct Rule 6.2 – Supporting Documentation
Facts specifically and clearly alleged in a complaint will rarely need the support of additional documentation. If a complainant considers supporting documentation necessary, the complainant should take care to include only documentation that is required to support the specific facts alleged. Excess or irrelevant documentation will be returned to the complainant.

Tenth Circuit Misconduct Rule 6.3 – Original Only
In connection with National Rule 6(e), the Tenth Circuit requires that only one original complaint be filed, along with one set of accompanying documents, if any.

7. Where to Initiate Complaints.
(a) Where to File.
Except as provided in (b),

(1) a complaint against a judge of a United States court of appeals, a United States district court, a United States bankruptcy court, or a United States magistrate judge must be filed with the circuit clerk in the jurisdiction in which the subject judge holds office.

(2) a complaint against a judge of the United States Court of International Trade or the United States Court of Federal Claims must be filed with the respective clerk of that court.

(3) a complaint against a judge of the United States Court of Appeals for the Federal Circuit must be filed with the circuit executive of that court.

(b) Misconduct in Another Circuit; Transfer.
If a complaint alleges misconduct in the course of official business while the subject judge was sitting on a court by designation under 28 U.S.C. §§ 291-293, and 294(d), the complaint may be filed or identified with the circuit clerk of that circuit or of the subject judge's home circuit. The proceeding will continue in the circuit of the first-filed or first-identified complaint. The judicial council of the circuit where the complaint was first filed or first identified may transfer the complaint to the subject judge's home circuit or to the circuit where the alleged misconduct occurred, as the case may be.

Commentary on Rule 7

Title 28 U.S.C. § 351 states that complaints are to be filed with "the clerk of the court of appeals for the circuit." However, in many circuits, this role is filled by circuit executives. Accordingly, the term "circuit clerk," as defined in Rule 3(b) and used throughout these Rules, applies to circuit executives.

Section 351 uses the term "the circuit" in a way that suggests that either the home circuit of the subject judge or the circuit in which misconduct is alleged to

have occurred is the proper venue for complaints. With an exception for judges sitting by designation, the Rule requires the identifying or filing of a misconduct or disability complaint in the circuit in which the judge holds office, largely based on the administrative perspective of the Act. Given the Act's emphasis on the future conduct of the business of the courts, the circuit in which the judge holds office is the appropriate forum because that circuit is likely best able to influence a judge's future behavior in constructive ways.

However, when judges sit by designation, the non-home circuit has a strong interest in redressing misconduct in the course of official business, and where allegations also involve a member of the bar – ex parte contact between an attorney and a judge, for example – it may often be desirable to have the judicial and bar misconduct proceedings take place in the same venue. Rule 7(b), therefore, allows transfer to, or filing or identification of a complaint in, the non-home circuit. The proceeding may be transferred by the judicial council of the filing or identified circuit to the other circuit.

Tenth Circuit Misconduct Rule 7.1 – Filing Address
Complaints filed with the Tenth Circuit pursuant to National Rule 7(a)(1) should be mailed or delivered to:

Office of the Circuit Executive
United States Courts for the Tenth Circuit
Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257

Tenth Circuit Misconduct Rule 7.2 – E-mail and FAX Not Accepted
Complaints and supporting or supplementary documentation will not be accepted for filing via e-mail or fax.

8. Action by Clerk.
(a) Receipt of Complaint.
Upon receiving a complaint against a judge filed under Rule 5 or 6, the circuit clerk must open a file, assign a docket number according to a uniform numbering scheme promulgated by the Judicial Conference Committee on Judicial Conduct and Disability, and acknowledge the complaint's receipt.

(b) Distribution of Copies.
The clerk must promptly send copies of a complaint filed under Rule 6 to the chief judge or the judge authorized to act as chief judge under Rule 25(f), and copies of complaints filed under Rule 5 or 6 to each subject judge. The clerk must retain the original complaint. Any further distribution should be as provided by local rule.

(c) Complaints Against Noncovered Persons.
If the clerk receives a complaint about a person not holding an office described in Rule 4, the clerk must not accept the complaint for filing under these Rules.

(d) Receipt of Complaint about a Judge and Another Noncovered Person.
If a complaint is received about a judge described in Rule 4 and a person not holding an office described in Rule 4, the clerk must accept the complaint for filing under these Rules only with regard to the judge and must inform the complainant of the limitation.

Commentary on Rule 8

This Rule is adapted from the Illustrative Rules and is largely self-explanatory.

The uniform docketing scheme described in subsection (a) should take into account potential problems associated with a complaint that names multiple judges. One solution may be to provide separate docket numbers for each subject judge. Separate docket numbers would help avoid difficulties in tracking cases, particularly if a complaint is dismissed with respect to some, but not all of the named judges.

Complaints against noncovered persons are not to be accepted for processing under these Rules but may, of course, be accepted under other circuit rules or procedures for grievances.

Tenth Circuit Misconduct Rule 8.1 – Office of the Circuit Executive
The Office of the Circuit Executive processes all misconduct matters. The term "circuit clerk" used throughout the National Rules will refer to the Circuit Executive of the Tenth Circuit and his/her staff.

Tenth Circuit Misconduct Rule 8.2 – Distribution
Internal distribution of complaints, pursuant to National Rule 8(b), will be made as follows: If a district or magistrate judge is complained about, a copy of the complaint will be sent, in addition to those individuals identified in National Rule 8(b), to the chief judge of the district court in which the district or magistrate judge holds his or her appointment. If a bankruptcy judge is complained about, copies of the complaint will also be sent to the chief judge of the appropriate district and bankruptcy courts. However, and similar to the provisions of National Rule 25(f), if the chief judge of a district or bankruptcy court is a subject of a complaint, the copy ordinarily sent to that chief judge will be sent to the judge of such court in regular active service who is most senior in date of commission among those who are not subjects of the complaint.

Tenth Circuit Misconduct Rule 8.3 – Complaints against Noncovered Persons
Complaints against noncovered persons, discussed in National Rule 8(c), will be returned to the complainant(s) who sent them for filing, along with notice of the reasons the complaint was not accepted for filing.

9. Time for Filing or Identifying a Complaint.
A complaint may be filed or identified at any time. If the passage of time has made an accurate and fair investigation of a complaint impractical, the complaint must be dismissed under Rule 11(c)(1)(E).

Commentary on Rule 9

This Rule is adapted from the Act, 28 U.S.C. §§ 351, 352(b)(1)(A)(iii), and the Illustrative Rules.

10. Abuse of the Complaint Procedure.
(a) Abusive Complaints.
A complainant who has filed repetitive, harassing, or frivolous complaints, or has otherwise abused the complaint procedure, may be restricted from filing further complaints. After giving the complainant an opportunity to show cause in writing why his or her right to file further complaints should not be limited, a judicial council may prohibit, restrict, or impose conditions on the complainant's use of the complaint procedure. Upon written request of the

complainant, the judicial council may revise or withdraw any prohibition, restriction, or condition previously imposed.

(b) Orchestrated Complaints.
When many essentially identical complaints from different complainants are received and appear to be part of an orchestrated campaign, the chief judge may recommend that the judicial council issue a written order instructing the circuit clerk to accept only a certain number of such complaints for filing and to refuse to accept further ones. The clerk must send a copy of any such order to anyone whose complaint was not accepted.

Commentary on Rule 10

This Rule is adapted from the Illustrative Rules.

Rule 10(a) provides a mechanism for a judicial council to restrict the filing of further complaints by a single complainant who has abused the complaint procedure. In some instances, however, the complaint procedure may be abused in a manner for which the remedy provided in Rule 10(a) may not be appropriate. For example, some circuits have been inundated with submissions of dozens or hundreds of essentially identical complaints against the same judge or judges, all submitted by different complainants. In many of these instances, persons with grievances against a particular judge or judges used the Internet or other technology to orchestrate mass complaint-filing campaigns against them. If each complaint submitted as part of such a campaign were accepted for filing and processed according to these Rules, there would be a serious drain on court resources without any benefit to the adjudication of the underlying merits.

A judicial council may, therefore, respond to such mass filings under Rule 10(b) by declining to accept repetitive complaints for filing, regardless of the fact that the complaints are nominally submitted by different complainants. When the first complaint or complaints have been dismissed on the merits, and when further, essentially identical submissions follow, the judicial council may issue a second order noting that these are identical or repetitive complaints, directing the circuit clerk not to accept these complaints or any further such complaints for filing, and directing the clerk to send each putative complainant copies of both orders.

ARTICLE III. REVIEW OF A COMPLAINT BY THE CHIEF JUDGE

11. Review by the Chief Judge.

(a) Purpose of Chief Judge's Review.

When a complaint is identified by the chief judge or is filed, the chief judge must review it unless the chief judge is disqualified under Rule 25. If the complaint contains information constituting evidence of misconduct or disability, but the complainant does not claim it as such, the chief judge must treat the complaint as if it did allege misconduct or disability and give notice to the subject judge. After reviewing the complaint, the chief judge must determine whether it should be:

(1) dismissed;

(2) concluded on the ground that voluntary corrective action has been taken;

(3) concluded because intervening events have made action on the complaint no longer necessary; or

(4) referred to a special committee.

(b) Inquiry by Chief Judge.

In determining what action to take under Rule 11(a), the chief judge may conduct a limited inquiry. The chief judge, or a designee, may communicate orally or in writing with the complainant, the subject judge, and any others who may have knowledge of the matter, and may review transcripts or other relevant documents. In conducting the inquiry, the chief judge must not determine any reasonably disputed issue.

(c) Dismissal.

(1) Allowable grounds. A complaint must be dismissed in whole or in part to the extent that the chief judge concludes that the complaint:

(A) alleges conduct that, even if true, is not prejudicial to the effective and expeditious administration of the business of the courts and does not indicate a mental or physical disability resulting in inability to discharge the duties of judicial office;

(B) is directly related to the merits of a decision or procedural ruling;

(C) is frivolous;

(D) is based on allegations lacking sufficient evidence to raise an inference that misconduct has occurred or that a disability exists;

(E) is based on allegations which are incapable of being established through investigation;

(F) has been filed in the wrong circuit under Rule 7; or

(G) is otherwise not appropriate for consideration under the Act.

(2) Disallowed grounds. A complaint must not be dismissed solely because it repeats allegations of a previously dismissed complaint if it also contains material information not previously considered and does not constitute harassment of the subject judge.

(d) Corrective Action.
The chief judge may conclude the complaint proceeding in whole or in part if:

(1) an informal resolution under Rule 5 satisfactory to the chief judge was reached before the complaint was filed under Rule 6, or

(2) the chief judge determines that the subject judge has taken appropriate voluntary corrective action that acknowledges and remedies the problems raised by the complaint.

