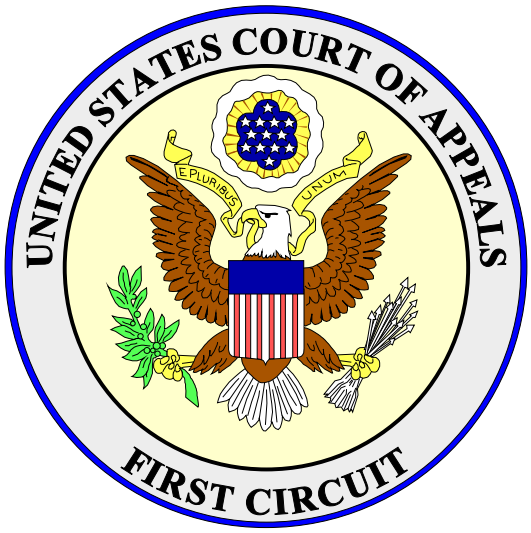
# United States Court of Appeals
## For the First Circuit

# Rulebook




**Federal Rules of Appellate Procedure**

**First Circuit Local Rules**

**First Circuit Internal Operating Procedures**

**Rules of Attorney Disciplinary Enforcement for the Court of Appeals for the First Circuit**

**Rules of the Judicial Council of the First Circuit Governing Complaints of Judicial Misconduct or Disability**

Effective with amendments through February 16, 2007

**Maine ● Massachusetts ● New Hampshire**
**Rhode Island ● Puerto Rico**

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# Judges of the Court

Hon. Michael Boudin, Chief Judge

Hon. Juan R. Torruella, Circuit Judge
Hon. Sandra L. Lynch, Circuit Judge
Hon. Kermit V. Lipez, Circuit Judge
Hon. Jeffrey R. Howard, Circuit Judge

Hon. Levin H. Campbell, Senior Circuit Judge
Hon. Bruce M. Selya, Senior Circuit Judge
Hon. Conrad K. Cyr, Senior Circuit Judge
Hon. Norman H. Stahl, Senior Circuit Judge
Hon. David Souter, Circuit Justice

# Officers of the Court

Richard Cushing Donovan, Clerk of Court
Gary Wente, Circuit Executive
Susan Sullivan, Circuit Librarian
Kathy Lanza, Senior Staff Attorney

# Advisory Committee on Rules

Emily Gray Rice
Samuel Cespedes
John W. McCarthy
Mark Spiegel
Mary K. Ryan
Tracy A. Miner
Deming E. Sherman
Dina Chaitowitz
Miriam Conrad
Arturo J. Garcia

# Schedule of Fees

Issued in accordance with 28 U.S.C. § 1913
Effective January 1, 2007

Following are fees to be charged for services to be provided by courts of appeals. No fees are to be charged for services rendered on behalf of the United States, with the exception of those specifically prescribed in items 2, 4, and 5. No fees under this schedule shall be charged to federal agencies or programs which are funded from judiciary appropriations, including, but not limited to, agencies, organizations, and individuals providing services authorized by the Criminal Justice Act, 18 U.S.C. § 3006A, and Bankruptcy Administrator programs.

(1) For docketing a case on appeal or review, or docketing any other proceeding, $450. A separate fee shall be paid by each party filing a notice of appeal in the district court, but parties filing a joint notice of appeal in the district court are required to pay only one fee. A docketing fee shall not be charged for the docketing of an application for the allowance of an interlocutory appeal under 28 U.S.C. § 1292(b), unless the appeal is allowed. A docketing fee shall not be charged for the docketing of a direct bankruptcy appeal or a direct bankruptcy cross appeal when the fee has been collected by the bankruptcy court in accordance with Item 15 or Item 21 of the Bankruptcy Court Miscellaneous Fee Schedule.

*[Upon filing a notice of appeal, appellant shall pay the clerk of the district court a fee of $455, which includes a $5 filing fee for the notice of appeal, and a $450 fee for docketing the appeal in this court.*
*Upon filing a petition for review of an agency order or a petition for writ of mandamus, petitioner shall pay the prescribed docketing fee of $450, payable to the Clerk, U.S. Court of Appeals, or submit a properly executed application for leave to proceed in forma pauperis.]*

(2) For every search of the records of the court and certifying the results thereof, $26. This fee shall apply to services rendered on behalf of the United States if the information requested is available through electronic access.

(3) For certifying any document or paper, whether the certification is made directly on the document, or by separate instrument, $9.

(4) For reproducing any record or paper, $.50 per page. This fee shall apply to paper copies made from either: (1) original documents; or (2) microfiche or microfilm reproductions of the original records. This fee shall apply to services rendered on behalf of the United States if the record or paper requested is available through electronic access.

(5) For reproduction of recordings of proceedings, regardless of the medium, $26, including the cost of materials. This fee shall apply to services rendered on behalf of the United States if the reproduction of the recording is available electronically.

(6) For reproduction of the record in any appeal in which the requirement of an appendix is dispensed with by any court of appeals pursuant to Rule 30(f), F.R.A.P., a flat fee of $71.

(7) For each microfiche or microfilm copy of any court record, where available, $5.

(8) For retrieval of a record from a Federal Records Center, National Archives, or other storage location removed from the place of business of the court, $45.

(9) For a check paid into the court which is returned for lack of funds, $45.

(10) Fees to be charged and collected for copies of opinions shall be fixed, from time to time, by each court, commensurate with the cost of printing.

*[Opinions may be purchased from the clerk of the court of appeals at a cost of $5 per opinion. Opinions in electronic form are available free of charge from the court's website, www.ca1.uscourts.gov.]*

(11) The court may charge and collect fees commensurate with the cost of providing copies of the local rules of court. The court may also distribute copies of the local rules without charge.

(12) The clerk shall assess a charge for the handling of registry funds deposited with the court, to be assessed from interest earnings and in accordance with the detailed fee schedule issued by the Director of the Administrative Office of the United States Courts.

(13) Upon the filing of any separate or joint notice of appeal or application for appeal from the Bankruptcy Appellate Panel, or notice of the allowance of an appeal from the Bankruptcy Appellate Panel, or of a writ of certiorari, $5 shall be paid by the appellant or petitioner.

(14) The court may charge and collect a fee of $200 per remote location for counsel's requested use of videoconferencing equipment in connection with each oral argument.

(15) For original admission of attorneys to practice, $150 each, including a certificate of admission. For a duplicate certificate of admission or certificate of good standing, $15.

*[The First Circuit collects a local attorney admission fee of $50.00 in addition to the national attorney admission fee of $150.00 imposed by this fee schedule pursuant to 28 U.S.C. § 1913. See 1st Cir. Loc. R. 46.0(a)(1). The payment of the combined fee of $200.00 should be made with one check made payable to "Clerk, United States Court."]*

# Notice to Litigants

To assist litigants in preparing documents that conform to the Federal Rules of Appellate Procedure [Fed. R. App. P.] and the Local Rules of this Court [Loc. R.], the Clerk's Office has compiled a list of **common, but easily avoidable, errors** that often delay the processing of cases and may result in the striking or returning for correction of submitted documents.

**1. Ordering Transcripts**
Requests for transcripts must be made to the court reporter immediately and a copy filed in the district court. The Transcript Order form specified in Local Rule 10.0(b) must be used. Counsel must accurately complete the form and arrange for payment for the Order to be effective. See Loc. R. 10.0.

**2. Form of Briefs**
The parties must carefully comply with the margin, print size and word limit requirements of Fed. R. App. P. 32. **One copy of the brief must be submitted on a computer readable disk.** See Loc. R. 32.0.

**3. Contents of Briefs**
The parties are directed to Fed. R. App. P. 28, which sets forth the contents of briefs. The required sections must be under the appropriate headings and in the order indicated by the rule. The appellant's brief must also include an addendum. See Loc. R. 28.0.

**4. References in Briefs to the Record Required**
To enable the Court to verify the documentary basis of the parties' arguments, factual assertions must be supported by accurate references to the appendix or to the record. Counsel and parties should ensure that transcripts cited in the briefs have been filed and made a part of the record on appeal. The appellant is responsible for preparing an appendix in accordance with Fed. R. App. P. 30 and Loc. R. 30.0, with each page clearly numbered.

**5. Motions to Enlarge Filing Dates or Length of Briefs**
Motions to enlarge time to file briefs or to file briefs in excess of applicable length limitations are discouraged. Any such request must be made by a motion filed well before the expiration of the time limit for filing the brief. See Loc. R. 32.4.

**6. Corporate Disclosure Statement**
Counsel representing corporations must include a corporate disclosure statement as specified in Fed. R. App. P. 26.1 in the first document submitted for filing with the Court, and **again** in front of the table of contents in the party's principal brief. A corporate disclosure statement must be filed even if the party has no information to disclose.

**7. Certificate of Service**
The Court will not consider any motion, brief, or document that has not been served on all parties. Therefore, all documents submitted for filing must contain a statement, preferably attached to the document's last page, indicating: the date of service; the manner of service, and the names and addresses of the persons served. See Fed. R. App. P. 25.

# Federal Rules of Appellate Procedure and First Circuit Local Rules

## TITLE I. APPLICABILITY OF RULES

### Rule 1. Scope of Rules; Title

**(a) Scope of Rules.**

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

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

**(b)** [Abrogated]

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

### Rule 2. Suspension of Rules

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

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

### Rule 3. Appeal as of Right — How Taken

**(a) Filing the Notice of Appeal.**

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

(2) An appellant's failure to take any step other than the timely filing of a notice of appeal does not

affect the validity of the appeal, but is ground only for the court of appeals to act as it considers appropriate, including dismissing the appeal.

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

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

**(b) Joint or Consolidated Appeals.**

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

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

**(c) Contents of the Notice of Appeal.**

(1) The notice of appeal must:

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

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

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

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

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

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

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

**(d) Serving the Notice of Appeal.**

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

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

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

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

***Local Rule 3.0. 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 of filing the notice of appeal, 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 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.*

*(1)* ***Form.*** *Counsel filing an appeal must complete and file a docketing statement, using the form provided by the clerk of the appeals court.*

*(2)* ***Service.*** *A copy of the docketing statement and any attachments must be served on the opposing party or parties at the time the docketing statement is filed.*

*(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 days of service of the docketing statement, with copies to all other parties.*

***(b)*** *If appellant does not pay the docket fee within 7 days of the filing of the notice of appeal, or does not file the docketing statement or any other paper within the time set by the court, the appeal may be dismissed for want of diligent prosecution.*

**Rule 3.1. Appeal from a Judgment of a Magistrate Judge in a Civil Case**
[Abrogated]

**Rule 4. Appeal as of Right — When Taken**

**(a) Appeal in a Civil Case.**

(1) **Time for Filing a Notice of Appeal.**

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

(B) When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

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

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

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

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

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

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

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

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

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

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

(vi) for relief under Rule 60 if the motion is filed no later than 10 days after the judgment is entered.

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

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

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

(5) **Motion for Extension of Time.**

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

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

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

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

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 10 days after the date when the order granting the motion is entered, whichever is later.

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

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

(B) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and

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

(7) **Entry Defined.**

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

(i) if Federal Rule of Civil Procedure 58(a)(1) 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)(1) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

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

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a)(1) does not affect the validity of an appeal from that judgment or order.

**(b) Appeal in a Criminal Case.**

(1) **Time for Filing a Notice of Appeal.**

(A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 10 days after the later of:

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

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

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

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

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

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

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

(A) If a defendant timely makes any of the following motions under the Federal Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within 10 days after the entry of the order disposing of the last such remaining motion, or within 10 days after the entry of the judgment of conviction, whichever period ends later. This provision applies to a timely motion:

(i) for judgment of acquittal under Rule 29;

(ii) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than 10 days after the entry of the judgment; or

(iii) for arrest of judgment under Rule 34.

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

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

(ii) the entry of the judgment of conviction.

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

(4) **Motion for Extension of Time.** Upon a finding of excusable neglect or good cause, the district court may — before or after the time has expired, with or without motion and notice — extend the

time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b).

(5) **Jurisdiction.** The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(c), nor does the filing of a motion under 35(c) 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.

**Rule 5. Appeal by Permission**

**(a) Petition for Permission to Appeal.**

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

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

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

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

(1) The petition must include the following:

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

(B) the question itself;

(C) the relief sought;

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

(E) an attached copy of:

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

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

(2) A party may file an answer in opposition or a cross-petition within 7 days after the petition is served.

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

**(c) Form of Papers; Number of Copies.** All papers must conform to Rule 32(c)(2). Except by the court's permission, a paper must not exceed 20 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 5(b)(1)(E). An original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case.

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

(1) Within 10 days after the entry of the order granting permission to appeal, the appellant must:

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

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

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

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

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

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

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

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

(1) **Applicability of Other Rules.** These rules apply to an appeal to a court of appeals under 28 U.S.C. § 158(d) from a final judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction under 28 U.S.C. § 158(a) or (b). But there are 3 exceptions:

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

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

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

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

(A) **Motion for rehearing.**

(i) If a timely motion for rehearing under Bankruptcy Rule 8015 is filed, the time to appeal for all parties runs from the entry of the order disposing of the motion. A notice of appeal filed after the district court or bankruptcy appellate panel announces or enters a judgment, order, or decree — but before disposition of the motion for rehearing — becomes effective when the order disposing of the motion for rehearing is entered.

(ii) Appellate review of the order disposing of the motion requires the party, in compliance with Rules 3(c) and 6(b)(1)(B), to amend a previously filed notice of appeal. A party intending to challenge an altered or amended judgment, order, or decree must file a notice of appeal or amended notice of appeal within the time prescribed by Rule 4 — excluding Rules 4(a)(4) and 4(b) — measured from the entry of the order disposing of the motion.

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

(B) **The record on appeal.**

(i) Within 10 days after filing the notice of appeal, the appellant must file with the clerk possessing the record assembled in accordance with Bankruptcy Rule 8006 — and serve on the appellee — a statement of the issues to be presented on appeal and a designation of the record to be certified and sent to the circuit clerk.

(ii) An appellee who believes that other parts of the record are necessary must, within 10 days after being served with the appellant's designation, file with the clerk and serve on the appellant a designation of additional parts to be included.

(iii) The record on appeal consists of:

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

(C) **Forwarding the record.**

(i) When the record is complete, the district clerk or bankruptcy appellate panel clerk must number the documents constituting the record and send them promptly to the circuit clerk together with a list of the documents correspondingly numbered and reasonably identified. Unless directed to do so by a party or the circuit clerk, the clerk will not send

to the court of appeals documents of unusual bulk or weight, physical exhibits other than documents, or other parts of the record designated for omission by local rule of the court of appeals. If the exhibits are unusually bulky or heavy, a party must arrange with the clerks in advance for their transportation and receipt.

(ii) All parties must do whatever else is necessary to enable the clerk to assemble and forward the record. The court of appeals may provide by rule or order that a certified copy of the docket entries be sent in place of the redesignated record, but any party may request at any time during the pendency of the appeal that the redesignated record be sent.

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

**Rule 7. Bond for Costs on Appeal in a Civil Case**

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

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

**(a) Motion for Stay.**

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

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

(B) approval of a supersedeas bond; or

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

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

(A) The motion must:

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

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

(B) The motion must also include:

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

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

(iii) relevant parts of the record.

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

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

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

**(b) Proceeding Against a Surety.** If a party gives security in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the district court and irrevocably appoints the district clerk as the surety's agent on whom any papers affecting the surety's liability on the bond or undertaking may be served. On motion, a surety's liability may be enforced in the district court without the necessity of an independent action. The motion and any notice that the district court prescribes may be served on the district clerk, who must promptly mail a copy to each surety whose address is known.

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

**Rule 9. Release in a Criminal Case**

**(a) Release Before Judgment of Conviction.**

(1) The district court must state in writing, or orally on the record, the reasons for an order regarding the release or detention of a defendant in a criminal case. A party appealing from the order must file with the court of appeals a copy of the district court's order and the court's statement of reasons as soon as practicable after filing the notice of appeal. An appellant who questions the

factual basis for the district court's order must file a transcript of the release proceedings or an explanation of why a transcript was not obtained.

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

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

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

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

***Local Rule 9.0. Recalcitrant Witnesses***

***(a)*** *A recalcitrant witness who is held in contempt for refusal to testify is entitled to disposition of the recalcitrant witness's appeal within thirty days if the recalcitrant witness is denied bail, and the government is entitled to equal promptness if bail is granted. The unsuccessful party on the bail issue may waive the thirty day statutory requirement by filing a written waiver with the clerk of this court.*

***(b)*** *The district court shall allow bail, with or without surety, unless the appeal appears frivolous, but a condition shall be the filing of a notice of appeal forthwith, and obedience to all subsequent orders with respect to briefing and argument. Except for cause shown the district court shall not, in any case, order a witness committed for the first forty-eight hours after the date of the order.*

***(c)*** *The appeal shall be docketed immediately, and the district court's order on bail may be reviewed by the court of appeals or a judge thereof.*

**Rule 10. The Record on Appeal**

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

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

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

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

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

(1) **Appellant's Duty to Order.** Within 10 days after filing the notice of appeal or entry of an order disposing of the last timely remaining motion of a type specified in Rule 4(a)(4)(A), whichever is later, the appellant must do either of the following:

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

(i) the order must be in writing;

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

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

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

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

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

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

(B) if the appellee considers it necessary to have a transcript of other parts of the proceedings, the appellee must, within 10 days after the service of the order or certificate and the statement of the issues, file and serve on the appellant a designation of additional parts to be ordered; and

(C) unless within 10 days after service of that designation the appellant has ordered all such parts, and has so notified the appellee, the appellee may within the following 10 days either order the parts or move in the district court for an order requiring the appellant to do so.

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

**(c) Statement of the Evidence When the Proceedings Were Not Recorded or When a Transcript Is Unavailable.** If the transcript of a hearing or trial is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement must be served on the appellee, who may serve objections or proposed amendments within 10 days after being served. The statement and any objections or proposed amendments must then be submitted to the district court for settlement and approval. As settled and approved, the statement must be included by the district clerk in the record on appeal.

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

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

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

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

(A) on stipulation of the parties;

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

(C) by the court of appeals.

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

***Local Rule 10.0. Ordering Transcripts***

***(a) Timely Filing.*** *Fed. R. App. P. 10(b) requires that the transcript be ordered within 10 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.*

***(b)*** ***Transcript Order/Report.*** *A Transcript Order/Report, in the form prescribed by this court, shall be used to satisfy the requirements of Fed. R. App. P. 10(b).*

***(c)*** ***Transcripts under the Criminal Justice Act.*** *If the cost of the transcript is to be paid by the United States under the Criminal Justice Act, counsel must complete and attach CJA form 24 to the Transcript Order/Report so as to satisfy the requirement of Fed. R. App. P. 10(b)(4).*

***(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-day ordering rule will not be suspended because of such activity, however, except by order of the court for good cause shown.*

**Rule 11. Forwarding the Record**

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

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

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

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

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

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

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

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

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

**(d)** [Abrogated]

**(e) Retaining the Record by Court Order.**

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

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

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

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

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

- for dismissal;
- for release;
- for a stay pending appeal;

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

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

***Local Rule 11.0. Transmission of the Record, Sealed Documents***

***(a) Duty of Appellant.*** *In addition to an appellant's duties under Fed. R. App. P. 11(a), it is an appellant's responsibility to see that the record, as certified, is complete.*

***(b) Transmission of Original Papers and Exhibits.*** *The district courts are to transmit the original papers and exhibits when complete without waiting for the filing of the transcript.*

***(c) Sealed Materials.***

*(1)* ***Materials Sealed by District Court or Agency Order.*** *The court of appeals expects that ordinarily motions to seal all or part of a district court or agency record will be presented to, and resolved by, the lower court or agency. Motions, briefs, transcripts, and other materials which were filed with the district court or agency under seal and which constitute part of the record transmitted to the court of appeals shall be clearly labeled as sealed when transmitted to the court of appeals and will remain under seal until further order of court.*

*(2)* ***Motions to Seal in the Court of Appeals.*** *In order to seal in the court of appeals materials not already sealed in the district court or agency (e.g., a brief or unsealed portion of the record), a motion to seal must be filed in the court of appeals; parties cannot seal otherwise public documents merely by agreement or by labeling them "sealed." A motion to seal, which should not itself be filed under seal, must explain the basis for sealing and specify the desired duration of the sealing order. If discussion of confidential material is necessary to support the motion to seal, that discussion shall be confined to an affidavit or declaration, which may be filed provisionally under seal. A motion to seal may be filed before the sealed material is submitted or, alternatively the item to be sealed (e.g., the brief) may be tendered with the motion and, upon request, will be accepted provisionally under seal, subject to the court's subsequent ruling on the motion. Material submitted by a party under seal, provisionally or otherwise must be stamped or labeled by the party on the cover* "FILED UNDER SEAL." *If the court of appeals denies the movant's motion to seal, any materials tendered under provisional seal will be returned to the movant.*

(*3)* ***Limiting Sealed Filings****. Rather than automatically requesting the sealing of an entire brief, motion, or other filing, litigants should consider whether argument relating to sealed materials may be contained in separate supplemental brief, motion, or filing, which may then be sealed in accordance with the procedures in subsection (2).*

***(d) References to Sealed Materials.***

*(1) Records or materials sealed by district court, court of appeals, or agency order shall not be included in the regular appendix, but may be submitted in a separate, sealed supplemental volume of appendix. The sealed supplemental volume must be clearly and prominently labeled by the party on the cover "FILED UNDER SEAL."*

*(2) In addressing material under seal in an unsealed brief or motion or oral argument counsel are expected not to disclose the substance of the sealed material and to apprise the court that the material in question is sealed. If the record contains sealed materials of a sensitive character, counsel would be well advised to alert the court to the existence of such materials and their location by a footnote appended to the "Statement of Facts" caption in the opening or answering brief.*

**Rule 12. Docketing the Appeal; Filing a Representation Statement; Filing the Record**

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

**(b) Filing a Representation Statement.** Unless the court of appeals designates another time, the attorney who filed the notice of appeal must, within 10 days after filing the notice, file a statement with the circuit clerk naming the parties that the attorney represents on appeal.

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

***Local Rule 12.0. Appearance, Withdrawal of Appearance***

***(a) Representation Statement, Appearance.*** *A representation statement must take the form of an appearance, in a form prescribed by this court. Attorneys for both appellant and appellee must file appearance forms within 14 days after the case is docketed in the court of appeals. See also Local Rule 46.0(a). Additional or new attorneys for the parties may enter an appearance outside the 14 day period. However, in no event may any attorney file a notice of appearance without leave of court after the appellee brief has been filed.*

***(b) Withdrawal of Appearance.*** *No attorney who has entered an appearance in this court may withdraw without the consent of the court. An attorney who has represented a defendant in a criminal case in the district court will be responsible for representing the defendant on appeal, whether or not the attorney has entered an appearance in the Court of Appeals, until the attorney is relieved of such duty*

*by the court. Procedures for withdrawal in criminal cases are found in Local Rule 46.6. For requirements applying to court-appointed counsel, reference is made to Loc. R. 46.5, para. (c), the Criminal Justice Plan of this Circuit.*

## TITLE III. REVIEW OF A DECISION OF THE UNITED STATES TAX COURT

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

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

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

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

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

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

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

(1) An appeal from the Tax Court is governed by the parts of Rules 10, 11, and 12 regarding the record on appeal from a district court, the time and manner of forwarding and filing, and the docketing in the court of appeals. References in those rules and in Rule 3 to the district court and district clerk are to be read as referring to the Tax Court and its clerk.

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

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

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

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

**Rule 15. Review or Enforcement of an Agency Order — How Obtained; Intervention**

**(a) Petition for Review; Joint Petition.**

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

(2) The petition must:

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

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

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

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

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

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

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

(2) Within 20 days after the application for enforcement is filed, the respondent must serve on the applicant an answer to the application and file it with the clerk. If the respondent fails to answer in time, the court will enter judgment for the relief requested.

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

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

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

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

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

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

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

**Rule 15.1. Briefs and Oral Argument in a National Labor Relations Board Proceeding**

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

**Rule 16. The Record on Review or Enforcement**

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

(1) the order involved;

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

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

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

**Rule 17. Filing the Record**

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

**(b) Filing — What Constitutes.**

(1) The agency must file:

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

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

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

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

**Rule 18. Stay Pending Review**

**(a) Motion for a Stay.**

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

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

(A) The motion must:

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

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

(B) The motion must also include:

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

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

(iii) relevant parts of the record.

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

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

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

**Rule 19. Settlement of a Judgment Enforcing an Agency Order in Part**

When the court files an opinion directing entry of judgment enforcing the agency's order in part, the agency must within 14 days file with the clerk and serve on each other party a proposed judgment conforming to the opinion. A party who disagrees with the agency's proposed judgment must within 7 days file with the clerk and serve the agency with a proposed judgment that the party believes conforms to the opinion. The court will settle the judgment and direct entry without further hearing or argument.

**Rule 20. Applicability of Rules to the Review or Enforcement of an Agency Order**

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

## TITLE V. EXTRAORDINARY WRITS

### Rule 21. Writs of Mandamus and Prohibition, and Other Extraordinary Writs

**(a) Mandamus or Prohibition to a Court: Petition, Filing, Service, and Docketing.**

(1) A party petitioning for a writ of mandamus or prohibition directed to a court must file a petition with the circuit clerk with proof of service on all parties to the proceeding in the trial court. The party must also provide a copy to the trial-court judge. All parties to the proceeding in the trial court other than the petitioner are respondents for all purposes.

(2) (A) The petition must be titled "In re [name of petitioner]."

(B) The petition must state:

(i) the relief sought;

(ii) the issues presented;

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

(iv) the reasons why the writ should issue.

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

(3) Upon receiving the prescribed docket fee, the clerk must docket the petition and submit it to the court.

**(b) Denial; Order Directing Answer; Briefs; Precedence.**

(1) The court may deny the petition without an answer. Otherwise, it must order the respondent, if any, to answer within a fixed time.

(2) The clerk must serve the order to respond on all persons directed to respond.

(3) Two or more respondents may answer jointly.

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

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

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

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

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

**(d) Form of Papers; Number of Copies.** All papers must conform to Rule 32(c)(2). Except by the court's permission, a paper must not exceed 30 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 21(a)(2)(C). An original and 3 copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.

***Local Rule 21.0. Petitions for Special Writs***

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

## TITLE VI. HABEAS CORPUS; PROCEEDINGS IN FORMA PAUPERIS

### Rule 22. Habeas Corpus and Section 2255 Proceedings

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

**(b) Certificate of Appealability.**

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C.

§ 2253(c). If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue. The district clerk must send the certificate or statement to the court of appeals with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.

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

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

***Local Rule 22.0. 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. 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 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.*

***(b) Denial in Full by District Court:*** *If the district court denies a certificate of appealability, the petitioner should promptly apply within the time set by the clerk to the court of appeals for issuance of a certificate of appealability. The motion should be accompanied by a copy of the district court's order and a memorandum giving specific and substantial reasons, and not mere generalizations, why a certificate should be granted. If no sufficient memorandum has been filed by the time set by the clerk, the certificate may be denied without further consideration. The effect of a denial is to terminate the appeal.*

***(c) Partial Denial by District Court:***

*(1) If the district court grants a certificate of appealability as to one or more issues, the petitioner's appeal shall go forward only as to the issue or issues for which the district court granted the certificate. See Grant-Chase v. Commissioner, 145 F.3d 431 (1st Cir. 1998).*

*(2) If the petitioner wants appellate review of an issue or issues as to which the district court has denied a certificate of appealability, petitioner must apply promptly, within the time set by the clerk of the court of appeals, to the court of appeals for an expanded certificate of appealability. The request for an expanded certificate of appealability:*

*(A) must be explicit as to the additional issues the petitioner wishes the court to consider and*

*(B) should be accompanied by a copy of the district court order and a memorandum giving specific and substantial reasons, and not mere generalizations, why an expanded certificate of appealability should be granted.*

*If the petitioner fails to apply for an expanded certificate of appealability within the time designated by the clerk, the appeal will proceed only with respect to the issues on which the district court has granted a certificate; this court will not treat an inexplicit notice of appeal, without more, as a request for a certificate of appealability with respect to issues on which the district court has denied a certificate.*

***(d) Grant in Full by District Court:*** *If the district court grants a certificate of appealability on all issues, the petitioner's appeal shall go forward. See Grant-Chase v. Commissioner, 145 F.3d 431 (1st Cir. 1998).*

***Local Rule 22.2. Habeas Corpus; Successive Petitions***

***(a) Motion for Authorization.*** *Any petitioner seeking to file a second or successive petition for relief pursuant to 28 U.S.C. §§ 2254 or 2555 must first file a motion with this court for authorization. A*

*motion for authorization to file a second or successive § 2254 or § 2255 petition must be sufficiently complete on filing to allow the court to assess whether the standard set forth in 28 U.S.C. §§ 2244(b) or 2255, as applicable, has been satisfied. The motion must be accompanied by both:*

*(1) a completed application form, available from this court, stating the new claims(s) presented and addressing how Section 2244(b) or Section 2255's standard is satisfied; and*

*(2) copies of all relevant portions of earlier court proceedings, which must ordinarily include:*

*(A) copies of all §2254 or §2255 petitions earlier filed;*

*(B) the respondent's answer to the earlier petitions (including any portion of the state record the respondent submitted to the district court);*

*(C) any magistrate-judge's report and recommendation in the earlier §2254 or §2255 proceedings;*

*(D) the district court's decision in the earlier proceedings; and*

*(E) the portions of the state court record needed to evaluate the claims presented and to show that movant has exhausted state court remedies.*

***(b) Incomplete Motion.*** *Failure to provide the requisite application and attachments may result in the denial of the motion for authorization with or without prejudice to refiling. At its discretion, the court may instead treat the motion as lodged, the filing being deemed complete when the deficiency is remedied.*

***(c) Service.*** *The movant shall serve a copy of the motion to file a second or successive petition and all accompanying attachments on the state attorney general (§ 2254 cases) or United States Attorney for the federal judicial district in which movant was convicted (§ 2255 cases) and shall comply with Fed. R. App. P. 25.*

***(d) Response****. The state attorney general (§ 2254 cases) or United States Attorney (§ 2255 cases) is requested to file a response within 14 days of the filing of the motion.*

***(e) Transfer****. If a second or successive § 2254 or § 2255 petition is filed in a district court without the requisite authorization by the court of appeals pursuant to 28 U.S.C. § 2244(b)(3), the district court will transfer the petition to the court of appeals pursuant to 28 U.S.C. § 1631 or dismiss the petition. If the petition is transferred, the petitioner must file a motion meeting the substantive requirements of Loc. R. 22.2(a) within 45 days of the date of notice from the clerk of the court of appeals that said motion is required. If the motion is not timely filed, the court will enter an order denying authorization for the § 2254 or § 2255 petition.*

**Rule 23. Custody or Release of a Prisoner in a Habeas Corpus Proceeding**

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

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

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

(2) detained in other appropriate custody; or

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

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

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

**Rule 24. Proceeding in Forma Pauperis**

**(a) Leave to Proceed in Forma Pauperis.**

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

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

(B) claims an entitlement to redress; and

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

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

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

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

(B) a statute provides otherwise.

