United States Court of Appeals
For the First Circuit

Rulebook

Federal Rules of Appellate Procedure

First Circuit Local Rules

First Circuit Internal Operating Procedures

Administrative Order Regarding Case Management /Electronic Case Files System ("CM/ECF")

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

Rules For Judicial-Conduct and Judicial-Disability Proceedings

Effective with amendments through December 1, 2020

Maine • **Massachusetts** • **New Hampshire**

Rhode Island • **Puerto Rico**

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Judges of the Court

Hon. Jeffrey R. Howard, Chief Judge

Hon. Juan R. Torruella, Circuit Judge
Hon. Sandra L. Lynch, Circuit Judge
Hon. O. Rogeriee Thompson, Circuit Judge
Hon. William J. Kayatta, Jr., Circuit Judge
Hon. David J. Barron, Circuit Judge

Hon. Bruce M. Selya, Senior Circuit Judge
Hon. Michael Boudin, Senior Circuit Judge
Hon. Norman H. Stahl, Senior Circuit Judge
Hon. Kermit V. Lipez, Senior Circuit Judge

Hon. Stephen Breyer, Circuit Justice

Officers of the Court

Maria R. Hamilton, Clerk of Court
Susan Goldberg, Circuit Executive
George P. Taoultsides, Circuit Librarian
Jane Willoughby, Senior Staff Attorney

Advisory Committee on Rules

Kaighn Smith, Jr., Chair
Seth Aframe
Shamis Beckley
Sarah S. Burg
Carla S. Loubriel Carrión
Mina S. Makarious
Linda Rekas Sloan
William J. Trach
Harold D. Vicente-González

Court of Appeals Miscellaneous Fee Schedule

(Issued in accordance with 28 U.S.C. § 1913)
Effective December 1, 2020

The fees included in the Court of Appeals Miscellaneous Fee Schedule are to be charged for services provided by the courts of appeals, including relevant services provided by the bankruptcy appellate panels established under 28 U.S. C. § 158(b)(1).

- The United States should not be charged fees under this schedule, except as prescribed in Items 2, 4, and 5 when the information requested is available through remote electronic access.

- Federal agencies or programs that are funded from judiciary appropriations (agencies, organizations, and individuals providing services authorized by the Criminal Justice Act, 18 U.S.C. § 3006A, and bankruptcy administrators) should not be charged any fees under this schedule.

(1) For docketing a case on appeal or review, or docketing any other proceeding, $500.

- Each party filing a notice of appeal pays a separate fee to the district court, but parties filing a joint notice of appeal pay only one fee.

- There is no docketing fee for an application for an interlocutory appeal under 28 U.S.C. § 1292(b) or other petition for permission to appeal under Fed. R. App. P. 5, unless the appeal is allowed.

- There is no docketing fee for a direct bankruptcy appeal or a direct bankruptcy cross appeal, when the fee has been collected by the bankruptcy court in accordance with item 14 of the Bankruptcy Court Miscellaneous Fee Schedule.

- This fee is collected in addition to the statutory fee of $5 that is collected under 28 U.S.C. § 1917.

[Upon filing a notice of appeal in the district court, appellant shall pay the clerk of the district court a fee of $505, which includes the $5 statutory filing fee for the notice of appeal, and a $500 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 $500 docketing fee, payable to the Clerk, U.S. Court of Appeals.]

(2) For conducting a search of the court of appeals or bankruptcy appellate panel records, $32 per name or item searched. This fee applies to services rendered on behalf of the United States if the information requested is available through remote electronic access.

(3) For certification of any document, $11. For the issuance of an apostille, $47.

(4) (a) For reproducing any document and providing a copy in paper form, $.50 per page. This fee applies to services rendered on behalf of the United States if the document requested is available through remote electronic access.

(b) For reproducing and transmitting in any manner a copy of an electronic record stored outside of the court's electronic case management system, including but not limited to, document files, audio and video recordings (other than a recording of a court proceeding), $31 per record provided.

(5) For reproducing recordings of proceedings, regardless of the medium, $32, including the cost of materials. This fee applies to services rendered on behalf of the United States if the recording is available through remote electronic access.

(6) For reproducing the record in any appeal in which the court of appeals does not require an appendix pursuant to Fed. R. App. P.30(f), (or, in appeals before a bankruptcy appellate panel, pursuant to Fed. R. Bankr. P. 8018(e)), $89.

(7) For retrieval of one box of records from a Federal Records Center, National Archives, or other storage location removed from the place of business of the court, $64. For retrievals involving multiple boxes, $39 for each additional box. For electronic retrievals, $10 plus any charges assessed by the Federal Records Center, National Archives, or other storage location removed from the place of business of the courts.

(8) For any payment returned or denied for insufficient funds, $53.

(9) For copies of opinions, a fee commensurate with the cost of printing, as fixed by each court of appeal.

[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, http://www.ca1.uscourts.gov*.]*

(10) For copies of the local rules of court, a fee commensurate with the cost of distributing the copies. The court may also distribute copies of the local rules without charge.

(11) For filing:

- Any separate or joint notice of appeal or application for appeal from the bankruptcy appellate panel, $5.

- A notice of the allowance of an appeal from the bankruptcy appellate panel, $5.

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

(13) For original admission of an attorney to practice, including a certificate of admission, $188. For a duplicate certificate of admission or certificate of good standing, $20.

[The First Circuit collects a local attorney admission fee of $50.00 in addition to the national attorney admission fee of $188.00 imposed by this fee schedule pursuant to 28 U.S.C. § 1913. See 1st Cir. R. 46.0(a)(1). Absent a waiver, the payment of the combined fee of $231.00 must be paid electronically using the court's Case Management/Electronic Case Files ("CM/ECF") system.]

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 [1st Cir. 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 1st Cir. 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.

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 1st Cir. 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 1st Cir. 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 1st Cir. R. 32.4.

6. Disclosure Statement

Counsel representing a nongovernmental corporation must include a 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 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. The Notice of Docket Activity that is generated by the court's electronic filing system constitutes service on all ECF filers. 1st Cir. R. 25.0(e). If a certificate of service is required by Fed. R. App. P. 25(d), it should be attached to the document's last page and indicate: the date of service; the manner of service; and the names and addresses of the persons served.

Federal Rules of Appellate Procedure and First Circuit Local Rules

TITLE I. APPLICABILITY OF RULES

Rule 1. Scope of Rules; Definition; 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) Definition. In these rules, 'state' includes the District of Columbia and any United States commonwealth or territory.

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

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 sending 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. 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 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 sends copies, with the date of sending. 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 after the case is docketed in the court of appeals, the person or persons taking the appeal must submit a separate statement listing all parties to the appeal, the last known counsel, and last known addresses and e-mail 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 fourteen days of service of the docketing statement, with copies to all other parties.*

(b) If appellant does not pay the docket fee within 14 days of the filing of the notice of appeal, or does not file the docketing statement or any other document within the time set by the court, the appeal may be dismissed for want of diligent prosecution.

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 entry of the judgment or order appealed from.

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

(i) the United States;

(ii) a United States agency;

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

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

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

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

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

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

(A) If a party files in the district court any of the following motions under the Federal Rules of Civil Procedure—and does so within the time allowed by those rules—the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

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

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

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

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

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

(vi) for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered.

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

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

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

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

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

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

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

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

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later.

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

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

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

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

(7) **Entry Defined.**

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

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

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

- the judgment or order is set forth on a separate document, or

- 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a).

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

(b) Appeal in a Criminal Case.

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

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

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

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

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

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

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

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

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

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

(i) for judgment of acquittal under Rule 29;

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

(iii) for arrest of judgment under Rule 34.

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

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

(ii) the entry of the judgment of conviction.

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

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

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

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

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

(1) If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 4(c)(1). If an inmate 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 and:

(A) it is accompanied by:

(i) a declaration in compliance with 28 U.S.C. § 1746—or a notarized statement—setting out the date of deposit and stating that first-class postage is being prepaid; or

(ii) evidence (such as a postmark or date stamp) showing that the notice was so deposited and that postage was prepaid; or

(B) the court of appeals exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies Rule 4(c)(1)(A)(i).

(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 with the circuit clerk and serve it on all other parties to the district-court action.

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

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

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

(1) The petition must include the following:

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

(B) the question itself;

(C) the relief sought;

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

(E) an attached copy of:

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

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

(2) A party may file an answer in opposition or a cross-petition within 10 days after the petition is served.

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

(c) Form of Papers; Number of Copies; Length Limits. All papers must conform to Rule 32(c)(2). 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. Except by the court's permission, and excluding the accompanying documents required by Rule 5(b)(1)(E):

(1) a paper produced using a computer must not exceed 5,200 words; and

(2) a handwritten or typewritten paper must not exceed 20 pages.

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

(1) Within 14 days after the entry of the order granting permission to appeal, the appellant must:

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

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

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

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

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

[Abrogated]

Rule 6. Appeal in a Bankruptcy Case

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

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

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

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

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

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

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

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

(A) Motion for Rehearing.

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

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

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

(B) The Record on Appeal.

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

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

(iii) The record on appeal consists of:

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

(C) Making the Record Available.

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

paper form, a party must arrange with the clerks in advance for their transportation and receipt.

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

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

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

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

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

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

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

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

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

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

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

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

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

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 bond or other security provided to obtain a stay of judgment; 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 security in the district court.

(b) Proceeding Against a Security Provider. If a party gives security with one or more security providers, each provider submits to the jurisdiction of the district court and irrevocably appoints the district clerk as its agent on whom any papers affecting its liability on the security may be served. On motion, a security provider'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 send a copy to each security provider 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 14 days after filing the notice of appeal or entry of an order disposing of the last timely remaining motion of a type specified in Rule 4(a)(4)(A), whichever is later, the appellant must do either of the following:

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

(i) the order must be in writing;

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

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

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

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

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

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

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

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

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

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

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

(e) Correction or Modification of the Record.

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

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

(A) on stipulation of the parties;

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

(C) by the court of appeals.

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

Local Rule 10.0. Ordering Transcripts

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

(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 fourteen-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 bond or other security provided to obtain a stay of judgment; 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 the Record. *The district court will not transmit the full record except upon request of the circuit clerk. Rather, the district court will transmit to the circuit clerk electronically a copy of the notice of appeal, the order(s) being appealed, and a certified copy of the district court docket report in lieu of transmitting the entire record. Sealed documents will not be included in this abbreviated electronic record. Rather, any sealed documents or sealed docket reports/entries will be transmitted to the circuit clerk in hard copy whether or*

not electronically available. In addition, any papers and exhibits which are not electronically available will also be transmitted to the circuit clerk. The entire electronic district court record is available to the court of appeals whether or not individual documents are transmitted as part of the abbreviated electronic record or later supplemented.

(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 paper form 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. Motions to seal or sealed documents should never be filed electronically. See 1st Cir. R. 25.0.*

(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 the Case" 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 14 days after filing the notice, file a statement with the circuit clerk naming the parties that the attorney represents on appeal.

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

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 1st Cir. R. 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 1st Cir. R. 46.6. For requirements applying to court-appointed counsel, reference is made to 1st Cir. R. 46.5(c), the Criminal Justice Plan of this Circuit.*

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

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

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

TITLE III. APPEALS FROM THE UNITED STATES TAX COURT

Rule 13. Appeals From the Tax Court

(a) Appeal as of Right.

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

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

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

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

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

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

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

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

court of appeals, the appellant must apply to that other court to make provision for the record.

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

Rule 14. Applicability of Other Rules to Appeals from the Tax Court

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

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

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

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

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

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

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

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

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

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

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

Rule 16. The Record on Review or Enforcement

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

(1) the order involved;

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

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

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

Rule 17. Filing the Record

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

(b) Filing — What Constitutes.

(1) The agency must file:

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

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

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

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

Rule 18. Stay Pending Review

(a) Motion for a Stay.

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

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

(A) The motion must:

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

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

(B) The motion must also include:

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

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

(iii) relevant parts of the record.

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

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

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

Local Rule 18.0 Stay in Immigration Cases; Notification of Removal Date

In order to ensure the orderly presentation of issues placed before this Court in immigration cases and to preserve the Court's ability to make considered decisions in such cases, the Court adopts the following policy, which applies to petitions for review and to appeals from district court habeas proceedings (collectively, for purposes of this rule, "petitions").

1. *If the government has scheduled the removal of a petitioner, then the government will file with the Court a notice identifying the earliest date upon which removal may be made. The notice must be filed by the later of: one day after a petition is docketed in the court of appeals and notification is transmitted to the government via the court's CM/ECF system or immediately once removal is scheduled. The absence of any such notice will be deemed a representation by counsel for the government that the government has not yet scheduled the removal of the petitioner.*

2. *When a first motion for stay of removal is timely filed in this court and notification is transmitted to the government via the court's CM/ECF system, the clerk will enter an administrative order staying removal for ten business days. The government shall file its response to the motion for stay of removal by the later of: two business days after the filing of the first motion for stay of removal; or, ten business days prior to the earliest possible date of removal; provided, however, that any response must be filed within the time period specified by Fed. R. App. P. 27(a)(3)(A). Upon motion and good cause, any of these deadlines, as well as the duration of the stay, may be revised in a particular case. This paragraph applies only*

to the first timely motion to stay removal filed in an individual case in this court. For purposes of this paragraph only, a first motion to stay removal will be deemed timely if filed by the later of: the docketing of the petition; or two business days after the filing of a notice by the government as provided in paragraph 1, above. If petitioner is pro se, this deadline shall not apply, but any stay motion should be filed as expeditiously as possible.

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

When the court files an opinion directing entry of judgment enforcing the agency's order in part, the agency must within 14 days file with the clerk and serve on each other party a proposed judgment conforming to the opinion. A party who disagrees with the agency's proposed judgment must within 10 days file with the clerk and serve the agency with a proposed judgment that the party believes conforms to the opinion. The court will settle the judgment and direct entry without further hearing or argument.

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 the petition with the circuit clerk and serve it 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 and serving it 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; Length Limits. All papers must conform to Rule 32(c)(2). 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. Except by the court's permission, and excluding the accompanying documents required by Rule 21(a)(2)(C);

(1) a paper produced using a computer must not exceed 7,800 words; and

(2) a handwritten or typewritten paper must not exceed 30 pages.

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

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

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

Local Rule 22.0. Habeas Corpus; Certificate of Appealability

(a) General Procedures. *In this circuit, ordinarily neither the court nor a judge thereof will act on a request for a certificate of appealability if the district judge who refused the writ is available and has not ruled first. The general procedures regarding certificates of appealability are set forth in Fed. R. App. P. 22 and Rule 11 of the Rules Governing*

Proceedings Under 28 U.S.C. § 2254 or § 2255. These latter rules require the district judge to rule on the issuance of a certificate of appealability when a final order issues. If the district court denies a certificate, the petitioner may not appeal the denial but may file a motion for a certificate of appealability before this court. A petitioner wishing to challenge the denial of a § 2254 or § 2255 petition must file a timely notice of appeal whether or not the district court issues a certificate of appealability.

(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 22.1. 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 2255 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. 22.1(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 from the United States Tax Court or on Appeal or Review of an Administrative-Agency Proceeding. A party may file in the court of appeals a motion for leave to proceed on appeal in forma pauperis with an affidavit prescribed by Rule 24(a)(1):

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

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

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

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) Nonelectronic Filing.

(i) **In General.** For a paper not filed electronically, 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.

(ii) **A Brief or Appendix.** A brief or appendix not filed electronically is timely filed, however, if on or before the last day for filing, it is:

- mailed to the clerk by first-class mail, or other class of mail that is at least as expeditious, postage prepaid; or

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

(iii) **Inmate Filing.** If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 25(a)(2)(A)(iii). A paper not filed electronically by an inmate is timely if it is deposited in the institution's internal mail system on or before the last day for filing and:

- it is accompanied by: a declaration in compliance with 28 U.S.C. § 1746—or a notarized statement—setting out the date of deposit and stating that first-class postage is being prepaid; or evidence (such as a postmark or date stamp) showing that the paper was so deposited and that postage was prepaid; or

- the court of appeals exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies Rule 25(a)(2)(A)(iii).

(B) Electronic Filing and Signing.

(i) **By a Represented Person—Generally Required; Exceptions.** A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

(ii) **By an Unrepresented Person—When Allowed or Required.** A person not represented by an attorney:

- may file electronically only if allowed by court order or by local rule; and
- may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

(iii) **Signing.** A filing made through a person's electronic-filing account and authorized by that person, together with that person's name on a signature block, constitutes the person's signature.

(iv) **Same as a Written Paper.** A paper filed electronically is a written paper for purposes of these rules.

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

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

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

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

(c) Manner of Service.

(1) Nonelectronic service may be any of the following:

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

(B) by mail; or

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

(2) Electronic service of a paper may be made (A) by sending it to a registered user by filing it with the court's electronic-filing system or (B) by sending it by other electronic means that the person to be served consented to in writing.

(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 filing or sending, 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 if it was served other than through the court's electronic-filing system:

(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)(A)(ii), 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. Electronic Case Filing System and Facsimile

(a) Electronic Case Filing. *Use of the electronic filing system is mandatory for all attorneys filing in this court, unless they are granted an exemption, and is voluntary for all non-incarcerated pro se litigants proceeding without counsel.*

(1) *The clerk may make changes to the procedures for electronic filing to adapt to changes in technology or to facilitate electronic filing.*

(2) *The court may deviate from these procedures in specific cases if deemed appropriate in the exercise of its discretion.*

(3) *Documents must be formatted for electronic filing by converting the original word processing document into Portable Document Format ("PDF"). PDF images created*

by scanning paper documents do not comply with this rule. However, exhibits that are submitted as attachments to an electronically filed pleading may be scanned and attached if the filer does not possess a word-processing file version of the document

(4) *Completed PDF fillable forms must be scanned or "printed to PDF" in order to lock or "flatten" the form prior to filing the document in CM/ECF.*

(b) Scope of Electronic Filing. *Unless this court by rule or order prescribes otherwise, all cases will be assigned to the court's electronic filing system. Upon motion and a showing of good cause, the court may exempt an attorney from the provisions of this rule and authorize filing by means other than use of the electronic filing system. Absent an exemption, all documents filed by counsel must be filed electronically using the electronic filing system with the exceptions below, which also apply to pro se litigants who have elected to use the electronic filing system.*

(1) ***Paper Only Filings. The following documents must be filed only in paper form:***

(A) motions to seal;

(B) sealed, ex parte, or otherwise non-public documents, including for example, pre-sentence reports and statements of reasons in a judgment of criminal conviction; and

(C) appendices to briefs.

(2) ***Documents Initiating a Case.*** *Documents that initiate a case in the court of appeals may be filed electronically or in paper, including for example, petitions for review, petitions for permission to appeal, applications to enforce an agency order, petitions for a writ of mandamus or prohibition, and applications for leave to file a second or successive petition for relief pursuant to 28 U.S.C. §2254 or §2255. While a Notice of Appeal initiates an appeal, it must be filed in the district court and, thus, is subject to the relevant district court's procedures governing electronic filing.*

(3) ***Briefs.*** *Although a brief (including the addendum, required by Loc. R. 28.0) must be filed electronically, paper copies of briefs are still required to be filed. When a brief is filed electronically, it is deemed tendered. The clerk's office will then review the electronically tendered brief and, if the brief is compliant with federal and local rules, send a notification accepting the brief as filed and requiring the attorney or party filing electronically ("ECF Filer") to file nine identical paper copies so that they are received by the court within seven days of the notification. The clerk may shorten the period for filing paper copies of a brief if it becomes necessary in a particular case. At the time a brief is tendered electronically, it must be served on all other parties, as required by Federal Rules of Appellate Procedure 25(b) and 31(b). See Loc. R. 25.0(e). Parties do not need to serve the brief again on the other parties to the case when identical paper copies are filed with the court. Appendices must be filed and served in paper form at the time the electronic version of the brief is tendered for filing.*

(4) ***Criminal Justice Act Vouchers.*** *CJA 24 vouchers filed in accordance with the Criminal Justice Act, 18 U.S.C. §3006A, must be filed electronically using the court's electronic filing system. All other Criminal Justice Act vouchers must be submitted electronically using the court's CJA eVoucher system.*

(5) ***Copies of Filings***. *Paper copies of electronically filed documents other than briefs (such as petitions for rehearing or rehearing en banc) are not required and should not be filed unless specifically requested by the clerk. The clerk may direct the ECF Filer to provide the court with paper copies of electronically filed documents, or with an identical electronic version of any paper document previously filed in the same case by that filer, in a format designated by the court.*

(c) ***Eligibility and Registration.*** *Attorneys who practice in this court must register as ECF Filers. Registration is required to obtain a login and password for use of the electronic case filing system. Attorneys and non-incarcerated pro se litigants may register at www.pacer.gov. A non-incarcerated party to a pending case who is not represented by an attorney may, but is not required to, register as an ECF Filer for purposes of that case. If a pro se party retains an attorney, the attorney must register as an ECF Filer if he or she has not already done so and file an appearance form.*

(1) ***Consent to Service.*** *Registration as an ECF Filer constitutes consent to electronic service of all documents as provided in these rules and in the Federal Rules of Appellate Procedure.*

(2) ***CM/ECF User's Guide***. *Before filing an electronic document using the court's electronic filing system, ECF Filers should familiarize themselves with the CM/ECF User's Guide available on the court's website at www.ca1.uscourts.gov.*

(3) ***Duty to Update Registration Information.*** *An ECF Filer has an affirmative duty to keep the filer's primary email address and any additional email addresses associated with the filer's account updated at all times. Any changes to an ECF Filer's contact information, including name, physical address, telephone, fax number or e-mail addresses, should be made through the PACER Service Center, which can be accessed at www.pacer.gov.*

(4) ***Password and Login Protection.*** *ECF Filers agree to protect the security of their logins and passwords. An ECF Filer shall immediately notify the PACER Service Center and the clerk if the filer learns, or has reason to suspect, that the filer's login or password has been compromised. ECF Filers may be sanctioned for failure to comply with this provision. In addition to other sanctions imposed by the court, the clerk may terminate without notice the electronic filing privileges of any ECF Filer who uses the electronic filing system inappropriately.*

(d) ***Consequences of Electronic Filing.*** *Electronic transmission of a document via the electronic filing system in compliance with these rules, together with the transmission of*

a Notice of Docket Activity from the court, constitutes filing of the document under the Federal Rules of Appellate Procedure and the local rules of this court, and constitutes entry of the document on the docket kept by the clerk under Fed. R. App. P. 36 and 45(b).

