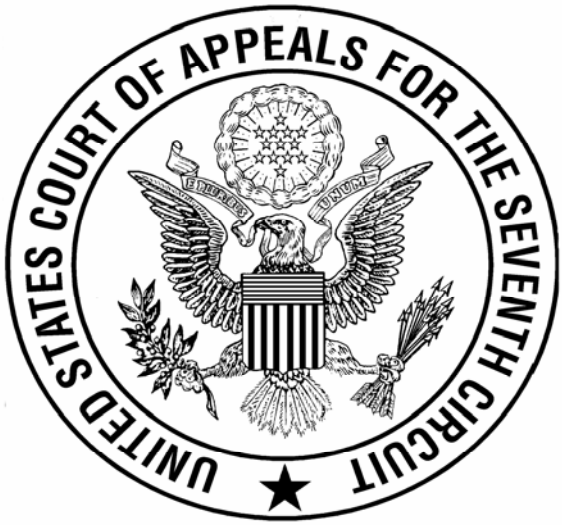
visited 7/26/2008

PRACTITIONER'S HANDBOOK FOR APPEALS



TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

2003 EDITION

TOGETHER WITH:

- FEDERAL RULES OF APPELLATE PROCEDURE
- SEVENTH CIRCUIT RULES
- SEVENTH CIRCUIT OPERATING PROCEDURES
- SEVENTH CIRCUIT CRIMINAL JUSTICE ACT PLAN
- SEVENTH CIRCUIT STANDARDS FOR PROFESSIONAL CONDUCT

visited 7/26/2008

TABLE OF CONTENTS

Notice i

Preface ii

Introductory Note iii

Electronic Access to Seventh Circuit Case Information, Rules, Procedures and Opinions iv

I. Outline of Procedural Steps and Time Limits on Appeals from District Courts and Tax Court 1

II. Organization of the Court 6

III. Panel Composition and Case Assignment 8

IV. Admission to Practice Before the Court 10

V. Appellate Jurisdiction 11
- A. In General 11
- B. Standing To Appeal 14
- C. Appealability 15
- D. The Time for Filing an Appeal 27
- E. Content of the Notice of Appeal 36
- F. Mandamus 37

VI. Scope of Review 39

VII. Motions and Docket Control 40

VIII. Temporary Relief Pending Appeal 42
- A. Civil Cases 42
- B. Motions Concerning Custody Pending Trial or Appeal 43
- C. Administrative Agency Cases 43

IX. Expedited Appeals 45

X. Appeals Involving Petitions for Relief Under 28 U.S.C. § 2254 and § 2255; Death Penalty Cases; Prisoner Litigation 46

XI. Cross-Appeals And Joint Appeals 47

visited 7/26/2008

A. Cross-Appeals 47
B. Joint Appeals 47

XII. Appeals In Forma Pauperis and Court-Appointed Counsel 49
A. Appeals In Forma Pauperis 49
B. Court-Appointed Counsel Under the Criminal Justice Act 50
C. Pro Bono Civil Appointments 52

XIII. General Duties of Counsel In the Court of Appeals 53
A. Settlement 53
B. Appearance of Counsel 53
C. Jurisdiction 54
D. Requirements for Filing Briefs 54
E. Requirement That All Appeals and Arguments Be Well Grounded; Sanctions for Frivolous Appeals Under Fed. R. App. P. 38 55

XIV. Duties of Trial Counsel in Criminal Cases with Regard to Appeals 57
A. Counsel Who Does Not Wish To Proceed On Appeal 57
B. Perfecting The Appeal 58

XV. Dismissal of Any Type of Appeal and Withdrawal of Court-Appointed Counsel 59
A. Voluntary Dismissal 59
B. Dismissal For Failure To Perfect Appeal 59
C. Withdrawal of Court-Appointed Counsel 59
D. Dismissal in Pro Se Appeals to Review a Conviction 60
E. Incompetent Appellants 60

XVI. How an Appeal is Taken 61
A. Appellate Jurisdiction 61
B. Civil And Criminal Appeals From The District Court As A Matter Of Right 61
C. Bond for Costs on Appeal in Civil Cases. Fed. R. App. P. 7 61
D. Appeals By Permission From Interlocutory Orders of The District Court Under 28 U.S.C. § 1292(b) 61
E. Bankruptcy Appeals 62
F. Review Of Decisions of The United States Tax Court 62
G. Review Of Orders Of Certain Administrative Agencies, Boards, Commissions, Or Officers 62
H. Enforcement Of Orders Of Certain Administrative Agencies 63
I. Original Proceedings 63

XVII. Docketing Statement, Representation Statement and Disclosure Statement; Docketing Conference and Settlement Conference 65

visited 7/26/2008

A. Docketing: Fees And Filing 65
B. Docketing Statement 65
C. Representation Statement; Disclosure Statement; Corporate Disclosure Statement 65
D. Docketing Conferences 66
E. Settlement Conferences 66

XVIII. Record on Appeal 67
A. Ordering And Filing The Transcript 67
B. Transcription Fees 67
C. Composition & Transmission Of Trial Court Record 67
D. Retention Of Record In Trial Court 69
E. Composition And Transmission Of Administrative Record 69
F. Sealed Items In The Record 69

XIX. Writing a Brief 71

XX. Requirements and Suggestions for Typography in Briefs and Other Papers 76

XXI. Filing and Serving Briefs 83
A. Time for Filing and Serving Briefs 83
B. Extension Of Time 84
C. Failure Of A Party To Timely File A Brief 84
D. Additional Authority 85
E. Brief Of An Amicus Curiae 85
F. Citation Of Unreported Opinion 85
G. Number Of Copies 86
H. Digital Version of Brief 86
I. Format 86
J. Contents 87
K. Length of Briefs 87
L. Required Short Appendix 88
M. References To The Record 88
N. Agreement of Parties to Submit Without Oral Argument 88
O. Sequence Of Briefing in National Labor Relations Board Proceedings 89
P. Summary Of Certain Technical Requirements 89

XXII. Certification of State Law 90

XXIII. Preparing and Serving Appendix 91

XXIV. Oral Argument and Submission Without Oral Argument 93
A. Submission Without Oral Argument 93

visited 7/26/2008

B. Scheduling Oral Argument 93
C. Courtroom Procedures 94
D. Preparation For Argument 95
E. The Opening Statement 96
F. The Statement Of Facts 96
G. The Argument 97
H. No Oral Reference to Cases Which Have Not Already Been Cited to the Court in Writing 99
I. Order of Oral Argument in NLRB Proceedings 99

XXV. Deciding an Appeal 100

XXVI. Remands 101
A. Remands For Revision of Judgment 101
B. Remands For a New Trial 101
C. Limited Remands 101
D. Cases Remanded From the Supreme Court 102

XXVII. Petition for Rehearing 103

XXVIII. En Banc Procedure 104

XXIX. Costs 106

XXX. Issuance of Mandate 107

XXXI. Advisory Committee 109

visited 7/26/2008

visited 7/26/2008

NOTICE

The Federal Rules of Appellate Procedure, the Circuit Rules of the Seventh Circuit, the Seventh Circuit Operating Procedures and the Criminal Justice Act Plan in this edition of the Practitioner's Handbook for Appeals are current to December 1, 2002. Up to date rules are always available on the Seventh Circuit Home Page, <http://www.ca7.uscourts.gov>.