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

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

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

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

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

**(b) Leave to Proceed in Forma Pauperis on Appeal or Review of an Administrative-Agency Proceeding.** When an appeal or review of a proceeding before an administrative agency, board, commission, or officer (including for the purpose of this rule the United States Tax Court) proceeds directly in a court of appeals, a party may file in the court of appeals a motion for leave to proceed on appeal in forma pauperis with an affidavit prescribed by Rule 24(a)(1).

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

## TITLE VII. GENERAL PROVISIONS

### Rule 25. Filing and Service

**(a) Filing.**

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

(2) **Filing: Method and Timeliness.**

(A) **In general.** Filing may be accomplished by mail addressed to the clerk, but filing is not timely unless the clerk receives the papers within the time fixed for filing.

(B) **A brief or appendix.** A brief or appendix is timely filed, however, if on or before the last day for filing, it is:

(i) mailed to the clerk by First-Class Mail, or other class of mail that is at least as expeditious, postage prepaid; or

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

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

(D) **Electronic filing.** A court of appeals may by local rule permit 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.

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

**(c) Manner of Service.**

(1) Service may be any of the following:

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

(B) by mail;

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

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

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

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

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

**(d) Proof of Service.**

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

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

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

(i) the date and manner of service;

(ii) the names of the persons served; and

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

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

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

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

***Local Rule 25.0. Facsimile Filing***

*The Clerk of Court is authorized to accept for filing papers transmitted by facsimile equipment in situations determined by the Clerk to be of an emergency nature or other compelling circumstances, subject to such procedures for follow-up filing of hard copies, or otherwise, as the Clerk may from time to time specify.*

**Rule 26. Computing and Extending Time**

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

(1) Exclude the day of the act, event, or default that begins the period.

(2) Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days, unless stated in calendar days.

(3) Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or — if the act to be done is filing a paper in court — a day on which the weather or other conditions make the clerk's office inaccessible.

(4) As used in this rule, "legal holiday" means New Year's Day, Martin Luther King, Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day, and any other day declared a holiday by the President, Congress, or the state in which is located either the district court that rendered the challenged judgment or order, or the circuit clerk's principal office.

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

extend the time to file:

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

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

**(c) Additional Time after Service.** When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service.

**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.

**Rule 27. Motions**

**(a) In General.**

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

(2) **Contents of a Motion.**

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

(B) **Accompanying documents.**

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

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

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

(C) **Documents barred or not required.**

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

(ii) A notice of motion is not required.

(iii) A proposed order is not required.

(3) **Response.**

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

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

(4) **Reply to Response.** Any reply to a response must be filed within 5 days after service of the response. A reply must not present matters that do not relate to the response.

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

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

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

(1) **Format.**

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

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

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

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

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

(2) **Page Limits.** A motion or a response to a motion must not exceed 20 pages, exclusive of the corporate disclosure statement and accompanying documents authorized by Rule 27(a)(2)(B), unless the court permits or directs otherwise. A reply to a response must not exceed 10 pages.

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

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

***Local Rule 27.0. Motions***

***(a) Assent.*** *Motions will not necessarily be allowed even though assented to.*

***(b) Emergency Relief****. Motions for stay, or other emergency relief, may be denied for failure to present promptly. Counsel who envisages a possible need for an emergency filing, or emergency action by the court, or both, during a period when the Clerk's Office is ordinarily closed should consult with the Clerk's Office at the earliest opportunity. Failure to consult with the Clerk's Office well in advance of the occasion may preclude such special arrangements.*

***(c) Summary Disposition.*** *At any time, on such notice as the court may order, on motion of appellee or sua sponte, the court may dismiss the appeal or other request for relief or affirm and enforce the judgment or order below if the court lacks jurisdiction, or if it shall clearly appear that no substantial question is presented. In case of obvious error the court may, similarly, reverse. Motions for such relief should be promptly filed when the occasion appears, and must be accompanied by four copies of a memorandum or brief.*

***(d) Motions Decided by the Clerk.*** *The clerk is authorized to dispose of certain routine, procedural motions in accordance with the Court's standing instructions. Any party adversely affected by the action of the clerk on a motion may promptly move for reconsideration. Unless the clerk grants reconsideration, the motion for reconsideration will be submitted to a single judge or panel. See Internal Operating Procedure V(C).*

**Rule 28. Briefs**

**(a) Appellant's Brief.** The appellant's brief must contain, under appropriate headings and in the order indicated:

(1) a corporate disclosure statement if required by Rule 26.1;

(2) a table of contents, with page references;

(3) a table of authorities — cases (alphabetically arranged), statutes, and other authorities — with references to the pages of the brief where they are cited;

(4) a jurisdictional statement, including:

(A) the basis for the district court's or agency's subject-matter jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

(B) the basis for the court of appeals' jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

(C) the filing dates establishing the timeliness of the appeal or petition for review; and

(D) an assertion that the appeal is from a final order or judgment that disposes of all parties' claims, or information establishing the court of appeals' jurisdiction on some other basis;

(5) a statement of the issues presented for review;

(6) a statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below;

(7) a statement of facts relevant to the issues submitted for review with appropriate references to the record (see Rule 28(e));

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

(9) the argument, which must contain:

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

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

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

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

**(b) Appellee's Brief.** The appellee's brief must conform to the requirements of Rule 28(a)(1)-(9) and (11), except that none of the following need appear unless the appellee is dissatisfied with the appellant's statement:

(1) the jurisdictional statement;

(2) the statement of the issues;

(3) the statement of the case;

(4) the statement of the facts; and

(5) the statement of the standard of review.

**(c) Reply Brief.** The appellant may file a brief in reply to the appellee's brief. 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.

***Local Rule 28.0. Addendum to Briefs Required***

*(a)* ***Contents.*** *In addition to the requirements of Fed. R. App. P. 28, for the court's convenience, the brief of the appellant must include an addendum containing the following items:*

*(1)* ***Required.*** *The judgments, decisions, rulings, or orders appealed from, including any supporting explanation (e.g., a written or transcript opinion), and in addition, where the district court or agency whose decision is under review was itself reviewing or acting upon the decision of a lower-level decision-maker, that lower-level decision as well (e.g., a recommended decision by a magistrate judge or an initial decision by an administrative law judge).*

*Note: If the decision appealed from is a text-only entry upon a docket report, a copy of the relevant entry or page of the docket report should be provided.*

*(2)* ***Optional, but encouraged.*** *The addendum may also include other items or short excerpts from the record that are either the subject of an issue on appeal (e.g., disputed jury instructions or disputed contractual provisions) or necessary for understanding the specific issues on appeal, up to 25 pages in total. Statutes, rules, regulations, etc. included as part of the addendum pursuant to Fed. R. App. P. 28(f) do not count towards this page limit.*

*(b)* ***Form.*** *The addendum shall be bound at the rear of the appellant's brief. The addendum must begin with a table of contents identifying the page at which each part begins.*

*(1) The appellee's brief may include such an addendum to incorporate materials omitted from the appellant's addendum, subject to the same limitations on length and content.*

*(2) Material included in the addendum need not be reproduced in the appendix also.*

*(c)* ***Sealed Items.*** *Notwithstanding the above, sealed or non-public items - - including a presentence investigation report or statement of reasons in a judgment of criminal conviction - - should not be included in a public addendum. Rather, where sealed items are to be included, they should be filed in a separate, sealed addendum.*

***Local Rule 28.1. References in Briefs to Sealed Material***

*Briefs filed with the court of appeals are a matter of public record. In order to have a brief sealed, counsel must file a specific and timely motion in compliance with Local Rule 11.0(c)(2) and (3) asking the court to seal a brief or supplemental brief. Counsel must also comply with Local Rule 11.0(d), when applicable.*

**Rule 28.1. Cross-Appeals**

**(a) Applicability.** This rule applies to a case in which a cross-appeal is filed. Rules 28(a)-(c), 31(a)(1), 32(a)(2), and 32(a)(7)(A)-(B) do not apply to such a case, except as otherwise provided in this rule.

**(b) Designation of Appellant.** The party who files a notice of appeal first is the appellant for the purposes of this rule and Rules 30 and 34. If notices are filed on the same day, the plaintiff in the proceeding below is the appellant. These designations may be modified by the parties' agreement or by court order.

**(c) Briefs.** In a case involving a cross-appeal:

(1) **Appellant's Principal Brief.** The appellant must file a principal brief in the appeal. That brief must comply with Rule 28(a).

(2) **Appellee's Principal and Response Brief.** The appellee must file a principal brief in the cross-appeal and must, in the same brief, respond to the principal brief in the appeal. That appellee's brief must comply with Rule 28(a), except that the brief need not include a statement of the case or a statement of the facts unless the appellee is dissatisfied with the appellant's statement.

(3) **Appellant's Response and Reply Brief.** The appellant must file a brief that responds to the principal brief in the cross-appeal and may, in the same brief, reply to the response in the appeal. That brief must comply with Rule 28(a)(2)-(9) and (11), except that none of the following need appear unless 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;

(D) the statement of the facts; and

(E) the statement of the standard of review.

(4) **Appellee's Reply Brief.** The appellee may file a brief in reply to the response in the cross-appeal. That brief must comply with Rule 28(a)(2)-(3) and (11) and must be limited to the issues presented by the cross-appeal.

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

**(d) Cover.** Except for filings by unrepresented parties, the cover of the appellant's principal brief must be blue; the appellee's principal and response brief, red; the appellant's response and reply brief, yellow; the appellee's reply brief, gray; an intervenor's or amicus curiae's brief, green; and any supplemental brief, tan. The front cover of a brief must contain the information required by Rule 32(a)(2).

**(e) Length.**

(1) **Page Limitation.** Unless it complies with Rule 28.1(e)(2) and (3), the appellant's principal brief must not exceed 30 pages; the appellee's principal and response brief, 35 pages; the appellant's response and reply brief, 30 pages; and the appellee's reply brief, 15 pages.

(2) **Type-Volume Limitation.**

(A) The appellant's principal brief or the appellant's response and reply brief is acceptable if:

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

(ii) it uses a monospaced face and contains no more than 1,300 lines of text.

(B) The appellee's principal and response brief is acceptable if:

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

(ii) it uses a monospaced face and contains no more than 1,500 lines of text.

(C) The appellee's reply brief is acceptable if it contains no more than half of the type volume specified in Rule 28.1(e)(2)(A).

(3) **Certificate of Compliance.** A brief submitted under Rule 28.1(e)(2) must comply with Rule 32(a)(7)(C).

**(f) Time to Serve and File a Brief.** Briefs must be served and filed as follows:

(1) the appellant's principal brief, within 40 days after the record is filed;

(2) the appellee's principal and response brief, within 30 days after the appellant's principal brief is served;

(3) the appellant's response and reply brief, within 30 days after the appellee's principal and response brief is served; and

(4) the appellee's reply brief, within 14 days after the appellant's response and reply brief is served, but at least 3 days before argument unless the court, for good cause, allows a later filing.

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

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

**(b) Motion for Leave to File.** The motion must be accompanied by the proposed brief and state:

(1) the movant's interest; and

(2) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.

**(c) Contents and Form.** An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. If an amicus curiae is a corporation, the brief must include a disclosure statement like that required of parties by Rule 26.1. An amicus brief need not comply with Rule 28, but must include the following:

(1) a table of contents, with page references;

(2) a table of authorities — cases (alphabetically arranged), statutes and other authorities — with references to the pages of the brief where they are cited;

(3) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;

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

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

**(d) Length.** Except by the court's permission, an amicus brief may be no more than one-half the maximum length authorized by these rules for a party's principal brief. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.

**(e) Time for Filing.** An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's or petitioner's principal brief is filed. A court may grant leave for later filing, specifying the time within which an opposing party may answer.

**(f) Reply Brief.** Except by the court's permission, an amicus curiae may not file a reply brief.

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

**Rule 30. Appendix to the Briefs**

**(a) Appellant's Responsibility.**

(1) **Contents of the Appendix.** The appellant must prepare and file an appendix to the briefs containing:

(A) the relevant docket entries in the proceeding below;

(B) the relevant portions of the pleadings, charge, findings, or opinion;

(C) the judgment, order, or decision in question; and

(D) other parts of the record to which the parties wish to direct the court's attention.

(2) **Excluded Material.** Memoranda of law in the district court should not be included in the appendix unless they have independent relevance. Parts of the record may be relied on by the court or the parties even though not included in the appendix.

(3) **Time to File; Number of Copies.** Unless filing is deferred under Rule 30(c), the appellant must file 10 copies of the appendix with the brief and must serve one copy on counsel for each party separately represented. An unrepresented party proceeding in forma pauperis must file 4 legible copies with the clerk, and one copy must be served on counsel for each separately represented party. The court may by local rule or by order in a particular case require the filing or service of a different number.

**(b) All Parties' Responsibilities.**

(1) **Determining the Contents of the Appendix.** The parties are encouraged to agree on the contents of the appendix. In the absence of an agreement, the appellant must, within 10 days after the record is filed, serve on the appellee a designation of the parts of the record the appellant intends to include in the appendix and a statement of the issues the appellant intends to present for review. The appellee may, within 10 days after receiving the designation, serve on the appellant a designation of additional parts to which it wishes to direct the court's attention. The appellant must include the designated parts in the appendix. The parties must not engage in unnecessary designation of parts of the record, because the entire record is available to the court. This paragraph applies also to a cross-appellant and a cross-appellee.

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

**(c) Deferred Appendix.**

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

(2) **References to the Record.**

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

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

**(d) Format of the Appendix.** The appendix must begin with a table of contents identifying the page at which each part begins. The relevant docket entries must follow the table of contents. Other parts of the record must follow chronologically. When pages from the transcript of proceedings are placed in the appendix, the transcript page numbers must be shown in brackets immediately before the included pages. Omissions in the text of papers or of the transcript must be indicated by asterisks. Immaterial formal matters (captions, subscriptions, acknowledgments, etc.) should be omitted.

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

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

***Local Rule 30.0. Appendix to the Briefs***

***(a) Number of Copies.*** *Pursuant to Fed. R. App. P. 30(a)(3), only five (5) copies of the appendix need be filed with the clerk and on motion, for cause shown, parties may be allowed to file even fewer copies.*

***(b) Filing of Designation.*** *One copy of any designation, statement of issues, or counter-designation served pursuant to Fed. R. App. P. 30(b), or any notice of agreement thereunder, shall be simultaneously filed with the clerk.*

***(c) In Forma Pauperis.*** *All appeals proceeding in forma pauperis shall be considered on the record on appeal as certified by the clerk of the district court without the necessity of filing an appendix unless otherwise ordered by this court in a specific case.*

***(d) Translations.*** *The court will not receive documents not in the English language unless translations are furnished. Whenever an opinion of the Supreme Court of Puerto Rico is cited in a brief or oral argument which does not appear in the bound volumes in English, an official, certified or stipulated translation thereof with three conformed copies shall be filed. Partial translations will be accepted if stipulated by the parties or if submitted by one party not less than 30 days before the oral argument. Where partial translations are submitted by one party, opposing parties may, prior to oral argument, submit translations of such additional parts as they may deem necessary for a proper understanding of the holding.*

***(e) Sanctions.*** *This court may impose sanctions against attorneys who unreasonably and vexatiously increase litigation costs by including unnecessary material in the appendix as provided for in Local Rule 38.0.*

***(f) Inclusion of Sealed Material in Appendices.*** *Appendices filed with the court of appeals are a matter of public record. If counsel conclude that it is necessary to include sealed material in appendix form, then, in order to maintain the confidentiality of materials filed in the district court or agency under seal, counsel must designate the sealed material for inclusion in a supplemental appendix to be filed separately from the regular appendix and must file a specific and timely motion in compliance with Local Rules 11.0(c)(2), 11.0(c)(3), and 11.0(d) asking the court to seal the supplemental appendix.*

**Rule 31. Serving and Filing Briefs**

**(a) Time to Serve and File a Brief.**

(1) The appellant must serve and file a brief within 40 days after the record is filed. The appellee must serve and file a brief within 30 days after the appellant's brief is served. The appellant may serve and file a reply brief within 14 days after service of the appellee's brief but a reply brief must be filed at least 3 days before argument, unless the court, for good cause, allows a later filing.

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

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

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

***Local Rule 31.0. Filing Briefs***

***(a) Time to File a Brief.***

*(1) Briefing schedules will be set in accordance with Fed. R. App. P. 31(a) except that a reply brief must be filed within 14 days after service of the brief of the appellee. A reply brief may be*

*rejected by the court if it contains matter repetitive of the main brief, or which, in the opinion of the court, should have been in the main brief.*

*(2) Unavailability of the transcript shall constitute cause for granting extensions, subject, however, to the provisions of Local Rule 10.0, ante.*

***(b) Number of copies**. Only 10 copies of briefs need be filed with the clerk and on motion for cause shown, parties may be allowed to file even fewer copies. The disk required by Local Rule 32.0 constitutes one copy for the purpose of this rule.*

**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 a monospaced face may be used.

(A) A proportionally spaced face must include serifs, but sans-serif type may be used in headings and captions. A proportionally spaced face must be 14-point or larger.

(B) A monospaced face may not contain more than 10½ characters per inch.

(6) **Type Styles.** A brief must be set in a plain, roman style, although italics or boldface may be used for emphasis. Case names must be italicized or underlined.

(7) **Length.**

(A) **Page limitation.** A principal brief may not exceed 30 pages, or a reply brief 15 pages, unless it complies with Rule 32(a)(7)(B) and (C).

(B) **Type-volume limitation.**

(i) A principal brief is acceptable if:

- it contains no more than 14,000 words; or
- it uses a monospaced face and contains no more than 1,300 lines of text.

(ii) A reply brief is acceptable if it contains no more than half of the type volume specified in Rule 32(a)(7)(B)(I).

(iii) Headings, footnotes, and quotations count toward the word and line limitations. The corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, any addendum containing statutes, rules or regulations, and any certificates of counsel do not count toward the limitation.

(C) **Certificate of compliance.**

(i) A brief submitted under Rules 28.1(e)(2) or 32(a)(7)(B) must include a certificate by the attorney, or an unrepresented party, that the brief complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the brief. The certificate must state either:

- the number of words in the brief; or

- the number of lines of monospaced type in the brief.

(ii) Form 6 in the Appendix of Forms is a suggested form of a certificate of compliance. Use of Form 6 must be regarded as sufficient to meet the requirements of Rules 28.1(e)(3) and 32(a)(7)(C)(I).

**(b) Form of an Appendix.** An appendix must comply with Rule 32(a)(1), (2), (3), and (4), with the following exceptions:

(1) The cover of a separately bound appendix must be white.

(2) An appendix may include a legible photocopy of any document found in the record or of a printed judicial or agency decision.

(3) When necessary to facilitate inclusion of odd-sized documents such as technical drawings, an appendix may be a size other than 8 ½ by 11 inches, and need not lie reasonably flat when opened.

**(c) Form of Other Papers.**

(1) **Motion.** The form of a motion is governed by Rule 27(d).

(2) **Other Papers.** Any other paper, including a petition for panel rehearing and a petition for hearing or rehearing en banc, and any response to such a petition, must be reproduced in the manner prescribed by Rule 32(a), with the following exceptions:

(A) A cover is not necessary if the caption and signature page of the paper together contain the information required by Rule 32(a)(2). If a cover is used, it must be white.

(B) Rule 32(a)(7) does not apply.

**(d) Signature.** Every brief, motion, or other paper filed with the court must be signed by the party filing the paper or, if the party is represented, by one of the party's attorneys.

**(e) Local Variation.** Every court of appeals must accept documents that comply with the form requirements of this rule. By local rule or order in a particular case a court of appeals may accept documents that do not meet all of the form requirements of this rule.

***Local Rule 32.0. Briefs, Petitions for Rehearing, and Other Papers: Computer Generated Disk Requirement***

***(a)*** *Where a party is represented by counsel, one copy of its brief, petition for rehearing, and, in addition, all other papers exceeding 10 pages in length must be submitted on a computer readable disk. The disk shall be filed at the time the party's paper filing is made. The brief on disk must be accompanied by nine paper copies of the brief. The disk shall contain the entire brief exclusive of computer non-generated appendices. The label of the disk shall include the case name and docket number and identify the brief being filed (i.e. appellant's brief, appellee's brief, appellant's reply brief, etc.) and the file format utilized.*

***(b)*** *The brief, petition for rehearing, and, in addition, all other papers exceeding 10 pages in length must be in WordPerfect on a Windows-based 3 ½" disk, CD, or DVD.*

***(c)*** *One copy of the disk may be served on each party separately represented by counsel. If a party chooses to serve a copy of the disk, the certificate of service must indicate service of the brief, petition for rehearing, and, in addition, all other papers exceeding 10 pages in length in both paper and electronic format.*

***(d)*** *A party may be relieved from filing and service under this rule by submitting a motion, within fourteen days after the date of the notice establishing the party's initial briefing schedule, certifying that compliance with the rule would impose undue hardship, that the text of the brief, petition for rehearing, and, in addition, all other papers exceeding 10 pages in length or other papers exceeding 10 pages in length is not available on disk, or that other unusual circumstances preclude compliance with this rule. The requirements of this rule shall not apply to parties appearing pro se. Briefs, petitions for rehearing, and, in addition, all other papers exceeding 10 pages in length or other papers exceeding 10 pages in length tendered by counsel after January 1, 1998 without a computer disk copy or court-approved waiver of the requirements of this rule may be rejected by the clerk's office.*

***Local Rule 32.2 Citation of State Decisions and Law Review Articles***

*All citations to State or Commonwealth Courts must include both the official state court citation and the National Reporter System citation when such decisions have been published in both reports; e.g., Coney v. Commonwealth, 364 Mass. 137, 301 N.E.2d 450 (1973). Law review or other articles unpublished at the time a brief or memorandum is filed may not be cited therein, except with permission of the court.*

***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.*

**Rule 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.

***Local Rule 32.1.0 Citation of Unpublished Dispositions***

***(a) Disposition of this court.*** *An unpublished judicial opinion, order, judgment or other written disposition of this court may be cited regardless of the date of issuance. The court will consider such dispositions for their persuasive value but not as binding precedent. A party must note in its brief or other filing that the disposition is unpublished. The term "unpublished" as used in this subsection and Local Rule 36.0(c) refers to a disposition that has not been selected for publication in the West Federal Reporter series, e.g., F., F.2d, and F.3d.*

***(b) Dispositions of other courts.*** *The citation of dispositions of other courts is governed by Fed. R. App. P. 32.1 and the local rules of the issuing court. Notwithstanding the above, unpublished or non-precedential dispositions of other courts may always be cited to establish a fact about the case before the court (for example, its procedural history) or when the binding or preclusive effect of the opinion, rather than its quality as precedent, is relevant to support a claim of res judicata, collateral estoppel, law of the case, double jeopardy, abuse of the writ, or other similar doctrine.*

**Rule 33. Appeal Conferences**

The court may direct the attorneys — and, when appropriate, the parties — to participate in one or more conferences to address any matter that may aid in disposing of the proceedings, including simplifying the issues and discussing settlement. A judge or other person designated by the court may preside over the conference, which may be conducted in person or by telephone. Before a settlement conference, the attorneys must consult with their clients and obtain as much authority as feasible to settle the case. The court may, as a result of the conference, enter an order controlling the course of the proceedings or implementing any settlement agreement.

***Local Rule 33.0. 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 days:*

*(A) file with the Clerk of the Court of Appeals, and serve on Settlement Counsel and 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.*

*(2) Nothing herein shall alter the duty to order from the court reporter, promptly upon filing of the Notice of Appeal in the District Court, a transcript of the proceedings pursuant to Fed. R. App. P. Rule 10(b).*

***(b) Pre-Argument Conference; Pre-Argument Conference Order.***

*(1) In cases where he may deem this desirable, the Settlement Counsel, who shall be appointed by the Court of Appeals, may direct the attorneys, and in certain cases the clients, to attend a pre-*

*argument conference to be held as soon as practicable before him or a judge designated by the Chief Judge to consider the possibility of settlement, the simplification of the issues, and any other matters which the Settlement Counsel determines may aid in the handling or the disposition of the proceeding.*

*(2) At the conclusion of the conference, the Settlement Counsel shall consult with the Clerk concerning the Clerk's entry of a Conference Order which shall control the subsequent course of the proceeding.*

***(c) Confidentiality.*** *The Settlement Counsel shall not disclose the substance of the Pre-argument Conference, nor report on the same, to any person or persons whomsoever (including, but not limited to, any judge). The attorneys are likewise prohibited from disclosing any substantive information emanating from the conference to anyone other than their clients or co-counsel; and then only upon receiving due assurance that the recipients will honor the confidentiality of the information. See In re Lake Utopia Paper Ltd., 608 F.2d 928 (1st Cir. 1979). The fact of the conference having taken place, and the bare result thereof (e.g., "settled," "not settled," "continued"), including any resulting Conference Order, shall not be considered to be confidential.*

***(d) Non-Compliance Sanctions.*** *If the appellant has not taken each of the actions set forth in section (a) of this Program, or in the Conference Order, within the time therein specified, the appeal may be dismissed by the Clerk without further notice.*

***(e) Grievances.*** *Any grievances as to the handling of any case under the Program will be addressed by the Court of Appeals, and should be sent to the Circuit Executive, One Courthouse Way, Suite 3700, Boston, MA 02210, who will hold them confidential on behalf of the Court of Appeals unless release is authorized by the complainant.*

***(f) Scope of Program.*** *The Program will include all civil appeals and review of administrative orders, except the following: It will not include original proceedings (such as petitions for mandamus), prisoner petitions, habeas corpus petitions, summary enforcement actions of the National Labor Relations Board or any pro se cases. Nothing herein shall prevent any judge or panel, upon motion or sua sponte, from referring any matter to the Settlement Counsel at any time.*

*The foregoing Civil Appeals Management Program shall be applicable to all such cases as set forth above, arising from the District Courts in the Districts of Maine, New Hampshire, Massachusetts, and Rhode Island, in which the Notice of Appeal is received in the Court of Appeals on or after January 1, 1992; and all such cases arising from the District Court in the District of Puerto Rico, in which the Notice of Appeal is received in the Court of Appeals on or after January 1, 1993.*

**Rule 34. Oral Argument**

**(a) In General.**

(1) **Party's Statement.** Any party may file, or a court may require by local rule, a statement explaining why oral argument should, or need not, be permitted.

(2) **Standards.** Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for any of the following reasons:

(A) the appeal is frivolous;

(B) the dispositive issue or issues have been authoritatively decided; or

(C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

**(b) Notice of Argument; Postponement.** The clerk must advise all parties whether oral argument will be scheduled, and, if so, the date, time, and place for it, and the time allowed for each side. A motion to postpone the argument or to allow longer argument must be filed reasonably in advance of the hearing date.

**(c) Order and Contents of Argument.** The appellant opens and concludes the argument. Counsel must not read at length from briefs, records, or authorities.

**(d) Cross-Appeals and Separate Appeals.** If there is a cross-appeal, Rule 28.1(b) determines which party is the appellant and which is the appellee for purposes of oral argument. Unless the court directs otherwise, a cross-appeal or separate appeal must be argued when the initial appeal is argued. Separate parties should avoid duplicative argument.

**(e) Nonappearance of a Party.** If the appellee fails to appear for argument, the court must hear appellant's argument. If the appellant fails to appear for argument, the court may hear the appellee's argument. If neither party appears, the case will be decided on the briefs, unless the court orders otherwise.

**(f) Submission on Briefs.** The parties may agree to submit a case for decision on the briefs, but the court may direct that the case be argued.

**(g) Use of Physical Exhibits at Argument; Removal.** Counsel intending to use physical exhibits other than documents at the argument must arrange to place them in the courtroom on the day of the argument before the court convenes. After the argument, counsel must remove the exhibits from the courtroom, unless the court directs otherwise. The clerk may destroy or dispose of the exhibits if counsel does not reclaim them within a reasonable time after the clerk gives notice to remove them.

***Local Rule 34.0. Oral Argument***

***(a) Party's Statement.*** *Any party who desires to do so may include, either in the opening or answering brief as the case may be, a statement limited to one-half page setting forth the reasons why oral argument should, or need not, be heard. If such a statement is included, it must be inserted in the brief immediately after the Table of Contents and Table of Authorities and immediately before the first page of the brief and must be captioned "REASONS WHY ORAL ARGUMENT SHOULD [NEED NOT] BE HEARD" as appropriate. The inclusion of this statement will not be counted in computing the maximum permitted length of the brief.*

***(b) Notice of Argument****. If the court concludes that oral argument is unnecessary based on the standards set forth in Fed. R. App. P. 34(a)(2), counsel shall be so advised. The court's decision to dispense with oral argument may be announced at the time that a decision on the merits is rendered.*

***(c) Argument.***

*(1)* ***Presentation.*** *Parties may expect the court to have some familiarity with the briefs. Normally the court will permit no more than 15 minutes per side for oral argument. It is counsel's responsibility to keep track of time. Where more than one counsel argues on one side of a case, it is counsel's further responsibility to assure a fair division of the total time allotted. One or more cases posing the same issues, arising from the same factual context, will be treated as a single case for the purposes of this rule.*

*(2)* ***Rebuttal.*** *Although Fed. R. App. P. 34(c) permits an appellant both to open and conclude the argument, the court holds the view that seldom is counsel well served by an advance reservation of time for rebuttal. Not only does such action reduce the limited time allotted but is likely merely to allow repetitious argument. Counsel are expected to cover all anticipated issues in their arguments in chief. Should unexpected matters arise, such as the need for factual correction, the court is prepared to give counsel who have not reserved time a brief additional period for real rebuttal.*

***Local Rule 34.1. Terms and Sittings***

***(a) Terms.*** *The court shall not hold formal terms but shall be deemed always open for the purpose of docketing appeals and petitions, making motions, filing records, briefs and appendices, filing opinions and entering orders and judgments. Where a federal holiday falls on a Monday, the general order is that the court shall commence its sitting on Tuesday.*

***(b) Sittings.***

*(1)* ***Locations****. Sittings will be in Boston except that there will also be sittings in Puerto Rico in November and March and at such other times and places as the court orders. Cases arising in Puerto Rico which are assigned to other sessions may be reassigned to sessions scheduled to be conducted in Puerto Rico. All other cases will be assigned for hearing or submission to the next available session after the briefs have been filed or the time therefor has run.*

*(2)* ***Request for Assignment.*** *Requests for assignment to a specific session, including the March and November sessions, must state reasons justifying special treatment. Assignment to the November and March Puerto Rico session list, so long as space permits, will be made on the basis of statutory priority requirements, hardship that would result from travel to Boston, or other good cause shown.*

***(c) Calendaring.*** *Approximately six weeks prior to hearing, the clerk will contact counsel concerning assignment of the case to a specific day, and request the name of the person who will present the oral argument. Two weeks before the monthly sitting commences the clerk will prepare and distribute an order assigning the cases for that session for hearing. The court reserves the privilege of reducing the allotted time for argument when the case is presented.*

***(d) Continuances.*** *Once a case is scheduled for argument, continuances may be allowed only for grave cause.*

**Rule 35. En Banc Determination**

**(a) When Hearing or Rehearing En Banc May Be Ordered.** A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:

(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or

(2) the proceeding involves a question of exceptional importance.