(1) ***Leave to File.*** *If leave of court is required to file a document and the document may be filed electronically under Loc. R. 25.0(b), both the motion and the subject document should be submitted electronically. If leave is granted, an order will issue accepting the filing for docketing.*

(2) ***Legibility.*** *Before filing a document with the court, an ECF Filer must ensure its legibility and completeness.*

(3) ***Time Filed.*** *When a document has been filed electronically, the official record is the electronic document stored by the court. Except in the case of documents first filed in paper form and subsequently submitted electronically, an electronically filed document is deemed filed at the date and time stated on the Notice of Docket Activity from the court. Unless otherwise required by statute, rule, or court order, filing must be completed by midnight in the time zone of the circuit clerk's office in Boston to be considered timely filed that day.*

(4) ***Failure to Electronically File a Document.*** *ECF Filers are advised that they should contact the clerk's office if they transmit a document via the electronic filing system but do not receive a Notice of Docket Activity. If a Notice of Docket Activity was not transmitted by the court, the ECF Filer's filing attempt failed and the document was not filed. If the filer was attempting to file a document initiating a case and does not receive electronic confirmation that the submission was received by the court, then the ECF Filer's filing attempt failed and the document was not filed.*

(e) Service of Documents by Electronic Means. *The Notice of Docket Activity that is generated by the court's electronic filing system constitutes service of the filed document on all ECF Filers.*

(1) ***Service on Paper Recipients.*** *The court's electronic filing system identifies which parties in a particular case are ECF filers. Parties who are not registered as ECF Filers must be served with a copy of any electronically filed document in some other way authorized by Fed. R. App. P. 25(c)(1). Similarly, a document filed in paper form pursuant to 1st Cir. R. 25.0(b)(1) must be served using an alternate method of service prescribed by Fed. R. App. P. 25(c)(1). However, paper copies of briefs filed and served electronically do not need to be served again on the parties to the case when paper copies of the briefs are filed with the court.*

(2) ***Certificate of Service.*** *The Notice of Docket Activity does not replace the certificate of service, if required by Fed. R. App. P. 25(d).*

(f) Entry of Court-Issued Documents. *Except as otherwise provided by local rule or court order, all public orders, opinions, judgments, and proceedings of the court in cases assigned*

to the electronic filing system will be filed in accordance with these rules, which will constitute entry on the docket kept by the clerk under Fed. R. App. P. 36 and 45(b). Any order or document electronically issued by the court without the original signature of a judge or authorized court personnel has the same force and effect as if the judge or clerk had signed a paper copy of the order. Orders also may be issued as "text-only" entries on the docket, without an attached document. Such orders are official and binding.

(g) ***Attachments and Exhibits to Electronically Filed Documents.*** *All documents referenced as exhibits or attachments to an electronically filed document must also be filed electronically, unless the court permits or requires paper filing. An ECF Filer must submit as exhibits or attachments only those excerpts of the referenced documents that are directly germane to the matter under consideration by the court. Excerpted material must be clearly and prominently identified as such. The court may require parties to file additional excerpts or the complete document. This rule does not apply to appendices to briefs. See Loc. R. 25.0(b)(1).*

(h) ***Sealed Documents.*** *As required by 1st Cir. R. 25.0(b)(1), sealed documents and motions for permission to file a document under seal should be filed only in paper form. Sealed documents must be filed in compliance with 1st Cir. R. 11.0(c) and 1st Cir. R. 30.0(g). If an entire case is sealed, all documents in the case are considered sealed unless the court orders otherwise or, in the case of a court order, opinion, or judgment, the court releases the order, opinion or judgment for public dissemination.*

(i) ***Retention Requirements.*** *Electronically filed documents that require original signatures other than that of the ECF Filer must be maintained in paper form by the ECF Filer until final disposition of the case. For purposes of this rule, a disposition is not final until the time for filing a petition for a writ of certiorari has expired, or, if a petition for a writ of certiorari is filed, until the Supreme Court disposes of the matter, and, if a remand is ordered, the case is finally resolved. Upon request by the court, ECF Filers must provide original documents for review.*

(j) ***Signatures.*** *The user login and password required to submit documents via the electronic filing system serve as the ECF Filer's signature on all electronic documents filed with the court. They also serve as a signature for purposes of the Federal Rules of Appellate Procedure, the local rules of court, and any other purpose for which a signature is required in connection with proceedings before the court.*

(1) ***Submission by Signatory.*** *No ECF Filer or other person may knowingly permit or cause to permit an ECF Filer's login and password to be used by anyone other than an authorized agent of the ECF Filer. ECF Filers are reminded that pursuant to 1st Cir. R. 25.0(c)(4), a filer must immediately notify the PACER Service Center and the clerk if the filer learns, or has reason to know, that the filer's login or password has been compromised.*

(2) ***Multiple Signatures.*** *The filer of any electronically filed document requiring multiple signatures (for example, stipulations) must list thereon all the names of other signatories by means of a signature block for each. By submitting such a document, the*

ECF Filer certifies that each of the other signatories has expressly agreed to the form and substance of the document, and that the ECF Filer has the authority to submit the document electronically. If any person objects to the representation of his or her signature on an electronic document as described above, he or she must, within 14 days of the electronic filing, file a notice setting forth the basis of the objection.

(k) ***Notice of Court Orders and Judgments.*** *Immediately upon the entry of a public order, opinion or judgment in a case assigned to the electronic filing system, a Notice of Docket Activity will be electronically transmitted to the ECF Filers in the case. Electronic transmission of the Notice of Docket Activity constitutes the notice and service of the order, opinion, or judgment required by Fed. R. App. P. 36(b) and 45(c). The clerk will give notice of any order, opinion, or judgment required by Fed. R. App. P. 36(b) and 45(c) in paper to any person who has not consented to electronic service.*

(l) ***Technical Failures****. An ECF Filer whose filing is made untimely as the result of a technical failure may seek appropriate relief from the court.*

(m) ***Privacy Protections and Public Access.*** *Filers, whether filing electronically or in paper form, shall refrain from including or shall redact certain personal data identifiers from all documents filed with the court whenever such redaction is required by Fed. R. App. P. 25(a)(5). The responsibility for redacting these personal identifiers rests solely with counsel and the parties. The clerk will not review any document for compliance with this rule. Filers are advised that it is the experience of this court that failure to comply with redaction requirements is most apt to occur in attachments, addenda, or appendices, and, thus, special attention should be given to such documents.*

(n) ***Hyperlinks.*** *Electronically filed documents may contain hyperlinks except as stated herein. Hyperlinks may not be used to link to sealed or restricted documents. Hyperlinks to cited authority may not replace standard citation format. Complete citations must be included in the text of the document. A hyperlink, or any site to which it refers, will not be considered part of the record. Hyperlinks are simply convenient mechanisms for accessing material in a document. The court accepts no responsibility for the availability or functionality of any hyperlink, and does not endorse any product, organization, or content at any hyperlinked site, or at any site to which that site might be linked.*

(o) ***Facsimile.*** *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 electronic or paper copies, 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 time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) Additional Time After Certain Kinds of Service. When a party may or must act within a specified time after being served, and the paper is not served electronically on the party or delivered to the party on the date stated in the proof of service, 3 days are added after the period would otherwise expire under Rule 26(a).

Rule 26.1. Disclosure Statement

(a) Nongovernmental Corporations. Any nongovernmental corporation that is a 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. The same requirement applies to a nongovernmental corporation that seeks to intervene.

(b) Organizational Victims in Criminal Cases. In a criminal case, unless the government shows good cause, it must file a statement that identifies any organizational victim of the alleged criminal activity. If the organizational victim is a corporation, the statement must also disclose the information required by Rule 26.1(a) to the extent it can be obtained through due diligence.

(c) Bankruptcy Cases. In a bankruptcy case, the debtor, the trustee, or, if neither is a party, the appellant must file a statement that:

(1) identifies each debtor not named in the caption; and

(2) for each debtor that is a corporation, discloses the information required by Rule 26.1(a).

(d) Time for Filing; Supplemental Filing. The Rule 26.1 statement must:

(1) be filed 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;

(2) be included before the table of contents in the principal brief; and

(3) be supplemented whenever the information required under Rule 26.1 changes.

(e) Number of Copies. If the Rule 26.1 statement is filed before the principal brief, or if a supplemental statement is filed, 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.

Rule 27. Motions

(a) In General.

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

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

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

(B) Accompanying documents.

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

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

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

(C) Documents barred or not required.

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

(ii) A notice of motion is not required.

(iii) A proposed order is not required.

(3) **Response.**

(A) **Time to file.** Any party may file a response to a motion; Rule 27(a)(2) governs its contents. The response must be filed within 10 days after service of the motion unless the court shortens or extends the time. A motion authorized by Rules 8, 9, 18, or 41 may be granted before the 10-day period runs only if the court gives reasonable notice to the parties that it intends to act sooner.

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

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

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

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

(d) Form of Papers; Length Limits; 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) **Length Limits.** Except by the court's permission, and excluding the accompanying documents authorized by Rule 27(a)(2)(B);

(A) a motion or response to a motion produced using a computer must not exceed 5,200 words;

(B) a handwritten or typewritten motion or response to a motion must not exceed 20 pages;

(C) a reply produced using a computer must not exceed 2,600 words; and

(D) a handwritten or typewritten 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. Although documents may be filed electronically at any time through CM/ECF, the filer should not expect that the filing will be addressed outside regular business hours unless the filer contacts the clerk's office in advance to make special arrangements. The business hours for the clerk's office are Mondays through Fridays from 8:30 a.m. to 5:00 p.m.*

(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.*

(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 disclosure statement if required by Rule 26.1;

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

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

(4) a jurisdictional statement, including:

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

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

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

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

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

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

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

(8) the argument, which must contain:

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

(B) for each issue, a concise statement of the applicable standard of review (which may

appear in the discussion of the issue or under a separate heading placed before the discussion of the issues);

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

(10) the certificate of compliance, if required by Rule 32(g)(1).

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

(1) the jurisdictional statement;

(2) the statement of the issues;

(3) the statement of the case; and

(4) the statement of the standard of review.

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

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

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

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

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

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

(g) [Reserved]

(h) [Reserved]

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

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

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 unless the appellee is dissatisfied with the appellant's statement.

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

(A) the jurisdictional statement;

(B) the statement of the issues;

(C) the statement of the case; and

(D) the statement of the standard of review.

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

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

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

(e) Length.

(1) **Page Limitation.** Unless it complies with Rule 28.1(e)(2), 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 it:

(i) contains no more than 13,000 words; or

(ii) 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 it:

(i) contains no more than 15,300 words; or

(ii) 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).

(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 21 days after the appellant's response and reply brief is served, but at least 7 days before argument unless the court, for good cause, allows a later filing.

Rule 29. Brief of an Amicus Curiae

(a) During Initial Consideration of a Case on the Merits.

(1) **Applicability.** This Rule 29(a) governs amicus filings during a court's initial consideration of a case on the merits.

(2) **When Permitted**. The United States or its officer or agency or a state may file an amicus 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, but a court of appeals may prohibit the filing of or may strike an amicus brief that would result in a judge's disqualification.

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

(A) the movant's interest; and

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

(4) **Contents and Form.** An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. An amicus brief need not comply with Rule 28, but must include the following:

(A) if the amicus curiae is a corporation, a disclosure statement like that required of parties by Rule 26.1;

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

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

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

(E) unless the amicus curiae is one listed in the first sentence of Rule 29(a)(2), a statement that indicates whether:

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

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

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

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

(G) a certificate of compliance under Rule 32(g)(1), if length is computed using a word or line limit.

(5) **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.

(6) **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.

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

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

(b) During Consideration of Whether to Grant Rehearing.

(1) **Applicability.** This Rule 29(b) governs amicus filings during a court's consideration of whether to grant panel rehearing or rehearing en banc, unless a local rule or order in a case provides otherwise.

(2) **When Permitted.** The United States or its officer or agency or a state may file an amicus brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court.

(3) **Motion for Leave to File.** Rule 29(a)(3) applies to a motion for leave.

(4) **Contents, Form, and Length.** Rule 29(a)(4) applies to the amicus brief. The brief must not exceed 2,600 words.

(5) **Time for Filing.** An amicus curiae supporting the petition for rehearing or supporting neither party must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the petition is filed. An amicus curiae opposing the petition must file its brief, accompanied by a motion for filing when necessary, no later than the date set by the court for the response.

Rule 30. Appendix to the Briefs

(a) Appellant's Responsibility.

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

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

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

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

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

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

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

(b) All Parties' Responsibilities.

(1) **Determining the Contents of the Appendix.** The parties are encouraged to agree on the contents of the appendix. In the absence of an agreement, the appellant must, within 14 days after the record is filed, serve on the appellee a designation of the parts of the record the appellant intends to include in the appendix and a statement of the issues the appellant intends to present for review. The appellee may, within 14 days after receiving the designation, serve on the appellant a designation of additional parts to which it wishes to direct the court's attention. The appellant must include the designated parts in the appendix. The parties must not engage in unnecessary designation of parts of the record, because the entire record is available to the court. This paragraph applies also to a cross-appellant and a cross-appellee.

(2) **Costs of Appendix.** Unless the parties agree otherwise, the appellant must pay the cost of the appendix. If the appellant considers parts of the record designated by the appellee to

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

(c) Deferred Appendix.

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

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

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

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

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

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

(f) Appeal on the Original Record Without an Appendix. The court may, either by rule for all

cases or classes of cases or by order in a particular case, dispense with the appendix and permit an appeal to proceed on the original record with any copies of the record, or relevant parts, that the court may order the parties to file.

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) Reproduction. *The appendix should be printed on both sides of each page.*

(c) Contents. *The appendix must include any relevant portions of the pleadings, transcripts, exhibits, or other parts of the record referred to in the briefs as may be necessary to understand the issues on appeal and to preserve context. Material included in the addendum bound with appellant's brief need not be reproduced in the appendix. Guidance to counsel as to the contents of the appendix is set forth in a Notice to Counsel Regarding Contents of the Appendix, which accompanies the briefing schedule and is available on the court's website at www.ca1.uscourts.gov. The required and optional contents of the addendum are set forth in Local Rule 28.0(a).*

(d) In Forma Pauperis. *All pro se 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. An appendix is required in all other appeals unless the court rules otherwise pursuant to Fed. R. App. P. 30(f). Although an appellant may be reimbursed for the cost of preparing an appendix where appellant's counsel is appointed under the Criminal Justice Act, counsel in consolidated multi-defendant appeals should coordinate, to the extent possible, to file a consolidated appendix.*

(e) Translations*. The court will not receive documents or cited opinions not in the English language unless translations are furnished. Whenever an opinion of the Supreme Court of Puerto Rico (or other Commonwealth of Puerto Rico court) 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 shall be filed. Unless the translation is filed electronically in compliance with the court's electronic filing system, three conformed copies should also 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.*

(f) 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.*

(g) 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 21 days after service of the appellee's brief but a reply brief must be filed at least 7 days before argument, unless the court, for good cause, allows a later filing.

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

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

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

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) once the record is complete, including any necessary transcripts. When a brief (and addendum required by Local Rule 28.0) is filed electronically in compliance with the court's electronic filing system, the court will review the electronic filing and notify the filer of the due date for the paper copies of the brief. 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 for briefs filed in paper form constitutes one copy for purposes of this rule. If a brief is filed electronically in compliance with the court's electronic filing system, the electronically filed brief counts as one copy and nine paper copies must be filed.*

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).

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

(i) A principal brief is acceptable if it:

- contains no more than 13,000 words; or
- 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).

(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 and the length limits set by these rules. By local rule or order in a particular case, a court of appeals may accept documents that do not meet all the form requirements of this rule or the length limits set by these rules.

(f) Items Excluded from Length. In computing any length limit, headings, footnotes, and quotations count toward the limit but the following items do not:

- cover page;
- disclosure statement;
- table of contents;
- table of citations;
- statement regarding oral argument;
- addendum containing statutes, rules, or regulations;
- certificate of counsel;
- signature block;
- proof of service; and
- any item specifically excluded by these rules or by local rule.

(g) Certificate of Compliance.

(1) **Briefs and Papers That Require a Certificate.** A brief submitted under Rules 28.1(e)(2), 29(b)(4), or 32(a)(7)(B)—and a paper submitted under Rules 5(c)(1), 21(d)(1), 27(d)(2)(A), 27(d)(2)(C), 35(b)(2)(A), or 40(b)(1)—must include a certificate by the attorney, or an unrepresented party, that the document 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 document. The certificate must state the number of words—or the number of lines of monospaced type—in the document.

(2) **Acceptable Form.** Form 6 in the Appendix of Forms meets the requirements for a certificate of compliance.

Local Rule 32.0. Computer Generated Disk Requirement for Documents Filed in Paper Form

(a) When a party who is represented by counsel files a brief, petition for rehearing or other paper exceeding 10 pages in length in paper form and not electronically, one copy 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 in a single electronic file. 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 Portable Document Format (PDF). The electronic version must contain any supplemental material that is bound with the paper version, such as an addendum. Although the main document must be generated by saving in PDF from the original word processing file, supplemental material may be scanned if an original word processing file of that material is unavailable.

(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.

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 undue hardship or other unusual circumstances preclude compliance. The requirements of this rule shall not apply to parties appearing pro se.

(d) The disk requirement does not apply to electronically filed documents.

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 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 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. *Upon receipt of the Notice of Appeal in the Court of Appeals, the Clerk of the Court of Appeals shall notify Settlement Counsel of the appeal. Within 14 days after the case is docketed in the Court of Appeals, appellant shall file with the Clerk of the Court of Appeals, and serve on all other parties a statement, in the form of the Docketing Statement required by Local Rule 3.0(a), detailing information needed for the prompt disposition of an appeal. The Parties shall provide Settlement Counsel with such additional information about the appeal as Settlement Counsel may reasonably request.*

(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 (2nd 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.

(1) 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.

(2) Upon the failure of a party or attorney to comply with the provisions of this rule or the provisions of the court's notice of settlement conference, the court may assess reasonable expenses caused by the failure, including attorney's fees; assess all or a portion of the appellate costs; dismiss the appeal; or take such other appropriate action as the circumstances may warrant.

(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, social security appeals, petitions for review from orders of the Board of Immigration Appeals, 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.*** *Allowance of time for rebuttal is within the discretion of the presiding judge, but often appellant will be allowed to reserve a few minutes on request made at the outset of opening argument. However, counsel is expected to cover all anticipated issues in opening argument. Reserved rebuttal time is for the purpose of answering contentions made in the other side's oral argument. Any time allowed to be reserved by the presiding judge will be deducted from that party's allotted time for opening argument.*

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) a petition for an en banc hearing or rehearing produced using a computer must not exceed 3,900 words; and

(B) a handwritten or typewritten petition for an en banc hearing or rehearing must not exceed 15 pages.

(3) For purposes of the limits 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. The length limits in Rule 35(b)(2) apply to 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.

(1) ***Vote.*** *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.*

(2) ***Composition of En Banc Court.***

(A) 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 (i) at that judge's election, as a member of an en banc court reviewing a decision of a panel of which that judge was a member, or (ii) to continue to participate in the decision of a case or controversy that was heard or reheard by the court en banc at a time when such judge was in regular active service.

(B) For the purpose of determining those who may be a member of the en banc court under subsection (A)(ii), a case is heard or reheard by the court en banc when oral argument is held, or if no oral hearing is held, as of the date the case is ordered to be submitted to the en banc court.

(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 length limitation contained in Fed. R. App. P. 35 (b)(2), (3).*

(c) Number of Copies*. When a petition for hearing or rehearing en banc or combined Fed. R. App. P. 35(b)(3) document is filed electronically in compliance with the court's electronic filing system, paper copies are not required and a disk copy is not required. When a petition for hearing or rehearing en banc or combined Fed. R. App. P. 35(b)(3) document is filed in paper form, ten copies 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 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. Free copies of opinions are available on the court's website at www.ca1.uscourts.gov.*

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 and serve an itemized and verified bill of costs.

(2) Objections must be filed within 14 days after service of the bill of costs, unless the court extends the time.

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

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

(1) the preparation and transmission of the record;

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

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

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

Local Rule 39.0. Taxation of Reproduction Costs

(a) *The maximum rate at which costs may be taxed shall be fixed from time to time by the clerk of the court of appeals. See Fed. R. App. P. 39(c). A schedule of Maximum Rates for Taxation of Costs is posted on the court's website at www.ca1.uscourts.gov and is available by request to the clerk's office. Costs are taxed at the maximum rates set by the clerk or at the actual cost, whichever is lower.*

(b) *Costs may be recovered for reproducing the following number of copies, unless the court directs filing of a different number:*

(1) ***Briefs****. Nine copies of each brief plus two for the filer and two for each party required to be served with paper copies of the brief. See 1st Cir. R. 31.0(b).*

(2) ***Appendices****. Five copies of each appendix plus one for the filer and one for each unrepresented party and each separately represented party. See 1st Cir. R. 30.0(a).*

(c) *Requests for taxation of costs must be made on the Bill of Costs form available on the court's website at www.ca1.uscourts.gov and by request to the clerk's office, and must be accompanied by a vendor's itemized statement of charges, if applicable, or a statement by counsel if reproduction was performed in-house. Bills of costs must be filed in the clerk's office within fourteen days after entry of judgment, even if a petition for rehearing or other post-judgment motion is filed. See Fed. R. App. P. 39(d)(1). Payment of costs should be made directly to the prevailing party or counsel, not to the clerk's office.*

Local Rule 39.1. 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; Response; Action by the Court if Granted.

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

(A) the United States;

(B) a United States agency;

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

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

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

(3) **Response.** Unless the court requests, no response to a petition for panel rehearing is permitted. Ordinarily, rehearing will not be granted in the absence of such a request. If a response is requested, the requirements of Rule 40(b) apply to the response.

(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. Except by the court's permission:

(1) a petition for panel rehearing produced using a computer must not exceed 3,900 words; and

(2) a handwritten or typewritten petition for panel rehearing must not exceed 15 pages.

Local Rule 40.0. Petition for Panel Rehearing

(a) Number of Copies. *When a petition for panel rehearing is filed electronically in compliance with the court's electronic filing system, paper copies are not required and a disk copy is not required. When a petition for panel rehearing is filed in paper form, ten copies 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 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 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time by order.

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

(d) Staying the Mandate Pending a Petition for Certiorari.

(1) **Motion to Stay.** 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 petition would present a substantial question and that there is good cause for a stay.

