

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

RICHARD CUSHING DONOVAN
CLERK

JOHN JOSEPH MOAKLEY
UNITED STATES COURTHOUSE
1 COURTHOUSE WAY, SUITE 2500
BOSTON, MA 02210
(617) 748-9057

NOTICE OF PROPOSED AMENDMENTS TO LOCAL RULES

The United States Court of Appeals for the First Circuit hereby provides notice that it proposes minor amendments to Local Rules 3.0(a)(3) and (b), 10.0(a) and (d), 32.4, 33.0(a)(1), 35.0(d), 40.0(b), and 45.0(a) and (c). The amendments are made to maintain consistency with time-computation amendments to the Federal Rules of Appellate Procedure effective December 1, 2009.

The court also provides notice of amendments to Local Rules 22.1, 22.2, and 48.0(c)(1), addressing certificates of appealability. These amendments are necessary to maintain consistency with amendments to Rule 11 of the Rules Governing Proceedings Under § 2254 or § 2255, and related amendments to Fed. R. App. P. 22(b)(1), effective December 1, 2009. As amended, Rule 11 requires the district judge to rule on the certificate of appealability when a final order issues.

Finally, the court provides notice of the deletion of Local Rule 22.0, an outdated provision regarding certificates of probable cause. The provision is no longer necessary as certificates of appealability have replaced certificates of probable cause for habeas appeals initiated on or after April 24, 1996.

A copy of the relevant provisions of the amended local rules are attached. Deletions are indicated in ~~strike-out~~ print; additions are indicated in *italic* print; and omitted sections are indicated by “* * *”.

The Court of Appeals invites public comments on the proposed amendments. Comments should be submitted by October 28, 2009, and addressed to:

Office of the Clerk
U.S. Court of Appeals for the First Circuit
United States Courthouse
1 Courthouse Way, Suite 2500
Boston, Massachusetts 02210

September 28, 2009

Richard Cushing Donovan, Clerk

Local Rule 3.0. Docketing Statement Required; Dismissals for Want of Diligent Prosecution

- (a) **Docketing Statement Required.** To provide the clerk of the Court of Appeals at the commencement of an appeal with the information needed for effective case management, within 14 days after the case is docketed in the court of appeals, the person or persons taking the appeal must submit a separate statement listing all parties to the appeal, the last known counsel, and last known addresses and email addresses for counsel and unrepresented parties. Errors or omissions in this separate statement alone shall not otherwise affect the appeal if the notice of appeal itself complies with this rule.

* * *

- (3) **Duty of Opposing Party.** If an opposing party concludes that the docketing statement is in any way inaccurate, incomplete, or misleading, the clerk's office must be informed in writing of any errors and any proposed additions or corrections within ~~seven~~ *fourteen* days of service of the docketing statement, with copies to all other parties.
- (b) If appellant does not pay the docket fee within ~~7~~ *14* days of the filing of the notice of appeal, or does not file the docketing statement or any other document within the time set by the court, the appeal may be dismissed for want of diligent prosecution.

Local Rule 10.0. Ordering Transcripts

- (a) **Timely Filing.** Fed. R. App. P. 10(b) requires that the transcript be ordered within ~~10~~ *14* days of the filing of the notice of appeal. Parties are nevertheless urged to order any necessary transcript immediately after the filing of the notice. If the appellant fails to timely order a transcript in writing from the court reporter, the appeal may be dismissed for want of diligent prosecution.

* * *

- (d) **Caveat.** The court is of the opinion that in many cases a transcript is not really needed, and makes for delay and expense, as well as unnecessarily large records. The court urges counsel to endeavor, in appropriate cases, to enter into stipulations that will avoid or reduce transcripts. See Fed. R. App. P. 30(b). However, if an agreed statement of the evidence is contemplated, counsel are reminded of Fed. R. App. P. 10(c) requiring submission to the district court for approval. The ~~ten~~ *fourteen*-day ordering rule will not be suspended because of such activity, however, except by order of the court for good cause shown.
-

Local Rule 22.0. Habeas Corpus; Certificate of Probable Cause

(Local Rule 22.0 is applicable to § 2254 petitions in which the appeal was initiated prior to April 24, 1996. See Slack v. McDaniel, 529 U.S. 473, 120 S.Ct. 1595 (2000).)

Certificate of Probable Cause. In this circuit neither the court nor a judge thereof will initially receive or act on a request for a certificate of probable cause if the district judge who refused the writ is available. The request to the district judge should be made as promptly as possible. If the district judge denies the certificate, and a notice of appeal has been filed, this court will review the district court judge's decision. However, it may decline to make such review unless a memorandum has been filed by the petitioner, either in the district court, or in this court, giving specific reasons and not mere generalizations why such relief should be granted. Ten days after the district court file has been received in this court, the clerk will present the record to the court, with or without a separate request for a certificate of probable cause addressed to that court. If no sufficient memorandum has been filed by that time, the court may deny the certificate without further consideration. The effect of such denial is to terminate the appeal.