**(b) Petition for Hearing or Rehearing En Banc.** A party may petition for a hearing or rehearing en banc.

(1) The petition must begin with a statement that either:

(A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and

consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or

(B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.

(2) Except by the court's permission, a petition for an en banc hearing or rehearing must not exceed 15 pages, excluding material not counted under Rule 32.

(3) For purposes of the page limit in Rule 35(b)(2), if a party files both a petition for panel rehearing and a petition for rehearing en banc, they are considered a single document even if they are filed separately, unless separate filing is required by local rule.

**(c) Time for Petition for Hearing or Rehearing En Banc.** A petition that an appeal be heard initially en banc must be filed by the date when the appellee's brief is due. A petition for a rehearing en banc must be filed within the time prescribed by Rule 40 for filing a petition for rehearing.

**(d) Number of Copies.** The number of copies to be filed must be prescribed by local rule and may be altered by order in a particular case.

**(e) Response.** No response may be filed to a petition for an en banc consideration unless the court orders a response.

**(f) Call for a Vote.** A vote need not be taken to determine whether the case will be heard or reheard en banc unless a judge calls for a vote.

***Local Rule 35.0. En Banc Determination***

***(a) Who May Vote; Composition of En Banc Court****. The decision whether a case should be heard or reheard en banc is made solely by the circuit judges of this circuit who are in regular active service. Rehearing en banc shall be ordered only upon the affirmative votes of a majority of the judges of this court in regular active service who are not disqualified, provided that the judges who are not disqualified constitute a majority of the judges who are in regular active service. A court en banc consists solely of the circuit judges of this circuit in regular active service except that any senior circuit judge of this circuit shall be eligible to participate, at that judge's election, in the circumstances specified in 28 U.S.C. § 46(c).*

***(b) Petitions for Panel Hearing or Rehearing En Banc.*** *If a petitioner files a petition for panel rehearing and a petition for rehearing en banc addressed to the same decision or order of the court,*

*the two petitions must be combined into a single document and the document is subject to the 15-page limitation contained in Fed. R. App. P. 35 (b)(2), (3).*

***(c)*** ***Number of Copies****. Pursuant to Fed. R. App. P. 35(d), ten copies of a petition for hearing or rehearing en banc or combined Fed. R. App. P. 35(b)(3) document must be filed with the clerk, including one copy on a computer generated disk. The disk must be filed regardless of page length but otherwise in accordance with Local Rule 32.0.*

***(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.*

**Rule 36. Entry of Judgment; Notice**

**(a)** **Entry.** A judgment is entered when it is noted on the docket. The clerk must prepare, sign, and enter the judgment:

(1) after receiving the court's opinion — but if settlement of the judgment's form is required, after final settlement; or

(2) if a judgment is rendered without an opinion, as the court instructs.

**(b)** **Notice.** On the date when judgment is entered, the clerk must serve on all parties a copy of the opinion — or the judgment, if no opinion was written — and a notice of the date when the judgment was entered.

***Local Rule 36.0. Opinions***

***(a)*** ***Opinions Generally.*** *The volume of filings is such that the court cannot dispose of each case by opinion. Rather it makes a choice, reasonably accommodated to the particular case, whether to use an order, memorandum and order, or opinion. An opinion is used when the decision calls for more than summary explanation. However, in the interests both of expedition in the particular case, and of saving time and effort in research on the part of future litigants, some opinions are rendered in unpublished form; that is, the opinions are directed to the parties but are not published in West's Federal Reporter. As indicated in Local Rule 36.0(b), the court's policy, when opinions are used, is to prefer that they be published; but in limited situations, described in Local Rule 36.0(b), where opinions are likely not to break new legal ground or contribute otherwise to legal development, they are issued in unpublished form.*

***(b) Publication of Opinions.*** *The United States Court of Appeals for the First Circuit has adopted the following plan for the publication of its opinions.*

*(1)* ***Statement of Policy.*** *In general, the court thinks it desirable that opinions be published and thus be available for citation. The policy may be overcome in some situations where an opinion does not articulate a new rule of law, modify an established rule, apply an established rule to novel facts or serve otherwise as a significant guide to future litigants. (Most opinions dealing with claims for benefits under the Social Security Act, 42 U.S.C. § 205(g), will clearly fall within the exception.)*

*(2)* ***Manner of Implementation.***

*(A) As members of a panel prepare for argument, they shall give thought to the appropriate mode of disposition (order, memorandum and order, unpublished opinion, published opinion). At conference the mode of disposition shall be discussed and, if feasible, agreed upon. Any agreement reached may be altered in the light of further research and reflection.*

*(B) With respect to cases decided by a unanimous panel with a single opinion, if the writer recommends that the opinion not be published, the writer shall so state in the cover letter or memorandum accompanying the draft. After an exchange of views, should any judge remain of the view that the opinion should be published, it must be.*

*(C) When a panel decides a case with a dissent, or with more than one opinion, the opinion or opinions shall be published unless all the participating judges decide against publication. In any case decided by the court en banc the opinion or opinions shall be published.*

*(D) Any party or other interested person may apply for good cause shown to the court for publication of an unpublished opinion.*

*(E) Periodically the court shall conduct a review in an effort to improve its publication policy and implementation.*

***(c) Precedential Value of Unpublished Opinions.*** *While an unpublished opinion of this court may be cited to this court in accordance with Fed. R. App. P. 32.1 and Local Rule 32.1.0, a panel's decision to issue an unpublished opinion means that the panel sees no precedential value in that opinion.*

***(d) Copies of Opinions.*** *Unless subject to a standing order which might apply to classes of subscribers, such as law schools, the charge for a copy of each opinion, after one free copy to counsel for each party, is $5.00.*

**Rule 37. Interest on Judgment**

**(a) When the Court Affirms.** Unless the law provides otherwise, if a money judgment in a civil case is affirmed, whatever interest is allowed by law is payable from the date when the district court's judgment was entered.

**(b) When the Court Reverses.** If the court modifies or reverses a judgment with a direction that a money judgment be entered in the district court, the mandate must contain instructions about the allowance of interest.

**Rule 38. Frivolous Appeal — Damages and Costs**

If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

***Local Rule 38.0. Sanctions for Vexatious Litigation***

*When any party to a proceeding before this court or any attorney practicing before the court files a motion, brief, or other document that is frivolous or interposed for an improper purpose, such as to harass or to cause unnecessary delay, or unreasonably or vexatiously increases litigation costs, the court may, on its own motion, or on motion of a party, impose appropriate sanctions on the offending party, the attorney, or both. Any party or attorney on whom sanctions may be imposed under this rule shall be afforded an opportunity to respond within fourteen days of service of a motion or an order to show cause before sanctions are imposed by the court.*

**Rule 39. Costs**

**(a) Against Whom Assessed.** The following rules apply unless the law provides or the court orders otherwise:

(1) if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise;

(2) if a judgment is affirmed, costs are taxed against the appellant;

(3) if a judgment is reversed, costs are taxed against the appellee;

(4) if a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as the court orders.

**(b) Costs For and Against the United States.** Costs for or against the United States, its agency, or officer will be assessed under Rule 39(a) only if authorized by law.

**(c) Costs of Copies.** Each court of appeals must, by local rule, fix the maximum rate for taxing the cost of producing necessary copies of a brief or appendix, or copies of records authorized by Rule 30(f). The rate must not exceed that generally charged for such work in the area where the clerk's office is located and should encourage economical methods of copying.

**(d) Bill of Costs: Objections; Insertion in Mandate.**

(1) A party who wants costs taxed must — within 14 days after entry of judgment — file with the circuit clerk, with proof of service, an itemized and verified bill of costs.

(2) Objections must be filed within 10 days after service of the bill of costs, unless the court extends the time.

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

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

(1) the preparation and transmission of the record;

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

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

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

***Local Rule 39.0. Fee Applications***

***(a) Fee Applications under the Equal Access to Justice Act.***

*(1)* ***Time for Filing.*** *An application to a court of appeals for an award of fees and other expenses pursuant to 28 U.S.C. § 2412, in connection with an appeal, must be filed with the clerk of the court of appeals, with proof of service on the United States, within 30 days of final judgment in the action. For purposes of the 30-day limit, a judgment must not be considered final until the time for filing an appeal or a petition for a writ of certiorari has expired, or the government has given*

*written notice to the parties and to the court of appeals that it will not seek further review, or judgment is entered by the court of last resort.*

*(2)* ***Content.*** *The application shall:*

*(A) identify the applicant and the proceeding for which the award is sought;*

*(B) show that the party seeking the award is a prevailing party and is eligible to receive an award;*

*(C) show the nature and extent of services rendered and the amount sought, including an itemized statement from an attorney representing the party or any agent or expert witness appearing on behalf of the party, stating the actual time expended and the rate at which fees are computed, together with a statement of expenses for which reimbursement is sought; and*

*(D) identify the specific position of the United States that the party alleges was not substantially justified. The court of appeals may, in its discretion, remit any such application to the district court for a determination.*

*(3)* ***Objection.*** *If the United States has any objection to the application for fees and other expenses, such objection must be filed within 30 days of service of the application.*

***(b) Fee Applications other than under 28 U.S.C. § 2412.*** *An application, under any statute, rule or custom other than 28 U.S.C. § 2412, for an award of fees and other expenses, in connection with an appeal, must be filed with the clerk of the court of appeals within 30 days of the date of entry of the final circuit judgment, whether or not attorney fees had been requested in the trial court, except in those circumstances where the court of appeals has ordered that the award of fees and other expenses be remanded to the district court for a determination. For purposes of the 30-day limit, a judgment must not be considered final until the time for filing an appeal or a petition for a writ of certiorari has expired, or judgment is entered by the court of last resort. If any party against whom an award of fees and other expenses is sought has any objection to the application, such objection must be filed within 30 days of service of the application. The court of appeals may, in its discretion, remit any such application to the district court for a determination.*

**Rule 40. Petition for Panel Rehearing**

**(a) Time to File; Contents; Answer; Action by the Court if Granted.**

(1) **Time.** Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment. But in a civil case, if the United States or its officer or agency is a party, the time within which any party may seek rehearing is 45 days after entry of judgment, unless an order shortens or extends the time.

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

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

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

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

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

(C) issue any other appropriate order.

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

***Local Rule 40.0. Petition for Panel Rehearing***

***(a) Number of Copies.*** *Ten copies of a petition for panel rehearing must be filed with the clerk, including one copy on computer generated disk. The disk must be filed regardless of page length but otherwise in accordance with Local Rule 32.0.*

***(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.*

**Rule 41. Mandate: Contents; Issuance and Effective Date; Stay**

**(a) Contents.** Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.

**(b) When Issued.** The court's mandate must issue 7 calendar days after the time to file a petition for rehearing expires, or 7 calendar days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.

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

**(d) Staying the Mandate.**

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

(2) **Pending Petition for Certiorari.**

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

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

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

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

***Local Rule 41.0. Stay of Mandate***

*Whereas an increasingly large percentage of unsuccessful petitions for certiorari have been filed in this circuit in criminal cases in recent years, in the interests of minimizing unnecessary delay in the administration of justice mandate will not be stayed hereafter in criminal cases following the affirmance of a conviction simply upon request. On the contrary, mandate will issue and bail will be revoked at such time as the court shall order except upon a showing, or an independent finding by the court, of probable cause to believe that a petition would not be frivolous, or filed merely for delay. See 18 U.S.C. § 3148. The court will revoke bail even before mandate is due. A comparable principle will be applied in connection with affirmed orders of the NLRB, see NLRB v. Athbro Precision Engineering, 423 F.2d 573 (1st Cir. 1970), and in other cases where the court believes that the only effect of a petition for certiorari would be pointless delay.*

**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.

**Rule 43. Substitution of Parties**

**(a) Death of a Party.**

(1) **After Notice of Appeal Is Filed.** If a party dies after a notice of appeal has been filed or while a proceeding is pending in the court of appeals, the decedent's personal representative may be substituted as a party on motion filed with the circuit clerk by the representative or by any party. A party's motion must be served on the representative in accordance with Rule 25. If the decedent has no representative, any party may suggest the death on the record, and the court of appeals may then direct appropriate proceedings.

(2) **Before Notice of Appeal Is Filed — Potential Appellant.** If a party entitled to appeal dies before filing a notice of appeal, the decedent's personal representative — or, if there is no personal representative, the decedent's attorney of record — may file a notice of appeal within the time prescribed by these rules. After the notice of appeal is filed, substitution must be in accordance with Rule 43(a)(1).

(3) **Before Notice of Appeal Is Filed — Potential Appellee.** If a party against whom an appeal may be taken dies after entry of a judgment or order in the district court, but before a notice of appeal is filed, an appellant may proceed as if the death had not occurred. After the notice of appeal is filed, substitution must be in accordance with Rule 43(a)(1).

**(b) Substitution for a Reason Other Than Death.** If a party needs to be substituted for any reason other than death, the procedure prescribed in Rule 43(a) applies.

**(c) Public Officer: Identification; Substitution.**

(1) **Identification of Party.** A public officer who is a party to an appeal or other proceeding in an official capacity may be described as a party by the public officer's official title rather than by name. But the court may require the public officer's name to be added.

(2) **Automatic Substitution of Officeholder.** When a public officer who is a party to an appeal or other proceeding in an official capacity dies, resigns, or otherwise ceases to hold office, the action does not abate. The public officer's successor is automatically substituted as a party. Proceedings following the substitution are to be in the name of the substituted party, but any misnomer that

does not affect the substantial rights of the parties may be disregarded. An order of substitution may be entered at any time, but failure to enter an order does not affect the substitution.

**Rule 44. Case Involving a Constitutional Question When the United States or the Relevant State is Not a Party**

**(a) Constitutional Challenge to Federal Statute.** If a party questions the constitutionality of an Act of Congress in a proceeding in which the United States or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the Attorney General.

**(b) Constitutional Challenge to State Statute.** If a party questions the constitutionality of a statute of a State in a proceeding in which that State or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the attorney general of the State.

**Rule 45. Clerk's Duties**

**(a) General Provisions.**

(1) **Qualifications.** The circuit clerk must take the oath and post any bond required by law. Neither the clerk nor any deputy clerk may practice as an attorney or counselor in any court while in office.

(2) **When Court Is Open.** The court of appeals is always open for filing any paper, issuing and returning process, making a motion, and entering an order. The clerk's office with the clerk or a deputy in attendance must be open during business hours on all days except Saturdays, Sundays, and legal holidays. A court may provide by local rule or by order that the clerk's office be open for specified hours on Saturdays or on legal holidays other than New Year's Day, Martin Luther King, Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day.

**(b) Records.**

(1) **The Docket.** The circuit clerk must maintain a docket and an index of all docketed cases in the manner prescribed by the Director of the Administrative Office of the United States Courts. The clerk must record all papers filed with the clerk and all process, orders, and judgments.

(2) **Calendar.** Under the court's direction, the clerk must prepare a calendar of cases awaiting argument. In placing cases on the calendar for argument, the clerk must give preference to appeals in criminal cases and to other proceedings and appeals entitled to preference by law.

(3) **Other Records.** The clerk must keep other books and records required by the Director of the Administrative Office of the United States Courts, with the approval of the Judicial Conference of the United States, or by the court.

**(c) Notice of an Order or Judgment.** Upon the entry of an order or judgment, the circuit clerk must immediately serve a notice of entry on each party, with a copy of any opinion, and must note the date of service on the docket. Service on a party represented by counsel must be made on counsel.

**(d) Custody of Records and Papers.** The circuit clerk has custody of the court's records and papers. Unless the court orders or instructs otherwise, the clerk must not permit an original record or paper to be taken from the clerk's office. Upon disposition of the case, original papers constituting the record on appeal or review must be returned to the court or agency from which they were received. The clerk must preserve a copy of any brief, appendix, or other paper that has been filed.

***Local Rule 45.0. 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 days.*

***(b) Appellee.*** *When a cause is in default as to the filing of the brief for appellee or respondent, the cause must be assigned to the next list and the appellee will not be heard at oral argument except by leave of the Court.*

***(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 days of the filing of the notice of appeal.*

***Local Rule 45.1. The Clerk***

***(a) Business Hours.*** *The office of the clerk shall be open for business from 8:30 a.m. to 5:00 p.m. except Saturdays, Sundays, and legal holidays.*

***(b) Fees and Costs****. The clerk must charge the fees and costs which are fixed from time to time by the Judicial Conference of the United States, pursuant to 28 U.S.C. § 1913.*

***(c) Copies of Opinions.*** *Unless subject to a standing order which might apply to classes of subscribers, such as law schools, the charge for a copy of each opinion, after one free copy to counsel for each party, is $5.00.*

**Rule 46. Attorneys**

**(a) Admission to the Bar.**

(1) **Eligibility.** An attorney is eligible for admission to the bar of a court of appeals if that attorney is of good moral and professional character and is admitted to practice before the Supreme Court of the United States, the highest court of a state, another United States court of appeals, or a United States district court (including the district courts for Guam, the Northern Mariana Islands, and the Virgin Islands).

(2) **Application.** An applicant must file an application for admission, on a form approved by the court that contains the applicant's personal statement showing eligibility for membership. The applicant must subscribe to the following oath or affirmation:

> "I, _____, do solemnly swear [or affirm] that I will conduct myself as an attorney and counselor of this court, uprightly and according to law; and that I will support the Constitution of the United States."

(3) **Admission Procedures.** On written or oral motion of a member of the court's bar, the court will act on the application. An applicant may be admitted by oral motion in open court. But, unless the court orders otherwise, an applicant need not appear before the court to be admitted. Upon admission, an applicant must pay the clerk the fee prescribed by local rule or court order.

**(b) Suspension or Disbarment.**

(1) **Standard.** A member of the court's bar is subject to suspension or disbarment by the court if the member:

(A) has been suspended or disbarred from practice in any other court; or

(B) is guilty of conduct unbecoming a member of the court's bar.

(2) **Procedure.** The member must be given an opportunity to show good cause, within the time prescribed by the court, why the member should not be suspended or disbarred.

(3) **Order.** The court must enter an appropriate order after the member responds and a hearing is held, if requested, or after the time prescribed for a response expires, if no response is made.

**(c) Discipline.** A court of appeals may discipline an attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with any court rule. First, however, the court must afford the attorney reasonable notice, an opportunity to show cause to the contrary, and, if requested, a hearing.

***Local Rule 46.0. Attorneys***

***(a) Admission.***

*(1)* ***Admission Fee.*** *Upon being admitted to practice, an attorney other than government counsel, and court-appointed counsel, must pay a local admission fee of $50.00 to the clerk. The clerk must maintain the proceeds as a court's discretionary fund for the reimbursement of expenses of non-compensable court-appointed counsel and such other purposes as the court may order. This fee is in addition to the $150.00 national admission fee imposed by the Court of Appeals Miscellaneous Fee Schedule, promulgated under 28 U. S. C. § 1913. Attorneys may be admitted in open court on motion or otherwise as the court shall determine.*

*(2)* ***Admission as a Prerequisite to Practice.*** *In order to file motions, pleadings or briefs on behalf of a party or participate in oral argument, attorneys must be admitted to the bar of this court and file an appearance form. The appearance of a member of the bar of any court designated in Fed. R. App. P. 46(a) will be entered subject to filing an application and subsequent admission to practice in this court. Forms for admission and entry of appearance will be provided by the clerk.*

*(3)* ***Parties.*** *A party desiring to appear without counsel shall notify the clerk in writing by completing and filing an entry of appearance on a form approved by the court.*

***(b) Temporary Suspension of Attorneys.*** *When it is shown to the Court of Appeals that any member of its bar has been suspended or disbarred from practice by a final decision issued by any other court of record, or has been found guilty of conduct unbecoming of a member of the bar of this court, the member may be temporarily suspended from representing parties before this court pending the completion of proceedings initiated under Fed. R. App. P. 46 and the Rules of Attorney Disciplinary Enforcement for the Court of Appeals for the First Circuit.*

***(c) Disciplinary Rules.*** *The Rules of Attorney Disciplinary Enforcement for the Court of Appeals for the First Circuit are on file in the clerks's office. A copy may be obtained upon request addressed to the clerk of this court.*

***(d) Library Access.*** *The law library of this court shall be open to members of the Bar, to the United States Attorney of the Circuit and their assistants, to other law officers of the government, and persons having a case in this court, but books may be removed only by government employees, who shall sign therefor.*

***(e) Staff Attorneys and Law Clerks.*** *No one serving as a staff attorney to the court or as a law clerk to a member of this court or employed in any such capacity by this court shall engage in the practice of law while continuing in such position. Nor shall a staff attorney or law clerk after separating from that position practice as an attorney in connection with any case pending in this court during the term of service, or appear at the counsel table or on brief in connection with any case heard during a period of one year following separation from service with the court.*

***(f) Standing Rule Governing Appearance and Argument by Eligible Law Students***

*(1)* ***Scope of Legal Assistance.***

*(A) An eligible law student with the written consent of an indigent and the indigent's attorney of record may appear in this court on behalf of that indigent in any case. The attorney of record, for purposes of this rule, must be a member of the bar of this court, the faculty member conducting the course in appellate advocacy described in paragraph (2)(c) of this section, and appointed as counsel on appeal for the indigent. The written consent must be filed with the clerk.*

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

*(2)* ***Student Eligibility Requirements.*** *In order to appear, the student must:*

*(A) Be enrolled in a law school approved by the American Bar Association;*

*(B) Have completed legal studies amounting to at least four (4) semesters, or the equivalent if the school is on some basis other than a semester basis;*

*(C) Be taking a course in appellate advocacy for academic credit;*

*(D) Be certified by the attorney of record as qualified to provide the legal representation permitted by this rule. This certification, which shall be filed with the clerk, may be withdrawn by the dean at any time by mailing a notice to the clerk or by termination by this court without notice or hearing and without any showing of cause;*

*(E) Neither ask for nor receive any compensation or remuneration of any kind for the student's services from the person on whose behalf the student renders services. This shall also prevent a law student from making charges for its services;*

*(F) certify in writing that the student has read and is familiar with the Code of Professional Responsibility of the American Bar Association, the Federal Rules of Appellate Procedure, and the rules of this court.*

*(3)* ***Standards of Supervision.*** *The supervising attorney of record must:*

*(A) File with this court the attorney's written consent to supervise the student;*

*(B) Assume personal professional responsibility for the student's work;*

*(C) Assist the student to the extent necessary;*

*(D) Appear with the student in all proceedings before this court and be prepared to supplement any written or oral statement made by the student to this court or opposing counsel.*

*(4)* ***Forms Required by Rule.***

*(A)* ***Form to be completed by the party for whom the law student is rendering services****:*

*I authorize _____, a law student, to appear in court or at other proceedings on my behalf, and to prepare documents on my behalf.*

_____ _____

*(Date)* _____ *(Signature of Client)*

*(If more than one client is involved, approvals from each shall be attached.)*

*(B)* ***Form to be completed by the law student's supervising attorney:***

*I certify that this student has completed at least 4 semesters of law school work, and is, to the best of my knowledge, of good character and competent legal ability. I will carefully supervise all of this student's work. I authorize this student to appear in court or at other proceedings, and to prepare documents. I will accompany the student at such appearances, sign all documents prepared by the student, assume personal responsibility for the student's work, and be prepared to supplement, if necessary, any statements made by the student to the court or to opposing counsel.*

_____ _____

*(Name of Student)* *(Signature of Supervising Attorney)*

_____ _____

_____ _____

*(Address & Phone of Above)* *(Address & Phone of Above)*

*Name of Law School Attending* _____

*(C)* ***Form to be completed by law student:***

*I certify that I have completed at least 4 semesters of law school; that I am familiar and will comply with the Code of Professional Responsibility of the American Bar Association, the Federal Rules of Appellate Procedure, and the Rules of this Court; and that I am receiving no compensation from the party on whose behalf I am rendering services.*

_____ _____

*(Date)* *(Signature of Student)*

***Local Rule 46.5. Appointment of Counsel in Criminal Cases***

*The United States Court of Appeals for the First Circuit adopts the following Plan to implement the Criminal Justice Act of 1964, 18 U.S.C. § 3006A, P.L. 88-455, as amended October 12, 1984, P.L. 98-473, and November 14, 1986, P.L. 99-651 to which references must be made. The purpose of this Plan is to provide adequate representation and defense of all persons to the extent provided therein including cases where a person faces loss of liberty or is in custody as a material witness. The court notes at the outset that the Act does not diminish the traditional responsibility of members of the Bar to accept appointments. It recognizes that compensation will, in most instances, be something less than full, and appreciates that service by counsel will represent a substantial measure of public dedication.*

***(a) Request for Counsel.*** *Every person or eligible witness desiring counsel and that the government pay for the expense of appeal, whether or not the person had court-appointed counsel in the district court, shall address to this court a request in writing and a statement of the person's inability to pay. The court may make such further inquiry of the person's need as it may see fit. This inquiry may also be addressed to previously retained counsel, with the objective of ascertaining that present inability to pay is not a result of past excessive compensation. Such inquiry is not aimed at depriving an indigent of counsel but at the relatively few counsel who might reasonably be considered to have used up all of the available funds for doing only part of the work.*

***(b) Appointment of Counsel.*** *The court may appoint counsel who represented the person in the district court, or counsel from a panel maintained by the court, or otherwise. The addition or deletion of names from the panel and the selection of counsel shall be the sole and exclusive responsibility of the court but the actual administration thereof may be conducted by the clerk of this court. The person may ask for appointment of counsel who represented the defendant in the district court or for the non-appointment of such counsel, but shall not otherwise request any specific individual. The court shall give consideration to such request, but shall not be bound by it. A request for relief by trial counsel, upon a showing of cause, shall be given due consideration. It is recognized that counsel on appeal may require different qualifications than for trial. The substitution of counsel on appeal shall not in any way reflect upon the ability or upon the conduct of prior counsel. The Administration Office shall be notified promptly of each appointment, and of each order releasing counsel.*

***(c) Duration and Substitution of Counsel.*** *The court notes, and incorporates herein, the provisions of section (c) of the Act, except the references therein to magistrates. Except when relieved by the court, counsel's appointment shall not terminate until, if the person loses the appeal, counsel informs the person of that fact and of the person's right to petition for certiorari and the time period, and has prepared and filed the petition if the person requests it and there are reasonable grounds for counsel properly to do so (see Rule 10 of the Rules of the Supreme Court of the United States). If counsel determines that there are no reasonable grounds and declines to file a petition for certiorari requested by the person, counsel shall so inform the Court and request leave to withdraw from the representation by written motion stating that counsel has reviewed the matter and determined that the petition would be frivolous, accompanied by counsel's certification of the date when a copy of the motion was furnished to the person. If the person does not wish to apply for certiorari or does not respond to the notification, counsel shall so inform the court by letter, which action shall terminate the representation. The clerk will inform the person in writing of the fact and effective date of the termination of counsel's appointment.*

***(d) Payment for Representation and Services other than Counsel.*** *The court notes sections (d) and (e) of the Act and incorporates the pertinent portions herein. Expenses described in the Act do not include overhead and such matters as secretarial expenses not ordinarily billed to clients, but a reasonable charge for copying briefs may be allowed. For additional guidance, see the Guidelines for the Administration of the Criminal Justice Act and Related Statutes, Volume VII, Guide to Judiciary Policies and Procedures.*

*All claims, whether for compensation, or for expenditures, shall be submitted promptly after the completion of all duties, at the risk of disallowance. If counsel files a petition for a writ of certiorari, counsel's time and expenses involved in the preparation of the petition should be included on the voucher for services performed in this court. After court approval all orders for payment shall be processed through the Administrative Office.*

***(e) Receipt of Other Payments.*** *The provisions of section (f) of the Act are incorporated herein. Appointed counsel shall be under a continuing duty to report to the court any circumstances indicating financial ability on behalf of the person to pay part or all of the person's counsel fees or expenses.*

*The court shall in no instance permit counsel who receives payments under the Act to frustrate the intent of the limitations contained in sections (d) and (e) by the receipt of other payment, either during, before, or after such representation.*

***(f) Forms.*** *For the appointment of counsel, the making of claims, and all other matters for which forms shall have been approved by the Administrative Office, such forms shall be used as a matter of course.*

***(g) Effective Date and Amendments.*** *This amended Plan shall take effect on November 14, 1986. It may be amended at any time with the approval of the Judicial Council. [The present plan incorporates an amendment made on December 16, 2002.]*

***Local Rule 46.6. Procedure for Withdrawal in Criminal Cases***

***(a) Trial counsel's duty to continue to represent defendant on appeal until relieved by the court of appeals.***

*An attorney who has represented a defendant in a criminal case in the district court will be responsible for representing the defendant on appeal, whether or not the attorney has entered an appearance in the court of appeals, until the attorney is relieved of such duty by the court of appeals. See Local Rule 12.0(b).*

***(b) Withdrawal by counsel appointed in the district court.***

*When a defendant has been represented in the district court by counsel appointed under the Criminal Justice Act, the clerk will usually send a "Form for Selection of Counsel on Appeal" to defendant, which asks defendant to select among the following:*

*(1) representing him or herself on appeal and proceeding pro se;*

*(2) requesting trial counsel to be appointed on appeal to represent defendant on appeal;*

*(3) requesting the appointment of new counsel on appeal; and*

*(4) retaining private counsel for appeal.*

*If the defendant returns the form and elects to proceed with new counsel to be appointed on appeal, then the court will ordinarily appoint new counsel and allow trial counsel to withdraw.*

*If counsel wishes to withdraw and either the defendant fails to complete the form or counsel wishes to terminate representation even though the defendant has selected (2) above, counsel may file an affidavit explaining the difficulty and move to withdraw.*

*An unsworn declaration under the penalty of perjury in the format set forth in 28 U.S.C. § 1746 will suffice in place of an affidavit.*

***(c) Procedure for withdrawal in situations not governed by Local Rule 46.6(b).***

*Motions to withdraw as counsel on appeal in criminal cases must be accompanied by a notice of appearance of replacement counsel or, in the absence of replacement counsel, such motions must state the reasons for withdrawal and must be accompanied by one of the following:*

*(1) The defendant's completed application for appointment of replacement counsel under the Criminal Justice Act or a showing that such application has already been filed with the court and, if defendant has not already been determined to be financially eligible, certification of compliance with Fed. R. App. P. 24; or*

*(2) An affidavit from the defendant showing that the defendant has been advised that the defendant may retain replacement counsel or apply for appointment of replacement counsel and expressly stating that the defendant does not wish to be represented by counsel but elects to appear pro se; or*

*(3) An affidavit from the defendant showing that the defendant has been advised of the defendant's rights with regard to the appeal and expressly stating that the defendant elects to withdraw the appeal; or*

*(4) If the reason for the motion is the frivolousness of the appeal, a brief following the procedure described in Anders v. California, 386 U.S. 738 (1967), must be filed with the court. [Counsel's attention is also directed to McCoy v. Court of Appeals, 486 U.S. 429 (1988); Penson v. Ohio, 488 U.S. 75 (1988)]. Any such brief shall be filed only after counsel has ordered and read all relevant transcripts, including trial, change of plea, and sentencing transcripts, as well as the presentence investigation report. Counsel shall serve a copy of the brief and motion on the defendant and advise the defendant that the defendant has thirty (30) days from the date of service in which to file a brief in support of reversal or modification of the judgment. The motion must be accompanied by proof of service on the defendant and certification that counsel has advised the defendant of the defendant's right to file a separate brief.*

*If counsel is unable to comply with (1), (2), or (3) and does not think it appropriate to proceed in accordance with (4), counsel may file an affidavit explaining the difficulty and move to withdraw.*

*An unsworn declaration under the penalty of perjury in the format set forth in 28 U.S.C. § 1746 will suffice in place of an affidavit.*

***(d) Service.***

*All motions must be accompanied by proof of service on the defendant and the Government and will be determined, without oral argument, by one or more judges.*

**Rule 47. Local Rules by Courts of Appeals**

**(a) Local Rules.**

(1) Each court of appeals acting by a majority of its judges in regular active service may, after giving appropriate public notice and opportunity for comment, make and amend rules governing its practice. A generally applicable direction to parties or lawyers regarding practice before a court must be in a local rule rather than an internal operating procedure or standing order. A local rule must be consistent with — but not duplicative of — Acts of Congress and rules adopted under 28 U.S.C. § 2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. Each circuit clerk must send the Administrative Office of the United States Courts a copy of each local rule and internal operating procedure when it is promulgated or amended.