(e) Intervening Events.
The chief judge may conclude the complaint proceeding in whole or in part upon determining that intervening events render some or all of the allegations moot or make remedial action impossible.

(f) Appointment of Special Committee.
If some or all of the complaint is not dismissed or concluded, the chief judge must promptly appoint a special committee to investigate the complaint or any relevant portion of it and to make recommendations to the judicial council. Before appointing a special committee, the chief judge must invite the subject judge to respond to the complaint either orally or in writing if the judge was not given an opportunity during the limited inquiry. In the chief judge's discretion, separate complaints may be joined and assigned to a single special committee. Similarly, a single complaint about more than one judge may be severed and more than one special committee appointed.

(g) Notice of Chief Judge's Action; Petitions for Review.

(1) When special committee is appointed. If a special committee is appointed, the chief judge must notify the complainant and the subject judge that the matter has been referred to a special committee and identify the members of the committee. A copy of the order appointing the special committee must be sent to the Judicial Conference Committee on Judicial Conduct and Disability.

(2) When chief judge disposes of complaint without appointing special committee. If the chief judge disposes of the complaint under Rule 11(c), (d), or (e), the chief judge must prepare a supporting memorandum that sets forth the reasons for the disposition. Except as authorized by 28 U.S.C. § 360, the memorandum must not include the name of the complainant or of the subject judge. The order and the supporting memorandum, which may be one document, must be provided to the complainant, the subject judge, and the Judicial Conference Committee on Judicial Conduct and Disability.

(3) Right of petition for review. If the chief judge disposes of a complaint under Rule 11(c),(d), or (e), the complainant and subject judge must be notified of the right to petition the judicial council for review of the disposition, as provided in Rule 18. If a petition for review is filed, the chief judge must promptly transmit all materials obtained in connection with the inquiry under Rule 11(b) to the circuit clerk for transmittal to the judicial council.

(h) Public Availability of Chief Judge's Decision.
The chief judge's decision must be made public to the extent, at the time, and in the manner provided in Rule 24.

Commentary on Rule 11

Subsection (a) lists the actions available to a chief judge in reviewing a complaint. This subsection provides that where a complaint has been filed under Rule 6, the ordinary doctrines of waiver do not apply. A chief judge must identify as a complaint any misconduct or disability issues raised by the factual allegations of the complaint even if the complainant makes no such claim with regard to those issues. For example, an allegation limited to misconduct in fact-finding that mentions periods during a trial when the judge was asleep must be treated as a

complaint regarding disability. Some formal order giving notice of the expanded scope of the proceeding must be given to the subject judge.

Subsection (b) describes the nature of the chief judge's inquiry. It is based largely on the Breyer Committee Report, 239 F.R.D. at 243-45. The Act states that dismissal is appropriate "when a limited inquiry . . . demonstrates that the allegations in the complaint lack any factual foundation or are conclusively refuted by objective evidence." 28 U.S.C. § 352(b)(1)(B). At the same time, however, Section 352(a) states that "[t]he chief judge shall not undertake to make findings of fact about any matter that is reasonably in dispute." These two statutory standards should be read together, so that a matter is not "reasonably" in dispute if a limited inquiry shows that the allegations do not constitute misconduct or disability, that they lack any reliable factual foundation, or that they are conclusively refuted by objective evidence.

In conducting a limited inquiry under subsection (b), the chief judge must avoid determinations of reasonably disputed issues, including reasonably disputed issues as to whether the facts alleged constitute misconduct or disability, which are ordinarily left to a special committee and the judicial council. An allegation of fact is ordinarily not "refuted" simply because the subject judge denies it. The limited inquiry must reveal something more in the way of refutation before it is appropriate to dismiss a complaint that is otherwise cognizable. If it is the complainant's word against the subject judge's – in other words, there is simply no other significant evidence of what happened or of the complainant's unreliability – then there must be a special-committee investigation. Such a credibility issue is a matter "reasonably in dispute" within the meaning of the Act.

However, dismissal following a limited inquiry may occur when the complaint refers to transcripts or to witnesses and the chief judge determines that the transcripts and witnesses all support the subject judge. Breyer Committee Report, 239 F.R.D. at 243. For example, consider a complaint alleging that the subject judge said X, and the complaint mentions, or it is independently clear, that five people may have heard what the judge said. Id. The chief judge is told by the subject judge and one witness that the judge did not say X, and the chief judge dismisses the complaint without questioning the other four possible witnesses. Id. In this example, the matter remains reasonably in dispute. If all five witnesses say the judge did not say X, dismissal is appropriate, but if potential witnesses who are reasonably accessible have not been questioned, then the matter remains reasonably in dispute. Id.

Similarly, under (c)(1)(A), if it is clear that the conduct or disability alleged, even if true, is not cognizable under these Rules, the complaint should be dismissed. If that issue is reasonably in dispute, however, dismissal under (c)(1)(A) is inappropriate.

Essentially, the standard articulated in subsection (b) is that used to decide motions for summary judgment pursuant to Fed R. Civ. P. 56. Genuine issues of material fact are not resolved at the summary judgment stage. A material fact is one that "might affect the outcome of the suit under the governing law," and a dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986). Similarly the chief judge may not resolve a genuine issue concerning a material fact or the existence of misconduct or a disability when conducting a limited inquiry pursuant to subsection (b).

Subsection (c) describes the grounds on which a complaint may be dismissed. These are adapted from the Act, 28 U.S.C. § 352(b), and the Breyer Committee Report, 239 F.R.D. at 239-45. Subsection (c)(1)(A) permits dismissal of an allegation that, even if true, does not constitute misconduct or disability under the statutory standard. The proper standards are set out in Rule 3 and discussed in the Commentary on that Rule. Subsection (c)(1)(B) permits dismissal of complaints related to the merits of a decision by a subject judge; this standard is also governed by Rule 3 and its accompanying Commentary.

Subsections (c)(1)(C)-(E) implement the statute by allowing dismissal of complaints that are "frivolous, lacking sufficient evidence to raise an inference that misconduct has occurred, or containing allegations which are incapable of being established through investigation." 28 U.S.C. § 352(b)(1)(A)(iii).

Dismissal of a complaint as "frivolous," under Rule 11(c)(1)(C), will generally occur without any inquiry beyond the face of the complaint. For instance, when the allegations are facially incredible or so lacking in indicia of reliability that no further inquiry is warranted, dismissal under this subsection is appropriate.

A complaint warranting dismissal under Rule 11(c)(1)(D) is illustrated by the following example. Consider a complainant who alleges an impropriety and asserts that he knows of it because it was observed and reported to him by a person who is identified. The judge denies that the event occurred. When contacted, the source also denies it. In such a case, the chief judge's proper course of action may

turn on whether the source had any role in the allegedly improper conduct. If the complaint was based on a lawyer's statement that he or she had an improper ex parte contact with a judge, the lawyer's denial of the impropriety might not be taken as wholly persuasive, and it would be appropriate to conclude that a real factual issue is raised. On the other hand, if the complaint quoted a disinterested third party and that disinterested party denied that the statement had been made, there would be no value in opening a formal investigation. In such a case, it would be appropriate to dismiss the complaint under Rule 11(c)(1)(D).

Rule 11(c)(1)(E) is intended, among other things, to cover situations when no evidence is offered or identified, or when the only identified source is unavailable. Breyer Committee Report, 239 F.R.D. at 243. For example, a complaint alleges that an unnamed attorney told the complainant that the judge did X. Id. The subject judge denies it. The chief judge requests that the complainant (who does not purport to have observed the judge do X) identify the unnamed witness, or that the unnamed witness come forward so that the chief judge can learn the unnamed witness's account. Id. The complainant responds that he has spoken with the unnamed witness, that the unnamed witness is an attorney who practices in federal court, and that the unnamed witness is unwilling to be identified or to come forward. Id. at 243-44. The allegation is then properly dismissed as containing allegations that are incapable of being established through investigation. Id.

If, however, the situation involves a reasonable dispute over credibility, the matter should proceed. For example, the complainant alleges an impropriety and alleges that he or she observed it and that there were no other witnesses; the subject judge denies that the event occurred. Unless the complainant's allegations are facially incredible or so lacking indicia of reliability warranting dismissal under Rule 11(c)(1)(C), a special committee must be appointed because there is a material factual question that is reasonably in dispute.

Dismissal is also appropriate when a complaint is filed so long after an alleged event that memory loss, death, or changes to unknown residences prevent a proper investigation.

Subsection (c)(2) indicates that the investigative nature of the process prevents the application of claim preclusion principles where new and material evidence becomes available. However, it also recognizes that at some point a renewed investigation may constitute harassment of the subject judge and should

be foregone, depending of course on the seriousness of the issues and the weight of the new evidence.

Rule 11(d) implements the Act's provision for dismissal if voluntary appropriate corrective action has been taken. It is largely adapted from the Breyer Committee Report, 239 F.R.D. 244-45. The Act authorizes the chief judge to conclude the proceedings if "appropriate corrective action has been taken." 28 U.S.C. § 352(b)(2). Under the Rule, action taken after the complaint is filed is "appropriate" when it acknowledges and remedies the problem raised by the complaint. Breyer Committee Report, 239 F.R.D. at 244. Because the Act deals with the conduct of judges, the emphasis is on correction of the judicial conduct that was the subject of the complaint. Id. Terminating a complaint based on corrective action is premised on the implicit understanding that voluntary self-correction or redress of misconduct or a disability is preferable to sanctions. Id. The chief judge may facilitate this process by giving the subject judge an objective view of the appearance of the judicial conduct in question and by suggesting appropriate corrective measures. Id. Moreover, when corrective action is taken under Rule 5 satisfactory to the chief judge before a complaint is filed, that informal resolution will be sufficient to conclude a subsequent complaint based on the identical conduct. "Corrective action" must be voluntary action taken by the subject judge. Breyer Committee Report, 239 F.R.D. at 244. A remedial action directed by the chief judge or by an appellate court without the participation of the subject judge in formulating the directive or without the subject judge's subsequent agreement to such action does not constitute the requisite voluntary corrective action. Id. Neither the chief judge nor an appellate court has authority under the Act to impose a formal remedy or sanction; only the judicial council can impose a formal remedy or sanction under 28 U.S.C. § 354(a)(2). Id. Compliance with a previous council order may serve as corrective action allowing conclusion of a later complaint about the same behavior. Id.