We attempt to keep the Practitioner's Handbook and the attached Rules as current and accurate as possible and will periodically publish updated editions. We would appreciate being advised of any errors or inconsistencies in the handbook or the rules and we welcome suggestions for improvement. Any such suggestions should be sent, in writing to Andrew J. Kohn, Chief Deputy Clerk, United States Court of Appeals for the 7th Circuit, 219 S, Dearborn Street, Chicago, IL 60604, or send E-mail to andy_kohn@ca7.uscourts.gov. Requests for information or procedural assistance should be directed to the clerk's office at 312-435-5850.

visited 7/26/2008

PREFACE

This Practitioner's Handbook was inspired by a similar publication entitled "Appeals to the Second Circuit" prepared by the Committee on Federal Courts of the Association of the Bar of the City of New York (Rev. Ed. 1970), and the "Practitioner's Handbook" for the Sixth Circuit, prepared by the Committee on Federal Courts of the Cincinnati Chapter of the Federal Bar Association (1971). Both of the above committees, and also the Record Press, Inc., 95 Morton Street, New York, New York 10014, owner of the copyright on the Second Circuit publication, have been good enough to consent to the incorporation of substantial portions of their work in the Handbook for the Seventh Circuit.

The Second and Sixth Circuits' handbooks have, however, been substantially revised for use in the Seventh Circuit. The Practitioner's Handbook was first prepared in 1973. David J. Shipman, Robert L. Stern, Owen Rall, and Edward A. Haight of the Seventh Circuit Bar Association and Thomas F. Strubbe, Circuit Judge Walter J. Cummings, Justice John Paul Stevens, then a Circuit Judge, then Chief Judge Luther M. Swygert, and Robert C. Williams, then President of the Seventh Circuit Bar Association, provided the leadership to develop the Handbook.

In 1980, then Chief Judge Thomas E. Fairchild promoted a revised edition prepared by Circuit Executive Collins T. Fitzpatrick and then Clerk Thomas F. Strubbe in consultation with then Circuit Judge Philip W. Tone and some of the original authors. Following revisions to the Federal Rules of Appellate Procedure and the Circuit Rules, then Chief Judge William J. Bauer authorized a revised edition in February of 1992. Following further rule revisions, then Chief Judge Richard A. Posner directed the preparation of revised editions in 1994, 1996 and 1999, and Chief Judge Joel M. Flaum in 2002.

This 2003 printing has been further revised and updated by Chief Deputy Clerk Andrew J. Kohn and Counsel to the Circuit Executive Donald J. Wall under the direction of Chief Judge Joel M. Flaum to incorporate amendments to the Federal Rules of Appellate Procedure effective December 1, 2002.

visited 7/26/2008

INTRODUCTORY NOTE

In recent years the number of appeals docketed in the Seventh Circuit has greatly increased and the number of filings that take place in each appeal have also proliferated. The judges must read the appellant's brief, the appellee's brief, the reply brief, if any, and the pertinent portions of the appendix or record on appeal in each of the six appeals that are orally argued daily. Further, the average appeal has several motions on its docket both prior to and subsequent to oral argument. Responses are filed to many of these motions.

All of these documents must be read, consuming a vast amount of judicial time. *For this reason verbiage is looked upon with great disfavor by the Seventh Circuit.* Briefs should be kept as short as possible. Motions and all other papers filed should be succinct. Every failure to honor this request reduces the amount of judge time that will be available for work that must be done.

NOTE: All references to rules are to the Federal Rules of Appellate Procedure (Fed. R. App. P.) unless otherwise stated. Local rules of the Seventh Circuit will be referred to as Circuit Rules and cited as Cir. R. < >. References to these rules are as of December 2002. Counsel are encouraged to check the court's web site www.ca7.uscourts.gov for the most up to date rules and for any changes or new rules.

visited 7/26/2008

ELECTRONIC ACCESS TO SEVENTH CIRCUIT CASE INFORMATION, RULES, PROCEDURES AND OPINIONS

The Seventh Circuit Court of Appeals provides internet access to up-to-date information on cases before the court through the Seventh Circuit Home Page. The court's Home Page also provides internet access to other important information such as:

- Public access to the court's dockets
- Ability to upload digital copy of briefs via internet
- Full text of :
  - Seventh Circuit Opinions
  - Seventh Circuit Rules and Operating Procedures
  - Federal Rules of Appellate Procedure
  - Practitioner's Handbook for Appeals
  - Standards for Professional Conduct
  - Misconduct Complaint Rules
- Filing tips, sample briefs, various court forms
- Handouts and information about court programs
- Proposed Rule Changes
- Postings of 7th Circuit Employment Opportunities
- Links to:
  - Federal Defender Home Page
  - Seventh Circuit Bar Association Home Page
  - Other court and legal web sites

Access to the web site is free of charge and available to anyone with a personal computer and Internet access. The Internet address ("URL") of the Seventh Circuit Home Page is http://www.ca7.uscourts.gov/.

All information viewed at the Seventh Circuit Home Page is fully text searchable and can be electronically transferred ("downloaded") or printed to local personal computer equipment.

visited 7/26/2008

I. Outline of Procedural Steps and Time Limits on Appeals from District Courts and Tax Court

After an appealable judgment or order has been entered in the district court, the following steps are necessary to insure that the appeal will be considered on its merits.

A. Timely Perfection Of Appeal.

1. Notice of appeal for an appeal as of right is filed, along with the $5.00 district court filing fee and the $100.00 appellate docket fee (collected on behalf of the court of appeals), with the clerk of the district court, or tax court. The fees must be paid upon filing the notice of appeal unless the appellant is granted leave to appeal in forma pauperis. Fed. R. App. P. 3. Time limits, per Fed. R. App. P. 4, are as follows:

   Thirty days from entry of judgment in civil cases.

   Sixty days from entry of judgment in civil cases if the United States or an officer or agency of the United States is a party.

   Fourteen days from the date on which the first notice of appeal was filed in civil cases for any other party desiring to appeal. Fed R. App. P. 4(a)(3).

   Ten days from entry of judgment for appeal by defendants in criminal cases.

   Thirty days from entry of judgment for appeal by the United States in criminal cases, when authorized by statute.

   The time for appeal runs from the denial of any timely motion under Fed. R. Civ. P. 50(b), 52(b), 59, or 60(b), if the motion is filed no later than 10 days after entry of judgment, and any notice of appeal filed prior to disposition of the motion is ineffective until entry of the order disposing of the motion. A party wishing to challenge an alteration or amendment of the judgment must file a new notice of appeal or amend the previously filed notice. Fed. R. App. P. 4(a)(4).