(2) A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.

**(b) Procedure When There Is No Controlling Law.** A court of appeals may regulate practice in a particular case in any manner consistent with federal law, these rules, and local rules of the circuit. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local circuit rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

***Local Rule 47.0. Local Rules of the First Circuit***

***(a) Advisory Committee***

*(1)* ***Membership.*** *In accordance with 28 U.S.C. § 2077(b) an advisory committee on the rules of practice and internal operating procedures is hereby created for the court. This committee shall consist of members of the Bar of the court as follows: Three members from the District of Massachusetts, two members from the District of Puerto Rico and one each from the Districts of Maine, New Hampshire and Rhode Island.*

*(2)* ***Duties.*** *The advisory committee shall have an advisory role concerning the rules of practice and internal operating procedures of the court. The advisory committee shall, among other things,*

*(A) provide a forum for continuous study of the rules of practice and internal operating procedures of the court;*

*(B) serve as a conduit between the bar and the public and the court regarding procedural matters and suggestions for changes;*

*(C) consider and recommend rules and amendments for adoption; and*

*(D) render reports from time to time, on its own initiative and on request, to the court.*

*(3)* ***Terms of Members****. The members of the advisory committee shall serve three-year terms, which will be staggered commencing on October 1, 1986, so that three new members will be appointed every year in such order as the court decides. The court shall appoint one of the members of the committee to serve as chairman.*

***(b) Comments from Members of the Bar.*** *Prior to the adoption of a proposed amendment to these Rules, if time permits, the court will seek the comments and recommendations of interested members of the bar through the office of the clerk and with the aid of the advisory committee created pursuant to 28 U.S.C. § 2077.*

***Local Rule 47.1. Judicial Conference of the First Circuit***

***(a)*** *A judicial conference of the First Circuit will be held periodically in accordance with 28 U.S.C. § 333. The chief judge shall preside at the Conference.*

***(b)*** *The chief judge of the circuit shall appoint a Planning Committee consisting of a circuit judge and/or district judge and such members of the Bar as they may designate to plan and conduct the Conference.*

***(c)*** *Members of the Conference shall include the following:*

*(1) Presidents of the state bar associations of states and commonwealths within the circuit;*

*(2) The dean or member of the faculty designated by the dean of each accredited law school within the circuit;*

*(3) All United States Attorneys of the circuit;*

*(4) Lawyers to be appointed from each state in numbers to be determined by the Planning Committee, such appointment to be made by the district committee of each district; if such a committee does not exist, such appointments to be made by the district judges as determined by each district court. Such additional members of the Bar may also be invited as the chief circuit judge, in consultation with the other circuit judges, and the Planning Committee shall decide; and*

*(5) All federal defenders designated by the chief judge of the circuit.*

***(d)*** *The Circuit Executive of this court shall be the Secretary of the Conference.*

**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.

***Local Rule 48.0. Capital Cases***

*(a)* ***Applicability of Rule.*** *This rule shall govern all matters in which this Court is requested to rule in any case where the death penalty has been imposed, including, but not limited to, the following:*

*(1) direct criminal appeals;*

*(2) appeals from District Court rulings, such as on motions to vacate a sentence, petitions for a writ of habeas corpus, and requests for a stay or other injunction;*

*(3) original petitions for a writ of habeas corpus;*

*(4) motions for second or successive habeas corpus applications;*

*(5) any related civil proceedings challenging the conviction or sentence of death, or the time, place or manner of execution, as being in violation of federal law, whether filed by the prisoner or by someone else on his or her behalf.*

*Such cases shall be referred to herein as "capital cases" and shall be governed by this rule, except where otherwise specified in a written order by the Court. To the extent that any local rule of this Court is inconsistent with this rule, this rule shall govern. All local rules of this Court, including interim local rules, are otherwise as applicable to capital cases as they would have been absent this rule.*

***(b) Certificate of Death Penalty Case.*** *A special docket shall be maintained by the Clerk of this Court for all cases filed pursuant to this rule.*

*(1) Filing. Upon the filing of any proceeding in any District Court in this Circuit challenging a sentence of death imposed pursuant to a federal or a state court judgment, each party to such proceeding shall file a Certificate of Death Penalty Case with the Clerk of this Court. The U.S. Attorney shall file a Certificate of Death Penalty Case with the Clerk of this Court immediately upon notifying the District Court of intent to seek the death penalty in a federal criminal case. The U.S. Attorney shall also update the Certificate immediately upon return of a verdict imposing a sentence of death.*

*(2) Content of the Certificate. The Certificate shall set forth the names, telephone numbers and addresses of the parties and counsel, the proposed date and place of implementation of the sentence of death, if set, and the emergency nature of the proceedings, if appropriate. It shall be the responsibility of counsel for all parties to apprise the Clerk of this Court of any changes in the information provided on the Certificate as expeditiously as possible.*

***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. 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.*

*(2) Stays of Execution.*

*(A) Except where otherwise prohibited by 28 U.S.C. § 2262, a sentence of death shall automatically be stayed upon the filing of a notice of appeal. In cases where the petitioner is seeking leave to file a second or successive application under 28 U.S.C. § 2254 or § 2255, a stay of execution shall automatically be issued upon approval by the Court of Appeals of the filing of a second or successive application under 28 U.S.C. § 2244(b). The Clerk shall immediately notify all parties and the state or federal authorities responsible for implementing the defendant's sentence of death of the stay of execution. If notification is oral, it shall be followed as expeditiously as possible by written notice.*

*(B) Except where otherwise required by law or specified in a written order by the Court, an automatic stay of execution shall remain in effect until the Court issues its mandate, at which time the automatic stay shall expire. In the event that a motion requesting a stay of*

*mandate is filed, the motion should also be accompanied by a motion requesting a case-specific stay of execution.*

*(C) The assigned panel may grant or modify or vacate any stay of execution at any time and will consider upon request motions for a case-specific stay of execution. All motions for a case specific stay of execution must be accompanied by a memorandum of law, which must include at a minimum the prevailing standards of review and any relevant facts to advise the Court's decision.*

*(D) Upon making the necessary findings, the Court may enter a case-specific stay of execution which shall clearly specify the duration of the stay.*

*(E) The Clerk shall send notice to all the parties and state or federal authorities responsible for implementing the defendant's sentence of death when a stay imposed by this provision, be it automatic or case-specific, is no longer in effect.*

# Appendix of 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 _____
File Number _____

| | | |
|---|---|---|
| A.B., Plaintiff | ) | |
| v. | ) | Notice of Appeal |
| C.D., Defendant | ) | |

Notice is hereby given that [(here name all parties taking the appeal), (plaintiffs)(defendants) in the above named case*] hereby appeal to the United States Court of Appeals for the First Circuit (from the final judgment)(from an order (describing it)) entered in this action on the _____ day of _____, _____.

(s) _____
Attorney for [____]
[Address:_____]

* See Rule 3(c) for permissible ways of identifying appellants.

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

United States Tax Court
Washington, D.C.

| | | |
|---|---|---|
| A.B., Petitioner | ) | |
| v. | ) | Docket No. ____ |
| Commissioner of Internal | ) | |
| Revenue, Respondent | ) | |

Notice of Appeal

Notice is hereby given that [here name all parties taking the appeal], hereby appeals to the United States Court of Appeals for the First Circuit from (that part of) the decision of this court entered in the above captioned proceeding on the _____ day of _____, _____ (relating to _____).

/s/ _____
Counsel for [____]
[Address:_____]

* See Rule 3(c) for permissible ways of identifying appellants.

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

United States Court of Appeals
for the First Circuit

| | | |
|---|---|---|
| A.B., Petitioner | ) | |
| v. | ) | Petition for Review |
| XYZ Commission, Respondent | ) | |

[(here name all parties bringing the petition*] hereby petitions the court for review of the Order of the XYZ Commission (describe the order) entered on _____, _____.

/s/ _____
Attorney for Petitioners
[Address:_____]

* See Rule 15.

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

United States District Court for the District of _____

A.B., Plaintiff

v. Case No._____

C.D., Defendant

| **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 in 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 you 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, 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, 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, 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 or your spouse owns. Do not list clothing and ordinary household furnishings.*

| **Home** (Value) | **Other real estate** (Value) | **Motor Vehicle #1** (Value) |
|---|---|---|
| _____ | _____ | Make & year: _____ |
| _____ | _____ | Model: _____ |
| _____ | _____ | Registration #:_____ |
| **Motor Vehicle #2** (Value) | **Other assets** (Value) | **Other assets** (Value) |
| Make & 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** | **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** | **Spouse** |
|---|---|---|
| Rent or home mortgage payment (include lot rented for mobile home)<br>Are any real estate taxes included? ☐ Yes ☐ No<br>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 operations 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 in your assets or liabilities during the next 12 months?*
☐ Yes ☐ No If yes, describe on an attached sheet.

*10. Have you paid — or will you be paying — an attorney any money for services in connection with this case, including the completion of this form?* ☐ Yes ☐ No

If yes, how much? $_____

If yes, state the attorney's name, address, and telephone number:
_____
_____
_____

*11. Have you paid — or will you be paying — anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?*
☐ Yes ☐ No

If yes, how much? $_____

If yes, state the person's name, address, and telephone number:

_____

_____

_____

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

*13. State the address of your legal residence.*

_____

_____

Your daytime phone number: (_____) _____

Your age: _____ Your years of schooling: _____

**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 | ) | |
| _____, | ) | |
| Debtor | ) | |
| | ) | File No _____ |
| _____, | ) | |
| Plaintiff | ) | |
| v. | ) | |
| _____, | ) | |
| Defendant | ) | |

Notice of Appeal to the United States Court of Appeals for the First Circuit

_____, the plaintiff [or defendant or other party] appeals to the United States Court of Appeals for the First Circuit from the final judgment [or order or decree] of the district court for the district of _____ [or bankruptcy appellate panel of the first circuit], entered in this case on _____, _____ [here describe the judgment, order, or decree] _____.

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

Dated _____

Signed _____
Attorney for Appellant

Address: _____
_____

## Form 6.
## 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*].

(s)_____

Attorney for_____

Dated:_____

# First Circuit Internal Operating Procedures

## Introduction

This publication outlines the procedures followed in this Court, and its Clerk's Office, for the processing of appeals, petitions for review and other appellate matters in this Circuit. New techniques and procedures are continually tried and, when improvements are found, such procedures are adopted so that at any given time the procedures set forth herein may be in a state of change.

## Internal Operating Procedure I. Court Organization

**A. Facilities.** The Clerk's Office and the appellate courtrooms are located in the John Joseph Moakley United States Courthouse at 1 Courthouse Way in Boston. The staff attorneys, the Court of Appeals library, the Circuit Executive and some of the appellate judges are located in the courthouse.

**B. Clerk's Office.** The office hours for the Clerk's Office are from 8:30 a.m. to 5:00 p.m., Monday through Friday. In case of an emergency, the Clerk or the Chief Deputy Clerk may be contacted after hours; however, appropriate arrangements should be made with the Clerk's Office in advance.

**C. Library.** The Court of Appeals library is open from 8:30 a.m. to 5:00 p.m. and attorneys practicing in the federal courts may use the library, but books and materials may not be removed.

**D. Staff Attorneys.** The office of the staff attorneys assists the Court in many ways including research, drafting memoranda and other forms of legal assistance to the Court.

## Internal Operating Procedure II. Attorneys

**A. Admission.** Attorneys seeking admission should obtain an application from the court's website at www.ca1.uscourts.gov or write to the Clerk's Office. The admission fee imposed by Local Rule 46.0(a)(1) is $50.00. There is an additional $150.00 admission fee prescribed by the Court of Appeals Miscellaneous Fee Schedule, promulgated under 28 U.S.C. § 1913. The combined fee of $200.00 should be paid in a single check or money order, made payable to: "Clerk, United States Court." Attorneys can mail the completed application along with the admission fee to the Clerk's Office for processing and a Certificate of Admission will be returned by mail. During court week, attorneys may also apply for admission in person at the Clerk's Office at least one hour prior to the start of the session and will be admitted in open court or otherwise as the court shall determine. See Federal Rule of Appellate Procedure 46 and Local Rule 46.0(a). Where an application raises questions about the applicant's qualification for admission, the Clerk will refer the matter to the Chief Judge. If the Chief Judge concludes that denial may be warranted, the matter will be referred to a panel for determination.

**B. Discipline.** Procedures to be followed in this Court are covered by Fed. R. App. P. 46(b) and the Rules of Attorney Disciplinary Enforcement for the Court of Appeals for the First Circuit. Copies of the latter rules may be obtained at the Clerk's Office.

## Internal Operating Procedure III. Initial Procedures

**A. Appeals, Petitions for Review and Fees.** In cases appealed from the district court, the notice of appeal is filed in the district court in accordance with the Fed. R. App. P. and the combined docketing and filing fees are paid to the district court clerk. In administrative agency cases and petitions for mandamus, the docketing fee is paid to the Clerk of the Court of Appeals at the time the petition is filed in the Court of Appeals. The relevant fees can be found in the Schedule of Fees posted on this court's website at www.ca1.uscourts.go v.

**B. Ordering Transcripts.** The transcripts must be ordered from the court reporter(s) on Transcript Order/Report Form which is available from the district court clerks and from the Clerk of the Court of Appeals. The order for the transcript must be given within 10 days after the filing of the notice of appeal and satisfactory financial arrangements must be made with the court reporter. See Fed. R. App. P. 10, 11; Local Rule 10.0. Counsel are required to complete these arrangements before the copy of the Transcript Order/Report is filed with the Court of Appeals. If counsel are being paid under the Criminal Justice Act ("CJA"), the CJA form must first be approved and then attached to the Transcript Order/Report Form.

**C. Reporter's Duties**. If the reporter cannot complete the transcript within 30 days after the order, then pursuant to Fed. R. App. P. 11(b) the reporter must file a motion in the Court of Appeals for an enlargement of time for filing the transcript. Counsel for appellants, however, would be well advised to check with the court reporter to see that the transcript will be timely filed and that the reporter is making such a request, if it will not be so completed.

## Internal Operating Procedure IV. Docketing Procedures

**A. Docketing.** Pursuant to Fed. R. App. P. 12, appeals are docketed in the Court of Appeals upon receipt from the Clerk of the district court of copies of the notice of appeal and the district court docket entries. If the docketing fee has not been paid in the district court, the failure to pay is grounds for dismissal of the appeal pursuant to Local Rule 3.0. Local Rule 3.0 also requires the filing of a Docketing Statement within 14 days of filing the Notice of Appeal.

**B. Screening.** In the First Circuit a preliminary screening takes place upon the docketing of the appeal and procedural defects are often called to the Court's attention for sua sponte action by the Court including dismissal of the appeal.

**C. Briefing.** Upon the filing of the record on appeal, including any transcripts required to complete the record, the Clerk's Office sends to counsel a notice advising appellant of the filing dates for the brief and the appendix. After the brief for appellant is filed, the Clerk's Office likewise gives notice to the appellee.

## Internal Operating Procedure V. Motion Procedures

**A. General.** In accordance with Fed. R. App. P. 27(d) (3), all motions must be accompanied by 3 copies, and a proof of service showing the type of service that was made, i.e., by mail or by hand delivery. The date of service establishes the due date for filing the response per Fed. R. App. P. 27(a)(3).

**B. Processing.** All motions must be filed with the clerk. The single judge matters are transmitted to a single judge and the matters calling for three judge action are transmitted to a three judge panel. The motion judge and the motion panel duties are rotated among the judges of this Court. All motions are decided without oral argument, unless the Court orders otherwise. The motions are submitted to the Court after the response time provided in Fed. R. App. P. 27(a)(3)(A) has run except for (1) routine procedural motions which are usually processed forthwith, and (2) emergency motions which may be handled on an expedited basis. The court will not ordinarily await the filing of a reply to a response before acting on a motion and response. If a movant intends to file a reply to a response, the movant shall promptly notify the clerk of the intended filing.

**C. Disposition By the Clerk.** Pursuant to Fed. R. App. P. 27(b) and 1st Cir. R. 27.0(d), the clerk is authorized to dispose of certain routine, procedural motions in accordance with the Court's standing instructions. Typical examples include motions for an enlargement of time, to consolidate, to correct filings, to correct captions, and to withdraw as counsel. Effective March 16, 2006, clerk's orders are identifiable by their form: a clerk's order states on its face that it is entered pursuant to 1st Cir. R. 27.0(d).

**D. Emergencies.** If counsel anticipates that a matter may arise requiring emergency action by the court outside of ordinary business hours, the court's local rules advise counsel to contact the Clerk's Office at the earliest opportunity to discuss the matter. Depending on the circumstances, the Clerk's Office, in consultation with the duty judge and the Staff Attorney's Office, may make special arrangements for after hours filings and responses, issuance of orders after hours, and similar matters. Counsel are further advised that in all emergency matters, whether or not action outside of ordinary business hours is required, the process is facilitated if counsel contacts the Clerk's Office in advance and the motion seeking expedited relief clearly indicates the date by which a ruling is requested and the reasons supporting expedition.

## Internal Operating Procedure VI. Briefs and Appendices

**A. General.** The court's website, www.ca1.uscourts.gov, contains guidelines and a checklist to assist counsel in preparing briefs. Counsel are advised that any brief that does not conform to the requirements of the rules may be rejected.

**B. Modifications.** The following modifications of the Fed. R. App. P. apply in the First Circuit:

1. One copy of the brief or petition must be filed on a computer generated disk. See Local Rule 32.0.

2. Only 10 copies, including the disk, need be filed.

**C. Deferred Appendix.** Note the Local Rules of this Court do not provide for the proceeding on a deferred appendix pursuant to Fed. R. App. P. 30(c). If special leave to proceed under this method is sought, and the Court grants such leave, the leave will be conditioned upon a shorter time schedule than the Fed. R. App. P. generally allow so that the processing of the appeal will not take any longer time than it would under the regular procedure.

**D. Defaults.** If the appellant fails to file the brief and appendix on time, the Clerk is authorized to enter an order dismissing the appeal, and when an appellee is in default as to filing a brief, the appellee will not be heard at oral argument. The party in default may remove the default by showing special circumstance justifying the failure to comply. Any motion to set aside a dismissal should be filed within ten days. See Local Rule 45.0.

## Internal Operating Procedure VII. Screening and Calendaring

**A. General**. Initially, the staff attorney reviews the briefs in the cases the Clerk has assigned for a particular session. If a panel of 3 judges, in accordance with Fed. R. App. P. 34 and after consultation with the staff attorney, is of the opinion that a case does not warrant oral argument, the Clerk so advises counsel. Shortly after the decision as to hearing is made, the amount of time to be allotted for oral argument is also set by the Court. Before the hearing list is finally established, the Clerk notifies the parties by letter of the proposed date for hearing the case so that counsel may contact the Clerk if it appears that a scheduling conflict exists.

**B. Expedited Schedule.** Expedited scheduling is provided automatically in those cases where it is required by statute, such as recalcitrant witness cases. In other cases a request for expedited processing may be filed, but the motion should be made shortly after the case is docketed in the Court of Appeals.

**C. Dates of Sessions.** In January through June, and October through December, the Court usually sits for one week starting on the first Monday of the month. In either July or August, the court sits for one week. In September the Court starts on the Wednesday after Labor Day and sits for the 3 days in that week and the 5 days in the following week. In November and March the Court sits two weeks, with one week in Boston and one week in Puerto Rico.

**D. Judges and Case Assignment.** In accordance with long-standing practice, cases are assigned to panels on a random basis provided, however, that a case may be assigned to a particular panel or to a panel including a particular judge in the following circumstances:

1) where the case is a sequel to, or offshoot of, a case previously decided by the court (e.g., following a remand);

2) where the case was presented to the duty panel in the regular course of duties, see, e.g., Bui v. DiPaolo, 170 F.3d 232, 238 (1st Cir. 1999) ("[a]s an administrative measure, we advise litigants that, to the extent practicable, the panel that determines whether to issue a complementary COA also will be the panel that adjudicates the appeal on the merits"), cert. denied, 529 U.S. 1086 (2000);

3) where a case has been assigned to a panel, but scheduling changes (e.g., postponement of oral argument) or changes in the procedural handling of the case (e.g., a case intended for summary disposition is thereafter set for oral argument) require rescheduling;

4) where a case has been assigned to a panel, but the subsequent recusal of a judge (or other unavailability of a judge, e.g., due to illness) makes it appropriate to transfer the case to a different panel or to find a replacement judge.

No other non-random assignments of cases shall be made except for special cause and with the concurrence of the duty judge.

**E. Judges and Case Assignment in Capital Cases.**

1) Capital Case Panel. Capital cases, as defined in Local Rule 48.0, shall be randomly assigned to a panel of three judges, of whom at least one is an active judge of this Court, from the capital case pool. The capital case pool of judges shall consist of all active judges of this Court and those senior judges who have filed with the Clerk a statement of willingness to serve on capital case panels.

2) Duties of Capital Case Panel. Notwithstanding the practices identified in Internal Operating Procedure V, the assigned capital case panel handles all matters relating to the case, including but not limited to, the merits of a direct appeal, all case management, all petitions for collateral review, motions for stay of execution, motions to vacate a stay of execution, applications for a certificate of appealability, motions for an order authorizing the district court to consider a second or successive application for habeas corpus, appeals from subsequent petitions, and remands from the United States Supreme Court.

**F. Timing.** The Court will hear up to six cases per day. Generally, it is the practice of this Court to schedule cases in which the brief for appellee is filed by the fifteenth day of one month, so as to have the case screened and assigned to the list for hearing or submission on the second month thereafter.

## Internal Operating Procedure VIII. Oral Argument

**A. General.** The Court establishes the times allotted for oral argument and the Clerk so notifies the parties at least one week before argument starts. Though the calendar is not called at the beginning of the court day, counsel should be present at the opening or make arrangements to ascertain whether there is any change in the order of the cases at the opening of Court. It is counsel's responsibility to be present and be prepared should earlier cases take less time for oral argument than was anticipated. See Local Rule 34.1.

**B. Disclosure of Panel in Advance of Oral Argument.** The names of the judges on each panel may be disclosed for a particular session seven (7) days in advance of the session. Once the panel is made public, the Court will not normally grant motions for continuances or for a change in argument date during the same session.

**C. Lights**. The signal lights are located on the Clerk's desk and they are set so that an amber light turns on when there are five minutes left and it remains on until the red light turns on indicating that the time for oral argument has ended.

**D. Rebuttal.** Extended rebuttal is not encouraged, and the court normally expects rebuttal to be used only where an unexpected matter has been raised and then usually not more than a minute is allowed.

**E. Recording**. Oral arguments in all cases are digitally recorded for the use of the Court and are not part of the permanent record of the case. A disk copy of the recording of an oral argument may be obtained by submitting a request in writing to the Clerk with a check in the amount prescribed by the Judicial Conference of the United States. The Schedule of Fees is posted on this court's website at www.ca1.uscourts.gov.

## Internal Operating Procedure IX. Opinions & Judgments

**A. Processing.** When the opinion of the Court (and concurring and dissenting opinions, if any) are completed, they are turned over to the Clerk for reproducing and release. Copies of the opinion and copies of the judgment are sent to one counsel for each side. They are also released in electronic format on the same day.

**B. Publication**. The manner of deciding whether an opinion is to be published and the Court's policy with respect to publication are set forth in Local Rule 36.0.

**C. Electronic Access.** The Court’s dockets and opinions are available electronically through the PACER network supported by the Administrative Office for the United States Courts. Details are available in the Clerk’s Office.

## Internal Operating Procedure X. Petitions for Panel Rehearing and Petitions for Hearing or Rehearing En Banc

**A. General.** Fed. R. App. P. 40 and 35 should be consulted with respect to the procedures. Petitions for rehearing are intended to bring to the attention of the panel claimed errors in the opinion and they are not to be used for reargument of an issue previously presented.

**B. No Response.** Unless the court requests, no response to a petition is permitted.

**C. En Banc Processing.** A petition for a hearing or rehearing en banc is submitted by the Clerk to the panel that heard the case and to the other active First Circuit judges. A petition for rehearing en banc will also be treated as a petition for rehearing before the original panel.

**D. Vacation of Previous Opinion and Judgment.** Usually when an en banc rehearing is granted, the previous opinion and judgment will be vacated.

## Internal Operating Procedure XI. Complaints Against Judges

The procedure for filing complaints against judges is set forth in the Rules of the Judicial Council of the First Circuit Governing Complaints of Judicial Misconduct or Disability. A copy of these Rules may be obtained from the Clerk of this Court.

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

## Internal Operating Procedure XII. Notification of Changes or Notifications of the Court's Local Rules and Internal Operating Procedures

Changes in the Local Rules of this Court or its Internal Operating Procedures will be publicized by circulating for comment the entire text of the proposed change to the following state legal publishers:

a. Massachusetts Lawyers Weekly, 41 West Street, Boston, Massachusetts 02111.
b. Rhode Island Lawyers Weekly, c/o Massachusetts Lawyers Weekly, 41 West Street, Boston, MA 02111.
c. New Hampshire Bar News, 112 Pleasant Street, Concord, New Hampshire 03301.
d. Maine Bar Journal, P.O. Box 788, Augusta, Maine 04332.
e. Puerto Rico Bar Association, P.O. Box 1900, San Juan, PR 00903.

Notice of the changes will also be placed in all federal court bulletin boards and to all state bar associations within the Circuit. Comments should be forwarded to the Clerk's Office within thirty days from the date of the notice.

# Rules of Attorney Disciplinary Enforcement for the Court of Appeals for the First Circuit

Effective: August 1, 2002

The Court of Appeals for the First Circuit, in furtherance of its inherent power and responsibility to supervise the conduct of attorneys who are admitted to practice before it, or admitted for the purpose of a particular proceeding (pro hac vice), promulgates the following Rules of Attorney Disciplinary Enforcement superseding all of its other Rules pertaining to disciplinary enforcement heretofore promulgated.

RULE I

Attorneys Convicted of Crimes.

A. Upon filing with this Court of a certified copy of a judgment of conviction demonstrating that any attorney admitted to practice before the Court has been convicted in any Court of the United States, or the District of Columbia, or of any state, territory, commonwealth or possession of the United States of a serious crime as hereinafter defined, the Chief Judge shall refer the matter to a disciplinary panel. The disciplinary panel shall enter an order immediately suspending that attorney, whether the conviction resulted from a plea of guilty or nolo contendere or from a verdict after trial or otherwise, and regardless of the pendency of any appeal, until final disposition of a disciplinary proceeding to be commenced upon such conviction. A copy of such order shall immediately be served by the Clerk of this Court upon the attorney personally or by certified or registered mail. Upon motion and good cause shown, the disciplinary panel may set aside such order when it appears in the interest of justice to do so.

B. The term "serious crime" shall include any felony and any lesser crime, a necessary element of which, as determined by the statutory or common law definition of such crime in the jurisdiction where the judgment was entered, involves 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 a "serious crime."