(2) **Duration of Stay; Extensions.** The stay must not exceed 90 days, unless:

(A) the period is extended for good cause; or

(B) the party who obtained the stay notifies the circuit clerk in writing within the period of the stay:

(i) that the time for filing a petition has been extended, in which case the stay continues for the extended period; or

(ii) that the petition has been filed, in which case the stay continues until the Supreme Court's final disposition.

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

(4) **Issuance of Mandate.** The court of appeals must issue the mandate immediately on receiving a copy of a Supreme Court order denying the petition, unless extraordinary circumstances exist.

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 fourteen 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 14 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. Free copies of opinions are available on the court's website at www.ca1.uscourts.gov.*

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 noncompensable court-appointed counsel and such other purposes as the court may order. This fee is in addition to the national admission fee imposed by the Court of Appeals Miscellaneous Fee Schedule, promulgated under 28 U. S. C. § 1913. Absent a waiver, the admission fee must be paid electronically using the court's Case Management/Electronic Case Files ("CM/ECF") system. 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 clerk'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 paragraph, must be a member of the bar of this court and either appointed as counsel on appeal for the indigent or represent the indigent on a pro bono basis. The written consent must be filed with the clerk.

An eligible law student may also appear in this court on behalf of the United States or a State, or agency thereof, provided that the governmental entity on whose behalf the student appears has consented thereto in writing, and that the attorney of record has also indicated in writing approval of that appearance. The attorney of record must be a member of the bar of this court, and 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, or be a recent graduate of such a school, awaiting the first bar examination after the student's graduation or the result of that examination;

(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, or have taken, a course in appellate advocacy or a course in a supervised clinical program for academic credit;

(D) Be certified by the dean of the student's law school 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, but this shall not prevent an attorney, legal aid bureau, law school, public defender agency, a State, or the United States from paying compensation to the eligible law student;

(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] or [recent law school graduate awaiting the first bar examination after the student's graduation or the results of that examination], 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. If services are rendered for the United States or agency thereof, the form should be completed by the United States Attorney or authorized representative. If services are rendered for a State or agency thereof, the form should be completed by the State Attorney General or authorized representative.)

(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] or [is a recent law school graduate awaiting the first bar examination or the results of that examination], 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 _____

(C) Form to be completed by law student:

I certify that I [have completed at least 4 semesters of law school work] or [am a recent law school graduate awaiting the first bar examination or the results of that examination]; that I am taking, or have taken, a course in appellate advocacy or a course in a supervised clinical program for academic credit; 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 (not including any compensation from an attorney, legal aid bureau, law school, public defender agency, a State, or the United States).

_____ _____

(Date) *(Signature of Student)*

(D) Form to be completed by Dean:

I certify that this student [has completed at least 4 semesters of law school work] or [is a recent law school graduate awaiting the first bar examination or the results of that examination]; is taking, or has taken, a course in appellate advocacy or a course in a supervised clinical program for academic credit; and is qualified to fulfill the responsibilities required by First Circuit Rule 46.0(f).

_____ _____

(Name of Student) *(Signature of Dean)*

_____

_____

_____

(Address & Phone of Above)

Name of Law School _____

(5) ***Exceptions.*** *The court retains authority to establish exceptions to these requirements in any individual case.*

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. The court notes, and incorporates herein, the entirety of the current United States Court of Appeals for the First Circuit CJA Reference Manual, which is periodically updated and amended, and includes policies, procedures, and regulations in accordance with the Guidelines for the Administration of the Criminal Justice Act and Related Statutes, Volume VII, Guide to Judiciary Policies and Procedures.

(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 amendments made on December 16, 2002 and January 23, 2015.]*

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 1st Cir. R. 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, if required by Fed. R. App. P. 25(d), the Government. Motions are customarily 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. In addition, a ninth member shall be appointed, which position shall rotate among the five districts.*

(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, 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 and Rule 11 of the Rules Governing Proceedings Under 28 U.S.C. § 2254 or § 2255.

(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_____Circuit (from the final judgment) (from an order (describing it)) entered in this action on the_____day of_____, 20_.

(s)_____
Attorney for _____
Address: _____

[***Note to inmate filers****: If you are an inmate confined in an institution and you seek the timing benefit of Fed. R. App. P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing) and file that declaration along with this Notice of Appeal.*]

* 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_____Circuit from (that part of) the decision of this court entered in the above captioned proceeding on the_____day of _____, 20__(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_____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_____, 20_.

(s)_____
Attorney for Petitioners
Address: _____

* See Rule 15.

Form 4. Affidavit Accompanying Motion for Permission to Appeal in Forma Pauperis

United States District Court
for the
_____District of _____

<Name(s) of plaintiff(s)>,

Plaintiff(s)

v. Case No. _____

<Name(s) of defendant(s)>,

Defendant(s)

AFFIDAVIT ACCOMPANYING MOTION FOR PERMISSION TO APPEAL IN FORMA PAUPERIS

Affidavit in Support of Motion	**Instructions**
I swear or affirm under penalty of perjury that, because of my poverty, I cannot prepay the docket fees of my appeal or post a bond for them. I believe I am entitled to redress. I swear or affirm under penalty of perjury under United States laws that my answers on this form are true and correct. (28 U.S.C. § 1746; 18 U.S.C. § 1621.)	Complete all questions in this application and then sign it. Do not leave any blanks: if the answer to a question is "0," "none," or "not applicable (N/A)," write 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 your spouse estimate the average amount of money received from each of the following sources during the past* 12 *months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.*

Income source	**Average monthly amount during the past 12 months**		**Amount expected next month**	
	You	**Spouse**	**You**	**Spouse**
Employment	$_____	$_____	$_____	$_____
Self-employment	$_____	$_____	$_____	$_____

Income from real property (such as rental income)	$_____	$_____	$_____	$_____
Interest and dividends	$_____	$_____	$_____	$_____
Gifts	$_____	$_____	$_____	$_____
Alimony	$_____	$_____	$_____	$_____
Child support	$_____	$_____	$_____	$_____
Retirement (such as social security, pensions, annuities, insurance)	$_____	$_____	$_____	$_____
Disability (such as social security, insurance payments)	$_____	$_____	$_____	$_____
Unemployment payments	$_____	$_____	$_____	$_____
Public-assistance (such as welfare)	$_____	$_____	$_____	$_____
Other (specify):	$_____	$_____	$_____	$_____
Total monthly income:	$_____	$_____	$_____	$_____

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

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

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

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

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

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

Financial institution	**Type of account**	**Amount you have**	**Amount your spouse has**

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

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

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

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

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

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

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

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

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

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

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

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

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

10. *Have you spent — or will you be spending — any money for expenses or attorney fees in connection with this lawsuit?*

[ ] Yes [ ] No If yes, how much? _____

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

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

_____

_____

Your daytime phone number: (_____) _____

Your age:_____ Your years of schooling: _____

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_____Circuit

_____, the plaintiff [or defendant or other party] appeals to the United States Court of Appeals for the_____Circuit from the final judgment [or order or decree] of the district court for the district of_____[or bankruptcy appellate panel of the _____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: _____

_____

[*Note to inmate filers: If you are an inmate confined in an institution and you seek the timing benefit of Fed. R. App. P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing) and file that declaration along with this Notice of Appeal.*]

Form 6. Certificate of Compliance With Type-Volume Limit

Certificate of Compliance With Type-Volume Limit,
Typeface Requirements, and Type-Style Requirements

1. This document complies with [the type-volume limit of Fed. R. App. P. [*insert Rule citation; e.g., 32(a)(7)(B)*]] [the word limit of Fed. R. App. P. [*insert Rule citation; e.g., 5(c)(1)*]] because, excluding the parts of the document exempted by the Fed. R. App. P. 32(f) [and [*insert applicable Rule citation, if any*]]:

⌋ this document contains [*state the number of*] words, **or**

⌋ this brief uses a monospaced typeface and contains [*state the number of*] lines of text.

2. This document 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 document 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 document 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: _____

Form 7. Declaration of Inmate Filing

_____

[insert name of court; for example,
United States District Court for the District of Minnesota]

A.B ., Plaintiff	)	
v.	)	Case No._____
C.D., Defendant	)	

I am an inmate confined in an institution. Today,_____[*insert date*], I am depositing the_____[*insert title of document; for example, "notice of appeal"*] in this case in the institution's internal mail system. First-class postage is being prepaid either by me or by the institution on my behalf.

I declare under penalty of perjury that the foregoing is true and correct (see 28 U.S.C. § 1746; 18 U.S.C. § 1621).

Sign your name here_____
Signed on_____[*insert date*]

[***Note to inmate filers:*** *If your institution has a system designed for legal mail, you must use that system in order to receive the timing benefit of Fed. R. App. P. 4(c)(1) or Fed. R. App. P. 25(a)(2)(A)(iii).*]

Appendix:

Length Limits Stated in the Federal Rules of Appellate Procedure

This chart summarizes the length limits stated in the Federal Rules of Appellate Procedure. Please refer to the rules for precise requirements, and bear in mind the following:

- In computing these limits, you can exclude the items listed in Rule 32(f).
- If you use a word limit or a line limit (other than the word limit in Rule 28(j)), you must file the certificate required by Rule 32(g).
- For the limits in Rules 5, 21, 27, 35, and 40:
  - You must use the word limit if you produce your document on a computer; and
  - You must use the page limit if you handwrite your document or type it on a typewriter.
- For the limits in Rule 28.1, 29(a)(5), and 32:
  - You may use the word limit or page limit, regardless of how you produce the document; or
  - You may use the line limit if you type or print your document with a monospaced typeface. A typeface is monospaced when each character occupies the same amount of horizontal space.

	Rule	Document type	Word limit	Page limit	Line limit
Permission to appeal	5(c)	• Petition for permission to appeal • Answer in opposition • Cross-petition	5,200	20	Not applicable
Extraordinary writs	21(d)	• Petition for writ of mandamus or prohibition or other extraordinary writ • Answer	7,800	30	Not applicable
Motions	27(d)(2)	• Motion • Response to a motion	5,200	20	Not applicable
	27(d)(2)	• Reply to a response to a motion	2,600	10	Not applicable

Parties' briefs (where no cross-appeal)	32(a)(7)	• Principal brief	13,000	30	1,300
	32(a)(7)	• Reply brief	6,500	15	650
Parties' brief (where cross-appeal)	28.1(e)	• Appellant's principal brief • Appellant's response and reply brief	13,000	30	1,300
	28.1(e)	• Appellee's principle and response brief	15,300	35	1,500
	28.1(e)	• Appellee's reply brief	6,500	15	650
Party's supplemental letter	28(j)	• Letter citing supplemental authorities	350	Not applicable	Not applicable
Amicus briefs	29(a)(5)	• Amicus brief during initial consideration of case on merits	One-half the length set by the Appellate Rules for a party's principle brief	One-half the length set by the Appellate Rules for a party's principle brief	One-half the length set by the Appellate Rules for a party's principle brief
	29(b)(4)	• Amicus brief during consideration of whether to grant rehearing	2,600	Not applicable	Not applicable
Rehearing and en banc filings	35(b)(2) & 40(b)	• Petition for hearing en banc • Petition for panel rehearing; petition for rehearing en banc	3,900	15	Not applicable

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. Although documents may be filed electronically at any time through the court's Case Management/Electronic Case Files ("CM/ECF") system, the filer should not expect that the filing will be addressed outside regular business hours unless the filer contacts the Clerk's Office in advance to make special arrangements.

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 to the bar of the First Circuit Court of Appeals 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 admission fee prescribed by the Court of Appeals Miscellaneous Fee Schedule, promulgated under 28 U.S.C. § 1913. Absent a waiver from the Clerk's Office, attorneys must file their application form electronically and pay the combined fee electronically using the Court's Case Management/Electronic Case Files ("CM/ECF") system. Once verification of the application is complete, which may take up to 7 days, a Certificate of

Admission will be returned by mail. Incomplete applications will not be considered. Requests to be admitted in person must be made on the application form and will be allowed at the Court's discretion. Successful applicants to be admitted in court will be electronically notified of the time and place of admission. Such applicants will receive their Certificate of Admission by mail at a later date. 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.gov.

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 14 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; 1st Cir. R. 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 by the date set by the court, 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 report. 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 after the case is docketed in the court of appeals.

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. Once the record on appeal is complete, including the filing of all necessary transcripts, 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 unless the motion is filed electronically in compliance with the court's electronic filing system, and a proof of service showing the type of service that was made, i.e., by mail or by hand delivery or electronically. 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. Although documents may be filed electronically at any time through CM/ECF,

the filer should not expect that the filing will be addressed outside regular business hours unless the filer contacts the Clerk's Office in advance to make special arrangements. The business hours for the Clerk's Office are Mondays through Fridays from 8:30 a.m. to 5:00 p.m.

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. For information regarding electronic document filing pursuant to the court's electronic filing system, see 1st Cir. R. 25.0, a copy of which is available on the court's website. Electronic filing is permitted after October 13, 2009 and is required for all attorney filings after January 1, 2010.

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 electronically or on a computer generated disk. See 1st Cir. R. 32.0.

2) Only 10 copies, including the disk or electronic filing, 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 fourteen days. See 1st Cir. R. 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 1st Cir. R. 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. 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. Audio recordings of the court's oral arguments are also available on the court's website.

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. Opinions are also available on the court's website at www.ca1.uscourts.gov.

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 for Judicial-Conduct and Judicial-Disability Proceedings. A copy of these Rules may be obtained from the Clerk of this Court and are also on the Court's website.

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, 10 Milk Street, Suite 1000, Boston, Massachusetts 02108.
b. Rhode Island Lawyers Weekly, c/o Massachusetts Lawyers Weekly, 10 Milk Street, Suite 1000, Boston, MA 02108.

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.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ADMINISTRATIVE ORDER REGARDING
CASE MANAGEMENT/ELECTRONIC CASE FILES SYSTEM ("CM/ECF") ENTERED
SEPTEMBER 14, 2009

As of August 21, 2017, amended Local Rule 25.0 superseded the court's September 14, 2009 Administrative Order Regarding Case Management/Electronic Case Files System. Consequently, the court's September 14, 2009 Administrative Order is no longer in effect.

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 this Court's suspension order provides otherwise, an attorney who seeks to resume practice before this Court after being disbarred or suspended under these rules must petition for reinstatement. Petitions for reinstatement 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.

B. 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.

C. 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.

D. 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.

JUDICIAL CONFERENCE OF THE UNITED STATES

RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS

Adopted March 11, 2008
Amended September 17, 2015
Amended March 12, 2019

UNITED STATES COURTS FOR THE FIRST CIRCUIT

FIRST CIRCUIT LOCAL RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS

Effective June 1, 2009

RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS

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RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS

Preface

These Rules were promulgated by the Judicial Conference of the United States, after public comment, pursuant to 28 U.S.C. §§ 331 and 358, to establish standards and procedures for addressing complaints filed by complainants or identified by chief judges under the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351–364.

ARTICLE I. GENERAL PROVISIONS

1. Scope and Covered Judges

(a) Scope. These Rules govern proceedings under the Judicial Conduct and Disability Act (Act), 28 U.S.C. §§ 351–364, to determine whether a covered judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts or is unable to discharge the duties of office because of mental or physical disability.

(b) Covered Judge. A covered judge is defined under the Act and is limited to judges of United States courts of appeals, judges of United States district courts, judges of United States bankruptcy courts, United States magistrate judges, and judges of the courts specified in 28 U.S.C. § 363.

Commentary on Rule 1

In September 2006, the Judicial Conduct and Disability Act Study Committee ("Breyer Committee"), appointed in 2004 by Chief Justice Rehnquist, presented a report ("Breyer Committee Report"), 239 F.R.D. 116 (Sept. 2006), to Chief Justice Roberts that evaluated implementation of the Judicial Conduct and Disability Act of 1980, 28 U.S.C. §§ 351–364. The Breyer Committee had been formed in response to criticism from the public and Congress regarding the effectiveness of the Act's implementation. The Executive Committee of the Judicial Conference directed its Committee on Judicial Conduct and Disability to consider the Breyer Committee's recommendations and to report on their implementation to the Conference.

The Breyer Committee found that it could not evaluate implementation of the Act without establishing interpretive standards, Breyer Committee Report, 239 F.R.D. at 132, and that a major problem faced by chief judges in implementing the Act was the lack of authoritative interpretive standards. *Id.* at 212–15. The Breyer Committee then established standards to guide its evaluation, some of which were new formulations and some of which were taken from the "Illustrative Rules Governing Complaints of Judicial Misconduct and Disability," discussed below. The principal standards used by the Breyer Committee are in Appendix E of its Report. *Id.* at 238.

Based on the Breyer Committee's findings, the Committee on Judicial Conduct and Disability concluded that there was a need for the Judicial Conference to exercise its power under Section 358 of the Act to fashion standards guiding the various officers and bodies that must exercise responsibility under the Act. To that end, the Committee on Judicial Conduct and Disability proposed rules based largely on Appendix E of the Breyer Committee Report and the Illustrative Rules.

The Illustrative Rules were originally prepared in 1986 by the Special Committee of the Conference of Chief Judges of the United States Courts of Appeals, and were subsequently revised and amended, most recently in 2000, by the predecessor to the Committee on Judicial Conduct and Disability. The Illustrative Rules were adopted, with minor variations, by circuit judicial councils, to govern complaints under the Judicial Conduct and Disability Act.

After being submitted for public comment pursuant to 28 U.S.C. § 358(c), the Judicial Conference promulgated the present Rules on March 11, 2008. They were amended on September 17, 2015, and again on March 12, 2019.

The definition of a covered judge tracks the Judicial Conduct and Disability Act. *See* 28 U.S.C. § 351(d)(1) (defining the term "judge" as "a circuit judge, district judge, bankruptcy judge, or magistrate judge"). As long as the subject of a complaint retains the judicial office and remains a covered judge as defined in Rule 1(b), a complaint must be addressed. *Id.*; 28 U.S.C. §§ 371(b); 372(a).

Rules 8(c) and (d) address the procedures for processing a complaint involving allegations against a person *not* covered by the Act, such as other court personnel, or against both a covered judge and a noncovered person. Court employees seeking to report, or file a claim related to, misconduct or the denial of rights granted under their Employment Dispute Resolution (EDR) plan by other court personnel may wish to consult the Model EDR Plan and the EDR plan for the relevant court, among other resources. *See* Guide to Judiciary Policy, vol. 12, appx. 2B.

2. Construction and Effect

(a) Generally. These Rules are mandatory; they supersede any conflicting judicial-council rules. Judicial councils may promulgate additional rules to implement the Act as long as those rules do not conflict with these Rules.

(b) Exception. A Rule will not apply if, when performing duties authorized by the Act, a chief judge, a special committee, a judicial council, the Committee on Judicial Conduct and Disability, or the Judicial Conference expressly finds that exceptional circumstances render application of that Rule in a particular proceeding manifestly unjust or contrary to the purposes of the Act or these Rules.

Commentary on Rule 2

Unlike the Illustrative Rules, these Rules provide mandatory and nationally uniform provisions governing the substantive and procedural aspects of misconduct and disability proceedings under the Act. The mandatory nature of these Rules is authorized by 28 U.S.C. § 358(a) and (c). Judicial councils retain the power to promulgate rules consistent with these Rules. For example, a local rule may authorize the electronic distribution of materials pursuant to Rule 8(b).

Rule 2(b) recognizes that unforeseen and exceptional circumstances may call for a different approach in particular cases.

3. General Definitions

The following general definitions apply to these Rules. Cognizable misconduct and disability are defined in Rule 4.

(a) Chief Judge. "Chief judge" means the chief judge of a United States court of appeals, of the United States Court of International Trade, or of the United States Court of Federal Claims.

(b) Circuit Clerk. "Circuit clerk" means a clerk of a United States court of appeals, the clerk of the United States Court of International Trade, the clerk of the United States Court of Federal Claims, or the circuit executive of the United States Court of Appeals for the Federal Circuit.

(c) Complaint. A "complaint" is:

(1) a document that, in accordance with Rule 6, is filed by, or on behalf of, any person, including a document filed by an organization; or

(2) information from any source, other than a document described in (c)(1), that gives a chief judge probable cause to believe that a covered judge, as defined in Rule 1(b), has engaged in misconduct or may have a disability, whether or not the information is framed as or is intended to be an allegation of misconduct or disability.

(d) Court of Appeals, District Court, and District Judge. "Court of appeals," "district court," and "district judge," where appropriate, include the United States Court of Federal Claims, the United States Court of International Trade, and the judges thereof.

(e) Judicial Council and Circuit. "Judicial council" and "circuit," where appropriate, include any courts designated in 28 U.S.C. § 363.

(f) Judicial Employee. "Judicial Employee" includes judicial assistants, law clerks, and other court employees, including unpaid staff, such as interns, externs, and other volunteer employees.

(g) Magistrate Judge. "Magistrate judge," where appropriate, includes a special master appointed by the Court of Federal Claims under 42 U.S.C. § 300aa-12(c).

(h) Subject Judge. "Subject judge" means a covered judge, as described in Rule 1(b), who is the subject of a complaint.

Commentary on Rule 3

Rule 3 is derived and adapted from the Breyer Committee Report and the Illustrative Rules.

Unless otherwise specified or the context otherwise indicates, the term "complaint" is used in these Rules to refer both to complaints identified by a chief judge under Rule 5 and to complaints filed by a complainant under Rule 6.

Under the Act, a "complaint" may be filed by "any person" or "identified" by a chief judge. *See* 28 U.S.C. § 351(a), (b). Under Rule 3(c)(1), a complaint may be submitted by, or on behalf of, any person, including a document filed by an organization. Traditional standing requirements do not apply. Individuals or organizations may file a complaint even if they have not been directly injured or aggrieved.

Generally, the word "complaint" brings to mind the commencement of an adversary proceeding in which the contending parties are left to present the evidence and legal arguments, and judges play the

role of an essentially passive arbiter. The Act, however, establishes an administrative, inquisitorial process. For example, even absent a complaint filed by a complainant under Rule 6, chief judges are expected in some circumstances to trigger the process — "identify a complaint," *see* 28 U.S.C. § 351(b) and Rule 5 — and conduct an investigation without becoming a party. *See* 28 U.S.C. § 352(a); Breyer Committee Report, 239 F.R.D. at 214; Illustrative Rule 2(j). Where the complainant reveals information of misconduct or disability but does not claim it as such, the chief judge is not limited to the "four corners of the complaint" and should proceed under Rule 5 to determine whether identification of a complaint is appropriate. *See* Breyer Committee Report, 239 F.R.D. at 183–84.