   An extension of up to 30 days may be granted by district court upon showing of excusable neglect in civil cases. Fed. R. App. P. 4(a)(5).

2. Petition for leave to appeal from an interlocutory order. Fed. R. App. P. 5.

   Ten days after entry of an interlocutory order with statement prescribed by 28 U.S.C. § 1292(b), or of amended order containing such statement. Filed with clerk

visited 7/26/2008

of court of appeals.

B. Bond For Costs On Appeal.

1. Civil cases. Fed. R. App. P. 7.

   Costs bonds are no longer automatically required; however, district court may require appellant to file bond in form and amount it finds necessary to ensure payment of costs.

2. Interlocutory and certain bankruptcy appeals. Fed. R. App. P. 5(d).

   If required by Fed. R. App. P. 7, within 10 days after entry of order granting permission to appeal by court of appeals.

C. Supersedeas Bond. Fed. R. App. P. 8(b).

May be presented for approval to the district court at or after the time of filing the notice of appeal or of procuring order allowing appeal. Fed. R. Civ. P. 62(d).

D. Transcript Of Proceedings. Fed. R. App. P. 10(b);
Cir. R. 10.

1. Criminal Cases.

   Appointed counsel in a criminal case must request a transcript at the time guilt is determined and must renew that request at sentencing if the district judge has not yet ordered the transcript prepared. Retained counsel must order and pay for the transcript within 10 days of filing the notice of appeal. Cir. R. 10(c), (d).

2. Civil Cases.

   Ten days after filing notice of appeal, appellant must order all necessary parts of the transcript from the court reporter. Fed. R. App. P. 10(b)(1).

   If the entire transcript is not to be included, appellant must file and serve on appellee a description of the parts of the transcript to be ordered and a statement of issues within 10 days after filing of notice of appeal. Fed. R. App. P. 10(b)(3).

   If appellee deems other parts necessary, he must file a statement of parts to be included within 10 days after receipt of appellant's statement. Fed. R. App. P. 10(b)(3)(B).

visited 7/26/2008

E. Docketing The Appeal. Fed. R. App. P. 12(a);
Cir. R. 12(a).

The appeal will be docketed as soon as the copy of the notice of appeal and the docket entries and appeal information sheet are received by the clerk of the court of appeals.

F. Forwarding The Record To The Court Of Appeals.
Fed. R. App. P.11(b); Cir. R. 10(a); Cir. R. 11(a).

Within 14 days of the notice of appeal, the clerk of the district court is to prepare the entire record, other than exhibits and procedural filings specified in Cir. R. 11(a) (unless an otherwise excludable item is ordered by the court of appeals or specially designated by the parties). Later filed transcripts are to be subsequently transmitted to the court of appeals. Records from the Eastern Division of the Northern District of Illinois shall be transmitted to the court of appeals when prepared. Records from all other districts in the circuit are temporarily retained by the district court clerk's office until requested by the clerk of the court of appeals. Counsel wishing to view these records may do so in the district court.

G. Docketing Conferences. Cir. R. 33.

Occasionally, after the appeal has been docketed in the court of appeals, the court may hold a docketing conference to set a schedule for filing any unprepared transcripts and briefs, examine jurisdiction, simplify and define issues, and consolidate appeals and establish joint briefing schedules. Counsel may request a docketing conference. These conferences are generally conducted by senior court staff, usually Counsel to the Circuit Executive. Note that docketing conferences are different from "settlement conferences" which may be held by the court's settlement conference attorney pursuant to Fed. R. App. P. 33.

H. Settlement Conference Program. Fed. R. App. P. 33.

After the appeal has been docketed in the court of appeals, the court may direct counsel, and sometimes the litigants, to meet with one of the court's settlement conference attorney*s* to discuss the possibility of resolving the appeal by agreement. See Section XVII(E) of this Handbook.

I. Counsel of Record. Cir. R. 3(d).

An attorney for a party or who first files a document with the clerk of this court will

visited 7/26/2008

be entered on the docket as counsel of record, and the court will send papers only to counsel of record for each party. Counsel of record may not withdraw without consent of the court unless another attorney simultaneously substitutes as counsel of record.

J. Representation and Disclosure Statements.
Fed. R. App. P. 12(b), Fed. R. App. P 26.1 and Cir. R. 26.1

The attorney who filed the notice of appeal must file a statement as to all parties that the attorney represents within 10 days of filing the notice. Fed. R. App. P. 12(b). Every attorney for a non-governmental party or amicus curiae must file a disclosure statement containing the information required by Cir. R. 26.1and, if a corporate party, identify all its parent corporations and list any publicly held company that owns 10% or more of the party's stock as required by Fed. R. App. P. 26.1. Attorneys must provide answers to all questions required by the rules. Lawyers should file their disclosure statements as soon as possible, but, these statements must be filed with the parties first motion, response or other request for relief and also included separately in the party's brief.

K. Briefing Schedule. Fed. R. App. P. 31(a); Cir. R. 31(a).

Unless a different schedule is set by order of the court, appellant's brief is due 40 days after docketing of appeal (regardless of completeness of the record); appellee's brief 30 days after appellant's brief is filed; and reply brief 14 days after appellee's brief.

L. Statement Concerning Oral Argument. Fed. R. App. P. 34(a).

A party may include, as part of a principal brief, a short statement explaining why oral argument is (or is not) appropriate under the criteria of Fed. R. App. P. 34(a)(2).

M. Oral Argument. Cir. R. 34(a).

Time allowed for oral argument is determined by the court. Counsel must notify clerk at least five days in advance of argument date of the person presenting oral argument.

N. Petition For Rehearing. Fed. R. App. P. 40; Cir. R. 40.

Fourteen days after entry of judgment unless time is shortened or extended by order. Forty five days after entry of judgment in civil cases in which the United States, an officer or agency thereof, is a party. There is not a "mailbox rule" for petitions for rehearing. All petitions must be received by the clerk by the due date.

visited 7/26/2008

O. Mandate. Fed. R. App. P. 41; Cir. R. 41.

Issued by the clerk automatically 21 days after entry of judgment or seven days after the denial of a petition for rehearing unless time is shortened or extended by order. Issued immediately after voluntary dismissal or certain procedural dismissals.

P. Petition For Writ Of Certiorari.

Ninety days from entry of judgment in all cases unless Supreme Court allows additional time not exceeding 60 days. 28 U.S.C. § 2101(c); Sup. Ct. R. 13.1 and 13.2.

visited 7/26/2008

II. ORGANIZATION OF THE COURT

The Seventh Circuit encompasses the states of Illinois, Indiana, and Wisconsin. The court of appeals sits in Chicago, Illinois. The court at present is authorized eleven active judgeships. Senior circuit judges participate in the work of the court. The office of the clerk is located in Room 2722 of the United States Courthouse, 219 South Dearborn Street, Chicago, Illinois, 60604. The Main Courtroom is located in Room 2721. Sometimes arguments will be scheduled in the Ceremonial Courtroom, Room 2525. All of the judges have chambers in the same building. The clerk's office is open for filing and other services from 9:00 A.M. to 5:00 P.M. every weekday except for federal holidays. Fed. R. App. P. 45. In an emergency, filings during non-business hours can be made by making prior arrangements with the clerk's office. The court also applies a "transom rule" whereby documents presented for filing at 9:00 A.M. when the doors open are filed as of the previous business day. In addition to their record-keeping duties, the clerk's staff provides procedural assistance to counsel or parties.