C. Upon the filing of a certified copy of a judgment of conviction of an attorney for a serious crime, the disciplinary panel shall, in addition to suspending that attorney in accordance with the provisions of this Rule, also initiate disciplinary proceedings in which the sole issue to be determined shall be the extent of the final discipline to be imposed as a result of the conduct resulting in the conviction, provided that no final disposition will be rendered until all direct appeals from the conviction are concluded. The certified copy of the judgment of conviction shall be conclusive evidence of the commission of that crime by the attorney in question.

D. Upon the filing of a certified copy of a judgment of conviction of an attorney for any crime not constituting a "serious crime," the Chief Judge may refer the matter to a disciplinary panel for disciplinary

proceedings or may exercise discretion to make no reference with respect to convictions for minor offenses for which discipline would not be appropriate.

E. Any attorney suspended under the first paragraph of this Rule will be reinstated immediately upon the filing of a certificate demonstrating that the underlying conviction has been vacated or reversed on direct appeal, but the reinstatement shall not terminate any disciplinary proceeding then pending against the attorney, the disposition of which shall be determined by the disciplinary panel on the basis of all available evidence pertaining to both guilt and the extent of discipline to be imposed.

RULE II

Discipline Imposed by Other Courts.

A. Any attorney admitted to practice before this Court shall, upon being subject to public discipline by any other Court of the United States, or the District of Columbia, or of any state, territory, commonwealth or possession of the United States, promptly inform the Clerk of this Court of such action.

B. Upon filing of a certified copy of a judgment, order, or other official document demonstrating that an attorney admitted to practice before this Court has been publicly disciplined by another court, the Chief Judge shall refer the matter to a disciplinary panel and the Clerk of this Court shall serve on the attorney, personally or by certified or registered mail, a notice containing:

1. a copy of the judgment or order from the other court; and

2. an order to show cause directing that the attorney inform this Court within 30 days after service of the order of any claim predicated upon the grounds set forth in paragraph (C) of this Rule that the imposition of substantially similar discipline on the attorney would be unwarranted and the reasons therefor. The order shall also state that a hearing on such a claim must be requested within 30 days after service of the order.

C. Upon the expiration of the time to show cause, if no response has been filed, then the disciplinary panel shall enter an order imposing substantially similar discipline. If a timely response is filed, the disciplinary panel shall, after any applicable hearing or other proceedings, impose substantially the same discipline imposed by the other court unless the attorney demonstrates, and the disciplinary panel is persuaded:

1. that the procedure used by the other court was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

2. that there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that this Court could not, consistent with its duty, accept as final the conclusion on that subject; or

3. that the imposition of substantially similar discipline by this Court would result in grave injustice; or

4. that the misconduct established is deemed by this Court to warrant different discipline.

Where the disciplinary panel determines that any of these elements exist, it shall enter such other order as it deems appropriate.

D. In all other respects, a final adjudication in another court that an attorney has been guilty of misconduct shall establish conclusively the misconduct for purposes of any disciplinary proceeding in this Court.

RULE III

Disbarment on Consent or Resignation in Other Courts.

A. Any attorney admitted to practice before this Court who shall be disbarred on consent or resign from the bar of any other court of the United States or the District of Columbia, or from the Bar of any state, territory, commonwealth or possession of the United States while an investigation into allegations of misconduct is pending, shall, upon the filing with this Court of a certified or exemplified copy of the judgment or order accepting such disbarment on consent or resignation, cease to be permitted to practice before this Court and be stricken from the roll of attorneys admitted to practice before this Court.

B. Any attorney admitted to practice before this Court shall, upon being disbarred on consent or resigning from the bar of any other court of the United States or the District of Columbia, or from the Bar of any state, territory, commonwealth or possession of the United States while an investigation into allegations of misconduct is pending, promptly inform the Clerk of this Court of such disbarment on consent or resignation.

RULE IV

Standards for Professional Conduct.

A. For misconduct defined in these Rules, and for good cause shown, and after notice and opportunity to be heard, any attorney admitted to practice before this Court may be disbarred, suspended from practice before this Court, reprimanded or subjected to such other disciplinary action as the circumstances may warrant.

B. Acts or omissions by an attorney admitted to practice before this Court, individually or in concert with any other person or persons, which violate the Code of Professional Responsibility, either of the state, territory, commonwealth or possession of the United States in which the attorney maintains his principal office; or of the state, territory, commonwealth or possession of the United States in which the attorney is acting at the time of the misconduct; or of the state in which the circuit maintains its Clerk's Office, shall

constitute misconduct and shall be grounds for discipline, whether or not the act or omission occurred in the course of the attorney-client relationship. The Code of Professional Responsibility means that code adopted by the highest court of the state, territory, commonwealth or possession of the United States, as amended from time to time by that court, except as otherwise provided by specific Rule of this Court after consideration of comments by representatives of bar associations within the state, territory, commonwealth or possession of the United States. Failure to comply with the Federal Rules of Appellate Procedure, the Local Rules of this Court, or the orders of this Court may also constitute misconduct and be grounds for discipline.

## RULE V

Disciplinary Proceedings.

A. When misconduct or allegations of misconduct on the part of an attorney admitted to practice before this Court shall come to the attention of a Judge or officer of this Court, whether by complaint or otherwise, and the applicable procedure is not otherwise mandated by these rules, the Judge or officer shall refer the matter to the Chief Judge for initial review. If the Chief Judge determines that misconduct is alleged which, if substantiated, would warrant discipline by this Court, the Chief Judge shall refer the matter to a disciplinary panel; if not, the Chief Judge may dismiss the matter. A disciplinary panel shall consist of three judges of this Court, whether active or senior, appointed by the Chief Judge. The Chief Judge may serve as a member of the disciplinary panel. In the absence of the Chief Judge, the active judge most senior in service on the Court serves as chair. If no active judge is on the disciplinary panel, the Chief Judge shall appoint the chair. The disciplinary panel may at any time appoint counsel to investigate or to prosecute any disciplinary matter. In a matter in which the Chief Judge is recused, references to "Chief Judge" shall mean the senior active judge who is not recused.

B. If the disciplinary panel determines that cause may exist for disciplinary action, the disciplinary panel will direct the Clerk of the Court to issue an order to the attorney in question to show cause why (1) specified discipline should not be imposed or (2) discipline to be determined later should not be imposed. The order shall be served on the attorney personally or by certified or registered mail, shall notify the attorney of the alleged conduct and the reason the conduct may justify disciplinary action, and shall direct that 5 copies of a response, including any supporting evidence or request for a hearing, be filed within 30 days of service of the order or such other time as the order may specify. The Clerk shall also append a copy of these rules to the order. In any response to the order, the attorney must also (a) include an affidavit listing the other bars to which the attorney is admitted, (b) note which if any of the facts alleged are controverted, and (c) specify the basis on which any controverted facts are disputed. If the disciplinary panel determines on initial investigation and review that cause does not exist for disciplinary action, the disciplinary panel may dismiss the matter.

C. If the attorney fails to timely respond to an order to show cause, or if the attorney's timely response to the order to show cause does not specifically request to be heard in person, the disciplinary panel may direct entry of an order imposing discipline or take any other appropriate action. If the attorney specifically requests to be heard in person, either in defense or in mitigation, the disciplinary panel shall set the matter

for such hearing as is appropriate under the circumstances. The disciplinary panel may itself order a hearing whether or not one is requested. Following such a hearing and the receipt of any findings or recommendation that may be required and any further submissions that the disciplinary panel may invite, the disciplinary panel may direct entry of an order imposing discipline or take any other appropriate action.

D. If a hearing is ordered, the disciplinary panel may conduct the hearing itself or designate a special master (including but not limited to a district judge or magistrate judge serving within the circuit) for purposes of conducting any hearing. The disciplinary panel (or the special master, subject to the instruction of the disciplinary panel) may in its discretion adopt appropriate procedural and evidentiary rules for any such hearing. At the conclusion of a hearing held before a special master, the special master shall promptly make a report of findings and--if directed by the disciplinary panel--recommendations to the disciplinary panel. A copy of the report and any recommendations shall be made available to the attorney under investigation. The disciplinary panel may reject or adopt the findings and/or recommendations of the special master in whole or part.

E. Any attorney may file a petition for rehearing by the disciplinary panel or a combined petition for rehearing by the disciplinary panel and suggestion for rehearing en banc by the active judges of the Court. Similarly, the attorney may seek a stay of any disciplinary order entered by the disciplinary panel, the stay to be sought from the disciplinary panel in the first instance and thereafter if desired by the attorney from the Court en banc. The procedures for any such petition will be in accordance with the Federal Rules of Appellate Procedure and the Local Rules of this Court. If en banc review is granted, any senior judge shall be eligible to be a member of the en banc Court, at that judge's election, in the circumstances specified in 28 U.S.C. § 46(c).

F. At any time, the disciplinary panel may in its discretion refer a disciplinary matter pending before it to an appropriate state bar association or state disciplinary board. In such a case, the disciplinary panel is free to dismiss the matter or hold its own proceedings in abeyance pending the completion of the state disciplinary proceedings. Nothing in these rules prevents any disciplinary panel, Judge, or officer of this Court from bringing disciplinary matters to the attention of the appropriate state disciplinary authorities.

G. The provisions of this Rule shall govern disciplinary proceedings addressed to misconduct as defined in Rule IV, and shall also apply to any proceedings under Rule I (Attorneys Convicted of Crimes), Rule II (Discipline Imposed by Other Courts), and Rule VII (Reinstatement) to the extent not inconsistent with the express provisions of those rules.

## RULE VI

Disbarment on Consent While Under Disciplinary Investigation or Prosecution.

A. Any attorney admitted to practice before this Court who is the subject of an investigation into, or a pending proceeding involving, allegations or misconduct may consent to disbarment, but only by delivering to this Court an affidavit stating that the attorney desires to consent to disbarment and that:

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

2. the attorney is aware that there is a presently pending investigation or proceeding involving allegation that there exist grounds for the attorney's discipline the nature of which the attorney shall specifically set forth;

3. the attorney acknowledges that the material facts so alleged are true; and

4. the attorney so consents because the attorney knows that if charges were predicted upon the matters under investigation, or if the proceeding were prosecuted, the attorney could not successfully defend himself.

B. Upon receipt of the required affidavit, this Court shall enter an order disbarring the attorney.

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

RULE VII

Reinstatement.

A. Unless the suspension order provides otherwise, an attorney who is suspended shall be automatically reinstated at the end of the period of suspension upon filing with this Court of an affidavit of compliance with the provisions of the order. An attorney who is suspended indefinitely or disbarred may not resume practice until reinstated by order of this Court. Suspensions may be directed to run concurrently with a suspension mandated by other state or federal courts, in which event the attorney shall be eligible for reinstatement in this Court when said suspension expires and will be automatically reinstated upon filing with this Court an affidavit indicating that the period of suspension has run.

B. Petitions for reinstatement by an attorney disbarred or indefinitely suspended under these rules shall be filed with the Clerk of this Court and contain a concise statement of the circumstances of the disciplinary proceeding, the discipline imposed by this Court, and the grounds that justify reinstatement of the attorney in question. In accordance with Rule V, the Chief Judge shall conduct an initial review, and, as warranted, dismiss the petition or refer it to a disciplinary panel. After whatever investigation it sees fit, the disciplinary panel may set the matter for whatever hearing it deems appropriate under the circumstances.

C. The petitioner shall have 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 law

before this Court and that the 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 subversive to the public interest.

D. If the disciplinary panel finds that the petitioner is unfit to resume the practice of law, the petition shall be dismissed. If the petitioner is found fit to resume the practice of law, the disciplinary panel shall enter an order of reinstatement, provided that the disciplinary panel may make reinstatement conditional upon the payment of all or part of the costs of the proceedings, and upon the making of partial or complete restitution to parties harmed by the petitioner whose conduct led to the suspension or disbarment, and the disciplinary panel may impose such other reasonable conditions as it deems meet. Further, if the petitioner has been suspended or disbarred for five or more years, the disciplinary panel may in its discretion condition reinstatement upon the furnishing of proof of competency and learning in the law, which proof may include successful completion of an examination for admission to practice subsequent to the date of suspension or disbarment.

E. No petition for reinstatement under this Rule shall be filed within one year following an adverse final judgment upon a petition for reinstatement filed by or on behalf of the same attorney.

## RULE VIII

Attorneys Specially Admitted.

Whenever an attorney applies to be admitted or is admitted to this Court for purposes of a particular proceeding (pro hac vice), the attorney shall be deemed thereby to have conferred disciplinary jurisdiction upon this Court for any alleged misconduct of that attorney arising in the course of or in the preparation for such proceeding.

## RULE IX

Appointment of Counsel.

Whenever counsel is appointed pursuant to these rules to investigate allegations of misconduct or prosecute disciplinary proceedings or in conjunction with a reinstatement petition filed by a disciplined attorney, a member of the Bar of this Court shall be appointed. Counsel, once appointed, shall not resign without the consent of the disciplinary panel.

## RULE X

Duties and Powers of the Clerk.

A. The Clerk of this Court shall promptly notify the National Discipline Data Bank operated by the American Bar Association of any order imposing public discipline upon any attorney admitted to practice before this Court.

B. The Clerk of this Court is empowered, upon being informed that any attorney admitted to practice before this Court has been convicted of any crime or has been subjected to discipline by another court, to obtain and file with this Court a certified or exemplified copy of such conviction or disciplinary judgment or order.

C. Whenever it appears that any person who is disbarred or suspended or censured or disbarred on consent by this Court is admitted to practice law in any other jurisdiction or before any other court, the Clerk of this Court is empowered, to the extent he deems it desirable and necessary to supplement the action taken under clause A, above, to so advise the disciplinary authority in such other jurisdiction or such other court.

## RULE XI

Jurisdiction.

Nothing contained in these Rules shall be construed to deny to this Court such powers as are necessary for the Court to maintain control over proceedings conducted before it, such as proceedings for contempt under Title 18 of the United States Code or under Rule 42 of the Federal Rules of Criminal Procedure.

## RULE XII

Effective Date.

These Rules shall become effective on August 1, 2002, provided that any formal disciplinary proceedings then pending before the Court shall (unless the Court otherwise directs) be concluded under the Rules existing prior to that date.

# RULES OF THE JUDICIAL COUNCIL OF THE FIRST CIRCUIT GOVERNING COMPLAINTS OF JUDICIAL MISCONDUCT OR DISABILITY

Effective: April 24, 2003

## Preface to the Rules

Section 351(a) of title 28 of the United States Code provides a way for any person to complain about a federal judge who the person believes "has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts" or "is unable to discharge all the duties of office by reason of mental or physical disability."[1] Section 358 of title 28 of the United States Code permits the Judicial Councils of the circuits to adopt rules for the consideration of these complaints. These rules have been adopted under that authority.

Complaints are filed with the clerk of the court of appeals on a form that has been developed for that purpose. Each complaint is referred first to the chief judge of the circuit, who decides whether the complaint raises an issue that should be investigated. (If the complaint is about the chief judge, another judge will make this decision; see rule 18(f).)

The chief judge will dismiss a complaint if it does not properly raise a problem that is appropriate for consideration under section 351(a). The chief judge will also dismiss a complaint if the chief judge concludes that the complaint is directly related to the merits of a decision or procedural ruling or is frivolous. The chief judge will also dismiss a complaint if, after a limited inquiry, the chief judge concludes that the allegations in the complaint lack any factual foundation or are conclusively refuted. The chief judge may also conclude the complaint proceeding if the problem has been corrected or if intervening events have made action on the complaint unnecessary. If the complaint is not disposed of in any of these ways, the chief judge will appoint a special committee to investigate the complaint. The special committee makes its report to the Judicial Council of the circuit, which decides what action, if any, should be taken. The Judicial Council is a body that consists of all the judges of the court of appeals in active service and five district judges.

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[1]On November 2, 2002, the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (the "Act"), 28 U.S.C. § 372(c) was amended and recodified as Chapter 16 of the Judicial Improvements Act of 2002, Complaints Against Judges and Judicial Discipline, 28 U.S.C. § 351, *et. seq.* The Act was reorganized as a separate chapter in order to "publicize its existence and . . . facilitate its use." Further, in amending the law, the legislature sought to define more clearly the "power of a circuit chief judge to conduct a 'limited inquiry'" and expand upon the "concept of dismissing a case for 'frivolousness.'" H.R. Rep. No. 107-459, 107th Cong., 2d Sess. (May 14, 2002). See 28 U.S.C § 352(b). Finally, the statutory amendments provide a judicial council with the "explicit authority to refer a complaint to a five-member panel . . .." H.R. Rep. No. 107-459, 107th Cong., 2d Sess. (May 14, 2002). See 28 U.S.C. § 352(d).

The rules provide, in some circumstances, for review of decisions of the chief judge or the Judicial Council.

The commentary to the rules is included for the purpose of assisting the bench, bar, and public in the understanding of the rules. Unlike the rules themselves, the Commentary has no official or binding status.

## CHAPTER I: FILING A COMPLAINT

### RULE 1. WHEN TO USE THE COMPLAINT PROCEDURE

**a.** **Purpose of the procedure.** The purpose of the complaint procedure is to improve the administration of justice in the federal courts by taking action when judges have engaged in conduct that does not meet the standards expected of federal judicial officers or are physically or mentally unable to perform their duties. The law's purpose is essentially forward-looking and not punitive. The emphasis is on correction of conditions that interfere with the proper administration of justice in the courts.

**b.** **What may be complained about.** The law authorizes complaints about United States circuit judges, district judges, bankruptcy judges, or magistrate judges who have "engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts" or who are "unable to discharge all the duties of office by reason of mental or physical disability."

"Conduct prejudicial to the effective and expeditious administration of the business of the courts" is not a precise term. It includes such things as use of the judge's office to obtain special treatment for friends and relatives, acceptance of bribes, improperly engaging in discussions with lawyers or parties to cases in the absence of representatives of opposing parties, and other abuses of judicial office. It does not include making wrong decisions – – even very wrong decisions – – in cases. The law provides that a complaint may be dismissed if it is "directly related to the merits of a decision or procedural ruling."

"Mental or physical disability" may include temporary conditions as well as permanent disability.

**c.** **Who may be complained about.** The complaint procedure applies to judges of the United States court of appeals, judges of United States district courts, judges of United States bankruptcy courts, and United States magistrate judges. These rules apply, in particular, only to judges of the Court of Appeals for the First Circuit and to district judges, bankruptcy judges, and magistrate judges of federal courts within the circuit. The circuit includes the districts of Maine, Massachusetts, New Hampshire, Puerto Rico and Rhode Island.

Complaints about other officials of federal courts should be made to their supervisors in the various courts. If such a complaint cannot be satisfactorily resolved at lower levels, it may be referred to the chief judge of the court in which the official is employed. The circuit executive, whose address is United States Courthouse, 1 Courthouse Way, Suite 3700, Boston, Massachusetts 02210, is sometimes able to provide assistance in resolving such complaints.

**d.** **Time for filing complaints.** Complaints should be filed promptly. A complaint may be dismissed if it is filed so long after the events in question that the delay will make fair consideration of the matter impossible. A complaint may also be dismissed if it does not indicate the existence of a current problem with the administration of the business of the courts.

**e.** **Limitations on use of the procedure.** The complaint procedure is not intended to provide a means of obtaining review of a judge's decision or ruling in a case. The Judicial Council of the circuit, the body that takes action under the complaint procedure, does not have the power to change a decision or ruling. Only a court can do that.

The complaint procedure may not be used to have a judge disqualified from sitting on a particular case. A motion for disqualification should be made in the case.

Also, the complaint procedure may not be used to force a ruling on a particular motion or other matter that has been before the judge too long. A petition for mandamus can sometimes be used for that purpose.

**f.** **Abuse of complaint procedure.** A complainant who has filed vexatious, repetitive, harassing or frivolous complaints, or has otherwise abused the complaint procedure, may be restricted from filing further complaints. After affording the offending complainant an opportunity to show cause in writing why his or her ability to file further complaints should not be limited, the Judicial Council may restrict or impose conditions upon the complainant's use of the complaint procedure. Upon written request of the complainant, the Judicial Council may revise or withdraw any restrictions or conditions imposed.

## *Commentary on Rule 1*

### *Advice to Prospective Complainants on Use of Complaint Procedure*

*As at least some members of Congress anticipated, a great many of the complaints that have been filed under the statute have been filed by litigants disappointed in the outcomes of their cases.*[2] *Some complaints allege nothing more than that the decision was in violation of established legal principles. Many of them allege that the judges are members of conspiracies to deprive the complainants of their rights, and offer the substance of the judicial decision as the only evidence of the conspiratorial behavior. A great many of the complaints seek various forms of relief in the underlying litigation.*

*Rule 1 is intended to provide prospective complainants with guidance about the appropriate uses of the complaint procedure. Paragraph (b) discusses cognizable subject matters, and paragraph (c) discusses cognizable persons. Paragraph (e) discusses remedies, and attempts to make it clear that the circuit council will not provide relief from a ruling or judgment of a court.*

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[2] See 125 Cong. Rec. 30,093-94 (1979) (remarks of Sen. Bellmon); 126 Cong. Rec. 28,091 (1980) (remarks of Sen. DeConcini); H.R. Rep. No. 1313, 96th Cong., 2d Sess. 18-19 (1980).

*It is hoped that such guidance will reduce the number of complaints filed that seek relief that cannot be given under the statute or deal with matters that are plainly not cognizable.*

*The last two paragraphs in rule 1(e), dealing with complaints alleging bias and those alleging undue delay, are in accord with Judicial Council decisions in some circuits. The use of the complaint procedure is not limited to cases in which a judge has committed an impropriety. For example, habitual failure to decide matters in a timely fashion may be the proper subject of a complaint where it is demonstrated that, over a period of years, the judge has persistently and unreasonably neglected to act on a substantial number of cases. Delay in a single case may be a proper subject for a complaint only in unusual cases, such as where the delay is improperly motivated or is the product of improper animus or prejudice toward a particular litigant, or, possibly, where the delay is of such an extraordinary or egregious character as to constitute a clear dereliction of judicial responsibilities suitable for discipline.*

***Venue***

*Rule 1(c) states that the complaint procedure applies to judges "of federal courts within the circuit." This language is intended to make it clear that the circuit in which a judge holds office is the appropriate circuit in which to file a complaint, regardless of where the alleged misconduct occurred.*

***Time Limitation***

*These rules do not contain a time limit for the filing of a complaint. However rule 1(d) indicates that a complaint may be dismissed, for reasons analogous to laches, if the delay in filing the complaint would prejudice the ability of the Judicial Council to give fair consideration to the matter.*

## RULE 2. HOW TO FILE A COMPLAINT

**a.** **Form.** Complaints should be filed on the official form for filing complaints in the First Circuit, which is reproduced in the appendix to these rules. Forms may be obtained by writing or telephoning the Office of the Circuit Executive, United States Courthouse, 1 Courthouse Way, Suite 3700, Boston, Massachusetts 02210, (617) 748-9330. Forms may be picked up in person at the Office of the Clerk of the Court of Appeals or any district court or bankruptcy court within the circuit.

**b.** **Statements of facts.** A statement should be attached to the complaint form, setting forth the particular facts on which the claim of misconduct or disability is based. The statement should not be longer than five pages (five sides), and the paper size should not be larger than the paper the form is printed on. Normally, the statement of facts will include – –

(1) A statement of what occurred;

(2) The time and place of the occurrence or occurrences;

(3) Any other information that would assist an investigator in checking the facts, such as the presence of a court reporter or other witnesses and their names and addresses.

**c.** **Legibility.** Complaints should be typewritten if possible. If not typewritten, they must be legible.

**d.** **Submission of documents.** Documents such as excerpts from transcripts may be submitted as evidence of the behavior complained about; if they are, the statement of facts should refer to the specific pages in the documents on which relevant materials appears.

**e.** **Number of copies.** If the complaint is about a single judge of the court of appeals, three copies of the complaint form, the statement of facts, and any documents submitted must be filed. If it is about a single district judge or magistrate judge, four copies must be filed; if about a single bankruptcy judge, five copies. If the complaint is about more than one judge, enough copies must be filed to provide one for the circuit executive, one for the chief judge of the circuit, one for each judge complained about, and one for each judge to whom the circuit executive must send a copy under rule 3(a)(2).

**f.** **Signature and oath.** The form must be signed and the truth of the statements verified in writing under oath. As an alternative to taking an oath, the complainant may declare under penalty of perjury that the statements are true. The complainant's address must also be provided.

**g.** **Anonymous complaints.** Anonymous complaints are not handled under these rules. However, anonymous complaints received by the clerk will be forwarded to the chief judge of the circuit for such action as the chief judge considers appropriate, including identifying a complaint. See rules 2(k) and 20.

**h.** **Where to file.** Complaints should be sent to: Clerk, United States Court of Appeals, United States Courthouse, 1 Courthouse Way, Suite 2500, Boston, Massachusetts 02210. The envelope should be marked "Complaint of Misconduct" or "Complaint of Disability." The name of the judge complained about should not appear on the envelope.

**i.** **No fee required.** There is no filing fee for complaints of misconduct or disability.

**j.** **Intervention.** No person shall be granted the right to intervene or to appear as amicus curiae in connection with any complaint filed under these rules.

**k.** **Chief Judge's authority to initiate complaint.** In the interest of effective and expeditious administration of the business of the courts and on the basis of information available to the chief judge of the circuit, the chief judge may, by written order stating reasons therefor, identify a complaint as authorized by 28 U.S.C. § 351(b) and thereby dispense with the filing of a written complaint. A chief judge who has identified a complaint under this rule will not be considered a complainant and, subject to the second sentence of rule 18(a), will perform all the functions assigned to the chief judge under these rules for the determination of complaints filed by a complainant.

## ***Commentary on Rule 2***

### ***Use of Complaint Form***

*Paragraph (a) of rule 2 provides that complaints be filed on a form. Use of a complaint form provides a simple means of eliciting some fairly standard information that is helpful in administering the act. The use of a complaint form will also resolve ambiguities that sometimes arise about whether the author of a complaining letter intends to invoke the procedures of section 351(c). With the use of the form, the 351(c) procedure will be used only if the complainant clearly invokes it.*

### ***Limitation on Length of Complaint***

*Paragraph (b) of rule 2 provides a five-page limit on the statement of facts. Paragraph (d), however, does not restrict the volume of documents that may be submitted as evidence of the behavior complained about. It is hoped that a five-page limit will get rid of the long, rambling complaints that do not clearly identify the conduct complained of without unduly restricting the ability to communicate the facts supporting a complaint.*

*The provision allowing submission of documentary evidence is partly motivated by the concern that a complainant not be unduly restricted in presenting the factual basis of the complaint, but also reflects a sense that prohibiting the submission of documents with the complaint tends to make the procedure unnecessarily complex. In many cases, a chief judge will have to ask for documents if they haven't been submitted.*

### ***Complaints Against More than One Judicial Officer***

*A separate complaint relating to the same underlying matter for each judicial officer complained about is not required under these rules. However, a complaint should provide sufficient facts alleging misconduct for each officer named in the complaint.*

### ***Oath or Declaration***

*Rule 2(f) includes a requirement that complaints be signed and verified under oath or declaration. This requirement is designed to deter abuse of the complaint process. In view of the ease with which a complainant can make a declaration under penalty of perjury, the requirement should not be burdensome. As is indicated below, anonymous complaints should not be handled under the section 351 procedure; the requirement of an oath or declaration would be inconsistent with a policy of accepting such complaints.*

*Under 28 U.S.C. § 1746, any statement required by rule to be made under an oath in writing may be subscribed instead with a written declaration under penalty of perjury that the statement is true and correct. 18 U.S.C. § 1621 includes in the definition of perjury a willfully false statement subscribed pursuant to 18 U.S.C. § 1746. Rule 2(f) prescribes an oath but informs prospective complainants of the availability of the alternative. The complaint form permits either method.*

***Anonymous Complaints***

*Rule 2(g) requires that complaints under section 351(a) be signed but makes it clear that the chief judge, as chair of the circuit judicial council, can, as he or she always has, consider information from any source, anonymous or otherwise. This solution is consistent with congressional expressions of intention that informal methods of resolving problems, traditionally used under section 332, should continue to be used in many cases.*[3] *Hence, under these rules, the formalities of the statute would not be invoked by an anonymous complaint, but the chief judge and the circuit council may nevertheless consider it. Information obtained from an anonymous complaint could also provide a basis for identification of a complaint by the chief judge under rule 2(k).*

***Identification of Complaints***

*Section 351(b) authorizes the chief judge, by written order stating reasons therefor, to identify a complaint and thereby dispense with the filing of a written complaint. Because the identification of a complaint is within the discretion of the chief judge, a chief judge's failure to identify a complaint will not ordinarily constitute a proper basis for the filing of a complaint of misconduct against the chief judge under section 351(a).*

*Once the chief judge has identified a complaint, the chief judge (subject to the disqualification provisions of rule 18(a)) will perform all functions assigned to the chief judge for the determination of complaints filed by a complainant. The identified complaint will be treated in a manner identical to a filed complaint under these rules.*

## RULE 3. ACTION BY CIRCUIT EXECUTIVE UPON RECEIPT OF A COMPLAINT

**a. Receipt of complaint in proper form.**

(1) Upon receipt of a complaint against a judge filed in proper form under these rules, the clerk of court of appeals will promptly file such complaint and transmit it to the circuit executive. The circuit executive will have custody of the complaint and all related papers and see that the complaint is expeditiously processed. The circuit executive will open a file, assign a docket number, and acknowledge receipt of the complaint. The circuit executive will promptly send copies of the complaint to the chief judge of the circuit (or the judge authorized to act as chief judge under rule 18(f)) and to each judge whose conduct is the subject of the complaint. The original of the complaint will be retained by the circuit executive.

When the chief judge issues an order identifying a complaint under rule 2(k), the circuit executive will process such complaint as otherwise provided by these rules.

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[3] See S. Rep. No. 362, 96th Cong., 1st Sess. 3-4, 6 (1979); 126 Cong. Rec. 28,092 (1980) (remarks of Sen. DeConcini on final passage).

(2) If a district judge or magistrate judge is complained about, the circuit executive will also send a copy of the complaint to the chief judge of the district court in which the judge or magistrate judge holds his or her appointment. If a bankruptcy judge is complained about, the circuit executive will send copies to the chief judges of the district court and the bankruptcy court. However, if the chief judge of the district court or bankruptcy court is a subject of a complaint, the chief judge's copy 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.