An allegation of misconduct or disability filed under Rule 6 is a "complaint," and the Rule so provides in subsection (c)(1). However, both the nature of the process and the use of the term "identify" suggest that the word "complaint" covers more than a document formally triggering the process. The process relies on chief judges considering known information and triggering the process when appropriate. "Identifying" a "complaint," therefore, is best understood as the chief judge's concluding that information known to the judge constitutes probable cause to believe that misconduct occurred or a disability exists, whether or not the information is framed as, or intended to be, an accusation. This definition is codified in subsection (c)(2).

The remaining subsections of Rule 3 provide technical definitions clarifying the application of the Rules.

ARTICLE II. MISCONDUCT AND DISABILITY

4. Misconduct and Disability Definitions

(a) Misconduct Generally. Cognizable Misconduct is conduct prejudicial to the effective and expeditious administration of the business of the courts. Cognizable misconduct includes, but is not limited to, the following:

(1) Violation of Specific Standards of Judicial Conduct. Cognizable misconduct includes:

(A) using the judge's office to obtain special treatment for friends or relatives;

(B) accepting bribes, gifts, or other personal favors related to the judicial office;

(C) engaging in improper ex parte communications with parties or counsel for one side in a case;

(D) engaging in partisan political activity or making inappropriately partisan statements;

(E) soliciting funds for organizations; or

(F) violating rules or standards pertaining to restrictions on outside income or knowingly violating requirements for financial disclosure.

(2) Abusive or Harassing Behavior. Cognizable misconduct includes:

(A) engaging in unwanted, offensive, or abusive sexual conduct, including sexual harassment or assault;

(B) treating litigants, attorneys, judicial employees, or others in a demonstrably egregious and hostile manner; or

(C) creating a hostile work environment for judicial employees.

(3) Discrimination. Cognizable misconduct includes intentional discrimination on the basis of race, color, sex, gender, gender identity, pregnancy, sexual orientation, religion, national origin, age, or disability;

(4) Retaliation. Cognizable misconduct includes retaliating against complainants, witnesses, judicial employees, or others for participating in this complaint process, or for reporting or disclosing judicial misconduct or disability;

(5) Interference or Failure to Comply with the Complaint Process. Cognizable misconduct includes refusing, without good cause shown, to cooperate in the investigation of a complaint or enforcement of a decision rendered under these Rules; or

(6) Failure to Report or Disclose. Cognizable misconduct includes failing to call to the attention of the relevant chief district judge or chief circuit judge any reliable information reasonably likely to constitute judicial misconduct or disability.

A judge who receives such reliable information shall respect a request for confidentiality but shall nonetheless disclose the information to the relevant chief district judge or chief circuit judge, who shall also treat the information as confidential. Certain reliable information may be protected from disclosure by statute or rule. A judge's assurance of confidentiality must yield when there is reliable information of misconduct or disability that threatens the safety or security of any person or that is serious or egregious such that it threatens the integrity and proper functioning of the judiciary.

A person reporting information of misconduct or disability must be informed at the outset of a judge's responsibility to disclose such information to the relevant chief district judge or chief circuit judge.

Reliable information reasonably likely to constitute judicial misconduct or disability related to a chief circuit judge should be called to the attention of the next most-senior active circuit judge. Such information related to a chief district judge should be called to the attention of the chief circuit judge.

(7) Conduct Outside the Performance of Official Duties. Cognizable misconduct includes conduct occurring outside the performance of official duties if the conduct is reasonably likely to have a prejudicial effect on the administration of the business of the courts, including a substantial and widespread lowering of public confidence in the courts among reasonable people.

(b) Conduct Not Constituting Cognizable Misconduct.

(1) Allegations Related to the Merits of a Decision or Procedural Ruling. Cognizable misconduct does not include an allegation that calls into question the correctness of a judge's ruling, including a failure to recuse.

If the decision or ruling is alleged to be the result of an improper motive, *e.g.*, a bribe, ex parte contact, racial or ethnic bias, or improper conduct in rendering a decision or ruling, such as personally derogatory remarks irrelevant to the issues, the complaint is not cognizable to the extent that it calls into question the merits of the decision.

(2) Allegations About Delay. Cognizable misconduct does not include an allegation about delay in rendering a decision or ruling, unless the allegation concerns an improper motive in delaying a particular decision or habitual delay in a significant number of unrelated cases.

(c) Disability. Disability is a temporary or permanent impairment, physical or mental, rendering a judge unable to discharge the duties of the particular judicial office. Examples of disability include substance abuse, the inability to stay awake during court proceedings, or impairment of cognitive abilities that renders the judge unable to function effectively.

Commentary on Rule 4

The phrase "prejudicial to the effective and expeditious administration of the business of the courts" is not subject to precise definition, and subsection (a) therefore provides some specific examples. 28 U.S.C. § 351(a). The Code of Conduct for United States Judges sets forth behavioral guidelines for judges. While the Code's Canons are instructive, ultimately the responsibility for determining what constitutes cognizable misconduct is determined by the Act and these Rules, as interpreted and applied by judicial councils, subject to review and limitations prescribed by the Act and these Rules. *See also* Rule 24 (Public Availability of Decisions).

Even where specific, mandatory rules exist — for example, governing the receipt of gifts by judges, outside earned income, and financial disclosure obligations — the distinction between the

misconduct statute and these specific, mandatory rules must be borne in mind. For example, an inadvertent, minor violation of any one of these rules, promptly remedied when called to the attention of the judge, might still be a violation but might not rise to the level of misconduct under the Act. By contrast, a pattern of such violations of the Code might well rise to the level of misconduct.

Rule 4(a)(2)(A) provides expressly that unwanted, offensive, or abusive sexual conduct by a judge, including sexual harassment or assault, constitutes cognizable misconduct. The Rule recognizes that anyone can be a victim of unwanted, offensive, or abusive sexual conduct, regardless of their sex and of the sex of the judge engaging in the misconduct.

Under Rule 4(a)(4), a judge's efforts to retaliate against any person for reporting or disclosing misconduct, or otherwise participating in the complaint process constitute cognizable misconduct. The Rule makes the prohibition against retaliation explicit in the interest of promoting public confidence in the complaint process.

Rules 4(a)(2), (3), and (4) reflect the judiciary's commitment to maintaining a work environment in which all judicial employees are treated with dignity, fairness, and respect, and are free from harassment, discrimination, and retaliation. *See* Code of Conduct for United States Judges, Canon 3A(3) cmt. ("The duty to be respectful includes the responsibility to avoid comment or behavior that could reasonably be interpreted as harassment, prejudice or bias.").

Rule 4(a)(5) provides that a judge's refusal, without good cause shown, to cooperate in the investigation of a complaint or enforcement of a decision rendered under these Rules constitutes cognizable misconduct. While the exercise of rights under the Fifth Amendment to the Constitution would constitute good cause under Rule 4(a)(5), given the fact-specific nature of the inquiry, it is not possible to otherwise anticipate all circumstances that might also constitute good cause. The Commentary on Rule 13 provides additional discussion regarding Rule 4(a)(5). The Rules contemplate that judicial councils will not consider commencing proceedings under Rule 4(a)(5) except as necessary after other means to acquire the information or enforce a decision have been tried or have proven futile.

All judges have a duty to bring to the attention of the relevant chief district judge or chief circuit judge reliable information reasonably likely to constitute judicial misconduct or disability. *See* Rule 4(a)(6). This duty is included within every judge's obligation to assist in addressing allegations of misconduct or disability and to take appropriate action as necessary. Public confidence in the integrity and impartiality of the judiciary is promoted when judges take appropriate action based on reliable information of likely misconduct. Appropriate action depends on the circumstances, but the overarching goal of such action should be to prevent harm to those affected by the misconduct and to prevent recurrence. *See* Code of Conduct for United States Judges, Canon 3B(6) & cmt. These Rules incorporate those principles while allowing for appropriate, expeditious, fair, and effective resolutions of all such complaints.

The formal procedures outlined in these Rules are intended to address serious issues of judicial misconduct and disability. By statute and rule, the chief circuit judge administers the misconduct and disability complaint process, including the authority to investigate an allegation and, if warranted, to identify a formal complaint. *See* Rule 5. Disclosures made to or otherwise brought to the attention of the appropriate chief district judge of reliable information of misconduct or disability that threatens the safety

or security of any person or that is serious or egregious such that it threatens the integrity and proper functioning of the judiciary warrant communication to and consultation with the chief circuit judge in light of the chief circuit judge's statutory responsibility for overseeing any required final action.

In practice, however, not all allegations of misconduct or disability will warrant resort to the formal procedures outlined in these Rules because they appear likely to yield to effective, prompt resolution through informal corrective action. In such cases, allegations may initially be addressed to the chief district judge or the chief circuit judge to determine whether informal corrective action will suffice and to initiate such steps as promptly as is reasonable under the circumstances.

A person who seeks to report information of misconduct or disability on a confidential or anonymous basis may proceed through various alternative avenues within the judiciary, including the Office of Judicial Integrity and/or comparable offices within the circuits.

Rule 4(a)(7) reflects that an allegation can meet the statutory standard for misconduct even though the judge's alleged conduct did not occur in the course of the performance of official duties. Furthermore, some conduct specified in Rule 4(a)(1) through 4(a)(6), or not specified within these Rules, might constitute misconduct occurring outside the performance of official duties. The Code of Conduct for United States Judges expressly covers a wide range of extra-official activities, and some of these activities may constitute misconduct under the Act and these Rules. For example, allegations that a judge solicited funds for a charity or other organization or participated in a partisan political event are cognizable under the Act even though they did not occur in the course of the performance of the judge's official duties.

Rule 4(b)(1) tracks the Act, 28 U.S.C. § 352(b)(1)(A)(ii), in excluding from the definition of misconduct allegations "[d]irectly related to the merits of a decision or procedural ruling." This exclusion preserves the independence of judges in the exercise of judicial authority by ensuring that the complaint procedure is not used to collaterally call into question the substance of a judge's decision or procedural ruling. Any allegation that calls into question the correctness of an official decision or procedural ruling of a judge — without more — is merits-related. The phrase "decision or procedural ruling" is not limited to rulings issued in deciding Article III cases or controversies. Thus, a complaint challenging the correctness of a chief judge's determination to dismiss a prior misconduct complaint would be properly dismissed as merits-related — in other words, as challenging the substance of the judge's administrative determination to dismiss the complaint — even though it does not concern the judge's rulings in Article III litigation. Similarly, an allegation that a judge incorrectly declined to approve a Criminal Justice Act voucher is merits-related under this standard.

Conversely, an allegation that a judge conspired with a prosecutor to make a particular ruling is not merits-related, even though it "relates" to a ruling in a colloquial sense. Such an allegation attacks the propriety of conspiring with the prosecutor and goes beyond a challenge to the correctness — "the merits" — of the ruling itself. An allegation that a judge ruled against the complainant because the complainant is a member of a particular racial or ethnic group, or because the judge dislikes the complainant personally, is also not merits-related. Such an allegation attacks the propriety of arriving at rulings with an illicit or improper motive. Similarly, an allegation that a judge used an inappropriate term to refer to a class of people is not merits-related even if the judge used it on the bench or in an opinion; the correctness of the judge's rulings is not at stake. An allegation that a judge treated litigants, attorneys, judicial

employees, or others in a demonstrably egregious and hostile manner is also not merits-related.

The existence of an appellate remedy is usually irrelevant to whether an allegation is merits-related. The merits-related ground for dismissal exists to protect judges' independence in making rulings, not to protect or promote the appellate process. A complaint alleging an incorrect ruling is merits-related even though the complainant has no recourse from that ruling. By the same token, an allegation that is otherwise cognizable under the Act should not be dismissed merely because an appellate remedy appears to exist (for example, vacating a ruling that resulted from an improper ex parte communication). However, there may be occasions when appellate and misconduct proceedings overlap, and consideration and disposition of a complaint under these Rules may be properly deferred by the chief judge until the appellate proceedings are concluded to avoid inconsistent decisions.

Because of the special need to protect judges' independence in deciding what to say in an opinion or ruling, a somewhat different standard applies to determine the merits-relatedness of a non-frivolous allegation that a judge's language in a ruling reflected an improper motive. If the judge's language was relevant to the case at hand — for example, a statement that a claim is legally or factually "frivolous" — then the judge's choice of language is presumptively merits-related and excluded, absent evidence apart from the ruling itself suggesting an improper motive. If, on the other hand, the challenged language does not seem relevant on its face, then an additional inquiry under Rule 11(b) is necessary.

With regard to Rule 4(b)(2), a complaint of delay in a single case is excluded as merits-related. Such an allegation may be said to challenge the correctness of an official action of the judge, *i.e.*, assigning a low priority to deciding the particular case. But, an allegation of a habitual pattern of delay in a significant number of unrelated cases, or an allegation of deliberate delay in a single case arising out of an improper motive, is not merits-related.

Rule 4(c) relates to disability and provides only the most general definition, recognizing that a fact-specific approach is the only one available. A mental disability could involve cognitive impairment or any psychiatric or psychological condition that renders the judge unable to discharge the duties of office. Such duties may include those that are administrative. If, for example, the judge is a chief judge, the judicial council, fulfilling its obligation under 28 U.S.C. § 332(d)(1) to make "necessary and appropriate orders for the effective and expeditious administration of justice," may find, under 28 U.S.C. § 45(d) or § 136(e), that the judge is "temporarily unable to perform" his or her chief-judge duties. In that event, an appropriate remedy could involve, under Rule 20(b)(1)(D)(vii), temporary reassignment of chief-judge duties to the next judge statutorily eligible to perform them.

Confidentiality as referenced elsewhere in these Rules is directed toward protecting the fairness and thoroughness of the process by which a complaint is filed or initiated, investigated (in specific circumstances), and ultimately resolved, as specified under these Rules. Nothing in these Rules concerning the confidentiality of the complaint process or the Code of Conduct for Judicial Employees concerning use or disclosure of confidential information received in the course of official duties prevents judicial employees from reporting or disclosing misconduct or disability. *See* Rule 23(c).

ARTICLE III. INITIATION OF COMPLAINT

5. Identification of Complaint

(a) Identification. When a chief judge has information constituting reasonable grounds for inquiry into whether a covered judge has engaged in misconduct or has a disability, the chief judge may conduct an inquiry, as he or she deems appropriate, into the accuracy of the information even if no related complaint has been filed. A chief judge who finds probable cause to believe that misconduct has occurred or that a disability exists may seek an informal resolution that he or she finds satisfactory. If no informal resolution is achieved or is feasible, the chief judge may identify a complaint and, by written order stating the reasons, begin the review provided in Rule 11. If the evidence of misconduct is clear and convincing and no informal resolution is achieved or is feasible, the chief judge must identify a complaint. A chief judge must not decline to identify a complaint merely because the person making the allegation has not filed a complaint under Rule 6. This Rule is subject to Rule 7.

(b) Submission Not Fully Complying with Rule 6. A legible submission in substantial but not full compliance with Rule 6 must be considered as possible grounds for the identification of a complaint under Rule 5(a).

Commentary on Rule 5

This Rule is adapted from the Breyer Committee Report, 239 F.R.D. at 245–46.

The Act authorizes a chief judge, by written order stating reasons, to identify a complaint and thereby dispense with the filing of a written complaint. *See* 28 U.S.C. § 351(b). Under Rule 5, when a chief judge becomes aware of information constituting reasonable grounds to inquire into possible misconduct or disability on the part of a covered judge, and no formal complaint has been filed, the chief judge has the power in his or her discretion to begin an appropriate inquiry. A chief judge's decision whether to informally seek a resolution and/or to identify a complaint is guided by the results of that inquiry. If the chief judge concludes that there is probable cause to believe that misconduct has occurred or a disability exists, the chief judge may seek an informal resolution, if feasible, and if failing in that, may identify a complaint. Discretion is accorded largely for the reasons police officers and prosecutors have discretion in making arrests or bringing charges. The matter may be trivial and isolated, based on marginal evidence, or otherwise highly unlikely to lead to a misconduct or disability finding. On the other hand, if the inquiry leads the chief judge to conclude that there is clear and convincing evidence of misconduct or a disability, and no satisfactory informal resolution has been achieved or is feasible, the chief judge is required to identify a complaint.

An informal resolution is one agreed to by the subject judge and found satisfactory by the chief judge. Because an informal resolution under Rule 5 reached before a complaint is filed under Rule 6 will generally cause a subsequent Rule 6 complaint alleging the identical matter to be concluded, *See* Rule 11(d), the chief judge must be sure that the resolution is fully appropriate before endorsing it. In doing so, the chief judge must balance the seriousness of the matter against the particular judge's alacrity in addressing the issue. The availability of this procedure should encourage attempts at swift remedial action before a formal complaint is filed.

When a chief judge identifies a complaint, a written order stating the reasons for the identification must be provided; this begins the process articulated in Rule 11. Rule 11 provides that once a chief judge has identified a complaint, the chief judge, subject to the disqualification provisions of Rule 25, will perform, with respect to that complaint, all functions assigned to the chief judge for the determination of complaints filed by a complainant.

In high-visibility situations, it may be desirable for a chief judge to identify a complaint without first seeking an informal resolution (and then, if the circumstances warrant, dismiss or conclude the identified complaint without appointment of a special committee) in order to assure the public that the allegations have not been ignored.

A chief judge's decision not to identify a complaint under Rule 5 is not appealable and is subject to Rule 4(b)(1), which excludes merits-related complaints from the definition of misconduct.

A chief judge may not decline to identify a complaint solely on the basis that the unfiled allegations could be raised by one or more persons in a filed complaint, but none of these persons has opted to do so.

Subsection (a) concludes by stating that this Rule is "subject to Rule 7." This is intended to establish that only (i) the chief judge of the home circuit of a potential subject judge, or (ii) the chief judge of a circuit in which misconduct is alleged to have occurred in the course of official business while the potential subject judge was sitting by designation, shall have the power or a duty under this Rule to identify a complaint.

Subsection (b) provides that submissions that do not comply with the requirements of Rule 6(d) must be considered under Rule 5(a). For instance, if a complaint has been filed but the form submitted is unsigned, or the truth of the statements therein are not verified in writing under penalty of perjury, then a chief judge must nevertheless consider the allegations as known information and as a possible basis for the identification of a complaint under the process described in Rule 5(a).

6. Filing of Complaint

(a) Form. A complainant may use the form reproduced in the Appendix to these Rules or a form designated by the rules of the judicial council in the circuit in which the complaint is filed. A complaint form is also available on each court of appeals' website or may be obtained from the circuit clerk or any district court or bankruptcy court within the circuit. A form is not necessary to file a complaint, but the complaint must be written and must include the information described in (b).

(b) Brief Statement of Facts. A complaint must contain a concise statement that details the specific facts on which the claim of misconduct or disability is based. The statement of facts should include a description of:

- **(1) what happened;**
- **(2) when and where the relevant events happened;**
- **(3) any information that would help an investigator check the facts; and**
- **(4) for an allegation of disability, any additional facts that form the basis of that allegation.**

(c) Legibility. A complaint should be typewritten if possible. If not typewritten, it must be

legible. An illegible complaint will be returned to the complainant with a request to resubmit it in legible form. If a resubmitted complaint is still illegible, it will not be accepted for filing.

(d) Complainant's Address and Signature; Verification. The complainant must provide a contact address and sign the complaint. The truth of the statements made in the complaint must be verified in writing under penalty of perjury. If any of these requirements are not met, the submission will be accepted, but it will be reviewed under only Rule 5(b).

(e) Number of Copies; Envelope Marking. The complainant shall provide the number of copies of the complaint required by local rule. Each copy should be in an envelope marked "Complaint of Misconduct" or "Complaint of Disability." The envelope must not show the name of any subject judge.

Commentary on Rule 6

The Rule is adapted from the Illustrative Rules and is largely self-explanatory. As discussed in the Commentary on Rule 4 and in Rule 23(c), confidentiality as referenced elsewhere in these Rules does not prevent judicial employees from reporting or disclosing misconduct or disability.

7. Where to Initiate Complaint

(a) Where to File. Except as provided in (b),

(1) a complaint against a judge of a United States court of appeals, a United States district court, a United States bankruptcy court, or a United States magistrate judge must be filed with the circuit clerk in the jurisdiction in which the subject judge holds office.

(2) a complaint against a judge of the United States Court of International Trade or the United States Court of Federal Claims must be filed with the respective clerk of that court.

(3) a complaint against a judge of the United States Court of Appeals for the Federal Circuit must be filed with the circuit executive of that court.

(b) Misconduct in Another Circuit; Transfer. If a complaint alleges misconduct in the course of official business while the subject judge was sitting on a court by designation under 28 U.S.C. §§ 291–293 and 294(d), the complaint may be filed or identified with the circuit clerk of that circuit or of the subject judge's home circuit. The proceeding will continue in the circuit of the first-filed or first-identified complaint. The judicial council of the circuit where the complaint was first filed or first identified may transfer the complaint to the subject judge's home circuit or to the circuit where the alleged misconduct occurred, as the case may be.

Commentary on Rule 7

Title 28 U.S.C. § 351 states that complaints are to be filed with "the clerk of the court of appeals for the circuit." However, in many circuits, this role is filled by circuit executives. Accordingly, the term "circuit clerk," as defined in Rule 3(b) and used throughout these Rules, applies to circuit executives.

Section 351 uses the term "the circuit" in a way that suggests that either the home circuit of the subject judge or the circuit in which misconduct is alleged to have occurred is the proper venue for

complaints. With an exception for judges sitting by designation, the Rule requires the filing or identification of a misconduct or disability complaint in the circuit in which the judge holds office, largely based on the administrative perspective of the Act. Given the Act's emphasis on the future conduct of the business of the courts, the circuit in which the judge holds office is the appropriate forum because that circuit is likely best able to influence a judge's future behavior in constructive ways.

However, when judges sit by designation, the non-home circuit has a strong interest in redressing misconduct in the course of official business, and where allegations also involve a member of the bar — ex parte contact between an attorney and a judge, for example — it may often be desirable to have the judicial and bar misconduct proceedings take place in the same venue. Rule 7(b), therefore, allows transfer to, or filing or identification of a complaint in, the non-home circuit. The proceeding may be transferred by the judicial council of the filing or identified circuit to the other circuit.

8. Action by Circuit Clerk

(a) Receipt of Complaint. Upon receiving a complaint against a judge filed under Rule 6 or identified under Rule 5, the circuit clerk must open a file, assign a docket number according to a uniform numbering scheme promulgated by the Committee on Judicial Conduct and Disability, and acknowledge the complaint's receipt.