By statute the administrative head of the court is the chief judge. A judge attains that position by seniority of service on the court. When he reaches the age of 70, he may continue as an active member of the court, but not as chief judge. 28 U.S.C. § 45(a).

The chief judge presides over any panel on which he sits. If the chief judge does not sit, the most senior Seventh Circuit active judge on the panel normally presides. The presiding judge assigns the writing of opinions at the conference immediately following the day's oral arguments.

To facilitate the disposition of cases, statutory provision is made for the assignment of additional judges. The chief judge may request the Chief Justice of the United States to appoint a "visiting" judge from another circuit, 28 U.S.C. § 291(a), or, more frequently, he may himself designate senior judges, 28 U.S.C. § 294(c), or district court judges from the districts within the circuit, 28 U.S.C. § 292(a), to serve on panels of the Seventh Circuit.

Upon reaching retirement age, a judge can elect to become a senior judge. 28 U.S.C. § 371(b). If he or she continues to perform substantial duties, as most do, he or she may retain chambers and is entitled to secretarial and law clerk services.

In addition to a full caseload of hearings and opinion writing, the chief judge is responsible for the administration of the court of appeals and the district courts and bankruptcy courts in the seven districts of the circuit. He is a member of the Judicial Conference of the United States, 28 U.S.C. § 331, and is head of the Judicial Council for the circuit. The council consists of the active circuit judges on the court and ten district court judges and is empowered to "make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit." 28 U.S.C. §

visited 7/26/2008

332(d). The judicial council has overall responsibility for the operation of the court of appeals, the district courts, and the bankruptcy courts within the Seventh Circuit. The circuit executive works for the council and also is the administrator of the court of appeals. The circuit executive is assisted in his administrative tasks by the clerk, circuit librarian, senior settlement conference attorney, and senior staff attorney.

visited 7/26/2008

III. Panel Composition and Case Assignment

The court, unless an en banc hearing has been ordered (Fed. R. App. P. 35), sits in panels of three judges. 28 U.S.C. § 46(c). In the Seventh Circuit the court regularly hears cases from early in September until the middle of June. This 10 month period comprises the September Term of the court. It is divided into the September, January and April Sessions. On rare occasions emergency matters and death penalty appeals are heard while the court is in recess and the court now sits a few days during the summer. The court ordinarily convenes at 9:30 A.M., and after entertaining any motions for admission of attorneys to practice before the court, hears oral argument in the cases scheduled for the day, usually six cases in the morning.

Assignments of judges to panels are made at least a month before the oral argument on a random basis. In death penalty appeals, panels are randomly assigned when the appeal is docketed. Cir. R. 22(a)(2). Each judge is assigned to sit approximately the same number of times per term with each of his or her colleagues. The clerk distributes the briefs and appendices to the judges substantially before the scheduled date of oral argument. The judges read the briefs prior to oral argument.

The calendar of cases to be orally argued in a given week is prepared and circulated to the judges, and the judges advise the chief judge of any disqualifications. The disclosure statements filed pursuant to Circuit Rule 26.1 and Fed. R. App. P. 26.1 are intended to make this process more accurate and, therefore, more helpful. The judges are then randomly assigned to sit in various panels. This separation of the processes of randomly assigning panels and scheduling cases avoids even the remote possibility of the deliberate assignment of an appeal to a particular panel. The identity of the three judges on any panel is not made public until the day the cases are argued. An exception to this procedure occurs when a previously argued case is on the docket for a subsequent hearing. In this situation the original panel may be reconstituted to hear the second appeal.

Each judge reads the briefs and relevant portions of the appendix or record prior to oral argument. At the time a case is being argued, no member of the panel knows which judge will have the responsibility of writing the opinion or order deciding the case.

The large and ever-growing number of appeals to be decided requires each judge to carry a heavy workload into the summer recess. Each judge devotes most of his or her summer to writing decisions. It is the goal of each judge to complete opinions and orders assigned to him or her during the previous year before the convening of the September Term.

visited 7/26/2008

Motions and emergency matters are received and reviewed by staff attorneys designated as motions attorneys and are presented to the judge assigned as the "motions judge." Certain types of motions requiring action by three judges are assigned to panels which usually act without oral argument. This responsibility is rotated among the active judges on a weekly basis.

visited 7/26/2008

IV. Admission to Practice Before the Court

The lead attorneys for all parties represented by counsel, as well as counsel presenting oral argument, must be admitted to practice in this court no more than 30 days after the docketing of the matters in which they are involved. Cir. R. 46(a). To qualify for admission to practice, an attorney must be a member of the bar in good standing of either the highest court of a state or of any court in the federal system. Fed. R. App. P. 46(a). There is no length of admission requirement. Attorneys representing any federal, state or local governmental unit are permitted to argue *pro hac vice* without being formally admitted. Cir. R. 46(c). The admission fee for the Seventh Circuit is currently $15.00. Attorneys representing the federal government or any agency thereof and court-appointed attorneys representing indigent parties do not have to pay the admission fee. Cir. R. 46(b).

Upon oral motion of an already-admitted attorney, new applicants may be admitted to practice immediately prior to the commencement of oral arguments, usually at 9:30 A.M. on any morning when the court is in session. In lieu of appearing personally, the applicant may send a written application and sponsor's affidavit on a form provided by the clerk upon request. Such *in absentia* applications are generally acted on about once a week by the designated motions judge.

If the applicant desires to be admitted to practice in open court, both the applicant and the sponsor must appear personally. The short application form should be filed in the clerk's office prior to 9:30 A.M. As the first order of business, the presiding judge will call all motions for admission. The sponsor should briefly outline the applicant's background, and must vouch for the applicant's personal integrity and professional ethics. The applicant then takes the prescribed oath as administered by the clerk in the courtroom. Later he must sign the "Roll of Attorneys" in the clerk's office. Funds derived from the admission fees are deposited in the Lawyers' Fund which is used for court purposes described in Circuit Rule 46(b). Attorneys admitted to the Seventh Circuit are entitled to use the William J. Campbell Library of the United States Courts.

visited 7/26/2008

V. APPELLATE JURISDICTION

A. In General

The Seventh Circuit is ever mindful of the limits on its adjudicatory power and vigilant of jurisdictional faults throughout the appellate process. *The Wellness Community-National v. Wellness House*, 70 F.3d 46, 50–51 (7th Cir. 1995); *see also Yang v. I.N.S.*, 109 F.3d 1185, 1192 (7th Cir. 1997) (a court always has jurisdiction to determine whether it has jurisdiction). Litigants can expect the court on its own to review both its own jurisdiction and that of the district court at any point in the appellate proceedings, *Baer v. First Options of Chicago, Inc.*, 72 F.3d 1294, 1298 (7th Cir. 1995); *Kelly v. United States*, 29 F.3d 1107, 1113 (7th Cir. 1994); *see also Wild v. Subscription Plus, Inc.*, 292 F.3d 526 (7th Cir. 2002), although a deficiency in appellate jurisdiction takes precedence and prevents a determination of the extent of the district court's jurisdiction. *Massey Ferguson Division of Varity Corp. v. Gurley*, 51 F.3d 102, 104 (7th Cir. 1995).