**b.** **Receipt of complaint about official other than a judge of the First Circuit.** If the circuit executive receives a complaint about an official other than a judge of the First Circuit, the circuit executive will not accept the complaint for filing and will advise the complainant in writing of the procedure for processing such complaints.

**c.** **Receipt of complaint about a judge of the First Circuit and another official.** If a complaint is received about a judge of the First Circuit and another official, the circuit executive will accept the complaint for filing only with regard to the judge, and will advise the complainant accordingly.

**d.** **Receipt of a complaint not in proper form.** If the circuit executive receives a complaint against a judge of this circuit that uses the complaint form but does not comply with the requirements of rule 2, the circuit executive will normally not accept the complaint for filing and will advise the complainant of the appropriate procedures. If a complaint against a judge is received in letter form, the circuit executive will normally not accept the letter for filing as a complaint, will advise the writer of the right to file a formal complaint under these rules, and will enclose a copy of these rules and the accompanying forms.

## *Commentary on Rule 3*

### *Role of Staff*

*Rule 2(h) follows the statutory language and provides that complaints are to be filed with the clerk of the court of appeals. Rule 3(a) provides that any complaint or related document filed with the clerk of the court of appeals will be forwarded promptly to the circuit executive who will thereafter have custody of the complaint and related papers and see that the complaint is expeditiously processed.*

### *Distribution of Complaint to Chief Judge of District Court or Bankruptcy Court*

*The statute requires that the complaint be transmitted to the chief judge of the circuit and the judge complained about. If the complaint is about a district judge, bankruptcy judge, or magistrate judge, rule 3(a)(2) requires in addition that a copy be transmitted to the chief judge of the district court and, where a bankruptcy judge is the subject, the chief judge of the bankruptcy court. This provision is included in recognition of the responsibility of every chief judge of the administration of his or her court.*

## CHAPTER II: REVIEW OF A COMPLAINT BY THE CHIEF JUDGE

### RULE 4. REVIEW BY THE CHIEF JUDGE

**a.** **Procedure for Review by the chief judge.** When a complaint in proper form is sent to the chief judge by the circuit executive's office or identified under section 351(b), the chief judge will review the complaint. In determining what action to take, the chief judge may conduct a limited inquiry for the purpose of determining: (1) whether appropriate corrective action has been or can be taken without the necessity for a formal investigation, (2) whether intervening events have made action on the complaint unnecessary, and (3) whether the facts stated in the complaint are either plainly untrue or are incapable of being established through investigation. For this purpose, the chief judge may request the judge whose conduct is complained of to file a written response to the complaint. The chief judge may also communicate orally or in writing with the complainant, the judge whose conduct is complained of, and other people who may have knowledge of the matter, and may review any transcripts or other relevant documents. The chief judge will not undertake to make findings of fact about any matter that, after an initial limited inquiry, remains reasonably in dispute.

**b.** **Actions Available to the chief judge.** After reviewing a complaint, under subsection (a), the chief judge, by written order stating his or her reasons, may:

(1) dismiss the complaint if the chief judge concludes –

(A) that the claimed conduct, even if the claim is true, 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;

(B) that the complaint is directly related to the merits of a decision or procedural ruling; or

(C) that the complaint is frivolous, a term that includes making charges that are wholly unsupported or which are incapable of being established through investigation; or

(D) that a limited inquiry conducted under subsection (a) demonstrates that the allegations in the complaint lack any factual foundation or are conclusively refuted by objective evidence; or

(E) that, under the statute, the complaint is otherwise not appropriate for consideration; or

(2) conclude the proceeding if the chief judge determines that appropriate action has been taken to remedy the problem raised by the complaint, or that action on the complaint is no longer necessary because of intervening events; or

(3) appoint a special committee, constituted as provided in rule 9, to investigate the complaint

and make recommendations to the Judicial Council. However, ordinarily a special committee will not be appointed until the judge complained about has been invited to respond to the complaint and has been allowed a reasonable time to do so. In the discretion of the chief judge, 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.

**c. Notice of the chief judge's action.**

(1) If the complaint is dismissed or the proceeding concluded on the basis of corrective action taken or because intervening events have made action on the complaint unnecessary, the chief judge will prepare a supporting memorandum that sets forth the allegations of the complaint and the reasons for the disposition. The memorandum will not include the name of the complainant or of the judge whose conduct is complained of. The order and the supporting memorandum will be provided to the complainant, the judge, and any judge entitled to receive a copy of the complaint pursuant to rule 3(a)(2). The complainant will be notified of the right to petition of the Judicial Council for review of the decisions and of the deadline for filing a petition.

(2) If a special committee is appointed, the chief judge will notify the complainant, the judge of whose conduct is complained, and any judge entitled to receive a copy of the complaint pursuant to rule 3(a)(2) that the matter has been referred and will inform them of the membership of the committee.

**d. Public availability of the chief judge's decision.** Materials related to the chief judge's decision will be made public at the time and in the matter set forth in rule 17.

**e. Report to the Judicial Council.** The chief judge will from time to time report to the Judicial Council of the circuit on actions taken under this rule.

**f. Allegations of criminal conduct.** If a chief judge dismisses, solely for lack of jurisdiction under 28 U.S.C. § 351(a), non-frivolous allegations of criminal conduct by a judge, the chief judge's order of dismissal shall inform the complainant that the dismissal does not prevent the complainant from bringing any allegations of criminal conduct to the attention of appropriate federal or state criminal authorities. If, in this situation, the allegations of criminal conduct were originally referred to the circuit by a congressional committee or member of Congress, the chief judge – – if no petition for review of the dismissal is filed within the thirty-day period specified by rule 6(a) – – shall notify the congressional committee or member that the judiciary has concluded that it lacks jurisdiction under § 351(a).

## *Commentary on Rule 4*

### *Expeditious Review*

*The statute requires the chief judge to review a complaint "expeditiously." It should be a rare case in which more than sixty days are permitted to elapse from the filing of the complaint to the chief judge's action on it.*

***Purpose of Chief Judge's Review***

*Although the statute permits the chief judge to conclude the proceeding "if the chief judge finds that appropriate corrective action has been taken," it seems clear that the chief judge, in cases in which a complaint appears to have merit, should make every effort to determine whether it is possible to fashion a remedy without the necessity of appointing a special committee. The formal investigatory procedures are to be regarded as a last resort; the remedial purpose of the statute is on the whole better and more promptly served if an informal solution can be found that will correct the problem giving rise to a complaint.*

***Inquiry by Chief Judge***

*The chief judge is not required to act solely on the face of the complaint. The power to conclude a complaint proceeding on the basis that corrective action has been taken implies some power to determine whether the facts alleged are true. See Report of the National Commission on Judicial Discipline and Removal (1993), at 102 [hereafter National Commission Report] ("such power is necessarily contemplated by the Act's provision authorizing a chief judge to conclude a proceeding"). But the boundary line of that power – – the point at which a chief judge invades the territory reserved for special committees – – is unclear. Rule 4(a) addresses that issue by stating that the chief judge may conduct a limited inquiry to determine whether the facts of the complaint are "either plainly untrue or are incapable of being established through investigation," and that the chief judge "will not undertake to make findings of fact about any matter that, after an initial limited inquiry, remains reasonably in dispute."*

*Offered here, as commentary, are some hypothetical situations demonstrating the implementation of this principle:*

*(1) The complainant alleges an impropriety and asserts that he knows of it because his voices told him. It would appear clearly appropriate to treat such a complaint as frivolous.*

*(2) The complainant alleges an impropriety and asserts that he knows of it because it was observed and reported to her by a person whom the complainant is not free to identify. The judge denies that the event occurred. The statutory basis for dismissal does not seem strong, but dismissal seems eminently sensible unless it is appropriate for special committee to subpoena the complainant and insist on the identity of the source. On balance, it would appear that the complaint should be dismissed as unsupported pursuant to 28 U.S.C. § 352(b)(1)(B).*

*(3) The complainant 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 well turn on whether the source had any role in the allegedly improper conduct. If the complaint were based on a lawyer's statement that he 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 seems appropriate to conclude that a real*

*factual issue is raised. On the other hand, if the complaint quoted a disinterested third party and the disinterested party denied that the statement had been made, there would not appear to be any value in opening a formal investigation. In such a case, it would seem appropriate to dismiss the complaint under 28 U.S.C. § 352(b)(1)(B) on the basis that there is no support for the allegation of misconduct.*

*(4) The complainant alleges an impropriety and alleges that he observed it and there were no other witnesses; the judge denies that the event occurred. This situation presents the possibility of a simple credibility conflict. Unless the complainant's allegations are wholly implausible, it would appear that a special committee must be appointed because there is a factual question that is reasonably in dispute.*

*(5) The complainant alleges an impropriety, which the judge complained of denies. Unlike example (4) (supra), where there are no witnesses, in this case the chief judge conducts a preliminary investigation and finds that the record clearly contradicts the complainant's allegations. The chief judge should dismiss the complaint.*

***Grounds for Dismissal of Complaints***

*It has been the accepted practice in many circuits to dismiss as "frivolous" a complaint that is shown to be unfounded by the chief judge's limited inquiry pursuant to rule 4(b). The 2002 statutory amendments clarify that the term "frivolous," however, may be more commonly understood by complainants to refer to complaints that contain insufficient factual allegations to warrant inquiry, as opposed to complaints adequate on their face that are found clearly unsupported after a limited inquiry. See 28 U.S.C. § 352(b)(1)(A)(iii). In contrast, where a complaint raises serious or sensitive allegations that are found unsupported after inquiry, the chief judge may indicate in the order of dismissal that the complaint, while not inadequate on its face, has been shown by a limited inquiry pursuant to rule 4(a) to be plainly untrue or lacking any factual foundation. See 28 U.S.C. § 352(b)(1)(B).*

*Rule 4(b)(1)(E) provides that a complaint may be dismissed as "otherwise not appropriate for consideration." This language is intended to accommodate dismissals of complaints for reasons such as untimeliness (see rule 1(d)) or mootness.*

***Opportunity of Judge to Respond***

*Rule 4(d) states that a judge will ordinarily be invited to respond to the complaint before a special committee is appointed.*

*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 4(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 judge complained about to devote time to a defense. By stating that ordinarily a chief judge will issue an invitation to respond before a special committee is appointed, the rule should encourage officials not to respond unnecessarily.*

***Notification to Complainant and Judge***

*Section 352(b) 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. Rule 4(f) contemplates that a formal order disposing of the complaint and a memorandum of reasons, either included in the order or issued separately, will be provided to the complainant, the judge complained against, and any other judge entitled to receive a copy of the complaint. Rule 17, dealing with availability of information to the public, contemplates that the memorandum would be made public, usually without disclosing the names of the complainant or the judge involved. However, if the chief judge concludes a proceeding because corrective action was taken, the order should explain the corrective action taken so the complainant will be better able to assess the adequacy of the decision and decide whether or not to file a petition for review.*

*Rule 4(f) also provides that a complainant will be notified, in the case of a disposition by the chief judge, of the right to petition the Judicial Council for review. Although the complainant should in all cases have a copy of the circuit rules at the time the complaint is filed, it seems appropriate to provide a reminder at the time of dismissal of the complaint.*

***Allegations of Criminal Conduct***

*In the course of implementing § 351, some circuits have ruled that certain instances of alleged criminal conduct did not fall within the definition of misconduct set out in 28 U.S.C. § 351(a), i.e, "conduct prejudicial to the effective and expeditious administration of the business of the courts." Generally speaking, the rationale of these rulings is that there is some range of purely personal behavior of the judge – in some conceivable circumstances even criminal behavior – that his so little relationship to the performance of judicial duties as to be not cognizable under § 351. These rulings raise the concern that dismissal by a circuit, solely on jurisdictional grounds, of non-frivolous allegations of criminal conduct – without at least informing the complainant that he or she may bring those allegations to the attention of criminal authorities – entails a risk that no one will undertake whatever investigation of those allegations may be appropriate. Actual criminal conduct might then go unpunished. Rule 4(I) resolves the problem by requiring a chief judge in that situation to inform the complainant that the dismissal does not prevent the complainant from bringing any allegations of criminal conduct to the attention of appropriate federal or state criminal authorities. If the allegations were originally referred to the circuit by a congressional committee or member of Congress, the chief judge shall also notify the congressional committee or member that the judiciary has concluded that it lacks jurisdiction under § 351(a). Rule 14(k) imposes similar requirements for a Judicial Council's dismissal, solely on jurisdictional grounds, of a complaint alleging criminal conduct.*

## CHAPTER III: REVIEW OF CHIEF JUDGE'S DISPOSITION OF A COMPLAINT

### RULE 5. PETITION FOR REVIEW OF CHIEF JUDGE'S DISPOSITION

If the chief judge dismisses a complaint or concludes the proceeding on the ground that corrective action has been taken or that intervening events have made action unnecessary, a petition for review may be addressed to the Judicial Council of the circuit. The Judicial Council may affirm the order of

the chief judge, return the matter to the chief judge for further action, or, in exceptional cases, take other appropriate action.

## ***Commentary on Rule 5***

### ***Petition to the Judicial Council for Review***

*Section 352(c) provides that a complainant or judge aggrieved by a chief judge's order dismissing a complaint or concluding a proceeding on the basis of correction action may "petition the Judicial Council for review thereof."*

*There is some suggestion in the legislative history that the draftsmen contemplated a two-step procedure, under which the council would first determine whether to grant or deny review and would then, if the petition were granted, proceed to the merits. Senator DeConcini, explaining the bill just before final Senate passage, said the "the Judicial Council may exercise its discretion in granting . . . review."[4] Moreover, the "petition . . . for review" formulation was used in the very next sentence of the legislation to describe the procedure for obtaining Judicial Conference review of an order of a Judicial Council, and in that context congressional leaders indicated that they contemplated a procedure analogous to the certiorari procedure in the Supreme Court.[5]*

*The analogy to the writ of certiorari raises more questions than it answers, however. The essence of the certiorari procedure is that the standards used for deciding whether to hear a case are different from the standards used for deciding a case on the merits. In the context of the petition for review to the Judicial Council from a chief judge's disposition of a complaint, it is not at all clear what different standards might apply to decisions whether or not to grant review. Indeed, Senator DeConcini, immediately after stating that the Judicial Council would have discretion, said, "It is to be expected that it is only in those rare cases where the chief judge has not recognized the merit of a complaint, that the council will reexamine a dismissed complaint about the conduct of a judge."[6] That statement seems to imply that the decision whether to grant review is to be a decision on the merits.*

*Therefore, the council ordinarily will review the decision of the chief judge on the merits, treating the petition for review for all practical purposes as an appeal. This view has been carried into the rules, which state that the circuit council may respond to a petition by affirming the chief judge's order, remanding the matter, or, in exceptional cases, taking other appropriate action. The "exceptional cases" language would permit the council to deny review rather than affirm in a case in which the process was obviously being abused.*

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[4] 126 Cong. Rec. 28.086 (1980).

[5] Id. at 28,092-93 (remarks of Sen. DeConcini); id. at 28,616 (remarks of Rep. Kastenmeier).

[6] Id. at 28,086.

## RULE 6. HOW TO PETITION FOR REVIEW OF A DISPOSITION BY THE CHIEF JUDGE

**a.** **Time**. A petition for review must be received in the office of the clerk of the court of appeals within 30 days of the date of the circuit executive's letter to the complainant transmitting the chief judge's order.

**b.** **Form.** A petition should be in the form of a letter, addressed to the clerk of the court of appeals, beginning "I hereby petition the Judicial Council for review of the chief judge's order. . ." There is no need to enclose a copy of the original complaint.

**c.** **Legibility.** Petitions should be typewritten, if possible. If not typewritten, they must be legible.

**d.** **Number of copies.** Only an original is required.

**e.** **Statement of grounds for petition.** The letter should set forth a brief statement of the reasons why the petitioner believes that the chief judge should not have dismissed the complaint or concluded the proceeding. It should not repeat the complaint; the complaint will be available to members of the circuit council considering the petition.

**f.** **Signature.** The letter must be signed.

**g.** **Where to file.** Petition letters should be sent to Clerk, United States Court of Appeals, United States Courthouse, 1 Courthouse Way, Suite 2500, Boston, Massachusetts 02210. The envelope should be marked "Misconduct Petition" or "Disability Petition." The name of the judge complained about should not appear on the envelope.

**h.** **No fee required.** There is no fee for filing a petition under this procedure.

**i.** **Intervention.** No person shall be granted the right to intervene or to appear as amicus curiae in connection with any petition filed with the Judicial Council.

### *Commentary on Rule 6*

#### *Time for Filing Petition for Review*

*Rule 6(a) contains a limit of thirty days for the filing of a petition for review. It seems appropriate that there should be some time limit on petitions for review of the chief judge's dispositions in order to provide finality to the process. If the complaint requires an investigation, the investigation should proceed; if it does not, the judge complained about should know at some point that the matter is closed. The thirty-day limit is relatively generous in recognition of the fact that most complainants are unrepresented and many are not well organized to maintain the discipline of court deadlines.*

*In accordance with this approach, rule 7(c) of the rules provides for an automatic extension of the time if a person files a petition that is rejected for failure to comply with formal requirements.*

## RULE 7. ACTION BY CIRCUIT EXECUTIVE UPON RECEIPT OF A PETITION FOR REVIEW

**a.** **Receipt of timely petition in proper form.** Upon receipt of a petition for review filed within the time allowed and in proper form under these rules, the clerk of the court of appeals will promptly transmit such petition to the circuit executive, who will acknowledge receipt of the petition. The circuit executive will promptly send to each member of the Judicial Council review panel, as set forth in rule 8(a), except for any member disqualified under rule 18, copies of: (1) the complaint form and statement of facts; (2) any response filed by the judge; (3) any record of information received by the chief judge in connection with the chief judge's consideration of the complaint; (4) the chief judge's order disposing of the complaint; (5) any memorandum in support of the chief judge's order; (6) the petition for review; (7) any other documents in the files of the circuit executive that appear to be relevant and material to the petition; (8) a list of any documents in the circuit executive's files that are not being sent because they are not considered relevant and material; and (9) a ballot that conforms with rule 8(a). The circuit executive will also send the same materials, except for the ballot, to the chief judge of the circuit and each judge whose conduct is at issue, except the materials previously sent to a person may be omitted.

**b.** **Receipt of untimely petition**. The circuit executive will refuse to accept a petition that is received after the deadline set forth in rule 6(a).

**c.** **Receipt of timely petition not in proper form.** Upon receipt of a petition filed within the time allowed but not in proper form under these rules (including a document that is ambiguous about whether a petition for review is intended), the circuit executive will acknowledge receipt of the petition, call the petitioner's attention to the deficiencies, and give the petitioner the opportunity to correct the deficiencies within fifteen days of the date of the circuit executive's letter or within the original deadline for filing the petition, whichever is later. If the deficiencies are corrected within the time allowed, the circuit executive will proceed in accordance with paragraph (a) of this rule. If the deficiencies are not corrected, the circuit executive will reject the petition.

### *Commentary on Rule 7*

#### *Transmittal of Documents by Circuit Executive*

*The rules include no limit on the volume of documents that may be submitted in support of a complaint. One of the problems created by this liberality is that some complaint files may get very thick with attachments. Hence, the circuit executive should have some discretion to decide what portions of the file should be duplicated and transmitted to the members of the circuit council. Rule 7(a) provides such discretion but requires the circuit executive to furnish a list of the documents not transmitted. Rule 8(c) enables each member of the council, as well as the*

*judge complained about, to obtain a copy of any document not originally transmitted by the circuit executive.*

## RULE 8. REVIEW BY THE JUDICIAL COUNCIL OF A CHIEF JUDGE'S ORDER

**a.** **Review Panel.** The chief judge shall annually designate two review panels to act for the Judicial Council on all petitions for review of the chief judge's dismissal order, except for those petitions referred to the full membership of the Judicial Council pursuant to Rule 8(b). Each review panel will serve alternating six-month terms and shall be comprised of five members of the Judicial Council, excluding the chief judge. In order of seniority, each circuit judge council member shall be alternately assigned to each of the two review panels. The district judge council members shall also be alternately assigned in order of seniority to each of the two panels so as to ensure that at least two of the members of each review panel shall be district judges.

In the event of the absence of a panel member, or the recusal or disqualification of a panel member under Rule 18 from ruling on a particular petition for review, the circuit executive will select a judge in order of seniority from the other review panel to replace the unavailable panel member. An unavailable circuit judge will be replaced by the next available circuit judge in rotation. An unavailable district judge will be replaced by the next available district judge in rotation. If necessary, an unavailable circuit judge may be replaced by a district judge and an unavailable district judge may be replaced by a circuit judge but in no event will the panel be composed of fewer than two district judges. In the event of a change in Judicial Council membership, the new council member shall take the place of his or her predecessor pending the review panels' annual reorganization.

**b.** **Mail Ballot.** Each member of the review panel to whom a ballot was sent will return a signed ballot, or otherwise communicate the member's vote, to the circuit executive. The ballot form will provide opportunities to vote to: (1) affirm the chief judge's disposition, or (2) refer the petition to the full membership of the Judicial Council. The form will also provide an opportunity for members to indicate that they have disqualified themselves from participating in consideration of the petition.

Upon the vote of any member of the review panel, the petition for review shall be referred to the full membership of the Judicial Council. Any member of the review panel who votes to refer the petition to the full council shall include a brief statement of the reasons for the referral with the ballot. The review panel may act only by vote of all five members. If, because of absence, recusal or disqualification, all five members of the panel cannot participate, the petition shall be referred to the full membership of the Judicial Council

Upon referral of a petition to the full membership of the Judicial Council, the circuit executive shall send the referring judge's ballot and brief statement to each member of the Judicial Council. The circuit executive will also transmit the documents specified in Rule 7(a) to council members not then serving on the reviewing panel, unless disqualified under Rule 18. Every voting member of the Judicial Council will return a signed ballot, or otherwise communicate the member's vote, to the circuit executive. The ballot form will provide opportunities to vote to:

(1) affirm the chief judge's disposition, (2) suggest an alternative disposition, or (3) discuss the matter further. The form will also provide an opportunity for members to indicate that they have disqualified themselves from participating in consideration of the petition. Any member of the Judicial Council who suggests an alternative disposition or votes to discuss the matter further shall include a brief statement of the reasons for the vote with the ballot.

**c.** **Availability of Documents.** Upon request, the circuit executive will make available to any member of the Judicial Council or to the judge complained about any document from the files that was not sent to the council members pursuant to rule 7(a).

**d.** **Vote by full Judicial Council.** If a petition is referred to the full Judicial Council, a majority of council members eligible to participate (see rule 18) shall constitute a quorum and is required for any effective council action. Council action may be taken by majority of the members voting.

**e.** **Rights of Judge Complained about.**

(1) At any time after the filing of a petition for review by a complainant, the judge complained about may file a written response with the circuit executive. The circuit executive will promptly distribute copies of the response to each member of the Judicial Council review panel who is not disqualified, to the chief judge, and to the complainant. The judge may not communicate with individual council members about the matter, either orally or in writing.

(2) The judge complained about will be provided with copies of any communications that may be addressed to the members of the Judicial Council by the complainant.

**f.** **Notice of Council Decision.**

(1) The order of the Judicial Council shall state the names of the judges who participated in the matter, as well as any disqualifications. The council order, together with any accompanying memorandum in support of the order, will be provided to the complainant, the judge, and any judge entitled to receive a copy of the complaint pursuant to rule 3(a)(2).

(2) If the decision is unfavorable to the complainant, the complainant will be notified that the law provides for no further review of the decision.

(3) A memorandum supporting a council order will not include the name of the complainant or the judge whose conduct was complained of. If the order of the council affirms the chief judge's disposition, a supporting memorandum will be prepared only if the Judicial Council concludes that there is a need to supplement the chief judge's explanation.

**g.** **Public Availability of Council Decision**. Materials related to the council's decision will be made public at the time and in the manner set forth in rule 17.

## *Commentary on Rule 8*

### *Voting Procedures*

*Rule 8(a) has been amended to provide for the referral of petitions for review to a panel of the Judicial Council. See 28 U.S.C. § 352(d). The second paragraph of Rule 8(a), as amended, ensures that, in the event of the unavailability of one or more panel members, the composition of the council review panel remains consistent with the statutory requirements.*

*Rule 8(b) adopts the use of mail ballots on petitions for review. The mail ballot procedure specified here assures that there will be full discussion in the council if any member of the reviewing panel believes that summary affirmance may not be appropriate.*

*It should be emphasized that the "rule of one" on the mail ballot is not intended to invoke the analogy of the Supreme Court's certiorari jurisdiction. A vote to affirm on the mail ballot is intended to be a vote on the merits. The "rule of one" is intended to guarantee an opportunity for discussion and a vote following discussion if any member of the council is uncomfortable with a summary affirmance.*

## CHAPTER IV: INVESTIGATION AND RECOMMENDATION BY SPECIAL COMMITTEE

### RULE 9. APPOINTMENT OF SPECIAL COMMITTEE

**a.** **Membership**. A special committee appointed pursuant to rule 4(e) will consist of the chief judge of the circuit and equal numbers of circuit and district judges. If the complaint is about a district judge, bankruptcy judge, or magistrate judge, the district judge members of the committee will be from districts other than the district of the judge or magistrate judge complained about.

**b.** **Presiding officer.** At the time of appointing the committee, the chief judge will designate one of its members (who may be the chief judge) as the presiding officer. When designating another member of the committee as the presiding officer, the chief judge may also delegate to such member the authority to direct the clerk of the court of appeals to issue subpoenas related to proceedings of the committee.

**c.** **Bankruptcy judge or magistrate judge as adviser.** If the judicial officer complained about is a bankruptcy judge or magistrate judge, the chief judge may also designate a bankruptcy judge or magistrate judge, as the case may be, to serve as an adviser to the committee. The chief judge will designate such an adviser if, within ten days of notification of the appointment of the committee, the bankruptcy judge or magistrate judge complained about requests that an adviser be designated. The adviser will be from a district other than the district of the bankruptcy judge or magistrate judge complained about. The adviser will not vote but will have the other privileges of a member of the committee.

**d.** **Provision of documents.** The chief judge will certify to each other member of the committee and to the adviser, if any, copies of (1) the complaint form and statement of facts, and (2) any other documents on file pertaining to the complaint (or to that portion of the complaint referred to the special committee).

**e.** **Continuing qualification of committee members.** A member of a special committee who was qualified at the time of appointment 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.

**f.** **Inability of committee member to complete service.** In the event that 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 of the circuit will determine whether to appoint a replacement member, either a circuit or district judge as the case may be. However, no special committee appointed under these rules will function with only a single member, and the quorum and voting requirements for a two-member committee will be applied as if the committee had three members.

## *Commentary on Rule 9*

### *Membership and Presiding Officer*

*Rule 9 leaves the size of a special committee flexible, to be determined on a case-by-case basis.*

*There is good reason to preserve the statutory flexibility in this regard. The question of the committee size is one that should be weighed with some 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 statute requires that the chief judge be a member of each special committee, it does not require that the chief judge preside.*[7] *Once again, the rules leave the decision for case-by-case determination at the time the committee is appointed.*

*Section 356(a) provides that a special committee will have subpoena powers as provided in 28 U.S.C. § 332(d). The latter section provides that subpoenas shall be issued on behalf of circuit councils by the clerk of the court of appeals "at the direction of the chief judge of the circuit or his designee." While it might be regarded as implicit that a special committee can exercise it subpoena power through its own presiding officer, strict compliance with the letter of section 332(d) would appear to be the safer course. Rule 9(b) therefore permits the chief judge,*

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[7] See H.R. Rep. No. 1313, 96th Cong., 2d Sess. 11 (1980) (chief judge may appoint another judge as presiding officer).

*when designating someone else as presiding officer, to make an explicit delegation of the authority to direct the issuance of subpoenas related to committee proceedings.*

*The rule does not specifically address the case in which, because of disqualification of the chief judge, another judge is exercising the powers of the chief judge in the proceeding. Under such circumstances, the designation to direct the issuance of subpoenas should nevertheless come from the chief judge.*

***Bankruptcy Judge or Magistrate Judge as Adviser***

*The rule provides that, if a bankruptcy judge or magistrate judge is the judicial officer complained about, a bankruptcy judge or magistrate judge, respectively, will be named as an adviser to the special committee upon request of the judge complained about. Absent such a request the chief judge may appoint an adviser sua sponte.*

*The adviser will have all the privileges of a member of a committee except the franchise. That would include participating in all deliberations of the committee, questioning witnesses at hearing, and even writing a separate statement to accompany the report of the special committee to the Judicial Council.*

***Continuing Qualification***

*Rule 9(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 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 make an important contribution to the quality of the work of such committees.*

***Inability of Committee Member to Complete Service***

*Stability of membership is also the principal concern animating rule 9(f), which deals with the case in which a special committee loses a member before its work is complete. The rule would permit the chief judge to determine whether a replacement member should be appointed. Generally, the appointment of a replacement member is desirable in these situations unless the committee has conducted evidentiary hearings before the vacancy occurs. However, other cases may also 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 protects 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 10. CONDUCT OF AN INVESTIGATION

**a.** **Extent and methods to be determined by committee.** Each special committee will determine the extent of the investigation and the methods of conducting it that are appropriate in the light of the allegations of the complaint. If, in the course of the investigation, the committee develops reason to believe that the judge may have engaged in misconduct that is beyond the scope of the complaint, the committee may, with written notice to the judge expand the scope of the investigation to encompass such misconduct.

**b.** **Criminal matters.** In the event that the complaint alleges criminal conduct on the part of a judge, or in the event that the committee becomes aware of possible criminal conduct, the committee will consult with the appropriate prosecuting authorities to the extent permitted by 28 U.S.C. § 360 in an effort to avoid compromising any criminal investigation. However, the committee will make its own determination about the timing of its activities, having in mind the importance of ensuring the proper administration of the business of the courts.

**c.** **Staff.** The committee may arrange for staff assistance in the conduct of the investigation. It may use existing staff of the judicial branch or may arrange, through the Administrative Office of the United States Courts, for the hiring of special staff to assist in the investigation.

**d.** **Delegation.** The committee may delegate duties in its discretion to subcommittees, to staff members, to individual committee members, or to an adviser designated under rule 9(c). The authority to exercise the committee's subpoena powers may be delegated only to the presiding officer. In the case of failure to comply with such subpoena, the Judicial Council or special committee may institute a contempt proceeding consistent with 28 U.S.C. § 332(d).