(b) Distribution of Copies. The circuit clerk must promptly send copies of a complaint filed under Rule 6 to the chief judge or, where the chief judge is disqualified from considering a complaint, to the judge authorized to act as chief judge under Rule 25(f), and copies of complaints filed under Rule 6 or identified under Rule 5 to each subject judge. The circuit clerk must retain the original complaint. Any further distribution should be as provided by local rule.

(c) Complaint Against Noncovered Person. If the circuit clerk receives a complaint about a person not holding an office described in Rule 1(b), the clerk must not accept the complaint under these Rules.

(d) Complaint Against Judge and Another Noncovered Person. If the circuit clerk receives a complaint about a judge described in Rule 1(b) and a person not holding an office described in Rule 1(b), the clerk must accept the complaint under these Rules only with regard to the judge and must so inform the complainant.

Commentary on Rule 8

This Rule is adapted from the Illustrative Rules and is largely self-explanatory.

The uniform docketing scheme described in subsection (a) should take into account potential problems associated with a complaint that names multiple judges. One solution may be to provide separate docket numbers for each subject judge. Separate docket numbers would help avoid difficulties in tracking cases, particularly if a complaint is dismissed with respect to some, but not all of the named judges.

Complaints against noncovered persons are not to be accepted for processing under these Rules but may, of course, be accepted under other circuit rules or procedures for grievances.

Local Rule 8. Action by Circuit Executive upon Receipt of a Complaint

(a) Receipt of Complaint in Proper Form. *Upon receipt of a complaint against a judge filed in proper form under these rules, the clerk of court of appeals will promptly 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 docket the complaint according to a uniform numbering scheme promulgated by the Judicial Conference Committee on Judicial Conduct and Disability, and acknowledge the complaint's receipt. The circuit executive will promptly distribute copies of the complaint in accordance with Rule 8(b). When the chief judge issues an order identifying a complaint under rule 5(a), the circuit executive will process such complaint as otherwise provided by these rules.*

(b) Distribution of Copies. *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.*

(c) Complaints Against Noncovered Persons. *If the circuit executive receives a complaint about a person not holding an office described in Rule 4, the circuit executive will not accept the complaint for filing and will advise the complainant in writing of the procedure for processing such complaints.*

(d) Receipt of Complaint about a Judge and Another Noncovered Person. *If a complaint is received about a judge described in Rule 4 and a person not holding an office described in Rule 4, the circuit executive will accept the complaint for filing only with regard to the judge, and will advise the complainant accordingly.*

(e) Receipt of a Complaint Not in Proper Form. *If the circuit executive receives a complaint against a judge described in Rule 4 that does not comply with the requirements of Rule 6, the circuit executive will ensure that the complaint is reviewed under Rule 5(b), will advise the complainant of the appropriate procedures for refiling the complaint under Rule 6, and will enclose a copy of these rules and the accompanying forms.*

9. Time for Filing or Identifying Complaint

A complaint may be filed or identified at any time. If the passage of time has made an accurate and fair investigation of a complaint impracticable, the complaint must be dismissed under Rule 11(c)(1)(E).

Commentary on Rule 9

This Rule is adapted from the Act, 28 U.S.C. §§ 351, 352(b)(1)(A)(iii), and the Illustrative Rules.

10. Abuse of Complaint Procedure

(a) Abusive Complaints. A complainant who has filed repetitive, harassing, or frivolous complaints, or has otherwise abused the complaint procedure, may be restricted from filing further complaints. After giving the complainant an opportunity to show cause in writing why his or her right to file further complaints should not be limited, the judicial council

may prohibit, restrict, or impose conditions on the complainant's use of the complaint procedure. Upon written request of the complainant, the judicial council may revise or withdraw any prohibition, restriction, or condition previously imposed.

(b) Orchestrated Complaints. When many essentially identical complaints from different complainants are received and appear to be part of an orchestrated campaign, the chief judge may recommend that the judicial council issue a written order instructing the circuit clerk to accept only a certain number of such complaints for filing and to refuse to accept additional complaints. The circuit clerk must send a copy of any such order to anyone whose complaint was not accepted.

Commentary on Rule 10

This Rule is adapted from the Illustrative Rules.

Rule 10(a) provides a mechanism for a judicial council to restrict the filing of further complaints by a single complainant who has abused the complaint procedure. In some instances, however, the complaint procedure may be abused in a manner for which the remedy provided in Rule 10(a) may not be appropriate. For example, some circuits have been inundated with submissions of dozens or hundreds of essentially identical complaints against the same judge or judges, all submitted by different complainants. In many of these instances, persons with grievances against a particular judge or judges used the Internet or other technology to orchestrate mass complaint filing campaigns against them. If each complaint submitted as part of such a campaign were accepted for filing and processed according to these Rules, there would be a serious drain on court resources without any benefit to the adjudication of the underlying merits.

A judicial council may, therefore, respond to such mass filings under Rule 10(b) by declining to accept repetitive complaints for filing, regardless of the fact that the complaints are nominally submitted by different complainants. When the first complaint or complaints have been dismissed on the merits, and when further, essentially identical submissions follow, the judicial council may issue a second order noting that these are identical or repetitive complaints, directing the circuit clerk not to accept these complaints or any further such complaints for filing, and directing the clerk to send each putative complainant copies of both orders.

ARTICLE IV. REVIEW OF COMPLAINT BY CHIEF JUDGE

11. Chief Judge's Review

(a) Purpose of Chief Judge's Review. When a complaint is identified by the chief judge or is filed, the chief judge must review it unless the chief judge is disqualified under Rule 25, in which case the most-senior active circuit judge not disqualified will review the complaint. If a complaint contains information constituting evidence of misconduct or disability, but the complainant does not claim it as such, the chief judge must treat the complaint as if it did allege misconduct or disability and give notice to the subject judge. After reviewing a complaint, the chief judge must determine whether it should be:

- **(1) dismissed;**
- **(2) concluded on the ground that voluntary corrective action has been taken;**
- **(3) concluded because intervening events have made action on the complaint no longer necessary; or**
- **(4) referred to a special committee.**

(b) Chief Judge's Inquiry. In determining what action to take under Rule 11(a), the chief judge may conduct a limited inquiry. The chief judge, or a designee, may communicate orally or in writing with the complainant, the subject judge, and any others who may have knowledge of the matter, and may obtain and review transcripts and other relevant documents. In conducting the inquiry, the chief judge must not determine any reasonably disputed issue. Any such determination must be left to a special committee appointed under Rule 11(f) and to the judicial council that considers the committee's report.

(c) Dismissal.

- **(1) Permissible grounds. A complaint may be dismissed in whole or in part to the extent that the chief judge concludes that the complaint:**
  - **(A) alleges conduct that, even if true, is not prejudicial to the effective and expeditious administration of the business of the courts and does not indicate a mental or physical disability resulting in the inability to discharge the duties of judicial office;**
  - **(B) is directly related to the merits of a decision or procedural ruling;**
  - **(C) is frivolous;**
  - **(D) is based on allegations lacking sufficient evidence to raise an inference that misconduct has occurred or that a disability exists;**
  - **(E) is based on allegations that are incapable of being established through investigation;**
  - **(F) has been filed in the wrong circuit under Rule 7; or**
  - **(G) is otherwise not appropriate for consideration under the Act.**
- **(2) Impermissible grounds. A complaint must not be dismissed solely because it repeats allegations of a previously dismissed complaint if it also contains material information not previously considered and does not constitute harassment of the subject judge.**

(d) Corrective Action. The chief judge may conclude a complaint proceeding in whole or in part if:

- **(1) an informal resolution under Rule 5 satisfactory to the chief judge was reached before the complaint was filed under Rule 6; or**
- **(2) the chief judge determines that the subject judge has taken appropriate voluntary**

corrective action that acknowledges and remedies the problems raised by the complaint.

(e) Intervening Events. The chief judge may conclude a complaint proceeding in whole or in part upon determining that intervening events render some or all of the allegations moot or make remedial action impossible as to the subject judge.

(f) Appointment of Special Committee. If some or all of a complaint is not dismissed or concluded, the chief judge must promptly appoint a special committee to investigate the complaint or any relevant portion of it and to make recommendations to the judicial council. Before appointing a special committee, the chief judge must invite the subject judge to respond to the complaint either orally or in writing if the judge was not given an opportunity during the limited inquiry. In the chief judge's discretion, separate complaints may be joined and assigned to a single special committee. Similarly, a single complaint about more than one judge may be severed and more than one special committee appointed.

(g) Notice of Chief Judge's Action; Petition for Review.

(1) When chief judge appoints special committee. If the chief judge appoints a special committee, the chief judge must notify the complainant and the subject judge that the matter has been referred to a committee, notify the complainant of a complainant's rights under Rule 16, and identify the members of the committee. A copy of the order appointing the special committee must be sent to the Committee on Judicial Conduct and Disability.

(2) When chief judge disposes of complaint without appointing special committee. If the chief judge disposes of a complaint under Rule 11(c), (d), or (e), the chief judge must prepare a supporting memorandum that sets forth the reasons for the disposition. If the complaint was initiated by identification under Rule 5, the memorandum must so indicate. Except as authorized by 28 U.S.C. § 360, the memorandum must not include the name of the complainant or of the subject judge. The order and memoranda incorporated by reference in the order must be promptly sent to the complainant, the subject judge, and the Committee on Judicial Conduct and Disability.

(3) Right to petition for review. If the chief judge disposes of a complaint under Rule 11(c), (d), or (e), the complainant and the subject judge must be notified of the right to petition the judicial council for review of the disposition, as provided in Rule 18. If the chief judge so disposes of a complaint that was identified under Rule 5 or filed by its subject judge, the chief judge must transmit the order and memoranda incorporated by reference in the order to the judicial council for review in accordance with Rule 19. In the event of such a transmission, the subject judge may make a written submission to the judicial council but will have no further right of review except as allowed under Rule 21(b)(1)(B). When a disposition is to be reviewed by the judicial council, the chief judge must promptly transmit all materials obtained in connection with the inquiry under Rule 11(b) to the circuit clerk for transmittal to the council.

(h) Public Availability of Chief Judge's Decision. The chief judge's decision must be made public to the extent, at the time, and in the manner provided in Rule 24.

Commentary on Rule 11

This Rule describes complaint-review actions available either to the chief judge or, where that judge is the subject judge or is otherwise disqualified under Rule 25, such as where the complaint is filed against the chief judge, to the judge designated under Rule 25(f) to perform the chief judge's duties under these Rules. Subsection (a) of this Rule provides that where a complaint has been filed under Rule 6, the ordinary doctrines of waiver do not apply. The chief judge must identify as a complaint any misconduct or disability issues raised by the factual allegations of the complaint even if the complainant makes no such claim with regard to those issues. For example, an allegation limited to misconduct in fact-finding that mentions periods during a trial when the judge was asleep must be treated as a complaint regarding disability. A formal order giving notice of the expanded scope of the proceeding must be given to the subject judge.

Subsection (b) describes the nature of the chief judge's inquiry. It is based largely on the Breyer Committee Report, 239 F.R.D. at 243–45. The Act states that dismissal is appropriate "when a limited inquiry . . . demonstrates that the allegations in the complaint lack any factual foundation or are conclusively refuted by objective evidence." 28 U.S.C. § 352(b)(1)(B). At the same time, however, Section 352(a) states that "[t]he chief judge shall not undertake to make findings of fact about any matter that is reasonably in dispute." These two statutory standards should be read together so that a matter is not "reasonably" in dispute if a limited inquiry shows that the allegations do not constitute misconduct or disability, that they lack any reliable factual foundation, or that they are conclusively refuted by objective evidence.

In conducting a limited inquiry under subsection (b), the chief judge must avoid determinations of reasonably disputed issues, including reasonably disputed issues as to whether the facts alleged constitute misconduct or disability, which are ordinarily left to the judicial council and its special committee. An allegation of fact is ordinarily not "refuted" simply because the subject judge denies it. The limited inquiry must reveal something more in the way of refutation before it is appropriate to dismiss a complaint that is otherwise cognizable. If it is the complainant's word against the subject judge's — in other words, there is simply no other significant evidence of what happened or of the complainant's unreliability — then there must be a special-committee investigation. Such a credibility issue is a matter "reasonably in dispute" within the meaning of the Act.

However, dismissal following a limited inquiry may occur when a complaint refers to transcripts or to witnesses and the chief judge determines that the transcripts and witnesses all support the subject judge. Breyer Committee Report, 239 F.R.D. at 243. For example, consider a complaint alleging that the subject judge said X, and the complaint mentions, or it is independently clear, that five people may have heard what the judge said. *Id.* The chief judge is told by the subject judge and one witness that the judge did not say X, and the chief judge dismisses the complaint without questioning the other four possible witnesses. *Id.* In this example, the matter remains reasonably in dispute. If all five witnesses say the subject judge did not say X, dismissal is appropriate, but if potential witnesses who are reasonably accessible have not been questioned, then the matter remains reasonably in dispute. *Id.*

Similarly, under subsection (c)(1)(A), if it is clear that the conduct or disability alleged, even if true, is not cognizable under these Rules, the complaint should be dismissed. If that issue is reasonably in dispute, however, dismissal under subsection (c)(1)(A) is inappropriate.

Essentially, the standard articulated in subsection (b) is that used to decide motions for summary

judgment pursuant to Fed. R. Civ. P. 56. Genuine issues of material fact are not resolved at the summary judgment stage. A material fact is one that "might affect the outcome of the suit under the governing law," and a dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). Similarly, the chief judge may not resolve a genuine issue concerning a material fact or the existence of misconduct or a disability when conducting a limited inquiry pursuant to subsection (b).

Subsection (c) describes the grounds on which a complaint may be dismissed. These are adapted from the Act, 28 U.S.C. § 352(b), and the Breyer Committee Report, 239 F.R.D. at 239–45. Subsection (c)(1)(A) permits dismissal of an allegation that, even if true, does not constitute misconduct or disability under the statutory standard. The proper standards are set out in Rule 4 and discussed in the Commentary on that Rule. Subsection (c)(1)(B) permits dismissal of complaints related to the merits of a decision by a subject judge; this standard is also governed by Rule 4 and its accompanying Commentary.

Subsections (c)(1)(C)-(E) implement the statute by allowing dismissal of complaints that are "frivolous, lacking sufficient evidence to raise an inference that misconduct has occurred, or containing allegations which are incapable of being established through investigation." 28 U.S.C. § 352(b)(1)(A)(iii).

Dismissal of a complaint as "frivolous" under Rule 11(c)(1)(C) will generally occur without any inquiry beyond the face of the complaint. For instance, when the allegations are facially incredible or so lacking in indicia of reliability that no further inquiry is warranted, dismissal under this subsection is appropriate.

A complaint warranting dismissal under Rule 11(c)(1)(D) is illustrated by the following example. Consider a complainant who alleges an impropriety and asserts that he knows of it because it was observed and reported to him by a person who is identified. The subject judge denies that the event occurred. When contacted, the source also denies it. In such a case, the chief judge's proper course of action may turn on whether the source had any role in the allegedly improper conduct. If the complaint was based on a lawyer's statement that he or she had an improper ex parte contact with a judge, the lawyer's denial of the impropriety might not be taken as wholly persuasive, and it would be appropriate to conclude that a real factual issue is raised. On the other hand, if the complaint quoted a disinterested third party and that disinterested party denied that the statement had been made, there would be no value in opening a formal investigation. In such a case, it would be appropriate to dismiss the complaint under Rule 11(c)(1)(D).

Rule 11(c)(1)(E) is intended, among other things, to cover situations when no evidence is offered or identified, or when the only identified source is unavailable. Breyer Committee Report, 239 F.R.D. at 243. For example, a complaint alleges that an unnamed attorney told the complainant that the subject judge did X. *Id.* The subject judge denies it. The chief judge requests that the complainant (who does not purport to have observed the subject judge do X) identify the unnamed witness, or that the unnamed witness come forward so that the chief judge can learn the unnamed witness's account. *Id.* The complainant responds that he has spoken with the unnamed witness, that the unnamed witness is an attorney who practices in federal court, and that the unnamed witness is unwilling to be identified or to come forward. *Id.* at 243–44. The allegation is then properly dismissed as containing allegations that are incapable of being established through investigation. *Id.*

If, however, the situation involves a reasonable dispute over credibility, the matter should proceed. For example, the complainant alleges an impropriety and alleges that he or she observed it and that there were no other witnesses; the subject judge denies that the event occurred. Unless the complainant's allegations are facially incredible or so lacking indicia of reliability as to warrant dismissal under Rule 11(c)(1)(C), a special committee must be appointed because there is a material factual question that is reasonably in dispute.

Dismissal is also appropriate when a complaint is filed so long after an alleged event that memory loss, death, or changes to unknown residences prevent a proper investigation.

Subsection (c)(2) indicates that the investigative nature of the process prevents the application of claim preclusion principles where new and material evidence becomes available. However, it also recognizes that at some point a renewed investigation may constitute harassment of the subject judge and should not be undertaken, depending of course on the seriousness of the issues and the weight of the new evidence.

Rule 11(d) implements the Act's provision for dismissal if voluntary appropriate corrective action has been taken. It is largely adapted from the Breyer Committee Report, 239 F.R.D. at 244–45. The Act authorizes the chief judge to conclude the complaint proceedings if "appropriate corrective action has been taken." 28 U.S.C. § 352(b)(2). Under the Rule, action taken after a complaint is filed is "appropriate" when it acknowledges and remedies the problem raised by the complaint. Breyer Committee Report, 239 F.R.D. at 244. Because the Act deals with the conduct of judges, the emphasis is on correction of the judicial conduct that was the subject of the complaint. *Id.* Terminating a complaint based on corrective action is premised on the implicit understanding that voluntary self-correction or redress of misconduct or a disability may be preferable to sanctions. *Id.* The chief judge may facilitate this process by giving the subject judge an objective view of the appearance of the judicial conduct in question and by suggesting appropriate corrective measures. *Id.* Moreover, when corrective action is taken under Rule 5 satisfactory to the chief judge before a complaint is filed, that informal resolution will be sufficient to conclude a subsequent complaint based on identical conduct.

"Corrective action" must be voluntary action taken by the subject judge. Breyer Committee Report, 239 F.R.D. at 244. A remedial action directed by the chief judge or by an appellate court without the participation of the subject judge in formulating the directive or without the subject judge's subsequent agreement to such action does not constitute the requisite voluntary corrective action. *Id.* Neither the chief judge nor an appellate court has authority under the Act to impose a formal remedy or sanction; only the judicial council can impose a formal remedy or sanction under 28 U.S.C. § 354(a)(2). *Id.* Compliance with a previous judicial-council order may serve as corrective action allowing conclusion of a later complaint about the same behavior. *Id.*

Where a subject judge's conduct has resulted in identifiable, particularized harm to the complainant or another individual, appropriate corrective action should include steps taken by that judge to acknowledge and redress the harm, if possible, such as by an apology, recusal from a case, or a pledge to refrain from similar conduct in the future. *Id.* While the Act is generally forward-looking, any corrective action should, to the extent possible, serve to correct a specific harm to an individual, if such harm can reasonably be remedied. *Id.* In some cases, corrective action may not be "appropriate" to justify conclusion of a complaint unless the complainant or other individual harmed is meaningfully apprised of

the nature of the corrective action in the chief judge's order, in a direct communication from the subject judge, or otherwise. *Id.*

Voluntary corrective action should be proportionate to any plausible allegations of misconduct in a complaint. The form of corrective action should also be proportionate to any sanctions that the judicial council might impose under Rule 20(b), such as a private or public reprimand or a change in case assignments. Breyer Committee Report, 239 F.R.D at 244–45. In other words, minor corrective action will not suffice to dispose of a serious matter. *Id.*

Rule 11(e) implements Section 352(b)(2) of the Act, which permits the chief judge to "conclude the proceeding," if "action on the complaint is no longer necessary because of intervening events," such as a resignation from judicial office. Ordinarily, stepping down from an administrative post such as chief judge, judicial-council member, or court-committee chair does not constitute an event rendering unnecessary any further action on a complaint alleging judicial misconduct. Breyer Committee Report, 239 F.R.D. at 245. As long as the subject of a complaint retains the judicial office and remains a covered judge as defined in Rule 1(b), a complaint must be addressed. *Id.*; 28 U.S.C. §§ 371(b); 372(a).

Concluding a complaint proceeding, by either the judicial council of the subject judge or the judicial council to which a complaint proceeding has been transferred, precludes remedial action under the Act and these Rules as to the subject judge. But the Judicial Conference and the judicial council of the subject judge have ample authority to assess potential institutional issues related to the complaint as part of their respective responsibilities to promote "the expeditious conduct of court business," 28 U.S.C. § 331, and to "make all necessary and appropriate orders for the effective administration of justice within [each] circuit." *Id.* at § 332(d)(1). Such an assessment might include an analysis of what conditions may have enabled misconduct or prevented its discovery, and what precautionary or curative steps could be undertaken to prevent its recurrence. The judicial council may request that the Committee on Judicial Conduct and Disability transmit its order to relevant Congressional entities.

If a complaint is not disposed of pursuant to Rule 11(c), (d), or (e), a special committee must be appointed. Rule 11(f) states that a subject judge must be invited to respond to the complaint before a special committee is appointed, if no earlier response was invited.

Subject judges receive copies of complaints at the same time that they are referred to the chief judge, and they are free to volunteer responses to them. Under Rule 11(b), the chief judge may request a response if it is thought necessary. However, many complaints are clear candidates for dismissal even if their allegations are accepted as true, and there is no need for the subject judge to devote time to a defense.

The Act requires that the order dismissing a complaint or concluding a proceeding contain a statement of reasons and that a copy of the order be sent to the complainant. 28 U.S.C. § 352(b). Rule 24, dealing with availability of information to the public, contemplates that the order will be made public, usually without disclosing the names of the complainant or the subject judge. If desired for administrative purposes, more identifying information can be included in a non-public version of the order.

When a complaint is disposed of by the chief judge, the statutory purposes are best served by providing the complainant with a full, particularized, but concise explanation, giving reasons for the

conclusions reached. *See also* Commentary on Rule 24 (dealing with public availability).