Similarly, every litigant has an obligation to bring both appellate and district court jurisdictional problems to the court's attention. *See Espinueva v. Garrett*, 895 F.2d 1164, 1166 (7th Cir. 1990); Cir. R. 3(c), 28(a) and (b). The parties may not consent to appellate jurisdiction. *United States v. Smith*, 992 F.2d 98, 99 (7th Cir. 1993); *see also United States v. Tittjung*, 235 F.3d 330, 335 (7th Cir. 2000). Attempts to engineer a final judgment by voluntarily dismissing viable claims without prejudice (so that the claims may be revived on conclusion of an appeal) likewise are insufficient to vest the court with jurisdiction. *See West v. Macht*, 197 F.3d 1185 (7th Cir. 1999); *Union Oil Co. v. John Bown, E & C, Inc.*, 121 F.3d 305 (7th Cir. 1997); *see also ITOFCA, Inc. v. MegaTrans Logistics, Inc.*, 235 F.3d 360 (7th Cir. 2000) (no jurisdiction where form of dismissal of claim without prejudice permitted claim's refiling at any time). *Cf. Furnance v. Bd. of Trustees of Southern Illinois Univ.*, 218 F.3d 666, 669–70 (7th Cir. 2000) (dismissal of complaint without prejudice may constitute adequate finality for appeal if amendment cannot save action); *South Austin Coalition Community Council v. SBC Communications, Inc.*, 191 F.3d 842, 844 (7th Cir. 1999) (dismissal of suit without prejudice to permit litigation of merits on some other court or at some other time is a final appealable decision). However, a party may eliminate the bar to appellate jurisdiction in such circumstances if the party agrees to treat the dismissal of its claims as having been with prejudice. *JTC Petroleum Co. v. Piasa Motor Fuels, Inc*, 190 F.3d 775, 776–77 (7th Cir. 1999); *see also ITOFCA, Inc. v. MegaTrans Logistics, Inc.*, 235 F.3d at 365.

Parties should keep in mind that Cir. R. 50 calls for the district judge to state reasons when the court enters dispositive orders and any orders that may be appealed. The rule urges the parties to flag the absence of reasons as quickly as possible so that the court may remand the case promptly to make repairs, rather than go through full briefing and

visited 7/26/2008

argument in the dark. *See United States v. Mobley*, 193 F.3d 492, 494–95 (7th Cir. 1999). *Cf. Ross Brothers Construction Co., Inc. v. International Steel Services, Inc.,* 283 F.3d 867, 872 (7th Cir. 2002).

The court may not as a rule choose to pass on jurisdictional issues and decide the case on the merits. *Steel Co. v. Citizens For A Better Environment*, 118 S.Ct. 1003, 1012–16 (1998).

(I) *District Courts*.

The jurisdiction of the Court of Appeals for the Seventh Circuit extends to all criminal appeals and virtually all civil appeals from the seven district courts within the circuit. They are: the Northern, Southern and Central Districts of Illinois; the Northern and Southern Districts of Indiana; and the Eastern and Western Districts of Wisconsin.

(II) *Magistrate Judge Decisions*.

The Seventh Circuit's jurisdiction over appeals from district court decisions includes appeals from a magistrate judge's final decision in civil cases pursuant to 28 U.S.C. § 636(c)(3). Fed. R. App. P. 3(a)(3). Unanimous consent of all parties is required. *Mark I, Inc. v. Gruber*, 38 F.3d 369, 370 (7th Cir. 1994). *Cf. Brook, Weiner, Sered, Kreger & Weinberg v. Coreq, Inc.*, 53 F.3d 851 (7th Cir. 1995) (consents of original parties are binding on parties that were substituted as legal representatives of deceased party or as legal successor of original party). Parties added to a case after the original parties have consented must also agree to submission of the case to the magistrate judge; if they do not, the case must be returned to a district judge. *Williams v. General Electric Capital Auto Lease, Inc.*, 159 F.3d 266, 268–69 (7th Cir.1998). The required consents can be provided after judgment is entered, *King v. Ionization Intern., Inc.*, 825 F.2d 1180, 1195 (7th Cir. 1987) (the statute does not require a specific form or time of consent), or even after oral argument on appeal. *See Drake v. Minnesota Mining & Manufacturing Co.*, 134 F.3d 878, 883 (7th Cir. 1998).

(III) *Tax Court; Administrative Agency Decisions*.

In addition, the court has jurisdiction to review decisions of the United States Tax Court (*see* 26 U.S.C. § 7482(a), (b)) and of various federal administrative tribunals. The court's jurisdiction in such cases depends, however, on the provisions of the various statutes relating to judicial review of agency determinations; the relevant statutory authority should be examined in each instance. *See, e.g.*, *CH2M Hill Central, Inc. v. Herman*, 131 F3d 1244 (7th Cir. 1997).

(IV) *Federal Circuit; Supreme Court; State Court Decisions*.

visited 7/26/2008

Appeals in Tucker Act cases involving less than $10,000 and appeals in patent cases, among others, go to the Court of Appeals for the Federal Circuit. *See generally* 28 U.S.C. § 1295. Also, there are a few classes of cases appealable directly from the district court to the Supreme Court of the United States. *See, e.g.*, 28 U.S.C. §§ 1253, 2284 (decisions of three-judge panels). The court does not under any circumstances have jurisdiction to hear appeals from decisions of state courts. *See Reilly v. Waukesha County*, 993 F.2d 1284, 1287 (7th Cir. 1993).

(V) *Screening Procedure*.

Every federal appellate court has a special obligation to satisfy itself of its own jurisdiction. *Steel Co. v. Citizens For A Better Environment*, 118 S.Ct. at 1012–13. In an effort to uncover jurisdictional defects very early in the appellate process, the Seventh Circuit reviews each new appeal shortly after it is docketed to determine whether potential subject matter or appellate jurisdictional problems exist. Generally, only the "short record" is reviewed: the notice of appeal, the Cir. R. 3(c) docketing statement (if attached), the judgment(s) or order(s) appealed, and the district court docket sheet.