Where a judge's conduct has resulted in identifiable, particularized harm to the complainant or another individual, appropriate corrective action should include steps taken by that judge to acknowledge and redress the harm, if possible, such as by an apology, recusal from a case, or a pledge to refrain from similar conduct in the future. Id. While the Act is generally forward-looking, any corrective action should, to the extent possible, serve to correct a specific harm to an individual, if such harm can reasonably be remedied. Id. In some cases, corrective action may not be "appropriate" to justify conclusion of a complaint unless the complainant or other individual harmed is meaningfully apprised of the nature of the corrective

action in the chief judge's order, in a direct communication from the subject judge, or otherwise. Id.

Voluntary corrective action should be proportionate to any plausible allegations of misconduct in the complaint. The form of corrective action should also be proportionate to any sanctions that a judicial council might impose under Rule 20(b), such as a private or public reprimand or a change in case assignments. Breyer Committee Report, 239 F.R.D. at 244-45. In other words, minor corrective action will not suffice to dispose of a serious matter. Id.

Rule 11(e) implements Section 352(b)(2) of the Act, which permits the chief judge to "conclude the proceeding," if "action on the complaint is no longer necessary because of intervening events," such as a resignation from judicial office. Ordinarily, however, stepping down from an administrative post such as chief judge, judicial-council member, or court-committee chair does not constitute an event rendering unnecessary any further action on a complaint alleging judicial misconduct. Breyer Committee Report, 239 F.R.D. at 245. As long as the subject of the complaint performs judicial duties, a complaint alleging judicial misconduct must be addressed. Id.

If a complaint is not disposed of pursuant to Rule 11(c), (d), or (e), a special committee must be appointed. Rule 11(f) states that a subject judge must be invited to respond to the complaint before a special committee is appointed, if no earlier response was invited.

Subject judges, of course, receive copies of complaints at the same time that they are referred to the chief judge, and they are free to volunteer responses to them. Under Rule 11(b), the chief judge may request a response if it is thought necessary. However, many complaints are clear candidates for dismissal even if their allegations are accepted as true, and there is no need for the subject judge to devote time to a defense.

The Act requires that the order dismissing a complaint or concluding the proceeding contain a statement of reasons and that a copy of the order be sent to the complainant. 28 U.S.C. § 352(b). Rule 24, dealing with availability of information to the public, contemplates that the order will be made public, usually without disclosing the names of the complainant or the subject judge. If desired for administrative purposes, more identifying information can be included in a non-public version of the order.

When complaints are disposed of by chief judges, the statutory purposes are best served by providing the complainant with a full, particularized, but concise explanation, giving reasons for the conclusions reached. See also Commentary on Rule 24, dealing with public availability.

Rule 11(g) provides that the complainant and subject judge must be notified, in the case of a disposition by the chief judge, of the right to petition the judicial council for review. A copy of a chief judge's order and memorandum, which may be one document, disposing of a complaint must be sent by the circuit clerk to the Judicial Conference Committee on Judicial Conduct and Disability.

ARTICLE IV. INVESTIGATION AND REPORT BY SPECIAL COMMITTEE

12. Composition of Special Committee.

(a) Membership.

Except as provided in (e), a special committee appointed under Rule 11(f) must consist of the chief judge and equal numbers of circuit and district judges. If the complaint is about a district judge, bankruptcy judge, or magistrate judge, then, when possible, the district-judge members of the committee must be from districts other than the district of the subject judge. For the courts named in 28 U.S.C. § 363, the committee must be selected from the judges serving on the subject judge's court.

(b) Presiding Officer.

When appointing the committee, the chief judge may serve as the presiding officer or else must designate a committee member as the presiding officer.

(c) Bankruptcy Judge or Magistrate Judge as Adviser.

If the subject judge is a bankruptcy judge or magistrate judge, he or she may, within 14 days after being notified of the committee's appointment, ask the chief judge to designate as a committee adviser another bankruptcy judge or magistrate judge, as the case may be. The chief judge must grant such a request but may otherwise use discretion in naming the adviser. Unless the adviser is a Court of Federal Claims special master appointed under 42 U.S.C. § 300aa-12(c), the adviser must be from a district other than the district of the subject bankruptcy judge or subject magistrate judge. The adviser cannot vote but has the other privileges of a committee member.

(d) Provision of Documents.

The chief judge must certify to each other member of the committee and to any adviser copies of the complaint and statement of facts in whole or relevant part, and any other relevant documents on file.

(e) Continuing Qualification of Committee Members.

A member of a special committee who was qualified to serve when appointed may continue to serve on the committee even though the member relinquishes the position of chief judge, active circuit judge, or active district judge, as the case may be, but only if the member continues to hold office under Article III, Section 1, of the Constitution of the United States, or under 28 U.S.C. § 171.

(f) Inability of Committee Member to Complete Service.
If a member of a special committee can no longer serve because of death, disability, disqualification, resignation, retirement from office, or other reason, the chief judge must decide whether to appoint a replacement member, either a circuit or district judge as needed under (a). No special committee appointed under these Rules may function with only a single member, and the votes of a two-member committee must be unanimous.

(g) Voting.
All actions by a committee must be by vote of a majority of all members of the committee.

Commentary on Rule 12

This Rule is adapted from the Act and the Illustrative Rules.

Rule 12 leaves the size of a special committee flexible, to be determined on a case-by-case basis. The question of committee size is one that should be weighed with care in view of the potential for consuming the members' time; a large committee should be appointed only if there is a special reason to do so.

Although the Act requires that the chief judge be a member of each special committee, 28 U.S.C. § 353(a)(1), it does not require that the chief judge preside. Accordingly, Rule 12(b) provides that if the chief judge does not preside, he or she must designate another committee member as the presiding officer.

Rule 12(c) provides that the chief judge must appoint a bankruptcy judge or magistrate judge as an adviser to a special committee at the request of a bankruptcy or magistrate subject judge.

Subsection (c) also provides that the adviser will have all the privileges of a committee member except a vote. The adviser, therefore, may participate in all deliberations of the committee, question witnesses at hearings, and write a separate statement to accompany the special committee's report to the judicial council.

Rule 12(e) provides that a member of a special committee who remains an Article III judge may continue to serve on the committee even though the member's status otherwise changes. Thus, a committee that originally consisted of the chief judge and an equal number of circuit and district judges, as required by the law, may continue to function even though changes of status alter that

composition. This provision reflects the belief that stability of membership will contribute to the quality of the work of such committees.

Stability of membership is also the principal concern animating Rule 12(f), which deals with the case in which a special committee loses a member before its work is complete. The Rule permits the chief judge to determine whether a replacement member should be appointed. Generally, appointment of a replacement member is desirable in these situations unless the committee has conducted evidentiary hearings before the vacancy occurs. However, cases may arise in which a committee is in the late stages of its work, and in which it would be difficult for a new member to play a meaningful role. The Rule also preserves the collegial character of the committee process by prohibiting a single surviving member from serving as a committee and by providing that a committee of two surviving members will, in essence, operate under a unanimity rule.

Rule 12(g) provides that actions of a special committee must be by vote of a majority of all the members. All the members of a committee should participate in committee decisions. In that circumstance, it seems reasonable to require that committee decisions be made by a majority of the membership, rather than a majority of some smaller quorum.

13. Conduct of an Investigation.

(a) Extent and Methods of Special-Committee Investigation.

Each special committee must determine the appropriate extent and methods of the investigation in light of the allegations of the complaint. If, in the course of the investigation, the committee has cause to believe that the subject judge may have engaged in misconduct or has a disability that is beyond the scope of the complaint, the committee must refer the new matter to the chief judge for action under Rule 5 or Rule 11.

(b) Criminal Conduct.

If the committee's investigation concerns conduct that may be a crime, the committee must consult with the appropriate prosecutorial authorities to the extent permitted by the Act to avoid compromising any criminal investigation. The committee has final authority over the timing and extent of its investigation and the formulation of its recommendations.

(c) Staff.
The committee may arrange for staff assistance to conduct the investigation. It may use existing staff of the judicial branch or may hire special staff through the Director of the Administrative Office of the United States Courts.

(d) Delegation of Subpoena Power; Contempt.
The chief judge may delegate the authority to exercise the committee's subpoena powers. The judicial council or special committee may institute a contempt proceeding under 28 U.S.C. § 332(d) against anyone who fails to comply with a subpoena.

Commentary on Rule 13

This Rule is adapted from the Illustrative Rules.

Rule 13, as well as Rule 14, 15, and 16, are concerned with the way in which a special committee carries out its mission. They reflect the view that a special committee has two roles that are separated in ordinary litigation. First, the committee has an investigative role of the kind that is characteristically left to executive branch agencies or discovery by civil litigants. 28 U.S.C. § 353(c). Second, it has a formalized fact-finding and recommendation-of-disposition role that is characteristically left to juries, judges, or arbitrators. Id. Rule 13 generally governs the investigative stage. Even though the same body has responsibility for both roles under the Act, it is important to distinguish between them in order to ensure that appropriate rights are afforded at appropriate times to the subject judge.

One of the difficult questions that can arise is the relationship between proceedings under the Act and criminal investigations. Rule 13(b) assigns responsibility for coordination to the special committee in cases in which criminal conduct is suspected, but gives the committee the authority to determine the appropriate pace of its activity in light of any criminal investigation.

Title 28 U.S.C. § 356(a) provides that a special committee will have full subpoena powers as provided in 28 U.S.C. § 332(d). Section 332(d)(1) provides that subpoenas will be issued on behalf of judicial councils by the circuit clerk "at the direction of the chief judge of the circuit or his designee." Rule 13(d) contemplates that, where the chief judge designates someone else as presiding officer of a special committee, the presiding officer also be delegated the authority to direct the circuit clerk to issue subpoenas related to committee proceedings. That is not intended to imply, however, that the decision to use the subpoena power is exercisable by the presiding officer alone. See Rule 12(g).

14. Conduct of Hearings by Special Committee.

(a) Purpose of Hearings.

The committee may hold hearings to take testimony and receive other evidence, to hear argument, or both. If the committee is investigating allegations against more than one judge, it may hold joint or separate hearings.

(b) Committee Evidence.

Subject to Rule 15, the committee must obtain material, nonredundant evidence in the form it considers appropriate. In the committee's discretion, evidence may be obtained by committee members, staff, or both. Witnesses offering testimonial evidence may include the complainant and the subject judge.

(c) Counsel for Witnesses.

The subject judge has the right to counsel. The special committee has discretion to decide whether other witnesses may have counsel present when they testify.

(d) Witness Fees.

Witness fees must be paid as provided in 28 U.S.C. § 1821.

(e) Oath.

All testimony taken at a hearing must be given under oath or affirmation.

(f) Rules of Evidence.

The Federal Rules of Evidence do not apply to special-committee hearings.

(g) Record and Transcript.

A record and transcript must be made of all hearings.

Commentary on Rule 14

This Rule is adapted from Section 353 of the Act and the Illustrative Rules.