Rule 11(g) provides that the complainant and the subject judge must be notified, in the case of a disposition by the chief judge, of the right to petition the judicial council for review. Because an identified complaint has no "complainant" to petition for review, the chief judge's dispositive order on such a complaint will be transmitted to the judicial council for review. The same will apply where a complaint was filed by its subject judge. A copy of the chief judge's order, and memoranda incorporated by reference in the order, disposing of a complaint must be sent by the circuit clerk to the Committee on Judicial Conduct and Disability.

ARTICLE V. INVESTIGATION AND REPORT BY SPECIAL COMMITTEE

12. Special Committee's Composition

(a) Membership. Except as provided in (e), a special committee appointed under Rule 11(f) must consist of the chief judge and equal numbers of circuit and district judges. These judges may include senior judges. If a complaint is about a district judge, bankruptcy judge, or magistrate judge, then, when possible, the district-judge members of the special committee must be from districts other than the district of the subject judge. For the courts named in 28 U.S.C. § 363, the special committee must be selected from the judges serving on the subject judge's court.

(b) Presiding Officer. When appointing the special committee, the chief judge may serve as the presiding officer or else must designate a committee member as the presiding officer.

(c) Bankruptcy Judge or Magistrate Judge as Adviser. If the subject judge is a bankruptcy judge or magistrate judge, he or she may, within 14 days after being notified of the special committee's appointment, ask the chief judge to designate as a committee adviser another bankruptcy judge or magistrate judge, as the case may be. The chief judge must grant such a request but may otherwise use discretion in naming the adviser. Unless the adviser is a Court of Federal Claims special master appointed under 42 U.S.C. § 300aa 12(c), the adviser must be from a district other than the district of the subject bankruptcy judge or subject magistrate judge. The adviser cannot vote but has the other privileges of a special-committee member.

(d) Provision of Documents. The chief judge must certify to each other member of the special committee and to any adviser copies of the complaint and statement of facts, in whole or relevant part, and any other relevant documents on file.

(e) Continuing Qualification of Special-Committee Member. A member of a special committee may continue to serve on the committee even though the member relinquishes the position of chief judge, active circuit judge, or active district judge, as the case may be, but only if the member continues to hold office under Article III, Section 1, of the Constitution of the United States, or under 28 U.S.C. § 171.

(f) Inability of Special-Committee Member to Complete Service. If a member of a special committee can no longer serve because of death, disability, disqualification, resignation, retirement from office, or other reason, the chief judge must decide whether to appoint a replacement member, either a circuit or district judge as needed under (a). No special committee appointed under these Rules may function with only a single member, and the votes of a two-member committee must be unanimous.

(g) Voting. All actions by a special committee must be by vote of a majority of all members of the committee.

Commentary on Rule 12

This Rule is adapted from the Act and the Illustrative Rules.

Rule 12 leaves the size of a special committee flexible, to be determined on a case-by-case basis. The question the size of a special committee is one that should be weighed with care in view of the potential for consuming the members' time; a large committee should be appointed only if there is a special reason to do so. Rule 12(a) acknowledges the common practice of including senior judges in the membership of a special committee.

Although the Act requires that the chief judge be a member of each special committee, 28 U.S.C. § 353(a)(1), it does not require that the chief judge preside. Accordingly, Rule 12(b) provides that if the chief judge does not preside, he or she must designate another member of the special committee as the presiding officer.

Rule 12(c) provides that the chief judge must appoint a bankruptcy judge or magistrate judge as an adviser to a special committee at the request of a bankruptcy or magistrate subject judge. Subsection (c) also provides that the adviser will have all the privileges of a member of the special committee except a vote. The adviser, therefore, may participate in all deliberations of the special committee, question witnesses at hearings, and write a separate statement to accompany the committee's report to the judicial council.

Rule 12(e) provides that a member of a special committee who remains an Article III judge may continue to serve on the committee even though the member's status otherwise changes. Thus, a special committee that originally consisted of the chief judge and an equal number of circuit and district judges, as required by the law, may continue to function even though changes of status alter that composition. This provision reflects the belief that stability of membership will contribute to the quality of the work of such committees.

Stability of membership is also the principal concern animating Rule 12(f), which deals with the case in which a special committee loses a member before its work is complete. The Rule permits the chief judge to determine whether a replacement member should be appointed. Generally, appointment of a replacement member is desirable in these situations unless the special committee has conducted evidentiary hearings before the vacancy occurs. However, cases may arise in which a special committee is in the late stages of its work, and in which it would be difficult for a new member to play a meaningful role. The Rule also preserves the collegial character of the special-committee process by prohibiting a single surviving member from serving as a committee and by providing that a committee of two surviving members will, in essence, operate under a unanimity rule.

Rule 12(g) provides that actions of a special committee must be by vote of a majority of all the members. All the members of a special committee should participate in committee decisions. In that circumstance, it seems reasonable to require that special-committee decisions be made by a majority of the membership, rather than a majority of some smaller quorum.

13. Conduct of Special-Committee Investigation

(a) Extent and Methods of Special-Committee Investigation. A special committee should

determine the appropriate extent and methods of its investigation in light of the allegations in the complaint and the committee's preliminary inquiry. In investigating the alleged misconduct or disability, the special committee should take steps to determine the full scope of the potential misconduct or disability, including whether a pattern of misconduct or a broader disability exists. The investigation may include use of appropriate experts or other professionals. If, in the course of the investigation, the special committee has cause to believe that the subject judge may have engaged in misconduct or has a disability that is beyond the specific pending complaint, the committee must refer the new matter to the chief judge for a determination of whether action under Rule 5 or Rule 11 is necessary before the committee's investigation is expanded to include the new matter.

(b) Criminal Conduct. If the special committee's investigation concerns conduct that may be a crime, the committee must consult with the appropriate prosecutorial authorities to the extent permitted by the Act to avoid compromising any criminal investigation. The special committee has final authority over the timing and extent of its investigation and the formulation of its recommendations.

(c) Staff. The special committee may arrange for staff assistance to conduct the investigation. It may use existing staff of the judiciary or may hire special staff through the Director of the Administrative Office of the United States Courts.

(d) Delegation of Subpoena Power; Contempt. The chief judge may delegate the authority to exercise the subpoena powers of the special committee. The judicial council or special committee may institute a contempt proceeding under 28 U.S.C. § 332(d) against anyone who fails to comply with a subpoena.

Commentary on Rule 13

This Rule is adapted from the Illustrative Rules.

Rule 13, as well as Rules 14, 15, and 16, are concerned with the way in which the special committee carries out its mission. They reflect the view that the special committee has two roles that are separated in ordinary litigation. First, the special committee has an investigative role of the kind that is characteristically left to executive branch agencies or discovery by civil litigants. 28 U.S.C. § 353(c). Second, it has a formalized fact-finding and recommendation-of-disposition role that is characteristically left to juries, judges, or arbitrators. *Id.* Rule 13 generally governs the investigative stage. Even though the same body has responsibility for both roles under the Act, it is important to distinguish between them in order to ensure that appropriate rights are afforded at appropriate times to the subject judge.

Rule 13(a) includes a provision making clear that the special committee may choose to consult appropriate experts or other professionals if it determines that such a consultation is warranted. If, for example, the special committee has cause to believe that the subject judge may be unable to discharge all of the duties of office by reason of mental or physical disability, the committee could ask the subject judge to respond to inquiries and, if necessary, request the judge to undergo a medical or psychological examination. In advance of any such examination, the special committee may enter into an agreement with the subject judge as to the scope and use that may be made of the examination results. In addition or in the alternative, the special committee may ask to review existing records, including medical records.

The extent of the subject judge's cooperation in the investigation may be taken into account in the consideration of the underlying complaint. If, for example, the subject judge impedes reasonable efforts to

confirm or disconfirm the presence of a disability, the special committee may still consider whether the conduct alleged in the complaint and confirmed in the investigation constitutes disability. The same would be true of a complaint alleging misconduct.

The special committee may also consider whether such a judge might be in violation of his or her duty to cooperate in an investigation under these Rules, a duty rooted not only in the Act's definition of misconduct but also in the Code of Conduct for United States Judges, which emphasizes the need to maintain public confidence in the judiciary, *See* Canon 2(A) and Canon 1 cmt., and requires judges to "facilitate the performance of the administrative responsibilities of other judges and court personnel," Canon 3(B)(1). If the special committee finds a breach of the duty to cooperate and believes that the breach may amount to misconduct under Rule 4(a)(5), it should determine, under the final sentence of Rule 13(a), whether that possibility should be referred to the chief judge for consideration of action under Rule 5 or Rule 11. *See also* Commentary on Rule 4.

One of the difficult questions that can arise is the relationship between proceedings under the Act and criminal investigations. Rule 13(b) assigns responsibility for coordination to the special committee in cases in which criminal conduct is suspected, but gives the committee the authority to determine the appropriate pace of its activity in light of any criminal investigation.

Title 28 U.S.C. § 356(a) provides that a special committee will have full subpoena powers as provided in 28 U.S.C. § 332(d). Section 332(d)(1) provides that subpoenas will be issued on behalf of a judicial council by the circuit clerk "at the direction of the chief judge of the circuit or his designee." Rule 13(d) contemplates that, where the chief judge designates someone else as presiding officer of the special committee, the presiding officer also be delegated the authority to direct the circuit clerk to issue subpoenas related to committee proceedings. That is not intended to imply, however, that the decision to use the subpoena power is exercisable by the presiding officer alone. *See* Rule 12(g).

14. Conduct of Special-Committee Hearings

(a) Purpose of Hearings. The special committee may hold hearings to take testimony and receive other evidence, to hear argument, or both. If the special committee is investigating allegations against more than one judge, it may hold joint or separate hearings.

(b) Special-Committee Evidence. Subject to Rule 15, the special committee must obtain material, nonredundant evidence in the form it considers appropriate. In the special committee's discretion, evidence may be obtained by committee members, staff, or both. Witnesses offering testimonial evidence may include the complainant and the subject judge.

(c) Counsel for Witnesses. The subject judge has the right to counsel. The special committee has discretion to decide whether other witnesses may have counsel present when they testify.

(d) Witness Fees. **Witness fees must be paid as provided in 28 U.S.C. § 1821.**

(e) Oath. **All testimony taken at a hearing must be given under oath or affirmation.**

(f) Rules of Evidence. **The Federal Rules of Evidence do not apply to special-committee hearings.**

(g) Record and Transcript. **A record and transcript must be made of all hearings.**

Commentary on Rule 14

This Rule is adapted from the Act, 28 U.S.C. § 353, and the Illustrative Rules.

Rule 14 is concerned with the conduct of fact-finding hearings. Special committee hearings will normally be held only after the investigative work has been completed and the committee has concluded that there is sufficient evidence to warrant a formal fact-finding proceeding. Special-committee proceedings are primarily inquisitorial rather than adversarial. Accordingly, the Federal Rules of Evidence do not apply to such hearings. Inevitably, a hearing will have something of an adversary character. Nevertheless, that tendency should be moderated to the extent possible. Even though a proceeding will commonly have investigative and hearing stages, special-committee members should not regard themselves as prosecutors one day and judges the next. Their duty — and that of their staff — is at all times to be impartial seekers of the truth.

Rule 14(b) contemplates that material evidence will be obtained by the special committee and presented in the form of affidavits, live testimony, etc. Staff or others who are organizing the hearings should regard it as their role to present evidence representing the entire picture. With respect to testimonial evidence, the subject judge should normally be called as a special-committee witness. Cases may arise in which the subject judge will not testify voluntarily. In such cases, subpoena powers are available, subject to the normal testimonial privileges. Although Rule 15(c) recognizes the subject judge's statutory right to call witnesses on his or her own behalf, exercise of this right should not usually be necessary.

15. Subject Judge's Rights

(a) Notice.

(1) Generally. **The subject judge must receive written notice of:**

(A) the appointment of a special committee under Rule 11(f);

(B) the expansion of the scope of an investigation under Rule 13(a);

(C) any hearing under Rule 14, including its purposes, the names of any witnesses the special committee intends to call, and the text of any

statements that have been taken from those witnesses.

(2) Suggestion of additional witnesses. The subject judge may suggest additional witnesses to the special committee.

(b) Special-Committee Report. The subject judge must be sent a copy of the special committee's report when it is filed with the judicial council.

(c) Presentation of Evidence. At any hearing held under Rule 14, the subject judge has the right to present evidence, to compel the attendance of witnesses, and to compel the production of documents. At the request of the subject judge, the chief judge or the judge's designee must direct the circuit clerk to issue a subpoena to a witness under 28 U.S.C. § 332(d)(1). The subject judge must be given the opportunity to cross-examine special committee witnesses, in person or by counsel.

(d) Presentation of Argument. The subject judge may submit written argument to the special committee and must be given a reasonable opportunity to present oral argument at an appropriate stage of the investigation.

(e) Attendance at Hearings. The subject judge has the right to attend any hearing held under Rule 14 and to receive copies of the transcript, of any documents introduced, and of any written arguments submitted by the complainant to the special committee.

(f) Representation by Counsel. The subject judge may choose to be represented by counsel in the exercise of any right enumerated in this Rule. As provided in Rule 20(e), the United States may bear the costs of the representation.

Commentary on Rule 15

This Rule is adapted from the Act and the Illustrative Rules.

The Act states that these Rules must contain provisions requiring that "the judge whose conduct is the subject of a complaint . . . be afforded an opportunity to appear (in person or by counsel) at proceedings conducted by the investigating panel, to present oral and documentary evidence, to compel the attendance of witnesses or the production of documents, to cross-examine witnesses, and to present argument orally or in writing." 28 U.S.C. § 358(b)(2). To implement this provision, Rule 15(e) gives the subject judge the right to attend any hearing held for the purpose of receiving evidence of record or hearing argument under Rule 14.

The Act does not require that the subject judge be permitted to attend all proceedings of the special committee. Accordingly, the Rules do not give a right to attend other proceedings — for example, meetings at which the special committee is engaged in investigative activity, such as interviewing persons to learn whether they ought to be called as witnesses or examining for relevance purposes documents delivered pursuant to a subpoena duces tecum, or meetings in which the committee is deliberating on the evidence or its recommendations.

16. Complainant’s Rights in Investigation

(a) Notice. The complainant must receive written notice of the investigation as provided in Rule 11(g)(1). When the special committee's report to the judicial council is filed, the complainant must be notified of the filing. The judicial council may, in its discretion, provide a copy of the report of a special committee to the complainant.

(b) Opportunity to Provide Evidence. If the complainant knows of relevant evidence not

already before the special committee, the complainant may briefly explain in writing the basis of that knowledge and the nature of that evidence. If the special committee determines that the complainant has information not already known to the committee that would assist in the committee's investigation, a representative of the committee must interview the complainant.

(c) Presentation of Argument. The complainant may submit written argument to the special committee. In its discretion, the special committee may permit the complainant to offer oral argument.

(d) Representation by Counsel. A complainant may submit written argument through counsel and, if permitted to offer oral argument, may do so through counsel.

Commentary on Rule 16

This Rule is adapted from the Act and the Illustrative Rules.

In accordance with the view of the process as fundamentally administrative and inquisitorial, these Rules do not give the complainant the rights of a party to litigation and leave the complainant's role largely to the discretion of the special committee. However, Rule 16(b) gives the complainant the prerogative to make a brief written submission showing that he or she is aware of relevant evidence not already known to the special committee. (Such a submission may precede any written or oral argument the complainant provides under Rule 16(c), or it may accompany that argument.) If the special committee determines, independently or from the complainant's submission, that the complainant has information that would assist the committee in its investigation, the complainant must be interviewed by a representative of the committee. Such an interview may be in person or by telephone, and the representative of the special committee may be either a member or staff.

Rule 16 does not contemplate that the complainant will ordinarily be permitted to attend proceedings of the special committee except when testifying or presenting oral argument. A special committee may exercise its discretion to permit the complainant to be present at its proceedings, or to permit the complainant, individually or through counsel, to participate in the examination or cross-examination of witnesses.

The Act authorizes an exception to the normal confidentiality provisions where the judicial council in its discretion provides a copy of the report of the special committee to the complainant and to the subject judge. 28 U.S.C. § 360(a)(1). However, the Rules do not entitle the complainant to a copy of the special committee's report.

17. Special-Committee Report

The special committee must file with the judicial council a comprehensive report of its investigation, including findings and recommendations for council action. The report must be accompanied by a statement of the vote by which it was adopted, any separate or dissenting statements of special-committee members, and the record of any hearings held under Rule 14. In addition to being sent to the subject judge under Rule 15(b), a copy of the report and any accompanying statements and documents must be sent to the Committee on Judicial Conduct and Disability.

Commentary on Rule 17

This Rule is adapted from the Illustrative Rules and is self-explanatory. The provision for sending a copy of the special-committee report and accompanying statements and documents to the Committee on Judicial Conduct and Disability was new at the time the Judicial Conference promulgated the Rules for Judicial-Conduct and Judicial-Disability Proceedings in 2008.

ARTICLE VI. REVIEW BY JUDICIAL COUNCIL

18. Petition for Review of Chief-Judge Disposition Under Rule 11(c), (d), or (e)

(a) Petition for Review. After the chief judge issues an order under Rule 11(c), (d), or (e), the complainant or the subject judge may petition the judicial council of the circuit to review the order. By rules promulgated under 28 U.S.C. § 358, the judicial council may refer a petition for review filed under this Rule to a panel of no fewer than five members of the council, at least two of whom must be district judges.

(b) When to File; Form; Where to File. A petition for review must be filed in the office of the circuit clerk within 42 days after the date of the chief judge's order. The petition for review should be in letter form, addressed to the circuit clerk, and in an envelope marked "Misconduct Petition" or "Disability Petition." The name of the subject judge must not be shown on the envelope. The petition for review should be typewritten or otherwise legible. It should begin with "I hereby petition the judicial council for review of . . . " and state the reasons why the petition should be granted. It must be signed.

(c) Receipt and Distribution of Petition. A circuit clerk who receives a petition for review filed in accordance with this Rule must:

- **(1) acknowledge its receipt and send a copy to the complainant or subject judge, as the case may be;**
- **(2) promptly distribute to each member of the judicial council, or its relevant panel, except for any member disqualified under Rule 25, or make available in the manner provided by local rule, the following materials:**
  - **(A) copies of the complaint;**
  - **(B) all materials obtained by the chief judge in connection with the inquiry;**
  - **(C) the chief judge's order disposing of the complaint;**
  - **(D) any memorandum in support of the chief judge's order;**
  - **(E) the petition for review; and**
  - **(F) an appropriate ballot; and**
- **(3) send the petition for review to the Committee on Judicial Conduct and Disability. Unless the Committee on Judicial Conduct and Disability requests them, the circuit clerk will not send copies of the materials obtained by the chief judge.**

(d) Untimely Petition. The circuit clerk must refuse to accept a petition that is received after the time allowed in (b).

(e) Timely Petition Not in Proper Form. When the circuit clerk receives a petition for review filed within the time allowed but in a form that is improper to a degree that would substantially impair its consideration by the judicial council — such as a document that is ambiguous about whether it is intended to be a petition for review — the circuit clerk must acknowledge its receipt, call the filer's attention to the deficiencies, and give the filer the opportunity to correct the deficiencies within the original time allowed for filing the petition or within 21 days after the date on which a notice of the deficiencies was sent to the complainant, whichever is later. If the deficiencies are corrected within the time allowed, the circuit clerk will proceed according to paragraphs (a) and (c) of this Rule. If the deficiencies are not corrected, the circuit clerk must reject the petition.

Commentary on Rule 18

Rule 18 is adapted largely from the Illustrative Rules.

Subsection (a) permits the subject judge, as well as the complainant, to petition for review of the chief judge's order dismissing a complaint under Rule 11(c), or concluding that appropriate corrective action or intervening events have remedied or mooted the problems raised by the complaint pursuant to Rule 11(d) or (e). Although the subject judge may ostensibly be vindicated by the dismissal or conclusion of a complaint, the chief judge's order may include language disagreeable to the subject judge. For example, an order may dismiss a complaint, but state that the subject judge did in fact engage in misconduct. Accordingly, a subject judge may wish to object to the content of the order and is given the opportunity to petition the judicial council of the circuit for review.

Subsection (b) contains a time limit of 42 days to file a petition for review. It is important to establish a time limit on petitions for review of chief judges' dispositions in order to provide finality to the process. If the complaint requires an investigation, the investigation should proceed; if it does not, the subject judge should know that the matter is closed.

The standards for timely filing under the Federal Rules of Appellate Procedure should be applied to petitions for review. *See* Fed. R. App. P. 25(a)(2)(A), (C).

Rule 18(e) provides for an automatic extension of the time limit imposed under subsection (b) if a person files a petition that is rejected for failure to comply with formal requirements.

Local Rule 18. Petitions for Review of Chief Judge Dispositions Under Rule 11(c), (d), or (e).

(a) Receipt and Distribution of Petitions for Review. *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 make available to each member of the Judicial Council review panel, as set forth in Local Rule 19(a), except for any member disqualified under Rule 25, copies of the materials identified in Rule 18(c)(2). 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 not accept a petition that is received after the deadline set forth in Rule 18(b).*

(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 21 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.*

19. Judicial-Council Disposition of Petition for Review

(a) Rights of Subject Judge. At any time after a complainant files a petition for review, the subject judge may file a written response with the circuit clerk. The circuit clerk must promptly distribute copies of the response to each member of the judicial council or of the relevant panel, unless that member is disqualified under Rule 25. Copies must also be distributed to the chief judge, to the complainant, and to the Committee on Judicial Conduct and Disability. The subject judge must not otherwise communicate with individual judicial-council members about the matter. The subject judge must be given copies of any communications to the judicial council from the complainant.

(b) Judicial-Council Action. After considering a petition for review and the materials before it, the judicial council may:

- **(1) affirm the chief judge's disposition by denying the petition;**
- **(2) return the matter to the chief judge with directions to conduct a further inquiry under Rule 11(b) or to identify a complaint under Rule 5;**
- **(3) return the matter to the chief judge with directions to appoint a special committee under Rule 11(f); or**
- **(4) in exceptional circumstances, take other appropriate action.**

(c) Notice of Judicial-Council Decision. Copies of the judicial council's order, together with memoranda incorporated by reference in the order and separate concurring or dissenting statements, must be given to the complainant, the subject judge, and the Committee on Judicial Conduct and Disability.

(d) Memorandum of Judicial-Council Decision. If the judicial council's order affirms the chief judge's disposition, a supporting memorandum must be prepared only if the council concludes that there is a need to supplement the chief judge's explanation. A memorandum supporting a judicial-council order must not include the name of the complainant or the subject judge.