If an initial review indicates that there may be a problem with appellate jurisdiction, the court (through a motions panel) attempts to resolve the problem, if possible, before the appeal is allowed to proceed. *See generally Barrow v. Falck*, 977 F.2d 1100, 1102–03 (7th Cir. 1992). Of course, a merits panel is free to re-examine jurisdictional issues that a motions panel decided, uninhibited by the law of the case doctrine or by Circuit Rule 40(e). *United States v. Lilly*, 206 F.3d 756, 760 (7th Cir. 2000); *Bogard v. Wright*, 159 F.3d 1060, 1062 (7th Cir. 1998); *American Fed'n of Grain Millers, Local 24 v. Cargill, Inc.*, 15 F.3d 726, 727 (7th Cir. 1994). *Cf Butera v. Apfel*, 173 F.3d 1049, 1053 (7th Cir. 1999) (merits panel not obligated to revisit jurisdictional issue resolved by a motions panel at an earlier date).

In some cases, the district court may take corrective action under Fed.R.App.P. 10(e) or Fed.R.Civ.P. 60(a), to clarify a jurisdictional issue that the court discovers in the screening process. *Rice v. Sunrise Express, Inc.,* 209 F.3d 1008, 1014 fn. 9 (7th Cir. 2000) ; *see also Boyko v Anderson*, 185 F.3d 672, 674 (7th Cir. 1999) (limited remands appropriate to perfect appellate jurisdiction to enable appeal to go forward.) A proper *nunc pro tunc* order that memorializes past action may eliminate jurisdictional concerns. *Id*. at 1014–15.

Appeals in diversity cases receive an extra screening. The court, ever mindful of the limitations on subject matter jurisdiction of federal courts, also scrupulously reviews the parties' docketing statements to determine whether the amount in controversy is established and the citizenship of each party to the litigation is identified. The parties

visited 7/26/2008

are ordered early on to clear up any inadequacies or deficiencies noted in the allegations of diversity jurisdiction. Failure to remedy a problen may result in the dismissal of the case or imposition of sanctions. *See Meyerson v. Harrah's East Chicago Casino*, 312 F.3d 318 (7th Cir. 2002); *Tylka v. Gerber Products Co.*, 211 F.3d 445 (7th Cir. 2000).

B. Standing To Appeal

Article III of the Constitution requires that federal courts only decide disputes that present "actual, ongoing cases or controversies." *Lewis v. Continental Bank Corp.*, 110 S. Ct. 1249, 1253 (1990). This constitutional requirement must persist throughout all stages of the appellate proceedings. *Id*. And like any other question implicating Article III jurisdiction, the court of appeals is obligated to consider the issue of standing, whether or not the parties have raised it. *Brown v. Disciplinary Committee of the Edgerton Volunteer Fire Dept.*, 97 F.3d 969, 972 (7th Cir. 1996).

An appeal that no longer presents a live controversy is moot and will be dismissed. *Henco, Inc. v. Brown*, 904 F.2d 11, 13 (7th Cir. 1990). *See also Selcke v. New England Ins. Co.*, 2 F.3d 790, 792 (7th Cir. 1993) (burden of proof on party asserting appellate jurisdiction if challenged). "The...test for mootness on appeal is...whether it is still possible to 'fashion *some* form of meaningful relief' to the appellant in the event he prevails on the merits." *Flynn v. Sandahl*, 58 F.3d 283, 287 (7th Cir. 1995), quoting *Church of Scientology v. United States*, 113 S.Ct. 447, 450 (1992) (emphasis in original). *See also In re Turner*, 156 F.3d 713, 716 (7th Cir.1998). As a final item in cases that are moot, the court of appeals typically will need to address the issue of vacatur — whether to vacate a district court order when it becomes moot on appeal. *Orion Sales, Inc. v. Emerson Radio Corp.*, 148 F.3d 840, 843 (7th Cir. 1998).

The person who brings an appeal must have standing to do so. *Moy v. Cowen*, 958 F.2d 168, 170 (7th Cir. 1992). It is a well-settled rule that "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." *Marino v.Ortiz*, 484 U.S. 301,304 (1988). In most cases, this means parties of record at the time the judgment was entered, including those who have become parties by intervention, substitution or third-party practice. *In re VMS Ltd. Partnership Sec. Litig.*, 976 F.2d 362, 366 (7th Cir. 1992). *See also Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998); *but see Wiggins v. Martin*, 150 F.3d 671, 673 (7th Cir. 1998) (intervenor in trial court may nevertheless lack standing on appeal).

Judgments, not statements in opinions, are the basis for appellate review. An appeal does not present a real case or controversy where the appellant complains not about a judgment but about statements or findings in the court's opinion. *Chathas v. Local 134 IBEW*, 233 F.3d 508, 512 (7th Cir. 2000); *Warner/Elektra/Atlantic Corp. v. County of DuPage*, 991 F.2d 1280, 1282–83 (7th Cir. 1993); *Pollution Control Industries of America,*

visited 7/26/2008

Inc. v. Van Gundy, 979 F.2d 1271, 1273 (7th Cir. 1992); *Abbs v. Sullivan*, 963 F.2d 918, 924–25 (7th Cir. 1992).

A party who has received all the relief sought in the trial court is not aggrieved and cannot bring an appeal. *Abbs v. Sullivan*, 963 F.2d 918, 924 (7th Cir. 1992). *Cf. INB Banking Co. v. Iron Peddlers, Inc.*, 993 F.2d 1291, 1292 (7th Cir. 1993) (a party who consents to judgment while explicitly reserving the right to appeal preserves that right); *Council 31, Am. Fed. of State, County & Mun. Employees v. Ward*, 978 F.2d 373, 380 (7th Cir. 1992) (conditional cross-appeals and unconditional appeals treated differently). Put another way, "[o]nly a person injured by the terms of the judgment is entitled to appeal." *Grinnell Mutual Reinsurance Co. V. Reinke*, 43 F.3d 1152, 1154 (7th Cir. 1995). *See also Nationwide Insurance v. Board of Trustees of the University of Illinois*, 116 F.3d 1154, 1155 (7th Cir. 1997) (victim of insured's alleged wrongdoing — a defendant in insurer's declaratory judgment action — suffered no cognizable injury from ruling that insurer had no duty to defend (the only ruling appealed); defendant-victim's appeal dismissed). Similarly, a party cannot appeal a judgment in its favor merely because it wants some other unsuccessful party to prevail against someone else on some aspect of the case. *Mueller v. Reich*, 54 F.3d 438, 441 (7th Cir. 1995), vacated on unrelated grounds under the name *Wisconsin v. Mueller*, 117 S.Ct. 1077 (1997).

A winning party cannot appeal (or cross-appeal) because the district court rejected one (or more) of its arguments on the way to deciding in its favor. A prevailing party is entitled to advance in support of its judgment all arguments if presented to the district court. An appeal (or cross-appeal) is necessary and proper only when a party wants the appellate court to alter the judgment (the bottom line, not the grounds or reasoning) of the district court. *See Jones Motor Co., Inc. v. Holtkamp, Liese, Beckemeier & Childress, P.C.*, 197 F.3d 1190, 1191 (7th Cir. 1999); *Stone Container Corp. v. Hartford Steam Boiler Inspection & Ins. Co.,* 165 F.3d 1157, 1159 (7th Cir. 1999); *Rose Acre Farms, Inc. v. Madigan*, 956 F.2d 670, 672 (7th Cir., 1992).