Rule 14 is concerned with the conduct of fact-finding hearings. Special-committee hearings will normally be held only after the investigative work has been completed and the committee has concluded that there is sufficient evidence to warrant a formal fact-finding proceeding. Special-committee proceedings are primarily inquisitorial rather than adversarial. Accordingly, the Federal Rules of Evidence do not apply to such hearings. Inevitably, a hearing will have something of an adversary character. Nevertheless, that tendency should be moderated to the

extent possible. Even though a proceeding will commonly have investigative and hearing stages, committee members should not regard themselves as prosecutors one day and judges the next. Their duty – and that of their staff – is at all times to be impartial seekers of the truth.

Rule 14(b) contemplates that material evidence will be obtained by the committee and presented in the form of affidavits, live testimony, etc. Staff or others who are organizing the hearings should regard it as their role to present evidence representing the entire picture. With respect to testimonial evidence, the subject judge should normally be called as a committee witness. Cases may arise in which the judge will not testify voluntarily. In such cases, subpoena powers are available, subject to the normal testimonial privileges. Although Rule 15(c) recognizes the subject judge's statutory right to call witnesses on his or her own behalf, exercise of this right should not usually be necessary.

15. Rights of Subject Judge.

(a) Notice.

(1) Generally. The subject judge must receive written notice of:

(A) the appointment of a special committee under Rule 11(f);

(B) the expansion of the scope of an investigation under Rule 13(a);

(C) any hearing under Rule 14, including its purposes, the names of any witnesses the committee intends to call, and the text of any statements that have been taken from those witnesses.

(2) Suggestion of additional witnesses. The subject judge may suggest additional witnesses to the committee.

(b) Report of the Special Committee.

The subject judge must be sent a copy of the special committee's report when it is filed with the judicial council.

(c) Presentation of Evidence.

At any hearing held under Rule 14, the subject judge has the right to present evidence, to compel the attendance of witnesses, and to compel the production of documents. At the request of the subject judge, the chief judge or the judge's designee must direct the circuit clerk to issue a subpoena to a witness

under 28 U.S.C. § 332(d)(1). The subject judge must be given the opportunity to cross-examine committee witnesses, in person or by counsel.

(d) Presentation of Argument.
The subject judge may submit written argument to the special committee and must be given a reasonable opportunity to present oral argument at an appropriate stage of the investigation.

(e) Attendance at Hearings.
The subject judge has the right to attend any hearing held under Rule 14 and to receive copies of the transcript, of any documents introduced, and of any written arguments submitted by the complainant to the committee.

(f) Representation by Counsel.
The subject judge may choose to be represented by counsel in the exercise of any right enumerated in this Rule. As provided in Rule 20(e), the United States may bear the costs of the representation.

Commentary on Rule 15

This Rule is adapted from the Act and the Illustrative Rules.

The act states that these Rules must contain provisions requiring that "the judge whose conduct is the subject of a complaint . . . be afforded an opportunity to appear (in person or by counsel) at proceedings conducted by the investigating panel, to present oral and documentary evidence, to compel the attendance of witnesses or the production of documents, to cross-examine witnesses, and to present argument orally or in writing." 28 U.S.C. § 358(b)(2). To implement this provision, Rule 15(e) gives the judge the right to attend any hearing held for the purpose of receiving evidence of record or hearing argument under Rule 14.

The Act does not require that the subject judge be permitted to attend all proceedings of the special committee. Accordingly, the Rules do not give a right to attend other proceedings – for example, meetings at which the committee is engaged in investigative activity, such as interviewing persons to learn whether they ought to be called as witnesses or examining for relevance purposes documents delivered pursuant to a subpoena duces tecum, or meetings in which the committee is deliberating on the evidence or its recommendations.

16. Rights of Complainant in Investigation.

(a) Notice.

The complainant must receive written notice of the investigation as provided in Rule 11(g)(1). When the special committee's report to the judicial council is filed, the complainant must be notified of the filing. The judicial council may, in its discretion, provide a copy of the report of a special committee to the complainant.

(b) Opportunity to Provide Evidence.

If the committee determines that the complainant may have evidence that does not already exist in writing, a representative of the committee must interview the complainant.

(c) Presentation of Argument.

The complainant may submit written argument to the special committee. In its discretion, the special committee may permit the complainant to offer oral argument.

(d) Representation by Counsel.

A complainant may submit written argument through counsel and, if permitted to offer oral argument, may do so through counsel.

(e) Cooperation.

In exercising its discretion under this Rule, a special committee may take into account the degree of the complainant's cooperation in preserving the confidentiality of the proceedings, including the identity of the subject judge.

Commentary on Rule 16

This Rule is adapted from the Act and the Illustrative Rules.

In accordance with the view of the process as fundamentally administrative and inquisitorial, these Rules do not give the complainant the rights of a party to litigation, and leave the complainant's role largely to the discretion of the special committee. However, Rule 16(b) provides that, where a special committee has been appointed and it determines that the complainant may have additional evidence, the complainant must be interviewed by a representative of the committee. Such an interview may be in person or by telephone, and the representative of the committee may be either a member or staff.

Rule 16 does not contemplate that the complainant will ordinarily be permitted to attend proceedings of the special committee except when testifying or presenting oral argument. A special committee may exercise its discretion to permit the complainant to be present at its proceedings, or to permit the complainant, individually or through counsel, to participate in the examination or cross-examination of witnesses.

The Act authorizes an exception to the normal confidentiality provisions where the judicial council in its discretion provides a copy of the report of the special committee to the complainant and to the subject judge. 28 U.S.C. § 360(a)(1). However, the Rules do not entitle the complainant to a copy of the special committee's report.

In exercising their discretion regarding the role of the complainant, the special committee and the judicial council should protect the confidentiality of the complaint process. As a consequence, subsection (e) provides that a special committee may consider the degree to which a complainant has cooperated in preserving the confidentiality of the proceedings in determining what role beyond the minimum required by these Rules should be given to that complainant.

17. Special-Committee Report.
The committee must file with the judicial council a comprehensive report of its investigation, including findings and recommendations for council action. The report must be accompanied by a statement of the vote by which it was adopted, any separate or dissenting statements of committee members, and the record of any hearings held under Rule 14. A copy of the report and accompanying statement must be sent to the Judicial Conference Committee on Judicial Conduct and Disability.

Commentary on Rule 17

This Rule is adapted from the Illustrative Rules and is self-explanatory. The provision for sending a copy of the special-committee report and accompanying statement to the Judicial Conference Committee is new.

ARTICLE V. JUDICIAL-COUNCIL REVIEW

18. Petitions for Review of Chief Judge Dispositions Under Rule 11(c), (d), or (e).

(a) Petitions for Review.

After the chief judge issues an order under Rule 11(c), (d), or (e), a complainant or subject judge may petition the judicial council of the circuit to review the order. By rules promulgated under 28 U.S.C. § 358, the judicial council may refer a petition for review filed under this Rule to a panel of no fewer than five members of the council, at least two of whom must be district judges.

(b) When to File; Form; Where to File.

A petition for review must be filed in the office of the circuit clerk within 35 days of the date on the clerk's letter informing the parties of the chief judge's order. The petition should be in letter form, addressed to the circuit clerk, and in an envelope marked "Misconduct Petition" or "Disability Petition." The name of the subject judge must not be shown on the envelope. The letter should be typewritten or otherwise legible. It should begin with "I hereby petition the judicial council for review of . . . " and state the reasons why the petition should be granted. It must be signed.

(c) Receipt and Distribution of Petition.

A circuit clerk who receives a petition for review filed within the time allowed and in proper form must:

(1) acknowledge its receipt and send a copy to the complainant or subject judge, as the case may be;

(2) promptly distribute to each member of the judicial council, or its relevant panel, except for any member disqualified under Rule 25, or make available in the manner provided by local rule, the following materials:

(A) copies of the complaint;

(B) all materials obtained by the chief judge in connection with the inquiry;

(C) the chief judge's order disposing of the complaint;

(D) any memorandum in support of the chief judge's order;

(E) the petition for review; and

(F) an appropriate ballot;

(3) send the petition for review to the Judicial Conference Committee on Judicial Conduct and Disability. Unless the Judicial Conference Committee requests them, the clerk will not send copies of the materials obtained by the chief judge.

(d) Untimely Petition.
The clerk must refuse to accept a petition that is received after the deadline in (b).

(e) Timely Petition Not in Proper Form.
When the clerk receives a petition filed within the time allowed but in a form that is improper to a degree that would substantially impair its consideration by the judicial council – such as a document that is ambiguous about whether it is intended to be a petition for review – the clerk must acknowledge its receipt, call the filer's attention to the deficiencies, and give the filer the opportunity to correct the deficiencies within 21 days of the date of the clerk's letter about the deficiencies or within the original deadline for filing the petition, whichever is later. If the deficiencies are corrected within the time allowed, the clerk will proceed according to paragraphs (a) and (c) of this Rule. If the deficiencies are not corrected, the clerk must reject the petition.

Commentary on Rule 18

Rule 18 is adapted largely from the Illustrative Rules.

Subsection (a) permits a subject judge, as well as the complainant, to petition for review of a chief judge's order dismissing a complaint under Rule 11(c), or concluding that appropriate corrective action or intervening events have remedied or mooted the problems raised by the complaint pursuant to Rule 11(d) or (e). Although the subject judge may ostensibly be vindicated by the dismissal or conclusion of a complaint, a chief judge's order may include language disagreeable to the subject judge. For example, an order may dismiss a complaint, but state that the subject judge did in fact engage in misconduct. Accordingly, a subject judge may wish to object to the content of the order and is given the opportunity to petition the judicial council of the circuit for review.

Subsection (b) contains a time limit of thirty-five days to file a petition for review. It is important to establish a time limit on petitions for review of chief judges' dispositions in order to provide finality to the process. If the complaint requires an investigation, the investigation should proceed; if it does not, the subject judge should know that the matter is closed.

The standards for timely filing under the Federal Rules of Appellate Procedure should be applied to petitions for review. See Fed. R. App. P. 25(a)(2)(A) and (C).

Rule 18(e) provides for an automatic extension of the time limit imposed under subsection (b) if a person files a petition that is rejected for failure to comply with formal requirements.

19. Judicial-Council Disposition of Petitions for Review.

(a) Rights of Subject Judge.

At any time after a complainant files a petition for review, the subject judge may file a written response with the circuit clerk. The clerk must promptly distribute copies of the response to each member of the judicial council or of the relevant panel, unless that member is disqualified under Rule 25. Copies must also be distributed to the chief judge, to the complainant, and to the Judicial Conference Committee on Judicial Conduct and Disability. The subject judge must not otherwise communicate with individual council members about the matter. The subject judge must be given copies of any communications to the judicial council from the complainant.