(e) Review of Judicial-Council Decision. If the judicial council's decision is adverse to the petitioner, and if no member of the council dissented, the complainant must be notified that he or she has no right to seek review of the decision. If there was a dissent, the petitioner must be informed that he or she can file a petition for review under Rule 21(b).

(f) Public Availability of Judicial-Council Decision. Materials related to the judicial council's decision must be made public to the extent, at the time, and in the manner set forth in Rule 24.

Commentary on Rule 19

This Rule is adapted largely from the Act and is self-explanatory.

The judicial council should ordinarily review the decision of the chief judge on the merits, treating the petition for review for all practical purposes as an appeal. The judicial council may respond to a petition for review by affirming the chief judge's order, remanding the matter, or, in exceptional cases, taking other appropriate action.

Under Rule 19(b), after considering a petition for review and the materials before it, a judicial council may return a matter to the chief judge to take various actions, including conducting further inquiry under Rule 11(b), identifying a complaint under Rule 5, or appointing a special committee under

Rule 11(f).

A petition for review of a judicial council's decision under this Rule may be filed in any matter in which one or more members of the council dissented from the order. *See* Rule 21(b).

Local Rule 19. Judicial-Council Disposition of Petitions for Review.

(a) Review Panel. *Pursuant to Rule 18(a), 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 Local Rule 19(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 25 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 for disposition in accordance with Rule 19(b). 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 for disposition in accordance with Rule 19(b).

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 make available the documents specified in Rule 18(c) to council members not then serving on the reviewing panel, unless disqualified under Rule 25. Every voting member of the Judicial Council will return a signed ballot, or otherwise communicate the member's vote, to the circuit executive.

20. Judicial-Council Action Following Appointment of Special Committee

(a) Subject Judge's Rights. Within 21 days after the filing of the report of a special committee, the subject judge may send a written response to the members of the judicial council. The subject judge must also be given an opportunity to present argument, personally or through counsel, written or oral, as determined by the judicial council. The subject judge must not otherwise communicate with judicial council members about the matter.

(b) Judicial-Council Action.

(1) Discretionary actions. Subject to the subject judge's rights set forth in subsection (a), the judicial council may:

(A) dismiss the complaint because:

(i) even if the claim is true, the claimed conduct is not conduct prejudicial to the effective and expeditious administration of the business of the courts and does not indicate a mental or physical disability resulting in inability to discharge the duties of office;

(ii) the complaint is directly related to the merits of a decision or procedural ruling;

(iii) the facts on which the complaint is based have not been established; or

(iv) the complaint is otherwise not appropriate for consideration under 28 U.S.C. §§ 351–364.

(B) conclude the proceeding because appropriate corrective action has been taken or intervening events have made the proceeding unnecessary.

(C) refer the complaint to the Judicial Conference with the judicial council's recommendations for action.

(D) take remedial action to ensure the effective and expeditious administration of the business of the courts, including:

(i) censuring or reprimanding the subject judge, either by private communication or by public announcement;

(ii) ordering that no new cases be assigned to the subject judge for a limited, fixed period;

(iii) in the case of a magistrate judge, ordering the chief judge of the district court to take action specified by the council, including the initiation of removal proceedings under 28 U.S.C. § 631(i) or 42 U.S.C. § 300aa–12(c)(2);

(iv) in the case of a bankruptcy judge, removing the judge from office under 28 U.S.C. § 152(e);

(v) in the case of a circuit or district judge, requesting the judge to retire voluntarily with the provision (if necessary) that ordinary length of service requirements be waived;

(vi) in the case of a circuit or district judge who is eligible to retire but does not do so, certifying the disability of the judge under 28 U.S.C. § 372(b) so that an additional judge may be appointed; and

(vii) in the case of a circuit chief judge or district chief judge, finding that the judge is temporarily unable to perform chief-judge duties, with the result that those duties devolve to the next eligible judge in accordance with 28 U.S.C. § 45(d) or § 136(e).

(E) take any combination of actions described in (b)(1)(A)–(D) of this Rule that is within its power.

(2) Mandatory actions. A judicial council must refer a complaint to the Judicial Conference if the council determines that a circuit judge or district judge may have engaged in conduct that:

(A) might constitute ground for impeachment; or

(B) in the interest of justice, is not amenable to resolution by the judicial council.

(c) Inadequate Basis for Decision. If the judicial council finds that a special committee's report, recommendations, and record provide an inadequate basis for decision, it may return the matter to the committee for further investigation and a new report, or it may conduct further investigation. If the judicial council decides to conduct further investigation, the subject judge must be given adequate prior notice in writing of that decision and of the general scope and purpose of the additional investigation. The judicial council's conduct of the additional investigation must generally accord with the procedures and powers set forth in Rules 13 through 16 for the conduct of an investigation by a special committee.

(d) Judicial-Council Vote. Judicial-council action must be taken by a majority of those members of the council who are not disqualified. A decision to remove a bankruptcy judge from office requires a majority vote of all the members of the judicial council.

(e) Recommendation for Fee Reimbursement. If the complaint has been finally dismissed or concluded under (b)(1)(A) or (B) of this Rule, and if the subject judge so requests, the judicial council may recommend that the Director of the Administrative Office use funds appropriated to the judiciary to reimburse the judge for reasonable expenses incurred during the investigation, when those expenses would not have been incurred but for the requirements of the Act and these Rules. Reasonable expenses include attorneys' fees and expenses related to a successful defense or prosecution of a proceeding under Rule 21(a) or (b).

(f) Judicial-Council Order. Judicial-council action must be by written order. Unless the judicial council finds that extraordinary reasons would make it contrary to the interests of justice, the order must be accompanied by a memorandum setting forth the factual determinations on which it is based and the reasons for the council action. Such a memorandum may incorporate all or part of any underlying special-committee report. If the complaint was initiated by identification under Rule 5, the memorandum must so indicate. The order and memoranda incorporated by reference in the order must be provided to the complainant, the subject judge, and the Committee on Judicial Conduct and Disability. The complainant and the subject judge must be notified of any right to review of the judicial council's decision as provided in Rule 21(b). If the complaint was identified under Rule 5 or filed by its subject judge, the judicial council must transmit the order and memoranda incorporated by reference in the order to the Committee on Judicial Conduct and Disability for review in accordance with Rule 21. In the event of such a transmission, the subject judge may make a written submission to the Committee on Judicial Conduct and Disability but will have no further right of review.

Commentary on Rule 20

This Rule is largely adapted from the Illustrative Rules.

Rule 20(a) provides that within 21 days after the filing of the report of a special committee, the

subject judge may address a written response to all of the members of the judicial council. The subject judge must also be given an opportunity to present argument to the judicial council, personally or through counsel, or both, at the direction of the council. Whether that argument is written or oral would be for the judicial council to determine. The subject judge may not otherwise communicate with judicial-council members about the matter.

Rule 20(b)(1)(B) allows a judicial council to conclude a proceeding where appropriate corrective action has been taken or intervening events have made the proceeding unnecessary. This provision tracks Rules 11(d) and (e), which provide for similar action by the chief judge. As with Rule 11(d), appropriate corrective action must acknowledge and remedy the problem raised by the complaint. *See* Breyer Committee Report, 239 F.R.D. at 244. And similar to Rule 11(e), although "action on the complaint is no longer necessary because of intervening events," the Judicial Conference and the judicial council of the subject judge may nonetheless be able to take action on potential institutional issues related to the complaint (such as an analysis of what conditions may have enabled misconduct or prevented its discovery, and what precautionary or curative steps could be undertaken to prevent its recurrence). 28 U.S.C. § 352(b)(2).

Rule 20(b)(1)(D) recites the remedial actions enumerated in 28 U.S.C. § 354(a)(2) while making clear that this list is not exhaustive. A judicial council may consider lesser remedies. Some remedies may be unique to senior judges, whose caseloads can be modified by agreement or through statutory designation and certification processes.

Under 28 U.S.C. §§ 45(d) and 136(e), which provide for succession where "a chief judge is temporarily unable to perform his duties as such," the determination whether such an inability exists is not expressly reserved to the chief judge. Nor, indeed, is it assigned to any particular judge or court-governance body. Clearly, however, a chief judge's inability to function as chief could implicate "the effective and expeditious administration of justice," which the judicial council of the circuit must, under 28 U.S.C. § 332(d)(1), "make all necessary and appropriate orders" to secure. For this reason, such reassignment is among a judicial council's remedial options, as subsection (b)(1)(D)(vii) makes clear. Consistent with 28 U.S.C. §§ 45(d) and 136(e), however, any reassignment of chief-judge duties must not outlast the subject judge's inability to perform them. Nor can such reassignment result in any extension of the subject judge's term as chief judge.

Rule 20(c) provides that a judicial council may return a matter to a special committee to augment its findings and report of its investigation to include additional areas of inquiry and investigation to allow the judicial council to reach a complete and fully informed judgment. Rule 20(c) also provides that if the judicial council decides to conduct an additional investigation, the subject judge must be given adequate prior notice in writing of that decision and of the general scope and purpose of the additional investigation. The conduct of the investigation will be generally in accordance with the procedures set forth in Rules 13 through 16 for the conduct of an investigation by a special committee. However, if hearings are held, the judicial council may limit testimony or the presentation of evidence to avoid unnecessary repetition of testimony and evidence before the special committee.

Rule 20(d) provides that judicial-council action must be taken by a majority of those members of the council who are not disqualified, except that a decision to remove a bankruptcy judge from office requires a majority of all the members of the council as required by 28 U.S.C. § 152(e). However, it is inappropriate to apply a similar rule to the less severe actions that a judicial council may take under the

Act. If some members of the judicial council are disqualified in the matter, their disqualification should not be given the effect of a vote against council action.

With regard to Rule 20(e), the judicial council, on the request of the subject judge, may recommend to the Director of the Administrative Office that the subject judge be reimbursed for reasonable expenses incurred, including attorneys' fees. The judicial council has the authority to recommend such reimbursement where, after investigation by a special committee, the complaint has been finally dismissed or concluded under subsection (b)(1)(A) or (B) of this Rule. It is contemplated that such reimbursement may be provided for the successful prosecution or defense of a proceeding under Rule 21(a) or (b), in other words, one that results in a Rule 20(b)(1)(A) or (B) dismissal or conclusion.

Rule 20(f) requires that judicial-council action be by order and, normally, that it be supported with a memorandum of factual determinations and reasons. Notice of the action must be given to the complainant and the subject judge, and must include notice of any right to petition for review of the judicial council's decision under Rule 21(b). Because an identified complaint has no "complainant" to petition for review, a judicial council's dispositive order on an identified complaint on which a special committee has been appointed must be transmitted to the Committee on Judicial Conduct and Disability for review. The same will apply where a complaint was filed by its subject judge.

ARTICLE VII. REVIEW BY COMMITTEE ON JUDICIAL CONDUCT AND DISABILITY

21. Committee on Judicial Conduct and Disability

(a) Committee Review. The Committee on Judicial Conduct and Disability, consisting of seven members, considers and disposes of all petitions for review under (b) of this Rule, in conformity with the Committee's jurisdictional statement. Its review of judicial-council orders is for errors of law, clear errors of fact, or abuse of discretion. Its disposition of petitions for review is ordinarily final. The Judicial Conference may, in its sole discretion, review any such Committee decision, but a complainant or subject judge does not have a right to this review.

(b) Reviewable Matters.

(1) Upon petition. A complainant or subject judge may petition the Committee for review of a judicial-council order entered in accordance with:

(A) Rule 20(b)(1)(A), (B), (D), or (E); or

(B) Rule 19(b)(1) or (4) if one or more members of the judicial council dissented from the order.

(2) Upon Committee's initiative. At its initiative and in its sole discretion, the Committee may review any judicial-council order entered under Rule 19(b)(1) or (4), but only to determine whether a special committee should be appointed. Before undertaking the review, the Committee must invite that judicial council to explain why it believes the appointment of a special committee is unnecessary, unless the reasons are clearly stated in the council's order denying the petition for review. If the Committee believes that it would benefit from a submission by the subject judge, it may issue an appropriate request. If the Committee determines that a special committee should be appointed, the Committee must issue a written decision giving its reasons.

(c) Committee Vote. Any member of the Committee from the same circuit as the subject judge is disqualified from considering or voting on a petition for review related to that subject judge. Committee decisions under (b) of this Rule must be by majority vote of the qualified Committee members. Those members hearing the petition for review should serve in that capacity until final disposition of the petition, whether or not their term of committee membership has ended. If only six members are qualified to consider a petition for review, the Chief Justice shall select an additional judge to join the qualified members to consider the petition. If four or fewer members are qualified to consider a petition for review, the Chief Justice shall select a panel of five judges, including the qualified Committee members, to consider it.

(d) Additional Investigation. Except in extraordinary circumstances, the Committee will not conduct an additional investigation. The Committee may return the matter to the judicial council with directions to undertake an additional investigation. If the Committee conducts an additional investigation, it will exercise the powers of the Judicial Conference under 28 U.S.C. § 331.

(e) Oral Argument; Personal Appearance. There is ordinarily no oral argument or personal appearance before the Committee. In its discretion, the Committee may permit written submissions.

(f) Committee Decision. A Committee decision under this Rule must be transmitted promptly

to the Judicial Conference. Other distribution will be by the Administrative Office at the direction of the Committee chair.

(g) Finality. All orders of the Judicial Conference or of the Committee (when the Conference does not exercise its power of review) are final.

Commentary on Rule 21

This Rule is largely self-explanatory.

Rule 21(a) is intended to clarify that the delegation of power to the Committee on Judicial Conduct and Disability to dispose of petitions for review does not preclude review of such dispositions by the Judicial Conference. However, there is no right to such review in any party.

Rules 21(b)(1)(B) and (b)(2) are intended to fill a jurisdictional gap as to review of a dismissal or a conclusion of a complaint under Rule 19(b)(1) or (4). Where one or more members of a judicial council reviewing a petition have dissented, the complainant or the subject judge has the right to petition for review by the Committee. Under Rule 21(b)(2), the Committee may review such a dismissal or conclusion in its sole discretion, whether or not a dissent occurred, and only as to the appointment of a special committee. Any review under Rule 21(b)(2) will be conducted as soon as practicable after the dismissal or conclusion at issue. No party has a right to such review, and such review will be rare.

Rule 21(c) provides for review only by Committee members from circuits other than that of the subject judge. The Rule provides that every petition for review must be considered and voted on by at least five, and if possible by seven, qualified Committee members to avoid the possibility of tie votes. If six, or four or fewer, members are qualified, the Chief Justice shall appoint other judges to join the qualified members to consider the petition for review. To the extent possible, the judges whom the Chief Justice selects to join the qualified members should be drawn from among former members of the Committee.

Under this Rule, all Committee decisions are final in that they are unreviewable unless the Judicial Conference, in its discretion, decides to review a decision. Committee decisions, however, do not necessarily constitute final action on a complaint for purposes of Rule 24.

22. Procedures for Review

(a) Filing Petition for Review. A petition for review of a judicial-council decision on a reviewable matter, as defined in Rule 21(b)(1), may be filed by sending a brief written statement to the Committee on Judicial Conduct and Disability at JCD_PetitionforReview@ao.uscourts.gov or to:

Judicial Conference Committee on Judicial Conduct and Disability
Attn: Office of the General Counsel
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

The Administrative Office will send a copy of the petition for review to the complainant or the subject judge, as the case may be.

(b) Form and Contents of Petition. No particular form is required. The petition for review must contain a short statement of the basic facts underlying the complaint, the history of its consideration before the appropriate judicial council, a copy of the council's decision, and the grounds on which the petitioner seeks review. The petition for review must specify the date and docket number of the judicial council order for which review is sought. The petitioner may attach any documents or correspondence arising in the course of the proceeding before the judicial council or its special committee. A petition for review should not normally exceed 20 pages plus necessary attachments. A petition for review must be signed by the petitioner or his or her attorney.

(c) Time. A petition for review must be submitted within 42 days after the date of the order for which review is sought.

(d) Action on Receipt of Petition. When a petition for review of a judicial-council decision on a reviewable matter, as defined in Rule 21(b)(1), is submitted in accordance with this Rule, the Administrative Office shall acknowledge its receipt, notify the chair of the Committee on Judicial Conduct and Disability, and distribute the petition to the members of the Committee for their deliberation.

Commentary on Rule 22

Rule 22 is self-explanatory.

ARTICLE VIII. MISCELLANEOUS RULES

23. Confidentiality

(a) Confidentiality Generally. Confidentiality under these Rules is intended to protect the fairness and thoroughness of the process by which a complaint is filed or initiated, investigated (in specific circumstances), and ultimately resolved, as specified under these Rules.

(b) Confidentiality in the Complaint Process.

(1) General Rule. The consideration of a complaint by a chief judge, a special committee, a judicial council, or the Committee on Judicial Conduct and Disability is confidential. Information about this consideration must not be publicly disclosed by any judge or judicial employee, or by any person who records or transcribes testimony except as allowed by these Rules. A chief judge, a judicial council, or the Committee on Judicial Conduct and Disability may disclose the existence of a proceeding under these Rules when necessary or appropriate to maintain public confidence in the judiciary's ability to redress misconduct or disability.

(2) Files. All files related to a complaint must be separately maintained with appropriate security precautions to ensure confidentiality.

(3) Disclosure in Decisions. Except as otherwise provided in Rule 24, written decisions of a chief judge, a judicial council, or the Committee on Judicial Conduct and Disability, and dissenting opinions or separate statements of members of a council or the Committee may contain information and exhibits that the authors consider appropriate for inclusion, and the information and exhibits may be made public.

(4) Availability to Judicial Conference. On request of the Judicial Conference or its Committee on Judicial Conduct and Disability, the circuit clerk must furnish any requested records related to a complaint. For auditing purposes, the circuit clerk must provide access to the Committee on Judicial Conduct and Disability to records of proceedings under the Act at the site where the records are kept.

(5) Availability to District Court. If the judicial council directs the initiation of proceedings for removal of a magistrate judge under Rule 20(b)(1)(D)(iii), the circuit clerk must provide to the chief judge of the district court copies of the report of the special committee and any other documents and records that were before the council at the time of its decision. On request of the chief judge of the district court, the judicial council may authorize release to that chief judge of any other records relating to the investigation.

(6) Impeachment Proceedings. If the Judicial Conference determines that consideration of impeachment may be warranted, it must transmit the record of all relevant proceedings to the Speaker of the House of Representatives.

(7) Subject Judge's Consent. If both the subject judge and the chief judge consent in writing, any materials from the files may be disclosed to any person. In any such disclosure, the chief judge may require that the identity of the complainant, or of witnesses in an investigation conducted under these Rules, not be revealed.

(8) Disclosure in Special Circumstances. The Judicial Conference, its Committee on Judicial Conduct and Disability, a judicial council, or a chief judge may authorize disclosure of information about the consideration of a complaint, including the papers, documents, and transcripts relating to the investigation, to the extent that

disclosure is justified by special circumstances and is not prohibited by the Act. For example, disclosure may be made to judicial researchers engaged in the study or evaluation of experience under the Act and related modes of judicial discipline, but only where the study or evaluation has been specifically approved by the Judicial Conference or by the Committee on Judicial Conduct and Disability. Appropriate steps must be taken to protect the identities of the subject judge, the complainant, and witnesses from public disclosure. Other appropriate safeguards to protect against the dissemination of confidential information may be imposed.

(9) Disclosure of Identity by Subject Judge. Nothing in this Rule precludes the subject judge from acknowledging that he or she is the judge referred to in documents made public under Rule 24.

(10) Assistance and Consultation. Nothing in this Rule prohibits a chief judge, a special committee, a judicial council, or the Judicial Conference or its Committee on Judicial Conduct and Disability, in the performance of any function authorized under the Act or these Rules, from seeking the help of qualified staff or experts or from consulting other judges who may be helpful regarding the performance of that function.

(c) Disclosure of Misconduct and Disability. Nothing in these Rules and Commentary concerning the confidentiality of the complaint process, or in the Code of Conduct for Judicial Employees concerning the use or disclosure of confidential information received in the course of official duties, prevents a judicial employee from reporting or disclosing misconduct or disability.

Commentary on Rule 23

Rule 23 was adapted from the Illustrative Rules.

The Act applies a rule of confidentiality to "papers, documents, and records of proceedings related to investigations conducted under this chapter" and states that they may not be disclosed "by any person in any proceeding," with enumerated exceptions. 28 U.S.C. § 360(a). Three questions arise: Who is bound by the confidentiality rule, what proceedings are subject to the rule, and who is within the circle of people who may have access to information without breaching the rule?

With regard to the first question, Rule 23(b)(1) provides that judges, employees of the judiciary, and those persons involved in recording proceedings and preparing transcripts are obliged to respect the confidentiality requirement. This of course includes subject judges who do not consent to identification under Rule 23(b)(9).

With regard to the second question, Rule 23(b)(1) applies the rule of confidentiality broadly to consideration of a complaint at any stage.

With regard to the third question, there is no barrier of confidentiality among a chief judge, a judicial council, the Judicial Conference, and the Committee on Judicial Conduct and Disability. Each may have access to any of the confidential records for use in their consideration of a referred matter, a petition for review, or monitoring the administration of the Act. A district court may have similar access if the judicial council orders the district court to initiate proceedings to remove a magistrate judge from office, and Rule 23(b)(5) so provides.

In extraordinary circumstances, a chief judge, a judicial council, or the Committee on Judicial Conduct and Disability may disclose the existence of a proceeding under these Rules. The disclosure of such information in high-visibility or controversial cases is to reassure the public that the judiciary is capable of redressing judicial misconduct or disability. Moreover, the confidentiality requirement does not prevent a chief judge from "communicat[ing] orally or in writing with . . . [persons] who may have knowledge of the matter," as part of a limited inquiry conducted by the chief judge under Rule 11(b).

Rule 23 recognizes that there must be some exceptions to the Act's confidentiality requirement. For example, the Act requires that certain orders and the reasons for them must be made public. 28 U.S.C. § 360(b). Rule 23(b)(3) makes it explicit that written decisions, as well as dissenting opinions and separate statements, may contain references to information that would otherwise be confidential and that such information may be made public. However, subsection (b)(3) is subject to Rule 24(a), which provides the general rule regarding the public availability of decisions. For example, the name of a subject judge cannot be made public in a decision if disclosure of the name is prohibited by that Rule.