As a final matter, be mindful that the court has jurisdiction to determine whether the plaintiffs lacked standing to sue or the district court otherwise lacked jurisdiction to act. *See*, *e.g.*, *United States v. One 1987 Mercedes Benz Roadster 560 SEC*, 2 F.3d 241, 242 n.1 (7th Cir. 1993); *Tisza v. Communications Workers of America*, 953 F.2d 298, 300 (7th Cir. 1992).

C. Appealability

(I) *Criminal Cases*.

Ordinarily, a defendant in a criminal case may not take an appeal until a sentence has been entered. *Flanagan v. United States*, 465 U.S. 259, 263 (1984); *Pollard v. United*

visited 7/26/2008

States, 352 U.S. 354, 358 (1957); *United States v. Kaufmann*, 951 F.2d 793 (7th Cir. 1992); Fed. R. Crim. P. 32(b)(1). A pretrial detention order, however, is appealable, 18 U.S.C. § 3145(c), but because these cases must be decided quickly, 18 U.S.C. § 3145(c), the appellant should file an appropriate motion within the appeal rather than having the case proceed to full briefing. *United States v. Daniels*, 772 F.2d 382, 383–84 (7th Cir. 1985); *United States v. Bilanzich*, 771 F.2d 292, 300 (7th Cir. 1985); Cir. R. 9(a). The government is statutorily authorized to appeal certain interlocutory orders, *see* 18 U.S.C. § 3731, and is permitted to appeal some sentences. *See* 18 U.S.C. § 3742(b). *See also United States v. Byerley*, 46 F.3d 694, 698 (7th Cir. 1995) (the United States has no right of appeal in a criminal case absent explicit statutory authority).

In addition, a limited exception to the final judgment rule has been recognized in criminal cases for interlocutory orders within the scope of the collateral order doctrine. *United States v. J.J.K.*, 76 F.3d 870 (7th Cir. 1996) (collateral order doctrine is to be interpreted particularly narrowly in criminal cases). *See Abney v. United States*, 431 U.S. 651 (1977) (pretrial order denying motion to dismiss an indictment on double jeopardy grounds immediately appealable under collateral order doctrine); *but see United States v. Ganos*, 961 F.2d 1284 (7th Cir. 1992) (a double jeopardy claim that is frivolous or not colorable defeats jurisdiction). *See also United States v. Davis*, 1 F.3d 606, 607–08 (7th Cir. 1993) (order denying motion in limine to bar disclosure of information based on attorney-client privilege); *United States v. Corbitt*, 879 F.2d 224, 227 n.1 (7th Cir. 1989) (order releasing presentence report to media); *United States v. Dorfman*, 690 F.2d 1230, 1231–32 (7th Cir. 1982) (pretrial order authorizing publication of wiretap transcripts). Orders denying or granting a motion to disqualify counsel are not within this exception. *See Flanagan v. United States*, 465 U.S. 259 (1984); *United States v. White*, 743 F.2d 488 (7th Cir. 1984); *In re Schmidt*, 775 F.2d 822 (7th Cir. 1985) (order disqualifying counsel for grand jury witness); *but see In Re Grand Jury Subpoena of Rochon*, 873 F.2d 170, 173 (7th Cir. 1989) (order disqualifying government counsel).

(II) *Civil Cases*.

(1) *Final Judgment Rule*. Generally an appeal may not be taken in a civil case until a final judgment disposing of all claims against all parties has been entered on the district court's civil docket pursuant to Fed. R. Civ. P. 58. *See Alonzi v. Budget Construction Co.*, 55 F.3d 331, 333 (7th Cir. 1995); *Cleaver v. Elias*, 852 F.2d 266 (7th Cir. 1988). The appellant, however, can waive the separate document requirement of Rule 58 if the only obstacle to appellate review is the district court's failure to enter judgment on a separate document, *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 386 (1978); Fed. R. App. P. 4(a)(7)(B), and if the district court makes clear that the case is over. *Smith-Bey v. Hospital Administrator*, 841 F.2d 751, 755–56 (7th Cir. 1988); *Foremost Sales Promotions, Inc. v. Director, Bureau of Alcohol, Tobacco & Firearms*, 812 F.2d 1044, 1046 (7th Cir. 1987). *Cf. West Lafayette Cor. v. Taft Contracting Co., Inc.,* 178 F.3d 840,

visited 7/26/2008

842–43 (7th Cir. 1999) (agreement to release claim good reason to enter judgment but not a substitute for action by the district court); *Spitz v. Tepfer*, 171 F.3d 443, 447–48 (7th Cir. 1999) (district court's technical error in failing to address an issue, if issue abandoned and court plainly intended to rule on all issues in case, no impediment to appellate jurisdiction). It remains essential, however, to know who won what. *Buck v. U.S. Digital Communications, Inc.*, 141 F.3d 710, 711 (7th Cir. 1998). *Cf. Health Cost Controls of Illinois v. Washington*, 187 F.3d 703, 707–08 (7th Cir. 1999) (failure of district court to specify amount of damages not bar to jurisdiction if parties agree to amount of damages during course of appeal.)

An appeal will not be dismissed if the judgment fails to resolve purely ministerial matters, involving no discretion. *See Richardson v. Gramley*, 998 F.2d 463, 465 (7th Cir. 1993). *Cf. Buchanan v. United States*, 82 F.3d 706 (7th Cir. 1996) (per curiam) (judgment in a suit for monetary relief not appealable if it fails to specify either the amount due plaintiff or a formula by which that amount of money could be computed in mechanical fashion). Still, the parties should insure that the district court has issued a separate judgment. *See Armstrong v. Ahitow*, 36 F.3d 574 (7th Cir. 1994); *Chambers v. American Trans Air, Inc.*, 990 F.2d 317, 318 (7th Cir. 1993); *Tobey v. Extel/JWP, Inc.*, 985 F.2d 330, 331 (7th Cir. 1993). Indeed, the court on a number of occasions has stressed the importance of a clear, definite and specific judgment and reminded counsel of their duty to take steps to see to the entry of a proper judgment. *Continental Casualty Co. v. Anderson Excavating & Wrecking Co.*, 189 F.3d 512, 515–16 (7th Cir. 1999); *Health Cost Controls of Illinois v. Washington*, 187 F.3d 703, 708 (7th Cir. 1999).