(b) Judicial-Council Action.

After considering a petition for review and the materials before it, a judicial council may:

(1) affirm the chief judge's disposition by denying the petition;

(2) return the matter to the chief judge with directions to conduct a further inquiry under Rule 11(b) or to identify a complaint under Rule 5;

(3) return the matter to the chief judge with directions to appoint a special committee under Rule 11(f); or

(4) in exceptional circumstances, take other appropriate action.

(c) Notice of Council Decision.
Copies of the judicial council's order, together with any accompanying memorandum in support of the order or separate concurring or dissenting statements, must be given to the complainant, the subject judge, and the Judicial Conference Committee on Judicial Conduct and Disability.

(d) Memorandum of Council Decision.
If the council's order affirms the chief judge's disposition, a supporting memorandum must be prepared only if the judicial council concludes that there is a need to supplement the chief judge's explanation. A memorandum supporting a council order must not include the name of the complainant or the subject judge.

(e) Review of Judicial-Council Decision.
If the judicial council's decision is adverse to the petitioner, and if no member of the council dissented on the ground that a special committee should be appointed under Rule 11(f), the complainant must be notified that he or she has no right to seek review of the decision. If there was a dissent, the petitioner must be informed that he or she can file a petition for review under Rule 21(b) solely on the issue of whether a special committee should be appointed.

(f) Public Availability of Judicial-Council Decision.
Materials related to the council's decision must be made public to the extent, at the time, and in the manner set forth in Rule 24.

Commentary on Rule 19

This Rule is largely adapted from the Act and is self-explanatory.

The council should ordinarily review the decision of the chief judge on the merits, treating the petition for review for all practical purposes as an appeal. The judicial council may respond to a petition by affirming the chief judge's order, remanding the matter, or, in exceptional cases, taking other appropriate action.

20. Judicial-Council Consideration of Reports and Recommendations of Special Committees.
(a) Rights of Subject Judge.
Within 21 days after the filing of the report of a special committee, the subject judge may send a written response to the members of the judicial council.

The judge must also be given an opportunity to present argument through counsel, written or oral, as determined by the council. The judge must not otherwise communicate with council members about the matter.

(b) Judicial-Council Action.

(1) Discretionary actions. Subject to the judge's rights set forth in subsection (a), the judicial council may:

(A) dismiss the complaint because:

(i) even if the claim is true, the claimed conduct is not conduct prejudicial to the effective and expeditious administration of the business of the courts and does not indicate a mental or physical disability resulting in inability to discharge the duties of office;

(ii) the complaint is directly related to the merits of a decision or procedural ruling;

(iii) the facts on which the complaint is based have not been established; or

(iv) the complaint is otherwise not appropriate for consideration under 28 U.S.C. §§ 351-364.

(B) conclude the proceeding because appropriate corrective action has been taken or intervening events have made the proceeding unnecessary.

(C) refer the complaint to the Judicial Conference of the United States with the council's recommendations for action.

(D) take remedial action to ensure the effective and expeditious administration of the business of the courts, including:

(i) censuring or reprimanding the subject judge, either by private communication or by public announcement;

(ii) ordering that no new cases be assigned to the subject judge for a limited, fixed period;

(iii) in the case of a magistrate judge, ordering the chief judge of the district court to take action specified by the council, including the

initiation of removal proceedings under 28 U.S.C. § 631(i) or 42 U.S.C. § 300aa-12(c)(2);

(iv) in the case of a bankruptcy judge, removing the judge from office under 28 U.S.C. § 152(e);

(v) in the case of a circuit or district judge, requesting the judge to retire voluntarily with the provision (if necessary) that ordinary length-of-service requirements will be waived; and

(vi) in the case of a circuit or district judge who is eligible to retire but does not do so, certifying the disability of the judge under 28 U.S.C. § 372(b) so that an additional judge may be appointed.

(E) take any combination of actions described in (b)(1)(A)-(D) of this Rule that is within its power.

(2) Mandatory actions. A judicial council must refer a complaint to the Judicial Conference if the council determines that a circuit judge or district judge may have engaged in conduct that:

(A) might constitute ground for impeachment; or

(B) in the interest of justice, is not amenable to resolution by the judicial council.

(c) Inadequate Basis for Decision.
If the judicial council finds that a special committee's report, recommendations, and record provide an inadequate basis for decision, it may return the matter to the committee for further investigation and a new report, or it may conduct further investigation. If the judicial council decides to conduct further investigation, the subject judge must be given adequate prior notice in writing of that decision and of the general scope and purpose of the additional investigation. The judicial council's conduct of the additional investigation must generally accord with the procedures and powers set forth in Rules 13 through 16 for the conduct of an investigation by a special committee.

(d) Council Vote.
Council action must be taken by a majority of those members of the council who are not disqualified. A decision to remove a bankruptcy judge from office requires a majority vote of all the members of the council.

(e) Recommendation for Fee Reimbursement.
If the complaint has been finally dismissed or concluded under (b)(1)(A) or (B) of this Rule, and if the subject judge so requests, the judicial council may recommend that the Director of the Administrative Office of the United States Courts use funds appropriated to the Judiciary to reimburse the judge for reasonable expenses incurred during the investigation, when those expenses would not have been incurred but for the requirements of the Act and these Rules. Reasonable expenses include attorneys' fees and expenses related to a successful defense or prosecution of a proceeding under Rule 21(a) or (b).

(f) Council Action.
Council action must be by written order. Unless the council finds that extraordinary reasons would make it contrary to the interests of justice, the order must be accompanied by a memorandum setting forth the factual determinations on which it is based and the reasons for the council action. The order and the supporting memorandum must be provided to the complainant, the subject judge, and the Judicial Conference Committee on Judicial Conduct and Disability. The complainant and the subject judge must be notified of any right to review of the judicial council's decision as provided in Rule 21(b).

Commentary on Rule 20

This Rule is largely adapted from the Illustrative Rules.

Rule 20(a) provides that within twenty-one days after the filing of the report of a special committee, the subject judge may address a written response to all of the members of the judicial council. The subject judge must also be given an opportunity to present oral argument to the council, personally or through counsel. The subject judge may not otherwise communicate with council members about the matter.

Rule 20(c) provides that if the judicial council decides to conduct an additional investigation, the subject judge must be given adequate prior notice in writing of that decision and of the general scope and purpose of the additional investigation. The conduct of the investigation will be generally in accordance with the procedures set forth in Rules 13 through 16 for the conduct of an investigation by a special committee. However, if hearings are held, the council may limit testimony or the presentation of evidence to avoid unnecessary repetition of testimony and evidence before the special committee.

Rule 20(d) provides that council action must be taken by a majority of those members of the council who are not disqualified, except that a decision to remove a bankruptcy judge from office requires a majority of all the members of the council as required by 28 U.S.C. § 152(e). However, it is inappropriate to apply a similar rule to the less severe actions that a judicial council may take under the Act. If some members of the council are disqualified in the matter, their disqualification should not be given the effect of a vote against council action.

With regard to Rule 20(e), the judicial council, on the request of the subject judge, may recommend to the Director of the Administrative Office of the United States Courts that the subject judge be reimbursed for reasonable expenses, including attorneys' fees, incurred. The judicial council has the authority to recommend such reimbursement where, after investigation by a special committee, the complaint has been finally dismissed or concluded under subsection (b)(1) (A) or (B) of this Rule. It is contemplated that such reimbursement may be provided for the successful prosecution or defense of a proceeding under Rule 21(a) or (b), in other words, one that results in a Rule 20(b)(1)(A) or (B) dismissal or conclusion.

Rule 20(f) requires that council action normally be supported with a memorandum of factual determinations and reasons and that notice of the action be given to the complainant and the subject judge. Rule 20(f) also requires that the notification to the complainant and the subject judge include notice of any right to petition for review of the council's decision under Rule 21(b).

Tenth Circuit Misconduct Rule 20.1 -- Consolidated Order and Memorandum National Rule 11(g)(2) specifically provides that a chief judge must prepare a written order and memorandum when disposing a case under that rule. The rule notes that the order and memorandum may be one document. National Rule 20 also requires a written order and memorandum – by the Judicial Council, but contains no notation about whether these documents may be joined. This circuit will ordinarily consolidate the written order and memorandum required by Rule 20 into one document.

ARTICLE VI. REVIEW BY JUDICIAL CONFERENCE COMMITTEE ON CONDUCT AND DISABILITY

21. Committee on Judicial Conduct and Disability.

(a) Review by Committee.

The Committee on Judicial Conduct and Disability, consisting of seven members, considers and disposes of all petitions for review under (b) of this Rule, in conformity with the Committee's jurisdictional statement. Its disposition of petitions for review is ordinarily final. The Judicial Conference of the United States may, in its sole discretion, review any such Committee decision, but a complainant or subject judge does not have a right to this review.

(b) Reviewable Matters.

(1) Upon petition. A complainant or subject judge may petition the Committee for review of a judicial-council order entered in accordance with:

(A) Rule 20(b)(1)(A), (B), (D), or (E); or

(B) Rule 19(b)(1) or (4) if one or more members of the judicial council dissented from the order on the ground that a special committee should be appointed under Rule 11(f); in that event, the Committee's review will be limited to the issue of whether a special committee should be appointed.

(2) Upon Committee's initiative. At its initiative and in its sole discretion, the Committee may review any judicial-council order entered under Rule 19(b)(1) or (4), but only to determine whether a special committee should be appointed. Before undertaking the review, the Committee must invite that judicial council to explain why it believes the appointment of a special committee is unnecessary, unless the reasons are clearly stated in the judicial council's order denying the petition for review. If the Committee believes that it would benefit from a submission by the subject judge, it may issue an appropriate request. If the Committee determines that a special committee should be appointed, the Committee must issue a written decision giving its reasons.

(c) Committee Vote.
Any member of the Committee from the same circuit as the subject judge is disqualified from considering or voting on a petition for review. Committee decisions under (b) of this Rule must be by majority vote of the qualified Committee members. If only six members are qualified to vote on a petition for review, the decision must be made by a majority of a panel of five members drawn from a randomly selected list that rotates after each decision by a panel drawn from the list. The members who will determine the petition must be selected based on committee membership as of the date on which the petition is received. Those members selected to hear the petition should serve in that capacity until final disposition of the petition, whether or not their term of committee membership has ended. If only four members are qualified to vote, the Chief Justice must appoint, if available, an ex-member of the Committee or, if not, another United States judge to consider the petition.

(d) Additional Investigation.
Except in extraordinary circumstances, the Committee will not conduct an additional investigation. The Committee may return the matter to the judicial council with directions to undertake an additional investigation. If the Committee conducts an additional investigation, it will exercise the powers of the Judicial Conference under 28 U.S.C. § 331.