The Act makes clear that there is a barrier of confidentiality between the judicial branch and the legislative branch. It provides that material may be disclosed to Congress only if it is believed necessary to an impeachment investigation or trial of a judge. 28 U.S.C. § 360(a)(2). Accordingly, Section 355(b) of the Act requires the Judicial Conference to transmit the record of a proceeding to the House of Representatives if the Conference believes that impeachment of a subject judge may be appropriate. Rule 23(b)(6) implements this requirement.

The Act provides that confidential materials may be disclosed if authorized in writing by the subject judge and by the chief judge. 28 U.S.C. § 360(a)(3). Rule 23(b)(7) implements this requirement. Once the subject judge has consented to the disclosure of confidential materials related to a complaint, the chief judge ordinarily will refuse consent only to the extent necessary to protect the confidentiality interests of the complainant or of witnesses who have testified in investigatory proceedings or who have provided information in response to a limited inquiry undertaken pursuant to Rule 11. It will generally be necessary, therefore, for the chief judge to require that the identities of the complainant or of such witnesses, as well as any identifying information, be shielded in any materials disclosed, except insofar as the chief judge has secured the consent of the complainant or of a particular witness to disclosure, or there is a demonstrated need for disclosure of the information that, in the judgment of the chief judge, outweighs the confidentiality interest of the complainant or of a particular witness (as may be the case where the complainant is delusional or where the complainant or a particular witness has already demonstrated a lack of concern about maintaining the confidentiality of the proceedings).

Rule 23(b)(8) permits disclosure of additional information in circumstances not enumerated. For example, disclosure may be appropriate to permit prosecution for perjury based on testimony given before a special committee, where a special committee discovers evidence of a judge's criminal conduct, to permit disciplinary action by a bar association or other licensing body, or in other appropriate circumstances.

Under subsection (b)(8), where a complainant or other person has publicly released information regarding the existence of a complaint proceeding, the Judicial Conference, the Committee on Judicial Conduct and Disability, a judicial council, or a chief judge may authorize the disclosure of information about the consideration of the complaint, including orders and other materials related to the complaint

proceeding, in the interest of assuring the public that the judiciary is acting effectively and expeditiously in addressing the relevant complaint proceeding.

Subsection (b)(8) also permits the authorization of disclosure of information about the consideration of a complaint, including the papers, documents, and transcripts relating to the investigation, to judicial researchers engaged in the study or evaluation of experience under the Act and related modes of judicial discipline. The Rule envisions disclosure of information from the official record of a complaint proceeding 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. In authorizing disclosure, a judicial council may refuse to release particular materials when such release would be contrary to the interests of justice, or when those materials constitute purely internal communications. The Rule does not envision disclosure of purely internal communications between judges and their colleagues and staff.

Under Rule 23(b)(10), any of the specified judges or entities performing a function authorized under these Rules may seek expert or staff assistance or may consult with other judges who may be helpful regarding performance of that function; the confidentiality requirement does not preclude this. A chief judge, for example, may properly seek the advice and assistance of another judge who the chief judge deems to be in the best position to communicate with the subject judge in an attempt to bring about corrective action. As another example, a new chief judge may wish to confer with a predecessor to learn how similar complaints have been handled. In consulting with other judges, of course, a chief judge should disclose information regarding the complaint only to the extent the chief judge deems necessary under the circumstances.

Rule 23(c) provides that confidentiality as referenced in these Rules and Commentary is directed toward protecting the fairness and thoroughness of the process by which a complaint is filed or initiated, investigated (in specific circumstances), and ultimately resolved, as specified under these Rules. Nothing in these Rules concerning the confidentiality of the complaint process or the Code of Conduct for Judicial Employees concerning use or disclosure of confidential information received in the course of official duties prevents judicial employees from reporting or disclosing misconduct or disability.

Judges should bring such matters to the attention of the relevant chief district judge or chief circuit judge in accordance with Rule 4(a)(6). Judges should be mindful of Canon 3(B)(6) of the Code of Conduct for United States Judges, which provides in part that a judge “should take appropriate action upon receipt of reliable information indicating the likelihood that a judge’s conduct contravened theit Code."

24. Public Availability of Decisions

(a) General Rule; Specific Cases. When final action has been taken on a complaint and it is no longer subject to review as of right, all orders entered by the chief judge and judicial council, including memoranda incorporated by reference in those orders and any dissenting opinions or separate statements by members of the judicial council, must be made public, with the following exceptions:

(1) if the complaint is finally dismissed under Rule 11(c) without the appointment of a special committee, or if it is concluded under Rule 11(d) because of voluntary corrective action, the publicly available materials generally should not disclose the

name of the subject judge without his or her consent.

(2) if the complaint is concluded because of intervening events, or dismissed at any time after a special committee is appointed, the judicial council must determine whether the name of the subject judge should be disclosed.

(3) if the complaint is finally disposed of by a privately communicated censure or reprimand, the publicly available materials must not disclose either the name of the subject judge or the text of the reprimand.

(4) if the complaint is finally disposed of under Rule 20(b)(1)(D) by any remedial action other than private censure or reprimand, the text of the dispositive order must be included in the materials made public, and the name of the subject judge must be disclosed.

(5) the name of the complainant must not be disclosed in materials made public under this Rule unless the chief judge or the judicial council orders disclosure.

(b) Manner of Making Public. The orders described in (a) must be made public by placing the orders on the court's public website and by placing them in a publicly accessible file in the office of the circuit clerk. If the orders appear to have precedential value, the chief judge may cause them to be published. In addition, the Committee on Judicial Conduct and Disability will make available on the judiciary's website, www.uscourts.gov, selected illustrative orders described in paragraph (a), appropriately redacted, to provide additional information to the public on how complaints are addressed under the Act.

(c) Orders of Committee on Judicial Conduct and Disability. Orders of the Committee on Judicial Conduct and Disability constituting final action in a complaint proceeding arising from a particular circuit will be made available to the public in the office of the circuit clerk of the relevant court of appeals. The Committee on Judicial Conduct and Disability will also make such orders available on the judiciary's website, www.uscourts.gov. When authorized by the Committee on Judicial Conduct and Disability, other orders related to complaint proceedings will similarly be made available.

(d) Complaints Referred to Judicial Conference. If a complaint is referred to the Judicial Conference under Rule 20(b)(1)(C) or 20(b)(2), materials relating to the complaint will be made public only if ordered by the Judicial Conference.

Commentary on Rule 24

Rule 24 is adapted from the Illustrative Rules and the recommendations of the Breyer Committee.

The Act requires the circuits to make available only written orders of a judicial council or the Judicial Conference imposing some form of sanction. 28 U.S.C. § 360(b). The Judicial Conference, however, has long recognized the desirability of public availability of a broader range of orders and other materials. In 1994, the Judicial Conference "urge[d] all circuits and courts covered by the Act to submit to the West Publishing Company, for publication in Federal Reporter 3d, and to Lexis all orders issued pursuant to [the Act] that are deemed by the issuing circuit or court to have significant precedential value to other circuits and courts covered by the Act." Report of the Proceedings of the Judicial Conference of the United States, Mar. 1994, at 28. Following this recommendation, the 2000 revision of the Illustrative Rules contained a public availability provision very similar to Rule 24. In 2002, the Judicial Conference again voted to encourage the circuits "to submit non-routine public orders disposing of complaints of judicial misconduct or disability for publication by on-line and print services." Report of the Proceedings of the Judicial Conference of the United States, Sept. 2002, at 58. The Breyer Committee Report further

emphasized that "[p]osting such orders on the judicial branch's public website would not only benefit judges directly, it would also encourage scholarly commentary and analysis of the orders." Breyer Committee Report, 239 F.R.D. at 216. With these considerations in mind, Rule 24 provides for public availability of a wide range of materials.

Rule 24 provides for public availability of orders of a chief judge, a judicial council, and the Committee on Judicial Conduct and Disability, as well as the texts of memoranda incorporated by reference in those orders, together with any dissenting opinions or separate statements by members of the judicial council. No memoranda other than those incorporated by reference in those orders shall be disclosed. However, these orders and memoranda are to be made public only when final action on the complaint has been taken and any right of review has been exhausted. The provision that decisions will be made public only after final action has been taken is designed in part to avoid public disclosure of the existence of pending proceedings. Whether the name of the subject judge is disclosed will then depend on the nature of the final action. If the final action is an order predicated on a finding of misconduct or disability (other than a privately communicated censure or reprimand) the name of the subject judge must be made public. If the final action is dismissal of the complaint, the name of the subject judge must not be disclosed. Rule 24(a)(1) provides that where a proceeding is concluded under Rule 11(d) by the chief judge on the basis of voluntary corrective action, the name of the subject judge generally should not be disclosed, except where the complainant or another person has disclosed the existence of a complaint proceeding to the public. Shielding the name of the subject judge in this circumstance should encourage informal disposition.

If a complaint is dismissed as moot, or because intervening events have made action on the complaint unnecessary, after appointment of a special committee, Rule 24(a)(2) allows the judicial council to determine whether the subject judge will be identified. In such a case, no final decision has been rendered on the merits, but it may be in the public interest — particularly if a judicial officer resigns in the course of an investigation — to make the identity of the subject judge known.

Once a special committee has been appointed, and a proceeding is concluded by the full judicial council on the basis of a remedial order of the council, Rule 24(a)(4) provides for disclosure of the name of the subject judge.

Rule 24(a)(5) provides that the identity of the complainant will be disclosed only if the chief judge so orders. Identifying the complainant when the subject judge is not identified would increase the likelihood that the identity of the subject judge would become publicly known, thus circumventing the policy of nondisclosure. It may not always be practicable to shield the complainant's identity while making public disclosure of the judicial council's order and supporting memoranda; in some circumstances, moreover, the complainant may consent to public identification.

Rule 24(b) makes clear that circuits must post on their external websites all orders required to be made public under Rule 24(a). The judiciary will seek ways to make decisions on complaints filed in their courts more readily accessible to the public through searchable electronic indices.

Matters involving orders issued following a special-committee investigation often involve highly sensitive situations, and it is important that judicial councils have every opportunity to reach a correct and just outcome. This would include the ability to reach informal resolution before a subject judge’s identity must be released. But there must also come a point of procedural finality. The date of finality — and thus the time at which other safeguards and rules such as the publication requirement are triggered — is the

date on which the judicial council issues a Final Order. *See In re Complaint of Judicial Misconduct*, 751 F.3d 611, 617 (2014) (requiring publication of a judicial council order "[e]ven though the period for review had not yet elapsed" and concluding that "the order was a final decision because the Council had adjudicated the matter on the merits after having received a report from a special investigating committee"). As determined in the cited case, modifications of this kind to a final order are subject to review by the Committee on Judicial Conduct and Disability.

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25. Disqualification

(a) General Rule. Any judge is disqualified from participating in any proceeding under these Rules if the judge concludes that circumstances warrant disqualification. If a complaint is filed by a judge, that judge is disqualified from participating in any consideration of the complaint except to the extent that these Rules provide for a complainant's participation. A chief judge who has identified a complaint under Rule 5 is not automatically disqualified from considering the complaint.

(b) Subject Judge. A subject judge, including a chief judge, is disqualified from considering a complaint except to the extent that these Rules provide for participation by a subject judge.

(c) Chief Judge Disqualified from Considering Petition for Review of Chief Judge's Order. If a petition for review of the chief judge's order entered under Rule 11(c), (d), or (e) is filed with the judicial council in accordance with Rule 18, the chief judge is disqualified from participating in the council's consideration of the petition.

(d) Member of Special Committee Not Disqualified. A member of the judicial council who serves on a special committee, including the chief judge, is not disqualified from participating in council consideration of the committee's report.

(e) Subject Judge's Disqualification After Appointment of Special Committee. Upon appointment of a special committee, the subject judge is disqualified from participating in the identification or consideration of any complaint, related or unrelated to the pending matter, under the Act or these Rules. The disqualification continues until all proceedings on the complaint against the subject judge are finally terminated with no further right of review.

(f) Substitute for Disqualified Chief Judge. If the chief judge is disqualified from performing duties that the Act and these Rules assign to a chief judge (including where a complaint is filed against a chief judge), those duties must be assigned to the most senior active circuit judge not disqualified. If all circuit judges in regular active service are disqualified, the judicial council may determine whether to request a transfer under Rule 26, or, in the interest of sound judicial administration, to permit the chief judge to dispose of the complaint on the merits. Members of the judicial council who are named in the complaint may participate in this determination if necessary to obtain a quorum of the council.

(g) Judicial-Council Action When Multiple Judges Disqualified. Notwithstanding any other provision in these Rules to the contrary,

- **(1) a member of the judicial council who is a subject judge may participate in its disposition if:**
  - **(A) participation by one or more subject judges is necessary to obtain a quorum of the judicial council;**
  - **(B) the judicial council finds that the lack of a quorum is due to the naming of one or more judges in the complaint for the purpose of disqualifying that judge or those judges, or to the naming of one or more judges based on their**

participation in a decision excluded from the definition of misconduct under Rule 4(b); and

(C) the judicial council votes that it is necessary, appropriate, and in the interest of sound judicial administration that one or more subject judges be eligible to act.

(2) otherwise disqualified members may participate in votes taken under (g)(1)(B) and (g)(1)(C).

(h) Disqualification of Members of Committee on Judicial Conduct and Disability. No member of the Committee on Judicial Conduct and Disability is disqualified from participating in any proceeding under the Act or these Rules because of consultations with a chief judge, a member of a special committee, or a member of a judicial council about the interpretation or application of the Act or these Rules, unless the member believes that the consultation would prevent fair minded participation.

Commentary on Rule 25

Rule 25 is adapted from the Illustrative Rules.

Subsection (a) provides the general rule for disqualification. Of course, a judge is not disqualified simply because the subject judge is on the same court. However, this subsection recognizes that there may be cases in which an appearance of bias or prejudice is created by circumstances other than an association with the subject judge as a colleague. For example, a judge may have a familial relationship with a complainant or subject judge. When such circumstances exist, a judge may, in his or her discretion, conclude that disqualification is warranted.

Subsection (e) makes it clear that the disqualification of the subject judge relates only to the subject judge's participation in any proceeding arising under the Act or these Rules. For example, the subject judge cannot initiate complaints by identification, conduct limited inquiries, or choose between dismissal and special-committee investigation as the threshold disposition of a complaint. Likewise, the subject judge cannot participate in any proceeding arising under the Act or these Rules as a member of any special committee, the judicial council of the circuit, the Judicial Conference, or the Committee on Judicial Conduct and Disability. The Illustrative Rule, based on Section 359(a) of the Act, is ambiguous and could be read to disqualify a subject judge from service of any kind on each of the bodies mentioned. This is undoubtedly not the intent of the Act; such a disqualification would be anomalous in light of the Act's allowing a subject judge to continue to decide cases and to continue to exercise the powers of chief circuit or district judge. It would also create a substantial deterrence to the appointment of special committees, particularly where a special committee is needed solely because the chief judge may not decide matters of credibility in his or her review under Rule 11.

While a subject judge is barred by Rule 25(b) from participating in the disposition of the complaint in which he or she is named, Rule 25(e) recognizes that participation in proceedings arising under the Act or these Rules by a judge who is the subject of a special committee investigation may lead to an appearance of self-interest in creating substantive and procedural precedents governing such proceedings. Rule 25(e) bars such participation.

Under the Act, a complaint against the chief judge is to be handled by "that circuit judge in regular active service next senior in date of commission." 28 U.S.C. § 351(c). Rule 25(f) provides that

seniority among judges other than the chief judge is to be determined by date of commission, with the result that complaints against the chief judge may be routed to a former chief judge or other judge who was appointed earlier than the chief judge. The Rules do not purport to prescribe who is to preside over meetings of the judicial council. Consequently, where the presiding member of the judicial council is disqualified from participating under these Rules, the order of precedence prescribed by Rule 25(f) for performing "duties that the Act and these Rules assign to a chief judge" does not apply to determine the acting presiding member of the council. That is a matter left to the internal rules or operating practices of each judicial council. In most cases the most senior active circuit judge who is a member of the judicial council and who is not disqualified will preside.

Sometimes a single complaint is filed against a large group of judges. If the normal disqualification rules are observed in such a case, no court of appeals judge can serve as acting chief judge of the circuit, and the judicial council will be without appellate members. Where the complaint is against all circuit and district judges, under normal rules no member of the judicial council can perform the duties assigned to the council under the statute.

A similar problem is created by successive complaints arising out of the same underlying grievance. For example, a complainant files a complaint against a district judge based on alleged misconduct, and the complaint is dismissed by the chief judge under the statute. The complainant may then file a complaint against the chief judge for dismissing the first complaint, and when that complaint is dismissed by the next senior judge, still a third complaint may be filed. The threat is that the complainant will bump down the seniority ladder until, once again, there is no member of the court of appeals who can serve as acting chief judge for the purpose of the next complaint. Similarly, complaints involving the merits of litigation may involve a series of decisions in which many judges participated or in which a rehearing en banc was denied by the court of appeals, and the complaint may name a majority of the judicial council as subject judges.

In recognition that these multiple-judge complaints are virtually always meritless, the judicial council is given discretion to determine: (1) whether it is necessary, appropriate, and in the interest of sound judicial administration to permit the chief judge to dispose of a complaint where it would otherwise be impossible for any active circuit judge in the circuit to act, and (2) whether it is necessary, appropriate, and in the interest of sound judicial administration, after appropriate findings as to need and justification are made, to permit subject judges of the judicial council to participate in the disposition of a petition for review where it would otherwise be impossible to obtain a quorum.

Applying a rule of necessity in these situations is consistent with the appearance of justice. *See, e.g., In re Complaint of Doe*, 2 F.3d 308 (8th Cir. Jud. Council 1993) (invoking the rule of necessity); *In re Complaint of Judicial Misconduct*, No. 91-80464 (9th Cir. Jud. Council 1992) (same). There is no unfairness in permitting the chief judge to dispose of a patently insubstantial complaint that names all active circuit judges in the circuit.

Similarly, there is no unfairness in permitting subject judges, in these circumstances, to participate in the review of the chief judge's dismissal of an insubstantial complaint. The remaining option is to assign the matter to another body. Among other alternatives, the judicial council may request a transfer of the petition under Rule 26. Given the administrative inconvenience and delay involved in these alternatives, it is desirable to request a transfer only if the judicial council determines that the petition for review is substantial enough to warrant such action.

In the unlikely event that a quorum of the judicial council cannot be obtained to consider the report of a special committee, it would normally be necessary to request a transfer under Rule 26.

Rule 25(h) recognizes that the jurisdictional statement of the Committee on Judicial Conduct and Disability contemplates consultation between members of the Committee and judicial participants in proceedings under the Act and these Rules. Such consultation should not automatically preclude participation by a member in that proceeding.

26. Transfer to Another Judicial Council

In exceptional circumstances, a chief judge or a judicial council may ask the Chief Justice to transfer a proceeding based on a complaint identified under Rule 5 or filed under Rule 6 to the judicial council of another circuit. The request for a transfer may be made at any stage of the proceeding before a reference to the Judicial Conference under Rule 20(b)(1)(C) or 20(b)(2) or a petition for review is filed under Rule 22. Upon receiving such a request, the Chief Justice may refuse the request or select the transferee judicial council, which may then exercise the powers of a judicial council under these Rules.

Commentary on Rule 26

Rule 26 implements the Breyer Committee's recommended use of transfers. Breyer Committee Report, 239 F.R.D. at 214-15.

Rule 26 authorizes the transfer of a complaint proceeding to another judicial council selected by the Chief Justice. Such transfers may be appropriate, for example, in the case of a serious complaint where there are multiple disqualifications among the original judicial council, where the issues are highly visible and a local disposition may weaken public confidence in the process, where internal tensions arising in the council as a result of the complaint render disposition by a less involved council appropriate, or where a complaint calls into question policies or governance of the home court of appeals. The power to effect a transfer is lodged in the Chief Justice to avoid disputes in a judicial council over where to transfer a sensitive matter and to ensure that the transferee council accepts the matter.

Upon receipt of a transferred proceeding, the transferee judicial council shall determine the proper stage at which to begin consideration of the complaint — for example, reference to the transferee chief judge, appointment of a special committee, etc.

27. Withdrawal of Complaint or Petition for Review

(a) Complaint Pending Before Chief Judge. With the chief judge's consent, the complainant may withdraw a complaint that is before the chief judge for a decision under Rule 11. The withdrawal of a complaint will not prevent the chief judge from identifying or having to identify a complaint under Rule 5 based on the withdrawn complaint.

(b) Complaint Pending Before Special Committee or Judicial Council. After a complaint has been referred to the special committee for investigation and before the committee files its report, the complainant may withdraw the complaint only with the consent of both the subject judge and either the special committee or the judicial council.

(c) Petition for Review. A petition for review addressed to the judicial council under Rule 18,

or the Committee on Judicial Conduct and Disability under Rule 22, may be withdrawn if no action on the petition has been taken.

Commentary on Rule 27

Rule 27 is adapted from the Illustrative Rules and treats the complaint proceeding, once begun, as a matter of public business rather than as the property of the complainant. Accordingly, the chief judge or the judicial council remains responsible for addressing any complaint under the Act, even a complaint that has been formally withdrawn by the complainant.

Under subsection (a), a complaint pending before the chief judge may be withdrawn if the chief judge consents. Where the complaint clearly lacked merit, the chief judge may accordingly be saved the burden of preparing a formal order and supporting memorandum. However, the chief judge may, or be obligated under Rule 5, to identify a complaint based on allegations in a withdrawn complaint.

If the chief judge appoints a special committee, Rule 27(b) provides that the complaint may be withdrawn only with the consent of both the body before which it is pending (the special committee or the judicial council) and the subject judge. Once a complaint has reached the stage of appointment of a special committee, a resolution of the issues may be necessary to preserve public confidence. Moreover, the subject judge is given the right to insist that the matter be resolved on the merits, thereby eliminating any ambiguity that might remain if the proceeding were terminated by withdrawal of the complaint.

With regard to all petitions for review, Rule 27(c) grants the petitioner unrestricted authority to withdraw the petition. It is thought that the public's interest in the proceeding is adequately protected, because there will necessarily have been a decision by the chief judge and often by the judicial council as well in such a case.

28. Availability of Rules and Forms

These Rules and copies of the complaint form as provided in Rule 6(a) must be available without charge in the office of the circuit clerk of each court of appeals, district court, bankruptcy court, or other federal court whose judges are subject to the Act. Each court must also make these Rules, the complaint form, and complaint-filing instructions available on the court's website, or provide an Internet link to these items on the appropriate court of appeals website or on www.uscourts.gov.

29. Effective Date

These Rules will become effective after promulgation by the Judicial Conference of the United States.