**e.** **Report.** The committee will file with the Judicial Council a comprehensive report of its investigation, including findings of the investigation and the committee's recommendations for council action. Any findings adverse to the judge will be based on evidence in the record. The report will 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 pursuant to rule 11.

**f.** **Voting.** All actions of the committee will be by vote of a majority of all of the members of the committee.

### *Commentary on Rule 10*

#### *Nature of the Process*

*Rule 10 and the three rules that follow are all concerned with the way in which a special committee carries out its mission. They reflect the view that a special committee has what are generally regarded in our jurisprudence as two distinct roles. The committee will often be performing an investigative role of the kind that is characteristically given to executive branch agencies in our system of justice and, in some stages, a more formalized fact-finding role. Even*

*though the same body has responsibility for both roles, it is important to distinguish between them in order to ensure that due process rights are afforded at appropriate times to the judge complained about.*

***Criminal Matters***

*One of the difficult questions that can arise under the judicial discipline statute is the relationship between proceedings under this statute and criminal investigations. Rule 10(b) assigns coordinating responsibility to the special committee in cases in which criminal conduct is suspected and gives the committee the authority to decide what the appropriate pace of its activity should be in light of any criminal investigation. However, a special committee should not abdicate its responsibility by assenting to indefinite deferral of its own work.*

*It is noted that a special committee may be barred from disclosing some information to a prosecutor or grand jury under 28 U.S.C. § 360. This provision is discussed in the commentary under rule 16.*

***Delegation***

*Rule 10(d) permits the committee, in its discretion, to delegate any of its duties to subcommittees, individual committee members, or staff. This is consistent with the general principle, expressed in rule 10(a), that each special committee will determine the methods of conducting the investigation that are appropriate in the light of the allegations of the complaint. It is, of course, not contemplated that the ultimate duty of adopting a report would be delegable.*

*Rule 9(b) suggests 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 clerk of the court of appeals to issue subpoenas related to committee proceedings. That is not intended to imply, however, that the decision to direct the issuance of a subpoena is necessarily exercisable by the presiding officer alone. Under rule 10(d), it is up to the committee to decide whether to delegate that decision-making authority.*

***Basis of Findings***

*Rule 10(e) requires that findings adverse to the judge complained about be based on evidence in the record. There is no similar requirement in the rules for determinations favorable to the judge. A committee may, in some circumstances, recommend dismissal of a complaint on the ground that preliminary investigation reveals no basis for going forward with hearings on the record.*

***Voting in the Special Committee***

*Rule 10(f) provides that actions of a special committee will be by vote of a majority of all the members. It seems reasonable to expect that, almost always, all the members of a committee will 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.*

## RULE 11. 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, in its discretion, hold joint hearings or separate hearings.

**b.** **Notice to judge complained about.** The judge complained about will be given adequate notice in writing of any hearing held, its purposes, the names of any witnesses whom the committee intends to call, and the text of any statements that have been taken from such witnesses. The judge may at any time suggest additional witnesses to the committee.

**c.** **Committee witnesses.** All persons who are believed to have substantial information to offer will be called as committee witnesses. Such witnesses may include the complainant and the judge complained about. The witnesses will be questioned by committee members, staff, or both. The judge will be afforded the opportunity to cross-examine committee witnesses, personally or through counsel.

**d.** **Witnesses called by the judge.** The judge complained about may also call witnesses and may examine them personally or through counsel. Such witnesses may also be examined by committee members, staff, or both.

**e.** **Witness fees.** Witness fees will be paid as provided in 28 U.S.C. § 1821.

**f.** **Rules of evidence; oath.** The Federal Rules of Evidence will apply to any evidentiary hearing except to the extent that departures from the adversarial format of a trial make them inappropriate. All testimony taken at such a hearing will be given under oath or affirmation.

**g.** **Record and transcript.** A record and transcript will be made of any hearing held.

### *Commentary on Rule 11*

#### *The Role of Hearings in the Investigation Process*

*The roles of a special committee include an investigative role and a fact-finding role. In conformity with this concept of roles, hearings ordinarily will be held only after the investigative work has been done and the committee has concluded that there is sufficient evidence to warrant a formal fact-finding proceeding. Rule 11 is concerned only with the conduct of hearings, and does not govern the earlier investigative stages of a special committee's work.*

*Inevitably, a hearing will have something of an adversarial character. The judge who has been complained about will surely feel threatened if the matter has reached this stage. Even though there are two roles and an investigation will commonly have two distinct 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.*

*In conformity with this view, rule 11(c) contemplates that witnesses at hearings should generally be called as committee witnesses, regardless of whether their testimony will be favorable or unfavorable to the judge complained about. Staff or others who are organizing the hearings should regard it as their role to present the entire picture, and not to act as prosecutors. Even the judge complained about should normally be called as a committee witnesses. Although rule 11(d) preserves the statutory right of the judge to call witnesses on his or her own behalf, we believe that this should not often be necessary.*

***Testimony of the Judge***

*It is appropriate to call the judge complained about as a committee witness. This assumes that the judge would wish to testify in most cases. The special committee should be the sponsor of that testimony as well as other testimony favorable to the judge. Cases may arise in which the judge will not testify voluntarily. In such cases, subpoena power appears to be available, subject to the normal testimonial privileges.*

***Applicability of Rules of Evidence***

*Rule 11(f) provides that the Federal Rules of Evidence will apply to evidentiary hearings conducted by special committees "except to the extent that departures from the adversarial format of a trial make them inappropriate."*

## RULE 12. RIGHTS OF A JUDGE IN INVESTIGATION

**a.** **Notice.** The judge complained about is entitled to written notice of the investigation (rule 4(f)), to written notice of the expansion of the scope of an investigation (rule 10(a)), and to written notice of any hearing (rule 11(b)).

**b.** **Presentation of evidence.** The judge is entitled to a hearing, and has the right to present evidence and to compel the attendance of witnesses and the production of documents at the hearing. Upon request of the judge, the chief judge or the chief judge's designee, will direct the clerk of the court of appeals to issue a subpoena in accordance with 28 U.S.C. § 332(d)(1).

**c.** **Presentation of argument.** The judge may submit written argument to the special committee at any time, and will be given a reasonable opportunity to present oral argument at an appropriate stage of the investigation.

**d.** **Attendance at hearings.** The judge will have the right to attend any hearing held by the special committee and to receive copies of the transcript and any documents introduced, as well as copies of any written arguments submitted by the complainant to the committee.

**e.** **Receipt of committee's report.** The judge will have the right to receive the report of the special committee at the time it is filed with the Judicial Council.

**f.** **Representation by counsel.** The judge may be represented by counsel in the exercise of any of the rights enumerated in this rule. The costs of such representation may be borne by the United states as provided in rule 14(h).

***Commentary on Rule 12***

***Right to Attend Hearings***

*The statute states that rules adopted by Judicial Councils shall contain provisions requiring that "the judge whose conduct is the subject of the 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." To implement this provision, rule 12(d)gives the judge the right to attend any hearing held by the committee. The word "hearings" is used in the rules to include sessions held for the purpose of receiving evidence of record or hearing argument.*

*The statute does not require that the judge be permitted to attend* ***all*** *proceedings of the special committee. Hence, the rules do not accord a right to attend such proceedings as meetings at which the committee is engaged in investigative activity (such as interviewing a possible witness or examining documents delivered pursuant to a subpoena duces tecum to determine if they contain relevant evidence) or meetings at which the committee is deliberating on the evidence.*

## RULE 13. RIGHTS OF COMPLAINANT IN INVESTIGATION

**a.** **Notice**. The complainant is entitled to written notice of the investigation as provided in rule 4(f). Upon the filing of the special committee's report to the Judicial Council, the complainant will be notified that the report has been filed and is before the council for decision. Although the complainant is not entitled to a copy of the report of the special committee, the Judicial Council may, in its discretion, release a copy of the report of the special committee to the complainant.

**b.** **Opportunity to provide evidence.** The complainant is entitled to be interviewed by a representative of the committee. If it is believed that the complainant has substantial information to offer, the complainant will be called as a witness at a hearing.

**c.** **Presentation of argument.** The complainant may submit written argument to the special committee at any time. In the discretion of the special committee, the complainant may be permitted 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.

***Commentary on Rule 13***

*In accordance with the view of the process as fundamentally administrative, these rules do not give the complainant the rights of a party to litigation, and leave the complainant's role largely within the discretion of the special committee. However, rule 13(b) promises complainants that, where a special committee has been appointed, the complainant will at a minimum be interviewed by a representative of the committee. Such an interview may, of course, be in person or by telephone, and the representative of the committee may be either a member or staff. In almost every case, such an interview would be regarded by the committee as essential in the performance of its task. Complainants should have an opportunity to tell their stories orally.*

*Rule 13 does not contemplate that the complainant will be permitted to attend proceedings of the special committee except when testifying or presenting argument.*

*The 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.*

*Section 360(a)(1) authorizes an exception to the confidentiality provisions of section 360(a) where the Judicial Council has in its discretion released a copy of the report of the special committee to the complainant and to the judge who is the subject of the complaint. Since these rules view the disciplinary process as fundamentally administrative rather than adversarial, the rules do not accord the complainant the rights of a litigant and do not entitle the complainant to receipt of a copy of the report of the special committee. Therefore, it remains a matter within the discretion of the Judicial Council whether to release a copy of the special committee's report to the complainant, and whether to impose conditions upon any such release, including that the complainant must keep the report confidential.*

## CHAPTER V: JUDICIAL COUNCIL CONSIDERATION OF RECOMMENDATIONS OF SPECIAL COMMITTEE

### RULE 14. ACTION BY JUDICIAL COUNCIL

**a.** **Purpose of Judicial Council consideration**. After receipt of a report of a special committee, the Judicial Council will determine whether to dismiss the complaint, conclude the proceeding on the ground that corrective action has been taken or that intervening events make action unnecessary, refer the complaint to the Judicial Conference of the United States, or order corrective action.

**b.** **Basis of council action.** Subject to the rights of the judge to submit argument to the council as provided in rule 15(a), the council may take action on the basis of the report of the special

committee and the record of any hearings held. If the council finds the report and record provide an inadequate basis for decision, it may (1) order further investigation and a further report by the special committee, or (2) conduct such additional investigation as it deems appropriate.

**c.** **Dismissal.** The council will dismiss a complaint if it concludes – –

(1) that the claimed conduct, even if the claim is true, 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;

(2) that the complaint is directly related to the merits of a decision or procedural ruling;

(3) that the facts on which the complaint is based have not been demonstrated; or

(4) that, under the statute, the complaint is otherwise not appropriate for consideration.

**d.** **Conclusion of the proceeding on the basis of corrective action taken.** The council will conclude the complaint proceeding if it determines that appropriate action has already been taken to remedy the problem identified in the complaint, or that intervening events make such action unnecessary.

**e.** **Referral to the Judicial Conference of the United States.** The Judicial Council may, in its discretion, refer a complaint to the Judicial Conference of the United States with the council's recommendations for action. It is required to refer such a complaint to the Judicial Conference of the United States if the council determines that a circuit judge or district judge may have engaged in conduct – –

(1) that might constitute ground for impeachment; or

(2) that, in the interest of justice, is not amenable to resolution by the Judicial Council.

**f.** **Order of corrective action.** If the complaint is not disposed of under paragraphs (c) through (e) of this rule, the Judicial Council will take other action to assure the effective and expeditious administration of the business of the courts. Such action may include, among other measures – –

(1) censuring or reprimanding the judge, either by private communication or by public announcement;

(2) ordering that, for a fixed temporary period, no new cases be assigned to the judge;

(3) 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 pursuant to 28 U.S.C. § 631(I);

(4) in the case of a bankruptcy judge, removing the judge from office pursuant to 28 U.S.C. § 152;

(5) 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; or

(6) 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.

**g.** **Combination of actions.** Referral of a complaint to the Judicial Conference of the United States under paragraph (e) or to a district court under paragraph (f)(3) of this rule will not preclude the council from simultaneously taking such other action under paragraph (f) as is within its power.

**h.** **Recommendation about fees.** Upon the request of a judge whose conduct is the subject of a complaint, the Judicial Council may, if the complaint has been finally dismissed, recommend that the Director of the Administrative Office of the United States Courts award reimbursement, from funds appropriated to the judiciary, for those reasonable expenses, including attorneys' fees, incurred by that judge during the investigation, which would not have been incurred but for the requirements of 28 U.S.C. § 351 *et. seq.* and these rules.

**i.** **Notice of action of Judicial Council.** Council action will be by written order. Unless the council finds that, for extraordinary reasons, it would be contrary to the interests of justice, the order will be accompanied by a memorandum setting forth the factual determinations on which it is based and the reasons for the council action. The memorandum will not include the name of the complainant or of the judge whose conduct was complained about. The order and the supporting memorandum will be provided to the complainant, the judge, and any judge entitled to receive a copy of the complaint pursuant to rule 3(a)(2). However, if the complaint has been referred to the Judicial Conference of the United States pursuant to paragraph (e) of this rule and the council determines that disclosure would be contrary to the interests of justice, such disclosure need not be made. The complainant and the judge will be notified of the right to seek review of the Judicial Council's decision by the Judicial Conference of the United States and of the procedures for filing a petition for review.

**j.** **Public availability of council action.** Materials related to the council's action will be made public at the time and in the matter set forth in rule 17.

**k.** **Allegations of criminal conduct.** If the Judicial Council dismisses, solely for lack of jurisdiction under 28 U.S.C. § 351(a), non-frivolous allegations of criminal conduct by a judge, the Judicial Council's order of dismissal shall inform the complainant that the dismissal does not prevent the complainant from bringing any allegation of criminal conduct to the attention of appropriate federal or state criminal authorities. If, in this situation, the allegations of criminal conduct were originally referred to the circuit by a congressional committee or member of Congress, the Judicial Council – – if no petition for review of the dismissal by the Judicial Council lies under 28 U.S.C. § 357(a), or if no petition for review is filed – – shall notify the congressional committee or member that the judiciary has concluded that it lacks jurisdiction under § 351(a).

## *Commentary on Rule 14*

### *Basis of Council Action*

*Section 354(a)(1)(A) states that, upon receipt of a report from a special committee, the Judicial Council may conduct additional investigation that it considers to be necessary. While the statute does not explicitly refer to an authority to ask the special committee to do further work and file a supplemental report, it appears that such a procedure is so inherently a part of a committee process that the authority for it may safely be assumed. An investigation of any magnitude by the entire Judicial Council would be warranted in only the rarest cases, since it would constitute a substantial drain on judicial resources of the circuit. There may be some cases, however, in which a loose end can be tied up without the necessity of a remand.*

### *Council Action*

*Paragraphs (2)(A), (2)(B) and (2)(C) of section 354(a) enumerate actions that the council may take after receipt of the report of a special committee in order to assure the effective and expeditious administration of the business of the courts within the circuit. See 28 U.S.C. § 354(a). Paragraphs (3)(A) and (3)(B) of section 354(a) limit the judicial council's authority to order the removal of a judge.*

*There are two notable omissions from this statutory enumeration: conclusion of the proceedings on the ground that corrective action has been taken, and conclusion of the proceedings on the ground that action on the complaint is no longer necessary because of intervening events. The authority to take these actions implicitly derives from the judicial council's ability to "take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit." 28 U.S.C. § 354(a)(1)(C). These rules include these two options for concluding the proceedings in the enumerated alternatives for council action.*

***Combination of Actions***

*Rule 14(g) states that referral of a complaint to the Judicial Conference of the United States, or to a district court in a case involving a magistrate judge, will not preclude the Judicial Council from simultaneously taking other action to assure the effective and expeditious administration of the business of the courts.*

*Referral to the Judicial Conference of the United States may take place under either clause (1) or clause (2) of section 354(b). Clause (1) states that, "[i]n addition to the authority granted under subsection (a)," Judicial Councils may, in their discretion, refer matters to the Judicial Conference of the United States with recommendations for action by the Conference. Clause (2) mandates Judicial Council referral of complaints to the Judicial Conference in certain circumstances; it is not introduced with the phrase, "[i]n addition to the authority granted under subsection (a)." This distinction in the introductory language was not intended to suggest a difference in the authority of the Judicial Council to take corrective action simultaneously with referral of a matter to the Conference. The phrase "[i]n addition to" in clause (1) says no more than that referral is another action within the council's authority, in addition to those actions listed in subsection (a).*

***Attorneys' Fees***

*Section 361 makes explicit the authority of the Judicial Council, upon the request of the judge who is the subject of the complaint, to recommend to the Director of the Administrative Office of the United States Courts that the judge who is the subject of the complaint be reimbursed for reasonable expenses, including attorneys' fees, incurred during the investigation. Under the statutory provision, the Judicial Council has the authority to recommend such reimbursement only where, after investigation by a special committee, the complaint has been finally dismissed under § 354(a)(1)(B). Accordingly, there is no basis in the statute for a recommendation of reimbursement for attorneys' fees where the Judicial Council, after an investigation, concludes the proceeding on the ground that corrective action has been taken or that intervening events have made action on the complaint unnecessary.*

***Notice of Council Action***

*Rule 14(I) 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 judge complained about. The two "interests of justice" exceptions are derived from 28 U.S.C. §§ 354(b)(3) and 360(b).*

***Right to Petition for Review of Judicial Council Action***

*The right to petition for review of judicial council action applies to any action of the judicial council under section 354. Rule 14(I) requires that the notification to the complainant*

*and the judge complained about include notice of the right to petition the Judicial Conference of the United States for review of the council's decision.*

### RULE 15. PROCEDURES FOR JUDICIAL COUNCIL CONSIDERATION OF A SPECIAL COMMITTEE'S REPORT

**a.** **Rights of judge complained about.** Within ten days after the filing of the report of a special committee, the judge complained about may address a written response to all of the members of the Judicial Council. The judge will also be given an opportunity to present oral argument to the council, personally or through counsel. The judge may not communicate with individual council members about the matter, either orally or in writing, except that the council may designate a member or members to receive communications from the judge or to initiate communications with the judge.

**b.** **Conduct of additional investigation by the council.** If the Judicial Council decides to conduct additional investigation, the judge complained about will 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 10 through 13 for the conduct of an investigation by a special committee. However, if hearings are held, the council may limit testimony to avoid unnecessary repetition of testimony presented before the special committee.

**c.** **Voting.** Council action will 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.

***Commentary on Rule 15***

***Voting***

*Section 354(a)(3)(B) requires that removal of a bankruptcy judge be in accordance with 28 U.S.C. § 152. Subsection (e) of that section requires the concurrence of a majority of all the members of the council in the order of removal. It is not appropriate 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.*

## CHAPTER VI: MISCELLANEOUS RULES

### RULE 16. CONFIDENTIALITY

**a.** **General rule.** Consideration of a complaint by the chief judge, a special committee, or the Judicial Council will be treated as confidential business, and information about such consider-

ation will not be disclosed by any judge, or employee of the judicial branch, or any person who records or transcribes testimony, except in accordance with these rules.

**b.** **Files.** All files related to complaints of misconduct or disability, whether maintained by the circuit executive, the chief judge, members of a special committee, members of the Judicial Council, or staff, and whether or not the complaint was accepted for filing, will be maintained separate and apart from all other files and records, with appropriate security precautions to ensure confidentiality.

**c.** **Disclosure in memoranda of reasons.** Memoranda supporting orders of the chief judge or the Judicial Council, and dissenting opinions or separate statements of members of the council, may contain such information and exhibits as the authors deem appropriate, and such information and exhibits may be made public pursuant to rule 17.

**d.** **Availability to Judicial Conference.** In the event that a complaint is referred under rule 14(e) to the Judicial Conference of the United States, the circuit executive will provide the Judicial Conference with 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 determination. Upon request of the Judicial Conference or its Committee to Review Circuit Council Conduct and Disability Orders, in connection with their consideration of a referred complaint under 28 U.S.C. § 354(b) or a petition under 28 U.S.C. § 357(a) for review of a council order, the circuit executive will furnish any other records related to the investigation.

**e.** **Availability to district court.** In the event that the Judicial Council directs the initiation of proceedings for removal of a magistrate judge under rule 14(f)(3), the circuit executive will 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 determination. Upon request of the chief judge of the district court, the Judicial Council may authorize release of any other records relating to the investigation.

**f.** **Impeachment proceedings.** The Judicial Council may release to the legislative branch any materials that are believed necessary to an impeachment investigation of a judge or a trial on articles of impeachment.

**g.** **Consent of judge complained about.** Any materials from the files may be disclosed to any person upon the written consent of both the judge complained about and the chief judge of the circuit. The chief judge may require that the identity of the complainant, of witnesses in an investigation conducted by a special committee or the Judicial Council, or of judges other than the judge complained about, be shielded in any materials disclosed.

**h.** **Disclosure by Judicial Council in special circumstances.** The 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 the council concludes that

such disclosure is justified by special circumstances and is not prohibited by 28 U.S.C. § 360.

Such disclosure may be made to judiciary researchers engaged in the study or evaluation of experience under 28 U.S.C. § 351, *et. seq.* and related modes of judicial discipline, but only where such study or evaluation has been specifically approved by the Judicial Conference or by the Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders. The Judicial Council should take appropriate steps (to the extent the Judicial Conference or its committee has not already done so) to shield the identities of the judge complained about, the complainant, and witnesses from public disclosure, and may impose other appropriate safeguards to protect against the dissemination of confidential information.

**i.** **Disclosure of identity by judge complained about.** Nothing in this rule will preclude the judge complained about from acknowledging that he or she is the judge referred to in documents made public pursuant to rule 17.

**j.** **Assistance and consultation.** Nothing in this rule precludes the chief judge or Judicial Council, for purposes of acting on a complaint filed under 28 U.S.C. § 351(a) or identified by the chief judge under 28 U.S.C. § 351(b), from seeking the assistance of qualified staff, or from consulting other judges who may be helpful in the process of complaint disposition.

## ***Commentary on Rule 16***

### ***Scope of Confidentiality Requirement***

*Section 360(a) applies a rule of confidentiality to "papers, documents, and records of proceedings related to investigations conducted under this chapter" and states that they shall not be disclosed "by any person in any proceeding," with enumerated exceptions. 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 16(a) provides that judges, employees of the judicial branch, and people involved in recording proceedings and preparing transcripts are obliged to respect the confidentiality requirement. This of course includes judges who may be the subjects of complaints.*

*With regard to the second question, the reference to "investigations" suggests that section 360(a) technically applies only in cases in which a special committee has been appointed. However, rule 16(a) applies the rule of confidentiality more broadly, covering consideration of a complaint at any stage.*

*With regard to the third question, it seems clear that there is no barrier of confidentiality between a Judicial Council and the Judicial Conference, and that members of the Judicial*

*Conference or its standing committee may have access to any of the confidential records for use in their consideration of a referred matter or a petition for review. It is implicit that a district court may have similar access if the Judicial Council orders in response to a complaint that the district court initiate proceedings to remove a magistrate judge from office, and rule 16(e) so provides. It would be absurd if the district court were in this circumstance denied access to the evidence on which the order was based.*

*The confidentiality requirement does not, of course, prevent the chief judge from " communicat[ing] orally or in writing with . . . people who may have knowledge of the matter," rule 4(b), as part of a limited inquiry conducted by the chief judge under that rule.*

*In addition, we find it implicit that chief judges and Judicial Councils may seek staff assistance or consult with other judges who may be helpful in the process of complaint disposition. Rule 16(j) provides that the confidentiality requirement does not preclude this. See National Commission Report at 103 (finding that "[t]he Act, including its provision on confidentiality does not constitute a barrier to such assistance or consultation"). The chief judge, for example, may properly seek the advice and assistance of another judge whom the chief judge deems to be in the best position to speak with the judge named in the complaint in an attempt to bring about corrective action to remedy the problem raised in the complaint. 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.*

*On the other hand, the statute makes it clear that there is a barrier of confidentiality between the judicial branch and the legislative; it provides, as an exception to the rule of confidentiality, that material is to be disclosed to Congress only if it is "believed necessary to an impeachment investigation or trial of a judge under article I."*

***Exceptions to Confidentiality Rule***

*With regard to the exception for impeachment proceedings, rule 16(f) tracks the statutory language, and deliberately preserves the ambiguity about who must believe that disclosure is necessary to an impeachment investigation or trial. There is some possibility of conflict between the legislative and judicial branches about this issue. It may never arise in fact, and it does not seem appropriate to try to resolve it in advance by rule.*

*Another exception to the rule of confidentiality is provided by section 360(a)(3), which states that confidential materials may be disclosed if authorized in writing by the judge complained about and by the chief judge of the circuit. Accordingly, the report of a special committee, or a summary of investigative findings in such form as the Judicial Council or the special committee may choose, may be disclosed upon the written consent of both the judge complained about and the chief judge of the circuit.*

*Rule 16 also recognizes that there must be some implicit exceptions to the confidentiality requirement. For example, 28 U.S.C. § 360(b) requires that certain orders and the reasons for them shall be made public; it would be a barren collection of reasons that could not refer to the evidence. Rule 16(c) thus 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.*

*Rule 16(h) permits disclosure of additional information by order of the council in circumstances not enumerated. Unfortunately, the statutory language does not explicitly authorize exceptions, so many cases will present issues of statutory interpretation. A strong case could be made for disclosure to permit a prosecution for perjury based on testimony given before a special committee. A more difficult case would be presented if a special committee turned up evidence of criminal conduct by a judge and wanted to refer the matter to a grand jury. The rule refers to the statutory prohibition but does not attempt to resolve such questions.*

*Rule 16(h) specifically permits the Judicial Council to authorize disclosure of information about the consideration of a complaint, including papers, documents, and transcripts relating to the investigation, to judiciary researchers engaged in the study or evaluation of experience under 28 U.S.C. § 351, et. seq. and related modes of judicial discipline. This provision responds to the recommendation of the National Commission on Judicial Discipline and Removal that council rules should authorize the "release [of] information, with appropriate safeguards, to government entities or properly accredited individuals engaged in the study or evaluation of experience under the 1980 Act." National Commission Report at 108.*

*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 whose release would be contrary to the interests of justice, or that constitutes purely internal communications. The rule does not envision any disclosure of purely internal communications between judges and their colleagues and staff.*

***Disclosure of Materials upon Consent***

*Once the judge complained about has consented to the disclosure of confidential materials pursuant to section 360(a)(3) and rule 16(g), the chief judge ordinarily will refuse to consent only to the extent necessary to protect the confidentiality interest (1) of the complainant, or (2) of witnesses who have testified in investigatory proceedings or who have provided information in response to a limited inquiry undertaken pursuant to rule 4(b). 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 (1) the chief judge has secured the consent of the complainant or of the particular*

*witness to disclosure, or (2) there is a demonstrated need for disclosure of the information that, in the judgment of the chief judge, outweighs the confidentiality interests of the complainant or of a particular witness (as may be the case where the complainant or particular witness has already demonstrated a lack of concern about maintaining the confidentiality of the proceedings).*

### RULE 17. PUBLIC AVAILABILITY OF DECISIONS

**a.** **General rule**. A docket-sheet record of orders of the chief judge and the Judicial Council and the texts of any memoranda supporting such orders and any dissenting opinions or separate statements by members of the Judicial Council will be made public when final action on the complaint has been taken and is no longer subject to review.

(1) If the complaint is finally disposed of without appointment of a special committee, or if it is disposed of by council order dismissing the complaint for reasons other than mootness or because intervening events have made action on the complaint unnecessary, the publicly available materials will not disclose the name of the judge complained about without his or her consent.

(2) If the complaint is finally disposed of by censure or reprimand by means of private communication, the publicly available materials will not disclose either the name of the judge complained about or the text of the reprimand.

(3) If the complaint is finally disposed of by any other action taken pursuant to rule 14(d) or (f), the text of the dispositive order will be included in the materials made public, and the name of the judge will be disclosed.

(4) If the complaint is dismissed as moot, or because intervening events have made action on the complaint unnecessary, at any time after the appointment of a special committee, the Judicial Council will determine whether the name of the judge is to be disclosed. The name of the complainant will not be disclosed in materials made public under this rule unless the chief judge orders such disclosure.

**b.** **Manner of making public.** The records referred to in paragraph (a) will be made public by placing them in a publicly accessible file in the office of the circuit executive, United States Courthouse, 1 Courthouse Way, Suite 3700, Boston, Massachusetts 02210. The circuit executive will send copies of the publicly available materials to the Federal Judicial Center, Thurgood Marshall Federal Judiciary Building, One Columbus Circuit, N.E., Washington, DC 20002, where such materials will also be available for public inspection. In cases in which memoranda appear to have precedential value, the chief judge may cause them to be published.

**c.** **Decisions of Judicial Conference Standing Committee.** To the extent consistent with the policy of the Judicial Conference Committee to Review Circuit Council Conduct and Disability

Orders, opinions of the committee about complaints arising from this circuit will also be made available to the public in the office of the circuit executive.

**d.** **Complaints referred to the Judicial Conference of the United States**. If a complaint is referred to the Judicial Conference of the United States pursuant to rule 14(e), materials relating to the complaint will be made public only as may be ordered by the Judicial Conference.

***Commentary on Rule 17***

*Section 360(b) provides that "[e]ach written order to implement any action under section 354(a)(1)(C)" shall be made publicly available and that, "[u]nless contrary to the interest of justice," each such order shall be accompanied by written reasons. Section 360(a) states that "papers, documents, and records of proceedings related to investigations" shall be confidential. Section 354(a)(2)(A) lists, among possible council actions following an investigation, censure or reprimand "by means of private communication" or "by means of public announcement." These three provisions exhaust the statutory guidance with respect to public availability of decisions on complaints.*

*The statute and its legislative history exhibit a strong policy goal of protecting judges from the damage that could be done by publicizing unfounded allegations of misconduct. Except in cases in which the proposed Court on Judicial Conduct and Disability held a de novo hearing, the Senate-passed bill specifically provided for confidentiality at all states of the complaint procedure "unless final adverse action is taken against a judge, not including an order of dismissal."*[8] *Although the language of the final legislation is derived from the House bill*[9] *and is limited to materials "related to investigations," there is no indication that non-confidential treatment of other materials was contemplated.*

*It is consistent with the congressional intent to protect a judge from public disclosure of a complaint, both while it is pending and after it has been dismissed if that should be the outcome. On the other hand, the goal of assuring the public that the disciplinary mechanism is operating satisfactorily is better served by making the process more open. Also, publication of some of the chief judges' dismissal orders – – as contrasted with mere public availability – – would surely improve the operation of the mechanism.*

*Rule 17 attempts to accommodate these conflicting interests. It provides for public availability of decisions of the chief judge and the Judicial Council, and the texts of any memoranda supporting their orders, together with any dissenting opinions of separate statements by members of the Judicial Council. However, these orders and memoranda are to be*

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[8] S. 1873, 96th Cong., 1st Sess. § 2(a) (1979) (proposed 28 U.S.C. § 372(n)(1)(C)); see S. Rep. No. 362, 96th Cong., 1st Sess. 16 (1979).