(e) Oral Argument; Personal Appearance.
There is ordinarily no oral argument or personal appearance before the Committee. In its discretion, the Committee may permit written submissions from the complainant or subject judge.

(f) Committee Decisions.
Committee decisions under this Rule must be transmitted promptly to the Judicial Conference of the United States. Other distribution will be by the Administrative Office at the direction of the Committee chair.

(g) Finality.
All orders of the Judicial Conference or of the Committee (when the Conference does not exercise its power of review) are final.

Commentary on Rule 21

This Rule is largely self-explanatory.

Rule 21(a) is intended to clarify that the delegation of power to the Judicial Conference Committee on Judicial Conduct and Disability to dispose of petitions does not preclude review of such dispositions by the Conference. However, there is no right to such review in any party.

Rules 21(b)(1)(B) and (b)(2) are intended to fill a jurisdictional gap as to review of dismissals or conclusions of complaints under Rule 19(b)(1) or (4). Where one or more members of a judicial council reviewing a petition have dissented on the ground that a special committee should have been appointed, the complainant or subject judge has the right to petition for review by the Committee but only as to that issue. Under Rule 21(b)(2), the Judicial Conference Committee on Judicial Conduct and Disability may review such a dismissal or conclusion in its sole discretion, whether or not such a dissent occurred, and only as to the appointment of a special committee. No party has a right to such review, and such review will be rare.

Rule 21(c) provides for review only by Committee members from circuits other than that of the subject judge. To avoid tie votes, the Committee will decide petitions for review by rotating panels of five when only six members are qualified. If only four members are qualified, the Chief Justice must appoint an additional judge to consider that petition for review.

Under this Rule, all Committee decisions are final in that they are unreviewable unless the Judicial Conference, in its discretion, decides to review a decision. Committee decisions, however, do not necessarily constitute final action on a complaint for purposes of Rule 24.

22. Procedures for Review.

(a) Filing a Petition for Review.

A petition for review of a judicial-council decision may be filed by sending a brief written statement to the Judicial Conference Committee on Judicial Conduct and Disability, addressed to:

Judicial Conference Committee on Judicial Conduct and Disability
Attn: Office of General Counsel
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

The Administrative Office will send a copy of the petition to the complainant or subject judge, as the case may be.

(b) Form and Contents of Petition for Review.
No particular form is required. The petition must contain a short statement of the basic facts underlying the complaint, the history of its consideration before the appropriate judicial council, a copy of the judicial council's decision, and the grounds on which the petitioner seeks review. The petition for review must specify the date and docket number of the judicial-council order for which review is sought. The petitioner may attach any documents or correspondence arising in the course of the proceeding before the judicial council or its special committee. A petition should not normally exceed 20 pages plus necessary attachments.

(c) Time.
A petition must be submitted within 63 days of the date of the order for which review is sought.

(d) Copies.
Seven copies of the petition for review must be submitted, at least one of which must be signed by the petitioner or his or her attorney. If the petitioner submits a signed declaration of inability to pay the expense of duplicating the petition, the Administrative Office must accept the original petition and must reproduce copies at its expense.

(e) Action on Receipt of Petition for Review.
The Administrative Office must acknowledge receipt of a petition for review submitted under this Rule, notify the chair of the Judicial Conference Committee on Judicial Conduct and Disability, and distribute the petition to the members of the Committee for their deliberation.

Commentary on Rule 22

Rule 22 is self-explanatory.

ARTICLE VII. MISCELLANEOUS RULES

23. Confidentiality.

(a) General Rule.

The consideration of a complaint by the chief judge, a special committee, the judicial council, or the Judicial Conference Committee on Judicial Conduct and Disability is confidential. Information about this consideration must not be disclosed by any judge or employee of the judicial branch or by any person who records or transcribes testimony except as allowed by these Rules. In extraordinary circumstances, a chief judge may disclose the existence of a proceeding under these Rules when necessary to maintain public confidence in the federal judiciary's ability to redress misconduct or disability.

(b) Files.

All files related to complaints must be separately maintained with appropriate security precautions to ensure confidentiality.

(c) Disclosure in Decisions.

Except as otherwise provided in Rule 24, written decisions of the chief judge, the judicial council, or the Judicial Conference Committee on Judicial Conduct and Disability, and dissenting opinions or separate statements of members of the council or Committee may contain information and exhibits that the authors consider appropriate for inclusion, and the information and exhibits may be made public.

(d) Availability to Judicial Conference.

On request of the Judicial Conference or its Committee on Judicial Conduct and Disability, the circuit clerk must furnish any requested records related to a complaint. For auditing purposes, the circuit clerk must provide access to the Committee to records of proceedings under the Act at the site where the records are kept.

(e) Availability to District Court.

If the judicial council directs the initiation of proceedings for removal of a magistrate judge under Rule 20(b)(1)(D)(iii), the circuit clerk must provide to the chief judge of the district court copies of the report of the special committee and any other documents and records that were before the judicial council at the time of its decision. On request of the chief judge of the district

court, the judicial council may authorize release to that chief judge of any other records relating to the investigation.

(f) Impeachment Proceedings.
If the Judicial Conference determines that consideration of impeachment may be warranted, it must transmit the record of all relevant proceedings to the Speaker of the House of Representatives.

(g) Subject Judge's Consent.
If both the subject judge and the chief judge consent in writing, any materials from the files may be disclosed to any person. In any such disclosure, the chief judge may require that the identity of the complainant, or of witnesses in an investigation conducted by a chief judge, a special committee, or the judicial council, not be revealed.

(h) Disclosure in Special Circumstances.
The Judicial Conference, its Committee on Judicial Conduct and Disability, or a judicial council may authorize disclosure of information about the consideration of a complaint, including the papers, documents, and transcripts relating to the investigation, to the extent that disclosure is justified by special circumstances and is not prohibited by the Act. Disclosure may be made to judicial researchers engaged in the study or evaluation of experience under the Act and related modes of judicial discipline, but only where the study or evaluation has been specifically approved by the Judicial Conference or by the Judicial Conference Committee on Judicial Conduct and Disability. Appropriate steps must be taken to protect the identities of the subject judge, the complainant, and witnesses from public disclosure. Other appropriate safeguards to protect against the dissemination of confidential information may be imposed.

(i) Disclosure of Identity by Subject Judge.
Nothing in this Rule precludes the subject judge from acknowledging that he or she is the judge referred to in documents made public under Rule 24.

(j) Assistance and Consultation.
Nothing in this Rule precludes the chief judge or judicial council acting on a complaint filed under the Act from seeking the help of qualified staff or from consulting other judges who may be helpful in the disposition of the complaint.

Commentary on Rule 23

Rule 23 was adapted from the Illustrative Rules.

The Act applies a rule of confidentiality to "papers, documents, and records of proceedings related to investigations conducted under this chapter" and states that they may not be disclosed "by any person in any proceeding," with enumerated exceptions. 28 U.S.C. § 360(a). Three questions arise: Who is bound by the confidentiality rule, what proceedings are subject to the rule, and who is within the circle of people who may have access to information without breaching the rule?

With regard to the first question, Rule 23(a) provides that judges, employees of the judicial branch, and those persons involved in recording proceedings and preparing transcripts are obliged to respect the confidentiality requirement. This of course includes subject judges who do not consent to identification under Rule 23(i).

With regard to the second question, Rule 23(a) applies the rule of confidentiality broadly to consideration of a complaint at any stage.

With regard to the third question, there is no barrier of confidentiality among a chief judge, judicial council, the Judicial Conference, and the Judicial Conference Committee on Judicial Conduct and Disability. Each may have access to any of the confidential records for use in their consideration of a referred matter, a petition for review, or monitoring the administration of the Act. A district court may have similar access if the judicial council orders the district court to initiate proceedings to remove a magistrate judge from office, and Rule 23(e) so provides.

In extraordinary circumstances, a chief judge may disclose the existence of a proceeding under these Rules. The disclosure of such information in high-visibility or controversial cases is to reassure the public that the federal judiciary is capable of redressing judicial misconduct or disability. Moreover, the confidentiality requirement does not prevent the chief judge from "communicat[ing] orally or in writing with . . . [persons] who may have knowledge of the matter," as part of a limited inquiry conducted by the chief judge under Rule 11(b).

Rule 23 recognizes that there must be some exceptions to the Act's confidentiality requirement. For example, the Act requires that certain orders and the reasons for them must be made public. 28 U.S.C. § 360(b). Rule 23(c) makes

it explicit that memoranda supporting chief judge and council orders, as well as dissenting opinions and separate statements, may contain references to information that would otherwise be confidential and that such information may be made public. However, subsection (c) is subject to Rule 24(a) which provides the general rule regarding the public availability of decisions. For example, the name of a subject judge cannot be made public in a decision if disclosure of the name is prohibited by that Rule.

The Act makes clear that there is a barrier of confidentiality between the judicial branch and the legislative. It provides that material may be disclosed to Congress only if it is believed necessary to an impeachment investigation or trial of a judge. 28 U.S.C. § 360(a)(2). Accordingly, Section 355(b) of the Act requires the Judicial Conference to transmit the record of the proceeding to the House of Representatives if the Conference believes that impeachment of a subject judge may be appropriate. Rule 23(f) implements this requirement.

The Act provides that confidential materials may be disclosed if authorized in writing by the subject judge and by the chief judge. 28 U.S.C. § 360(a)(3). Rule 23(g) implements this requirement. Once the subject judge has consented to the disclosure of confidential materials related to a complaint, the chief judge ordinarily will refuse consent only to the extent necessary to protect the confidentiality interests of the complainant or of witnesses who have testified in investigatory proceedings or who have provided information in response to a limited inquiry undertaken pursuant to Rule 11. It will generally be necessary, therefore, for the chief judge to require that the identities of the complainant or of such witnesses, as well as any identifying information, be shielded in any materials disclosed, except insofar as the chief judge has secured the consent of the complainant or of a particular witness to disclosure, or there is a demonstrated need for disclosure of the information that, in the judgment of the chief judge, outweighs the confidentiality interest of the complainant or of a particular witness (as may be the case where the complainant is delusional or where the complainant or a particular witness has already demonstrated a lack of concern about maintaining the confidentiality of the proceedings).

Rule 23(h) permits disclosure of additional information in circumstances not enumerated. For example, disclosure may be appropriate to permit a prosecution for perjury based on testimony given before a special committee. Another example might involve evidence of criminal conduct by a judge discovered by a special committee.