Local Rule 22.1 22.0. Habeas Corpus; Certificate of Appealability

(Local Rule 22.1 is applicable to 28 U.S.C. §§ 2254 and 2255 petitions in which the appeal was initiated on or after April 24, 1996. Slack v. McDaniel, 529 U.S. 473, 120 S.Ct. 1595 (2000).)

- (a) *General Procedures: In this circuit, ordinarily neither the court nor a judge thereof will act on a request for a certificate of appealability if the district judge who refused the writ is available and has not ruled first. The general procedures regarding certificates of appealability are set forth in Fed. R. App. P. 22 and Rule 11 of the Rules Governing Proceedings Under 28 U.S.C. § 2254 or § 2255. These latter rules require the district judge to rule on the issuance of a certificate of appealability when a final order issues. If the district court denies a certificate, the petitioner may not appeal the denial but may file a motion for a certificate of appealability before this court. A petitioner wishing to challenge the denial of a § 2254 or § 2255 petition must file a timely notice of appeal whether or not the district court issues a certificate of appealability. In this circuit, ordinarily neither the court nor a judge thereof will initially receive or act on a request for a certificate of appealability if the district judge who refused the writ is available, unless an application has first been made to the district court judge. A petitioner wishing to appeal from the denial of a § 2254 or § 2255 petition must timely file a notice of appeal and should promptly apply to the district court for a certificate of appealability. If the district court grants a certificate of appealability, it must state which issue or issues satisfy the standard set forth in 28 U.S.C. § 2253(c)(2). If the district court denies a certificate of appealability, it must state the reasons why the certificate should not issue.*

Local Rule 22.2 22.1 Habeas Corpus; Successive Petitions

* * *

Local Rule 32.4. Motions for Leave to File Oversized Briefs

The First Circuit encourages short, concise briefs. A motion for leave to file an oversized opening brief must be filed at least ten ~~calendar~~ days in advance of the brief's due date, must specify the additional length sought, and must be supported by a detailed statement of grounds. A motion for leave to file an oversized reply brief must be filed at least seven ~~calendar~~ days in advance. Such motions will be granted only for compelling reasons.

Local Rule 33.0. Civil Appeals Management Plan

Pursuant to Rule 47 of the Federal Rules of Appellate Procedure, the United States Court of Appeals for the First Circuit adopts the following plan to establish a Civil Appeals Management Program, said Program to have the force and effect of a local rule.

(a) Pre-Argument Filing; Ordering Transcript.

- (1) Upon receipt of the Notice of Appeal in the Court of Appeals, the Clerk of the Court of Appeals shall send notice of the Civil Appeals Management Plan to the appellant. Upon receipt of further notice from the Clerk of the Court of Appeals, appellant shall, within ~~ten~~ *fourteen* days:
 - (A) file with the Clerk of the Court of Appeals, and serve on all other parties a statement, in the form of the Docketing Statement required by Local Rule 3.0(a), detailing information needed for the prompt disposition of an appeal;
 - (B) certify and file with the Clerk of the Court of Appeals a statement, in the form required by Local Rule 10.0(b), that satisfactory arrangements have been made with the court reporter for payment of the cost of the transcript.

The Parties shall thereafter provide Settlement Counsel with such information about the appeals as Settlement Counsel may reasonably request.

* * *

Local Rule 35.0. En Banc Determination

* * *

- (d) **Motions for Leave to File Oversized Petitions.** A motion for leave to file a petition in excess of the page length limitations of Fed. R. App. P. 35(b)(2) and Local Rule 35.0(b) must be filed at least five ~~calendar~~ days in advance of the petition's due date, must specify the additional length sought, and must contain a detailed statement of grounds. Such motions will be granted only for compelling reasons.

Local Rule 40.0. Petition for Panel Rehearing

* * *

- (b) **Motions for Leave to File Oversized Petitions.** A motion for leave to file a petition for panel rehearing in excess of the page length limitations of Fed. R. App. P. 40(b) must be filed at least five ~~calendar~~ days in advance of the petition's due date, must specify the additional length sought, and must contain a detailed statement of grounds. Such motions will be granted only for compelling reasons.

Local Rule 45.0. Defaults

- (a) **Appellant.** When a cause is in default as to the filing of the brief for appellant or petitioner, and the appendix, if one is required, the clerk must enter an order dismissing the appeal for want of diligent prosecution. The party in default may have the appeal reinstated upon showing special circumstances justifying the failure to comply with the time limit. The motion to set aside the dismissal must be filed within ~~ten~~ *fourteen* days.

* * *

- (c) **Local Rule 3.0.** Counsel are reminded of Local Rule 3.0 providing for the dismissal of the appeal for want of diligent prosecution if the docket fee is not paid within ~~7~~ *14* days of the filing of the notice of appeal.
-

Local Rule 48.0 Capital Cases

* * *

(c) Certificates of Appealability and Stays

- (1) Certificates of Appealability and Motions for Stays. Certificates of appealability for all habeas matters are addressed in Fed. R. App. P. 22 *and Rule 11 of the Rules Governing Proceedings Under 28 U.S.C. § 2254 or § 2255*. ~~If no express request for a certificate of appealability has been filed in the district or appellate court, a motion for stay of execution or a notice of appeal shall be deemed to constitute such a request.~~
-