[9] H.R. 7974, 96th Cong., 2d Sess. § 3(a) (1980) (proposed 28 U.S.C. § 372(c)(14)).

*made public only when final action on the complaint has been taken and any right of review has been exhausted. Whether the name of the judge is disclosed will then depend upon the nature of the final action. If the final action is an order predicated on a finding of misconduct or disability (other than censure or reprimand by means of private communication), the name of the judge will be made public. If the final action is dismissal of the complaint, or a conclusion of the proceeding by the chief judge on the basis of corrective action taken, the name of the judge will not be disclosed. However, if the chief judge or Judicial Council concludes a proceeding because corrective action was taken, the order should explain the corrective action taken so the complainant will be better able to assess the adequacy of the decision and decide whether or not to file an appeal.*

*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 17(a)(4) leaves it to the Judicial Council to determine whether the judge will be identified. In such a case, no final decision has been reached on the merits, but it may be the public interest – – particularly if a judicial officer resigns in the course of an investigation – – to make the identity of the judge known.*

*It should be noted that rule 17 provides for different treatment where a proceeding is concluded on the basis of corrective action taken, depending on whether the proceeding is concluded by the chief judge or by the council following investigation by a special committee. If a chief judge concludes a proceeding on the basis, rule 17(a)(1) provides that the name of the judge will not be disclosed. Shielding the name of the judge in this circumstance should contribute to the frequency of this kind of informal disposition. Once a special committee has been appointed, and a proceeding is concluded by the full council on the basis of corrective action taken, rule 17(a)(3) provides for disclosure of the name of the judge. An "informal" resolution of the complaint at this stage is likely to look very much like any other council order, and should be disclosed in the same manner.*

*The proposal that decisions be made public only after final action has been taken is designed in part to avoid disclosure of the existence of pending proceedings. Because the Judicial Conference has not established a deadline for filing petitions for review with the Committee to Review Judicial Council Conduct and Disability Orders, rule 17(d) provides for making decisions public if thirty days have elapsed without the filing of a petition for review.*

*Public availability of orders under 28 U.S.C. § 354(a)(1)(C) is a statutory requirement. The statute does not prescribe the time at which these orders must be made public, and it might be thought implicit that it should be without delay. Similarly, the statute does not state whether the name of the judge must be disclosed, but it could be argued that such disclosure is implicit. In view of the legislative interest in protecting a judge from public airing of unfounded charges, rule 17 adopts an interpretation permitting non-disclosure of the identity of a judicial officer who is ultimately exonerated and also permitting delay in disclosure until the ultimate outcome is known. In this connection congressional leaders described the public availability requirement*

*as applying to "sanctioning orders."*[10]

*Finally, the rule provides that the identity of the complainant will be disclosed only if the chief judge so orders. Identifying the complainant when the judge is not identified would of course increase the likelihood that the identity of the judge would become publicly known, thus thwarting the policy of non-disclosure. If the identity of the complainant is not to be made public in such cases, there is no particular reason to change the rule and make it public routinely in cases in which the judge is identified. However, 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.*

**RULE 18. DISQUALIFICATION**

**a.** **Complainant**. If the complaint is filed by a judge, that judge will be disqualified from participation in any consideration of the complaint except to the extent that these rules provide for participation by a complainant. A chief judge who has identified a complaint under rule 2(k) will not be automatically disqualified from participating in the consideration of the complaint, but may consider in his or her discretion whether the circumstances warrant disqualification.

**b.** **Judge complained about.** A judge whose conduct is the subject of a complaint will be disqualified from participating in any consideration of the complaint except to the extent that these rules provide for participation by a judge who is complained about.

**c.** **Disqualification of chief judge on consideration of a petition for review of a chief judge's order.** If a petition for review of a chief judge's order dismissing a complaint or concluding a proceeding is filed with the Judicial Council pursuant to rule 5, the chief judge will not participate in the council's consideration of the petition. In such a case, the chief judge may address a written communication to all of the members of the Judicial Council, with copies provided to the complainant and to the judge complained about. The chief judge may not communicate with individual council members about the matter, either orally or in writing.

**d.** **Member of special committee not disqualified.** A member of the Judicial Council who is appointed to a special committee will not be disqualified from participating in council consideration of the committee's report.

**e.** **Judge under investigation.** Upon appointment of a special committee, the judge complained about will automatically be disqualified from serving on (1) any special committee appointed under rule 4(e); (2) the Judicial Council of the circuit; (3) the Judicial Conference of the United States; and (4) the Committee to Review Circuit Council Conduct and Disability Orders of the Judicial Conference of the United States. The disqualification will continue until all proceedings

[10] 126 Cong. Rec. 28,093 (1980) (remarks of Sen. DeConcini); id. at 28,617 (remarks of Rep. Kastenmeier).

regarding the complaint are finally terminated, with no further right of review. The proceedings will be deemed terminated thirty days after the final action of the Judicial Council if no petition for review has at that time been filed with the Judicial Conference.

**f.** **Substitute for disqualified chief judge.** If the chief judge of the circuit is disqualified from participating in consideration of the complaint, the duties and responsibilities of the chief judge under these rules will be assigned to the circuit judge in regular active service who is the most senior in date of commission of those who are not disqualified. If no such circuit judge is available, these duties and responsibilities will be assigned to the district judge member of the Judicial Council who is the most senior in date of commission of those who are not disqualified. If no such judge is available, the complaint may be referred to a circuit judge from another circuit pursuant to 28 U.S.C. § 291(a). The Judicial Council could also decide that it is necessary, appropriate, and 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 where multiple judges are disqualified.** Notwithstanding any other provision in these rules to the contrary, a member of the Judicial Council who is a subject of the complaint may participate in the disposition thereof if (1) participation by members who are subjects of the complaint is necessary to obtain a quorum of the Judicial Council, and (2) the Judicial Council votes that it is necessary, appropriate, and in the interest of sound judicial administration that such complained -- against members be eligible to act. Members of the Judicial Council who are subjects of the complaint may participate in this determination if necessary to obtain a quorum of the Judicial Council. Under no circumstances, however, shall the judge who acted as chief judge of the circuit in ruling on the complaint under rule 4 be permitted to participate in this determination.

## *Commentary on Rule 18*

### *Disqualification of Chief Judge on Review of Chief Judge's Order*

*Rule 18(c) would bar participation by the chief judge in decisions on petitions to the circuit council. Such a policy is best calculated to assure complainants that their petitions will receive fair consideration.*

### *Disqualification of Judge Under Investigation*

*28 U.S.C. § 359(a) states that a judge under investigation will be disqualified from certain activities "until all related proceedings under this chapter relating to such investigation have been finally terminated." In the absence of Judicial Conference rules regulating the time within which a petition for review must be filed, rule 18(e) provides that the proceedings will be*

*deemed terminated if no petition for review is filed within thirty days after the final action of the Judicial Council.*

***Substitute for Disqualified Chief Judge***

*Under 28 U.S.C. § 351(c), a complaint against the chief judge is to be handled by "that circuit judge in regular active service next senior in date of commission." Rule 18(f) interprets the statutory language to mean that seniority among judges other than the chief 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. No evidence exists that Congress intended to depart from the normal order of precedence.*

*If the presiding member of the Judicial Council is disqualified from participating under these rules, the most senior active circuit judge, or if all circuit judges are disqualified, the most senior active district judge who is a member of the Judicial Council will preside.*

***Disqualification when Multiple Judges are Complained Against***

*Sometimes a single complaint is filed against a large group of judges. Complaints have been filed against all the members of the court of appeals and at least one has been filed against all circuit and district court judges of the circuit. If the normal disqualification rules are observed in the former case, no court of appeals judge can serve as acting chief judge of the circuit, and the Judicial Council will be without appellate members. In the latter case -- where the complainant is against all circuit and district judges -- 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.*

*Although these multiple-judge complaints are virtually always meritless, the appearance of justice is best served by adherence to traditional principles that matters should be decided by disinterested judges. If no circuit judge or district judge member of the Judicial Council is available to serve as acting chief judge of the circuit, intercircuit assignment procedures under 28 U.S.C. § 291(a) can be used to assign a circuit judge from another circuit to perform the statutory duties of the chief judge. If a quorum of the Judicial Council cannot be obtained to act on a petition for review of a chief judge's order, it would be appropriate to assign the matter to another body. Among other alternatives, the council might ask the Judicial Council of another circuit to consider the petition or might ask the chief justice to assign the matter to either the Judicial Council of another circuit or the Judicial Conference Committee to Review Judicial Conduct and Disability Orders. In the unlikely event that a quorum of the Judicial Council cannot be obtained to consider the report of a special committee, there is legislative history suggesting that the council should use the authority provided in section 354(b)(1) to refer the complaint to the Judicial Conference for consideration.*[11]

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[11] See H.R. Rep. No. 1313, 96th Cong., 2d Sess. 12 (1980).

*With recognition that these multiple-judge complaints are virtually always meritless, we have concluded that the Judicial Council should be accorded authority 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 or district judge on the Judicial Council to act, and (2) whether it is necessary, appropriate, and in the interest of sound judicial administration to permit complained-against members of the Judicial Council to participate in the disposition of a petition for review where it would otherwise be impossible to obtain a quorum.*

*We do not believe that any reasonable observer will view invocation of a rule of necessity in these situations to be inconsistent 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 6/24/92 (same)); National Commission Report at 105. 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.*

*The remaining option is to use intercircuit assignment procedures under 28 U.S.C. § 291(a) to assign a circuit judge from another circuit to perform the statutory duties of the chief judge. Given the administrative inconvenience and delay involved in this alternative, we have concluded that it is desirable to use intercircuit assignment procedures only if the Judicial Council determines that the complaint is substantial enough to warrant such action.*

*Similarly, there is no unfairness in permitting complained-against 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 might ask the Judicial Council of another circuit to consider the petition or might ask the chief justice to assign the matter to either the Judicial Council of another circuit or the Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders. Given the administrative inconveniences and delay involved in these alternatives, we have concluded that it is desirable to refer the petition to another body 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 refer the matter to another body. There is legislative history suggesting that in such a circumstance the council should use the authority provided in section 354(b)(1) to refer the complaint to the Judicial Conference for consideration.*[12]

## RULE 19. WITHDRAWAL OF COMPLAINTS AND PETITIONS FOR REVIEW

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[12] See H.R. Rep. No. 1313, 96th Cong., 2d Sess. 12 (1980).

**a.** **Complaint pending before chief judge**. A complaint that is before the chief judge for a decision under rule 4 may be withdrawn by the complainant with the consent of the chief judge.

**b.** **Complaint pending before special committee or Judicial Council.** After a complaint has been referred to a special committee for investigation, the complaint may be withdrawn by the complainant only with the consent of both (1) the judge complained about, and (2) the special committee (before its report has been filed) or the Judicial Council.

**c.** **Petition for review of chief judge's disposition.** A petition to the Judicial Council for review of the chief judge's disposition of a complaint may be withdrawn by the petitioner at any time before the Judicial Council acts on the petition.

***Commentary on Rule 19***

*Rule 19 treats the complaint proceeding, once begun, as a matter of public business rather than as the property of the complainant. The complainant is denied the unrestricted power to terminate the proceeding by withdrawing the complaint.*

*Under rule 19(a), a complaint pending before the chief judge may be withdrawn if the chief judge consents. In appropriate cases, the chief judge consents. In appropriate cases, the chief judge may accordingly be saved the burden of preparing a formal order and supporting memorandum.*

*If the chief judge appoints a special committee, however, rule 19(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 judge complained about. Once a complaint has reached the stage of appointment of a special committee, the judge complained about is thus given the right to insist that the matter be resolved on the merits, thereby escaping the ambiguity that might remain if the proceeding were terminated by withdrawal of the complaint.*

*With regard to petitions for Judicial Council review, rule 19(c) grants the petitioner unrestricted authority to withdraw the petition. The public's interest in the proceeding is adequately protected, since there will necessarily have been a decision by the chief judge in such a case.*

## RULE 20. AVAILABILITY OF OTHERS PROCEDURES

The availability of the complaint procedure under these rules and 28 U.S.C. § 351 *et. seq.* will not preclude the chief judge of the circuit or the Judicial Council of the circuit from considering any information that may come to their attention suggesting that a judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts or is unable to discharge all the duties of office by reason of disability.

***Commentary on Rule 20***

*Rule 20 reflects the fact that the enactment of the statutory complaint procedure was not intended to displace the historic functions of the chief judge and the Circuit Judicial Council to respond to problems that come to their attention. As stated by Senator DeConcini in his remarks upon final Senate passage of the 1980 act, "the informal, collegial resolution of the great majority of meritorious disability or disciplinary matters is to be the rule rather than the exception. Only in the rare case will it be deemed necessary to invoke the formal statutory procedures and sanctions provided for in the act."*[13]

**RULE 21. AVAILABILITY OF RULES AND FORMS**

These rules and copies of the complaint form prescribed by rule 2 will be available without charge in the Office of the Clerk of the Court of Appeals, United States Courthouse, 1 Courthouse Way, Suite 2500, Boston, Massachusetts 02210, and in each office of the clerk of a district court or bankruptcy court within this circuit.

**RULE 22. EFFECTIVE DATE**

These rules apply to complaints filed on or after April 24, 2003. The handling of complaints filed before that date will be governed by the rules previously in effect.

**RULE 23. ADVISORY COMMITTEE**

The advisory committee appointed by the Court of Appeals for the First Circuit for the study of rules of practice and internal operating procedures shall also constitute the advisory committee for the study of these rules, as provided by 28 U.S.C. § 2077(b), and shall make any appropriate recommendations to the circuit council concerning these rules.

[13] 126 Cong. Rec. 28, 092 (1980).

# *APPENDIX A - 28 U.S.C. §§ 351-364*

**§ 351. Complaints; Judge Defined**

**(a) Filing of complaint by any person.**
Any person alleging that a judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or alleging that such judge is unable to discharge all the duties of office by reason of mental or physical disability, may file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of the facts constituting such conduct.

**(b) Identifying complaint by chief judge.**
In the interests of the effective and expeditious administration of the business of the courts and on the basis of information available to the chief judge of the circuit, the chief judge may, by written order stating reasons therefor, identify a complaint for purposes of this chapter and thereby dispense with filing of a written complaint.

**(c) Transmittal of complaint.** Upon receipt of a complaint filed under subsection (a), the clerk shall promptly transmit the complaint to the chief judge of the circuit, or, if the conduct complained of is that of the chief judge, to that circuit judge in regular active service next senior in date of commission (hereafter, for purposes of this chapter only, included in the term "chief judge"). The clerk shall simultaneously transmit a copy of the complaint to the judge whose conduct is the subject of the complaint. The clerk shall also transmit a copy of any complaint identified under subsection (b) to the judge whose conduct is the subject of the complaint.

**(d) Definitions.** In this chapter –

**(1)** The term "judge" means a circuit judge, district judge, bankruptcy judge, or magistrate judge; and

**(2)** The term "complainant" means the person filing a complaint under subsection (a) of this section.

**§ 352. Review of Complaint by Chief Judge.**

**(a) Expeditious review; limited inquiry**. The chief judge shall expeditiously review any complaint received under section 351(a) or identified under section 351(b). In determining what action to take, the chief judge may conduct a limited inquiry for the purpose of determining –

**(1)** whether appropriate corrective action has been or can be taken without the necessity for a formal investigation; and

**(2)** whether the facts stated in the complaint are either plainly untrue or are incapable of being established through investigation.

For this purpose, the chief judge may request the judge whose conduct is complained of to file a written response to the complaint. Such response shall not be made available to the complainant unless authorized by the judge filing the response. The chief judge or his or her designee may also communicate orally or in writing with the complainant, the judge whose conduct is complained of, and any other person who may have knowledge of the matter, and may review any transcripts or other relevant documents. The chief judge shall not undertake to make findings of fact about any matter that is reasonably in dispute.

**(b) Action by chief judge following review.** After expeditiously reviewing a complaint under subsection (a), the chief judge by written order stating his or her reasons, may –

**(1)** dismiss the complaint –

**(A)** if the chief judge finds the complaint to be –

**(i)** not in conformity with section 351(a);

**(ii)** directly related to the merits of a decision or procedural ruling; or

**(iii)** frivolous, lacking sufficient evidence to raise an inference that misconduct has occurred, or containing allegations which are incapable of being established through investigation; or

**(B)** when a limited inquiry conducted under subsection (a) demonstrates that the allegations in the complaint lack any factual foundation or are conclusively refuted by objective evidence; or

**(2)** conclude the proceeding if the chief judge finds that appropriate corrective action has been taken or that action on the complaint is no longer necessary because of intervening events.

The chief judge shall transmit copies of the written order to the complainant and to the judge whose conduct is the subject of the complaint.

**(c) Review of orders of chief judge.** A complainant or judge aggrieved by a final order of the chief judge under this section may petition the judicial council of the circuit for review thereof. The denial of a petition for review of the chief judge's order shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise.

**(d) Referral of petitions for review to panels of the judicial council.** Each judicial council may, pursuant to rules prescribed under section 358, refer a petition for review filed under subsection (c) to a panel of no fewer than 5 members of the council, at least 2 of whom shall be district judges.

**§ 353. Special Committees.**

**(a) Appointment.** If the chief judge does not enter an order under section 352(b), the chief judge shall promptly –

**(1)** appoint himself or herself and equal numbers of circuit and district judges of the circuit to a special committee to investigate the facts and allegations contained in the complaint;

**(2)** certify the complaint and any other documents pertaining thereto to each member of such committee; and

**(3)** provide written notice to the complainant and the judge whose conduct is the subject of the complaint of the action taken under this subsection.

**(b) Change in status or death of judges.** A judge appointed to a special committee under subsection (a) may continue to serve on that committee after becoming a senior judge or, in the case of the chief judge of the circuit, after his or her term as chief judge terminates under subsection (a)(3) or (c) of section 45. If a judge appointed to a committee under subsection (a) dies, or retires from office under section 371(a), while serving on the committee, the chief judge of the circuit may appoint another circuit or district judge, as the case may be, to the committee.

**(c) Investigation by special committee.** Each committee appointed under subsection (a) shall conduct an investigation as extensive as it considers necessary, and shall expeditiously file a comprehensive written report thereon with the judicial council of the circuit. Such report shall present both the findings of the investigation and the committee's recommendation for necessary and appropriate action by the judicial council of the circuit.

**§ 354. Action by Judicial Council.**

**(a) Actions upon receipt of report.**

**(1) Actions.** The judicial council of a circuit, upon receipt of a report filed under section 353(c) –

**(A)** may conduct any additional investigation which it considers to be necessary;

**(B)** may dismiss the complaint; and

**(C)** if the complaint is not dismissed, shall take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit.

**(2) Description of possible actions if complaint is not dismissed** –

**(A) In general.** – Action by the judicial council under paragraph (1)(C) may include –

**(i)** ordering that, on a temporary basis for a time certain, no further cases be assigned to the judge whose conduct is the subject of the complaint;

**(ii)** censuring or reprimanding such judge by means of private communication; and

**(iii)** censuring or reprimanding such judge by means of public announcement.

**(B) For Article III judges.** If the conduct of a judge appointed to hold office during good behavior is the subject of the complaint, action by the judicial council under paragraph (1)(C) may include –

**(i)** certifying disability of the judge pursuant to the procedures and standards provided under section 372(b); and

**(ii)** requesting that the judge voluntarily retire, with the provision that the length of service requirements under section 371 of this title shall not apply.

**(C) For magistrate judges.** If the conduct of a magistrate judge is the subject of the complaint, action by the judicial council under paragraph (1)(C) may include directing the chief judge of the district of the magistrate judge to take such action as the judicial council considers appropriate.

**(3)** Limitations on judicial council regarding removals.

**(A) Article III judges.** Under no circumstances may the judicial council order removal from office of any judge appointed to hold office during good behavior.

**(B) Magistrate and bankruptcy judges.** Any removal of a magistrate judge under this subsection shall be in accordance with section 631 and any removal of a bankruptcy judge shall be in accordance with section 152.

**(4) Notice of action to judge.** The judicial council shall immediately provide written notice to the complainant and to the judge whose conduct is the subject of the complaint of the action taken under this subsection.

**(b) Referral to Judicial Conference.**

**(1) In general.** In addition to the authority granted under subsection (a), the judicial council may, in its discretion, refer any complaint under section 351, together with the record of any associated proceedings and its recommendations for appropriate action, to the Judicial Conference of the United States.

**(2) Special circumstances.** In any case in which the judicial council determines, on the basis of a complaint and an investigation under this chapter, or on the basis of information otherwise available to the judicial council, that a judge appointed to hold office during good behavior may have engaged in conduct--

**(A)** which might constitute one or more grounds for impeachment under article II of the Constitution, or

**(B)** which, in the interest of justice, is not amenable to resolution by the judicial council, the judicial council shall promptly certify such determination, together with any complaint and a record of any associated proceedings, to the Judicial Conference of the United States.

**(3) Notice to complainant and judge.** A judicial council acting under authority of this subsection shall, unless contrary to the interests of justice, immediately submit written notice to the complainant and to the judge whose conduct is the subject of the action taken under this subsection.

**§ 355. Action by Judicial Conference.**

**(a) In general.** Upon referral or certification of any matter under section 354(b), the Judicial Conference, after consideration of the prior proceedings and such additional investigation as it considers appropriate, shall by majority vote take such action, as described in section 354(a)(1)(C) and (2), as it considers appropriate.

**(b)** If impeachment warranted.

**(1) In general.** If the Judicial Conference concurs in the determination of the judicial council, or makes its own determination, that consideration of impeachment may be warranted, it shall so certify and transmit the determination and the record of proceedings to the House of Representatives for whatever action the House of Representatives considers to be necessary. Upon receipt of the determination and record of proceedings in the House of Representatives, the Clerk of the House of Representatives shall make available to the public the determination and any reasons for the determination.

**(2) In case of felony conviction.** If a judge has been convicted of a felony under State or Federal law and has exhausted all means of obtaining direct review of the conviction, or the time for seeking further direct review of the conviction has passed and no such review has been sought, the Judicial Conference may, by majority vote and without referral or certification under section 354(b), transmit to the House of Representatives a determination that consideration of impeachment may be warranted, together with appropriate court records, for whatever action the House of Representatives considers to be necessary.

**§ 356. Subpoena Power.**

**(a) Judicial councils and special committees.** In conducting any investigation under this chapter, the judicial council, or a special committee appointed under section 353, shall have full subpoena powers as provided in section 332(d).

**(b) Judicial Conference and standing committees.** In conducting any investigation under this chapter, the Judicial Conference, or a standing committee appointed by the Chief Justice under section 331, shall have full subpoena powers as provided in that section.

**§ 357. Review of Orders and Actions.**

**(a) Review of action of judicial council.** A complainant or judge aggrieved by an action of the judicial council under section 354 may petition the Judicial Conference of the United States for review thereof.

**(b) Action of Judicial Conference.** The Judicial Conference, or the standing committee established under section 331, may grant a petition filed by a complainant or judge under subsection (a).

**(c) No judicial review.** Except as expressly provided in this section and section 352(c), all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise.

**§ 358. Rules**

**(a) In general.** Each judicial council and the Judicial Conference may prescribe such rules for the conduct of proceedings under this chapter, including the processing of petitions for review, as each considers to be appropriate.

**(b) Required provisions**. Rules prescribed under subsection (a) shall contain provisions requiring that–

**(1)** adequate prior notice of any investigation be given in writing to the judge whose conduct is the subject of a complaint under this chapter;

**(2)** the judge whose conduct is the subject of a complaint under this chapter 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; and

**(3)** the complainant be afforded an opportunity to appear at proceedings conducted by the investigating panel, if the panel concludes that the complainant could offer substantial information.

**(c) Procedures.** Any rule prescribed under this section shall be made or amended only after giving appropriate public notice and an opportunity for comment. Any such rule shall be a matter of public record, and any such rule promulgated by a judicial council may be modified by the Judicial Conference. No rule promulgated under this section may limit the period of time within which a person may file a complaint under this chapter.

**§ 359. Restrictions**

**(a) Restriction on individuals who are subject of investigation.** No judge whose conduct is the subject of an investigation under this chapter shall serve upon a special committee appointed under section 353, upon a judicial council, upon the Judicial Conference, or upon the standing committee established under section 331, until all proceedings under this chapter relating to such investigation have been finally terminated.

**(b) Amicus curiae.** No person shall be granted the right to intervene or to appear as amicus curiae in any proceeding before a judicial council or the Judicial Conference under this chapter.

**§ 360. Disclosure of Information.**

**(a) Confidentiality of proceedings.** Except as provided in section 355, all papers, documents, and records of proceedings related to investigations conducted under this chapter shall be confidential and shall not be disclosed by any person in any proceeding except to the extent that--

**(1)** the judicial council of the circuit in its discretion releases a copy of a report of a special committee under section 353(c) to the complainant whose complaint initiated the investigation by that special committee and to the judge whose conduct is the subject of the complaint;

**(2)** the judicial council of the circuit, the Judicial Conference of the United States, or the Senate or the House of Representatives by resolution, releases any such material which is believed necessary to an impeachment investigation or trial of a judge under article I of the Constitution; or

**(3)** such disclosure is authorized in writing by the judge who is the subject of the complaint and by the chief judge of the circuit, the Chief Justice, or the chairman of the standing committee established under section 331.

**(b) Public availability of written orders.** Each written order to implement any action under section 354(a)(1)(C), which is issued by a judicial council, the Judicial Conference, or the standing committee established under section 331, shall be made available to the public through the appropriate clerk's office of the court of appeals for the circuit. Unless contrary to the interests of justice, each such order shall be accompanied by written reasons therefor.

**§ 361. Reimbursement of Expenses.**

Upon the request of a judge whose conduct is the subject of a complaint under this chapter, the judicial council may, if the complaint has been finally dismissed under section 354(a)(1)(B), recommend that the Director of the Administrative Office of the United States Courts award reimbursement, from funds appropriated to the Federal judiciary, for those reasonable expenses, including attorneys' fees, incurred by that judge during the investigation which would not have been incurred but for the requirements of this chapter.

**§ 362. Other Provisions and Rules Not Affected.**

Except as expressly provided in this chapter, nothing in this chapter shall be construed to affect any other provision of this title, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Appellate Procedure, or the Federal Rules of Evidence.

**§ 363. Court of Federal Claims, Court of International Trade, Court of Appeals for the Federal Circuit**

The United States Court of Federal Claims, the Court of International Trade, and the Court of Appeals for the Federal Circuit shall each prescribe rules, consistent with the provisions of this chapter, establishing procedures for the filing of complaints with respect to the conduct of any judge of such court and for the investigation and resolution of such complaints. In investigating and taking action with respect to any such complaint, each such court shall have the powers granted to a judicial council under this chapter.

**§ 364. Effect of Felony Conviction.**

In the case of any judge or judge of a court referred to in section 363 who is convicted of a felony under State or Federal law and has exhausted all means of obtaining direct review of the conviction, or the time for seeking further direct review of the conviction has passed and no such review has been sought, the following shall apply:

**(1)** The judge shall not hear or decide cases unless the judicial council of the circuit (or, in the case of a judge of a court referred to in section 363, that court) determines otherwise.

**(2)** Any service as such judge or judge of a court referred to in section 363, after the conviction is final and all time for filing appeals thereof has expired, shall not be included for purposes of determining years of service under section 371(c), 377, or 178 of this title or creditable service under subchapter III of chapter 83, or chapter 84, of title 5.

# *APPENDIX B - COMPLAINT FORM*

JUDICIAL COUNCIL OF THE FIRST CIRCUIT

COMPLAINT OF JUDICIAL MISCONDUCT OR DISABILITY

Mail this form to the Clerk, United States Court of Appeals for the First Circuit, United States Courthouse, Suite 2500, 1 Courthouse Way, Boston, Massachusetts 02210. Mark the envelope JUDICIAL MISCONDUCT COMPLAINT or JUDICIAL DISABILITY COMPLAINT. Do not put the name of the judge or magistrate on the envelope.

See Rule 2(e) for the number of copies required.

1. Complainant's name: _____

   Address: _____

   _____

   Daytime telephone: (  )

2. Judge or magistrate complained about:

   Name: _____

   Court: _____

3. Does this complaint concern the behavior of the judge or magistrate in a particular lawsuit or lawsuits?

   [  ] Yes  [  ] No

   If yes, give the following information about each lawsuit (use the reverse side if there is more than one):

   Court: _____

   Docket number: _____

   Are (were) you a party or lawyer in the lawsuit?

   [  ] Party  [  ] Lawyer  [  ] Neither

   If a party, give the name, address and telephone number of your lawyer:

   _____

   _____

   Docket numbers of any appeals to the First Circuit: _____

4. Have you filed any lawsuits against the judge or magistrate?

[ ] Yes [ ] No

If yes, give the following information about each lawsuit (use the reverse side if there is more than one):

Court: _____

Docket number: _____

Present status of suit: _____

Name, address and telephone number of your lawyer: _____

_____

Court to which any appeal has been taken: _____

Docket number of the appeal: _____

Present status of the appeal: _____

5. On separate sheets of paper, not larger than the paper this form is printed on, describe the conduct or the evidence of disability that is the subject of this complaint. See Rule 2(b) and 2(d). Do not use more than 5 pages (5 sides).

6. You should either

(1) check the first box below and sign this form in the presence of a notary public; or
(2) check the second box and sign the form. You do not need a notary public if you check the second box.

[ ] I swear (affirm) that –

[ ] I declare under penalty of perjury that –

(1) I have read Rules 1 and 2 of the Rules of the Judicial Council of the First Circuit Governing Complaints of Judicial Misconduct or Disability; and
(2) The statements made in this complaint are true and correct to the best of my knowledge.

Signature: _____

Date executed: _____

Sworn and subscribed to before me

Date: _____

Notary Public: _____

My commission expires: _____