Subsection (h) also permits the authorization of disclosure of information about the consideration of a complaint, including the papers, documents, and transcripts relating to the investigation, to judicial researchers engaged in the study or evaluation of experience under the Act and related modes of judicial discipline. The Rule envisions disclosure of information from the official record of complaint proceedings to a limited category of persons for appropriately authorized research purposes only, and with appropriate safeguards to protect individual identities in any published research results that ensue. In authorizing disclosure, the judicial council may refuse to release particular materials when such release would be contrary to the interests of justice, or that constitute purely internal communications. The Rule does not envision disclosure of purely internal communications between judges and their colleagues and staff.

Under Rule 23(j), chief judges and judicial councils may seek staff assistance or consult with other judges who may be helpful in the process of complaint disposition; the confidentiality requirement does not preclude this. The chief judge, for example, may properly seek the advice and assistance of another judge who the chief judge deems to be in the best position to communicate with the subject judge in an attempt to bring about corrective action. As another example, a new chief judge may wish to confer with a predecessor to learn how similar complaints have been handled. In consulting with other judges, of course, the chief judge should disclose information regarding the complaint only to the extent the chief judge deems necessary under the circumstances.

24. Public Availability of Decisions.

(a) General Rule; Specific Cases.

When final action has been taken on a complaint and it is no longer subject to review, all orders entered by the chief judge and judicial council, including any supporting memoranda and any dissenting opinions or separate statements by members of the judicial council, must be made public, with the following exceptions:

(1) if the complaint is finally dismissed under Rule 11(c) without the appointment of a special committee, or if it is concluded under Rule 11(d) because of voluntary corrective action, the publicly available materials must not disclose the name of the subject judge without his or her consent.

(2) if the complaint is concluded because of intervening events, or dismissed at any time after a special committee is appointed, the judicial

council must determine whether the name of the subject judge should be disclosed.

(3) if the complaint is finally disposed of by a privately communicated censure or reprimand, the publicly available materials must not disclose either the name of the subject judge or the text of the reprimand.

(4) if the complaint is finally disposed of under Rule 20(b)(1)(D) by any action other than private censure or reprimand, the text of the dispositive order must be included in the materials made public, and the name of the subject judge must be disclosed.

(5) the name of the complainant must not be disclosed in materials made public under this Rule unless the chief judge orders disclosure.

(b) Manner of Making Public.
The orders described in (a) must be made public by placing them in a publicly accessible file in the office of the circuit clerk or by placing the orders on the court's public website. If the orders appear to have precedential value, the chief judge may cause them to be published. In addition, the Judicial Conference Committee on Judicial Conduct and Disability will make available on the Federal Judiciary's website, www.uscourts.gov , selected illustrative orders described in paragraph (a), appropriately redacted, to provide additional information to the public on how complaints are addressed under the Act.

(c) Orders of Judicial Conference Committee.
Orders of this Committee constituting final action in a complaint proceeding arising from a particular circuit will be made available to the public in the office of the clerk of the relevant court of appeals. The Committee will also make such orders available on the Federal Judiciary's website, www.uscourts.gov . When authorized by the Committee, other orders related to complaint proceedings will similarly be made available.

(d) Complaints Referred to the Judicial Conference of the United States.
If a complaint is referred to the Judicial Conference under Rule 20(b)(1)(C) or 20(b)(2), materials relating to the complaint will be made public only if ordered by the Judicial Conference.

Commentary on Rule 24

Rule 24 is adapted from the Illustrative Rules and the recommendations of the Breyer Committee.

The Act requires the circuits to make available only written orders of a judicial council or the Judicial Conference imposing some form of sanction. 28 U.S.C. § 360(b). The Judicial Conference, however, has long recognized the desirability of public availability of a broader range of orders and other materials. In 1994, the Judicial Conference "urge[d] all circuits and courts covered by the Act to submit to the West Publishing Company, for publication in Federal Reporter 3d, and to Lexis all orders issued pursuant to [the Act] that are deemed by the issuing circuit or court to have significant precedential value to other circuits and courts covered by the Act." Report of the Proceedings of the Judicial Conference of the United States, Mar. 1994, at 28. Following this recommendation, the 2000 revision of the Illustrative Rules contained a public availability provision very similar to Rule 24. In 2002, the Judicial Conference again voted to encourage the circuits "to submit non-routine public orders disposing of complaints of judicial misconduct or disability for publication by on-line and print services." Report of the Proceedings of the Judicial Conference of the United States, Sept. 2002, at 58. The Breyer Committee Report further emphasized that "[p]osting such orders on the judicial branch's public website would not only benefit judges directly, it would also encourage scholarly commentary and analysis of the orders." Breyer Committee Report, 239 F.R.D. at 216. With these considerations in mind, Rule 24 provides for public availability of a wide range of materials.

Rule 24 provides for public availability of orders of the chief judge, the judicial council, and the Judicial Conference Committee on Judicial Conduct and Disability and the texts of any memoranda supporting their orders, together with any dissenting opinions or separate statements by members of the judicial council. However, these orders and memoranda are to be made public only when final action on the complaint has been taken and any right of review has been exhausted. The provision that decisions will be made public only after final action has been taken is designed in part to avoid public disclosure of the existence of pending proceedings. Whether the name of the subject judge is disclosed will then depend on the nature of the final action. If the final action is an order predicated on a finding of misconduct or disability (other than a privately communicated censure or reprimand) the name of the judge must be made public. If the final action is dismissal of the complaint, the name of the subject judge must not be disclosed. Rule 24(a)(1) provides that where a proceeding is concluded under Rule 11(d) by

the chief judge on the basis of voluntary corrective action, the name of the subject judge must not be disclosed. Shielding the name of the subject judge in this circumstance should encourage informal disposition.

If a complaint is dismissed as moot, or because intervening events have made action on the complaint unnecessary, after appointment of a special committee, Rule 24(a)(2) allows the judicial council to determine whether the subject judge will be identified. In such a case, no final decision has been rendered on the merits, but it may be in the public interest – particularly if a judicial officer resigns in the course of an investigation – to make the identity of the judge known.

Once a special committee has been appointed, and a proceeding is concluded by the full council on the basis of a remedial order of the council, Rule 24(a)(4) provides for disclosure of the name of the subject judge.

Finally, Rule 24(a)(5) provides that the identity of the complainant will be disclosed only if the chief judge so orders. Identifying the complainant when the subject judge is not identified would increase the likelihood that the identity of the subject judge would become publicly known, thus circumventing the policy of nondisclosure. It may not always be practicable to shield the complainant's identity while making public disclosure of the judicial council's order and supporting memoranda; in some circumstances, moreover, the complainant may consent to public identification.

Tenth Circuit Misconduct Rule 24.1 -- Public Posting of Orders
National Rule 24(a) requires that all orders entered by the chief judge and the judicial council, with certain listed exceptions, "must be made public." It is the policy of this circuit, and permitted by National Rule 24(b), to make such orders public by posting them on the circuit court's external website. The website address is www.ca10.uscourts.gov ; the qualifying orders are posted under "Judicial Misconduct."

25. Disqualification.
(a) General Rule.
Any judge is disqualified from participating in any proceeding under these Rules if the judge, in his or her discretion, concludes that circumstances warrant disqualification. If the complaint is filed by a judge, that judge is disqualified from participating in any consideration of the complaint except to the extent that these Rules provide for a complainant's participation. A chief

judge who has identified a complaint under Rule 5 is not automatically disqualified from considering the complaint.

(b) Subject Judge.
A subject judge is disqualified from considering the complaint except to the extent that these Rules provide for participation by a subject judge.

(c) Chief Judge Not Disqualified from Considering a Petition for Review of a Chief Judge's Order.
If a petition for review of a chief judge's order entered under Rule 11(c), (d), or (e) is filed with the judicial council in accordance with Rule 18, the chief judge is not disqualified from participating in the council's consideration of the petition.

(d) Member of Special Committee Not Disqualified.
A member of the judicial council who serves on a special committee, including the chief judge, is not disqualified from participating in council consideration of the committee's report.

(e) Subject Judge's Disqualification After Appointment of a Special Committee.
Upon appointment of a special committee, the subject judge is automatically disqualified from participating in any proceeding arising under the Act or these Rules as a member of any special committee, the judicial council of the circuit, the Judicial Conference of the United States, and the Judicial Conference Committee on Judicial Conduct and Disability. The disqualification continues until all proceedings on the complaint against the subject judge are finally terminated with no further right of review.

(f) Substitute for Disqualified Chief Judge.
If the chief judge is disqualified from participating in consideration of the complaint, the duties and responsibilities of the chief judge under these Rules must be assigned to the most-senior active circuit judge not disqualified. If all circuit judges in regular active service are disqualified, the judicial council may determine whether to request a transfer under Rule 26, or, in the interest of sound judicial administration, to permit the chief judge to dispose of the complaint on the merits. Members of the judicial council who are named in the complaint may participate in this determination if necessary to obtain a quorum of the judicial council.

(g) Judicial-Council Action When Multiple Judges Are Disqualified. Notwithstanding any other provision in these Rules to the contrary,

(1) a member of the judicial council who is a subject judge may participate in its disposition if:

(A) participation by one or more subject judges is necessary to obtain a quorum of the judicial council;

(B) the judicial council finds that the lack of a quorum is due to the naming of one or more judges in the complaint for the purpose of disqualifying that judge or judges, or to the naming of one or more judges based on their participation in a decision excluded from the definition of misconduct under Rule 3(h)(3); and

(C) the judicial council votes that it is necessary, appropriate, and in the interest of sound judicial administration that one or more subject judges be eligible to act.

(2) otherwise disqualified members may participate in votes taken under (g)(1)(B) and (g)(1)(C).

(h) Disqualification of Members of the Judicial Conference Committee. No member of the Judicial Conference Committee on Judicial Conduct and Disability is disqualified from participating in any proceeding under the Act or these Rules because of consultations with a chief judge, a member of a special committee, or a member of a judicial council about the interpretation or application of the Act or these Rules, unless the member believes that the consultation would prevent fair-minded participation.

Commentary on Rule 25

Rule 25 is adapted from the Illustrative Rules.

Subsection (a) provides the general rule for disqualification. Of course, a judge is not disqualified simply because the subject judge is on the same court. However, this subsection recognizes that there may be cases in which an appearance of bias or prejudice is created by circumstances other than an association with the subject judge as a colleague. For example, a judge may have a familial relationship with a complainant or subject judge. When such circumstances exist, a judge may, in his or her discretion, conclude that disqualification is warranted.

Subsection (e) makes it clear that the disqualification of the subject judge relates only to the subject judge's participation in any proceeding arising under the Act or these Rules as a member of a special committee, judicial council, Judicial Conference, or the Judicial Conference Committee. The Illustrative Rule, based on Section 359(a) of the Act, is ambiguous and could be read to disqualify a subject judge from service of any kind on each of the bodies mentioned. This is undoubtedly not the intent of the Act; such a disqualification would be anomalous in light of the Act's allowing a subject judge to continue to decide cases and to continue to exercise the powers of chief circuit or district judge. It would also create a substantial deterrence to the appointment of special committees, particularly where a special committee is needed solely because the chief judge may not decide matters of credibility in his or her review under Rule 11.

While a subject judge is barred by Rule 25(b) from participating in the disposition of the complaint in which he or she is named, Rule 25(e) recognizes that participation in proceedings arising under the Act or these Rules by a judge who is the subject of a special committee investigation may lead to an appearance of self-interest in creating substantive and procedural precedents governing such proceedings; Rule 25(e) bars such participation.

Under the Act, a complaint against the chief judge is to be handled by "that circuit judge in regular active service next senior in date of commission." 28 U.S.C. § 351(c). Rule 25(f) provides that seniority among judges other than the chief judge is to be determined by date of commission, with the result that complaints against the chief judge may be routed to a former chief judge or other judge who was appointed earlier than the chief judge. The Rules do not purport to prescribe who is to preside over meetings of the judicial council. Consequently, where the presiding member of the judicial council is disqualified from participating under these Rules, the order of precedence prescribed by Rule 25(f) for performing "the duties and responsibilities of the chief circuit judge under these Rules" does not apply to determine the acting presiding member of the judicial council. That is a matter left to the internal rules or operating practices of each judicial council. In most cases, the most senior active circuit judge who is a member of the judicial council and who is not disqualified will preside.

Sometimes a single complaint is filed against a large group of judges. If the normal disqualification rules are observed in such a case, no court of appeals judge can serve as acting chief judge of the circuit, and the judicial council will be without appellate members. Where the complaint is against all circuit and district

judges, under normal rules no member of the judicial council can perform the duties assigned to the council under the statute.

A similar problem is created by successive complaints arising out of the same underlying grievance. For example, a complaint files a complaint against a district judge based on alleged misconduct, and the complaint is dismissed by the chief judge under the statute. The complainant may then file a complaint against the chief judge for dismissing the first complaint, and when that complaint is dismissed by the next senior judge, still a third complaint may be filed. The threat is that the complainant will bump down the seniority ladder until, once again, there is no member of the court of appeals who can serve as acting chief judge for the purpose of the next complaint. Similarly, complaints involving the merits of litigation may involve a series of decisions in which many judges participated or in which a rehearing en banc was denied by the court of appeals, and the complaint may name a majority of the judicial council as subject judges.

In recognition that these multiple-judge complaints are virtually always meritless, the judicial council is given discretion to determine: (1) whether it is necessary, appropriate, and in the interest of sound judicial administration to permit the chief judge to dispose of a complaint where it would otherwise be impossible for any active circuit judge in the circuit to act, and (2) whether it is necessary, appropriate, and in the interest of sound judicial administration, after appropriate findings as to need and justification are made, to permit subject judges of the judicial council to participate in the disposition of a petition for review where it would otherwise be impossible to obtain a quorum.

Applying a rule of necessity in these situations is consistent with the appearance of justice. See, e.g., In re Complaint of Doe, 2 F.3d 308 (8th Cir. Jud. Council 1993) (invoking the rule of necessity); In re Complaint of Judicial Misconduct, No. 91-80464 (9th Cir. Jud. Council 1992) (same). There is no unfairness in permitting the chief judge to dispose of a patently insubstantial complaint that names all active circuit judges in the circuit.

Similarly, there is no unfairness in permitting subject judges, in these circumstances, to participate in the review of a chief judge's dismissal of an insubstantial complaint. The remaining option is to assign the matter to another body. Among other alternatives, the council may request a transfer of the petition under Rule 26. Given the administrative inconvenience and delay involved in these alternatives, it is desirable to request a transfer only if the judicial council determines that the petition is substantial enough to warrant such action.

In the unlikely event that a quorum of the judicial council cannot be obtained to consider the report of a special committee, it would normally be necessary to request a transfer under Rule 26.

Rule 25(h) recognizes that the jurisdictional statement of the Judicial Conference Committee contemplates consultation between members of the Committee and judicial participants in proceedings under the Act and these Rules. Such consultation should not automatically preclude participation by a member in that proceeding.

26. Transfer to Another Judicial Council.
In exceptional circumstances, a chief judge or a judicial council may ask the Chief Justice to transfer a proceeding based on a complaint identified under Rule 5 or filed under Rule 6 to the judicial council of another circuit. The request for a transfer may be made at any stage of the proceeding before a reference to the Judicial Conference under Rule 20(b)(1)(C) or 20(b)(2) or a petition for review is filed under Rule 22. Upon receiving such a request, the Chief Justice may refuse the request or select the transferee judicial council, which may then exercise the powers of a judicial council under these Rules.

Commentary on Rule 26

Rule 26 is new; it implements the Breyer Committee's recommended use of transfers. Breyer Committee Report, 239 F.R.D. at 214-15.

Rule 26 authorizes the transfer of a complaint proceeding to another judicial council selected by the Chief Justice. Such transfers may be appropriate, for example, in the case of a serious complaint where there are multiple disqualifications among the original council, where the issues are highly visible and a local disposition may weaken public confidence in the process, where internal tensions arising in the council as a result of the complaint render disposition by a less involved council appropriate, or where a complaint calls into question policies or governance of the home court of appeals. The power to effect a transfer is lodged in the Chief Justice to avoid disputes in a council over where to transfer a sensitive matter and to ensure that the transferee council accepts the matter.

Upon receipt of a transferred proceeding, the transferee council shall determine the proper stage at which to begin consideration of the complaint – for

example, reference to the transferee chief judge, appointment of a special committee, etc.

27. Withdrawal of Complaints and Petitions for Review.
(a) Complaint Pending Before Chief Judge.
With the chief judge's consent, a complainant may withdraw a complaint that is before the chief judge for a decision under Rule 11. The withdrawal of a complaint will not prevent a chief judge from identifying or having to identify a complaint under Rule 5 based on the withdrawn complaint.

(b) Complaint Pending before Special Committee or Judicial Council.
After a complaint has been referred to a special committee for investigation and before the committee files its report, the complainant may withdraw the complaint only with the consent of both the subject judge and either the special committee or the judicial council.

(c) Petition for Review.
A petition for review addressed to a judicial council under Rule 18, or the Judicial Conference Committee on Judicial Conduct and Disability under Rule 22 may be withdrawn if no action on the petition has been taken.

Commentary on Rule 27

Rule 27 is adapted from the Illustrative Rules and treats the complaint proceeding, once begun, as a matter of public business rather than as the property of the complainant. Accordingly, the chief judge or the judicial council remains responsible for addressing any complaint under the Act, even a complaint that has been formally withdrawn by the complainant.

Under subsection 27(a), a complaint pending before the chief judge may be withdrawn if the chief judge consents. Where the complaint clearly lacked merit, the chief judge may accordingly be saved the burden of preparing a formal order and supporting memorandum. However, the chief judge may, or be obligated under Rule 5, to identify a complaint based on allegations in a withdrawn complaint.

If the chief judge appoints a special committee, Rule 27(b) provides that the complaint may be withdrawn only with the consent of both the body before which it is pending (the special committee or the judicial council) and the subject judge.

Once a complaint has reached the stage of appointment of a special committee, a resolution of the issues may be necessary to preserve public confidence. Moreover, the subject judge is given the right to insist that the matter be resolved on the merits, thereby eliminating any ambiguity that might remain if the proceeding were terminated by withdrawal of the complaint.

With regard to all petitions for review, Rule 27(c) grants the petitioner unrestricted authority to withdraw the petition. It is thought that the public's interest in the proceeding is adequately protected, because there will necessarily have been a decision by the chief judge and often by the judicial council as well in such a case.

28. Availability of Rules and Forms.
These Rules and copies of the complaint form as provided in Rule 6(a) must be available without charge in the office of the clerk of each court of appeals, district court, bankruptcy court, or other federal court whose judges are subject to the Act. Each court must also make these Rules and the complaint form available on the court's website, or provide an Internet link to the Rules and complaint form that are available on the appropriate court of appeals' website.

29. Effective Date.
These Rules will become effective 30 days after promulgation by the Judicial Conference of the United States.

A P P E N D I X

COMPLAINT FORM

A three-page complaint form follows.

Judicial Council of the Tenth Circuit

COMPLAINT OF JUDICIAL MISCONDUCT OR DISABILITY

To begin the complaint process, complete this form and prepare the brief statement of facts described in item 5 (below). The RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS, adopted by the Judicial Conference of the United States, contain information on what to include in a complaint (Rule 6), where to file a complaint (Rule 7), and other important matters. The rules are available in federal court clerks' offices, on individual federal courts' websites, and on www.ca10.uscourts.gov .

Your complaint (this form and the statement of facts) should be typewritten and must be legible. Pursuant to Tenth Circuit Misconduct Rule 6.3, only one original need be filed. Enclose the complaint in an envelope marked "COMPLAINT OF MISCONDUCT" or "COMPLAINT OF DISABILITY" and submit it to the appropriate clerk of court. **Do not put the name of any judge on the envelope.**

1. Name of Complainant:

Contact Address:

Daytime telephone: ( )

2. Name(s) of Judge(s):

Court:

3. Does this complaint concern the behavior of the judge(s) in a particular lawsuit or lawsuits?

[ ] Yes [ ] No

If "yes," give the following information about each lawsuit:

Court:

Case Number:

Docket number of any appeal to the ____Circuit: _____

Are (were) you a party or lawyer in the lawsuit?

[ ] Party [ ] Lawyer [ ] Neither

If you are (were) a party and have (had) a lawyer, give the lawyer's name, address, and telephone number:

4. Have you filed any lawsuits against the judge?

[ ] Yes [ ] No

If "yes," give the following information about each such lawsuit:

Court:

Case Number:

Present status of lawsuit:

Name, address, and telephone number of your lawyer for the lawsuit against the judge:

Court to which any appeal has been taken in the lawsuit against the judge:

Docket number of the appeal:

Present status of the appeal:

5. Brief Statement of Facts. Attach a brief statement of the specific facts on which the claim of judicial misconduct or disability is based. Include what happened, when and where it happened, and any information that would help an investigator check the facts. If the complaint alleges judicial disability, also include any additional facts that form the basis of that allegation. *See* Tenth Circuit Misconduct Rule 6.1; such statement should be limited to five (5) pages.

6. Declaration and signature:

I declare under penalty of perjury that the statements made in this complaint are true and correct to the best of my knowledge.

(Signature)_____ (Date)_____