No special wording is required to comply with Rule 58. The judgment merely must be self-contained and set forth the relief to which the parties are entitled in resolving all claims of all parties. *Massey Ferguson Division of Varity Corp. v. Gurley*, 51 F.3d 102, 104–05 (7th Cir. 1995); *Paganis v. Blonstein*, 3 F.3d 1067, 1071–72 (7th Cir. 1993). In fact, a completed minute order form commonly used in the district court for Northern District of Illinois may constitute a Rule 58 judgement although it is preferred that the clerks of the district court use Form AO 450 to comply with Rule 58. *Hope v. United States*, 43 F.3d 1140, 1142 (7th Cir. 1994). A judgment that simply announces the prevailing party without "award[ing] the relief to which the prevailing party is entitled," *see*, *e.g.*, *American Inter-Fidelity Exchange v. American Re-Insurance Co.*, 17 F.3d 1018, 1020 (7th Cir. 1994), or merely repeats that a motion was granted, *see*, *e.g.*, *Camp v. Gregory*, 67 F.3d 1286, 1290 (7th Cir. 1995); *Massey Ferguson Division of Varity Corp. v. Gurley*, 51 F.3d at 104, is defective. Unless some other document clearly reveals the terms on which the litigation has been resolved or the parties otherwise agree on the terms of the resolution of the case to remove any ambiguity in the district court's judgment, it is not appealable. *See, e.g.*, *Health Cost Controls of Illinois v.* Washington, 187 F.3d 703, 708 (7th Cir. 1999); Buck *v. U.S. Digital Communications*, 141 F.3d 710 (7th Cir. 1998); *Buchanan v. United States*, 82 F.3d 706 (7th Cir. 1996) (per curiam);

visited 7/26/2008

Burgess v. Ryan, 996 F.2d 180 (7th Cir. 1993). Litigants and their attorneys should bring such matters promptly to the district judge's attention so that the district judge can take appropriate action to correct any deficiencies in the judgment. Failure to act will cause unnecessary additional work for the court on appeal in untangling jurisdictional snarls.

Although it is possible to appeal in advance of a proper Rule 58 judgment, it is never necessary to do so. *United States v. Indrelunas*, 411 U.S. 216 (1973). As such, it is incorrect to assume that the maximum number of opportunities to appeal is one. *Otis v. City of Chicago*, 29 F.3d 1159, 1166–67 (7th Cir. 1994) (en banc).

Formerly, this circuit, as others, gave appellants a virtually limitless time to appeal when a judgment or order was required to be set forth on a separate document under Rule 58 but was not. *See, e.g., Champ v. Siege Trading Co., Inc.*, 55 F.3d 269, 273-74 (7th Cir. 1995); *Brill v. McDonald's Corp.*, 28 F.3d 633 (7th Cir. 1994); *In re Kilgus*, 811 F.3d 1112, 1117 (7th Cir. 1987). Amendments to both the civil and appellate rules, effective December 1, 2002, now impose a cap. When Rule 58 requires a judgment or order to be set forth on a separate document, it is treated as such 150 days after entry of the district court's judgment or order. *See* Fed. R. App. P. 4(a)(7)(A).

After a final judgment has been entered, a party has a right to appeal any earlier interlocutory order entered during the proceedings in the district court (provided that it has not been mooted by subsequent proceedings) as well as the final decision itself. *See Glass v. Dachel*, 2 F.3d 733, 738 (7th Cir. 1993) (reference in the notice of appeal to the final order presents the whole case to us on appeal); *see also Hendrich v. Pegram*, 154 F.3d 362, 368 (7th Cir. 1998); *Matter of Grabill Corp.*, 983 F.2d 773, 775 (7th Cir. 1993); *House v. Belford*, 956 F.2d 711, 716 (7th Cir. 1992). *Cf. Ackerman v. Northwestern Mutual Life Ins. Co.*, 172 F.3d 467, 468–69 (7th Cir. 1999) (notice of appeal cannot bring up for review an order entered after the notice's filing).

Post-judgment proceedings are treated for purposes of appeal as a separate lawsuit, and orders in those proceedings are appealable if final. *Trustees of Funds of IBEW Local 701 v. Pyramid Electric,* 223 F.3d 459, 463–64 (7th Cir. 2000).

(2) *Attorneys' Fees*. Where a district court has entered a final judgment on the merits of a case, the entry of a subsequent order granting or denying an award of attorneys' fees for the case at hand is a separate proceeding having no effect on the finality of the merits judgment, and a separate notice of appeal is required, *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988); *Dunn v. Truck World, Inc.*, 929 F.2d 311 (7th Cir. 1991), unless the district court, acting under Fed. R. Civ. P. 58, enters an order extending the time to appeal. *See* Fed. R. App. P. 4(a)(4). An order determining that a party is entitled to fees but leaving the amount of the award undetermined may be appealable if it can be consolidated with an appeal on the merits. *Kokomo Tube Co. v. Dayton Equipment*

visited 7/26/2008

Services Co., 123 F.3d 616, 621–22 (7th Cir. 1997); *BASF Corp.v. Old World Trading Co., Inc.*, 41 F.3d 1081, 1099 (7th Cir. 1994); *Vandenplas v. Muskego*, 797 F.2d 425, 428 n.1 (7th Cir. 1986); *Bittner v. Sadoff & Rudoy Industries*, 728 F.2d 820, 826–27 (7th Cir. 1984). Otherwise, it will be dismissed as premature. *See Hershinow v. Bonamarte*, 735 F.2d 264, 266–67 (7th Cir. 1984). Interim awards may be appealed under the collateral order doctrine when the payor may have difficulty getting the money back. *People Who Care v. Rockford Bd. of Educ. Dist. No. 205*, 921 F.2d 132 (7th Cir. 1991); *Palmer v. City of Chicago*, 806 F.2d 1316, 1318–20 (7th Cir. 1986). A notice of appeal from an order awarding or denying fees does not bring up the judgment on the merits for appellate review. *Exchange Nat'l Bank v. Daniels*, 763 F.2d 286, 289–94 (7th Cir. 1985).

(3) *Bankruptcy*. Bankruptcy cases present unique issues concerning finality. A considerably more flexible approach to finality applies in a bankruptcy appeal taken under 28 U.S.C. § 158(d) than in an ordinary civil appeal under 28 U.S.C. § 1291. *In re Gould*, 977 F.2d 1038, 1040–41 (7th Cir. 1992); *In re James Wilson Assoc.*, 965 F.2d 160, 166 (7th Cir. 1992). Generally, an order finally resolving a separable controversy (for example, between one creditor and the debtor) is appealable even though the bankruptcy proceeding is not over. *See In re Rimstat, Ltd.,* 212 F.3d 1039, 1044 (7th Cir. 2000); *In re Official Committee of Unsecured Creditors of White Farm Equipment Co.*, 943 F.2d 752 (7th Cir. 1991). But the decisions of both the district and bankruptcy courts must be final. *In re Devlieg, Inc.*, 56 F.3d 32, 33 (7th Cir. 1995) (per curiam); *In re Klein*, 940 F.2d 1075, 1077 (7th Cir. 1991); *In re Behrens*, 900 F.2d 97, 99 (7th Cir. 1990). A district court order remanding a case to the bankruptcy court is not final if further significant proceedings are contemplated. *In re Stoecker*, 5 F.3d 1022, 1027 (7th Cir. 1993); *In re Lytton's*, 832 F.2d 395, 400 (7th Cir. 1987); *In re Fox*, 762 F.2d 54, 55 (7th Cir. 1985); *see also In re Excello Press, Inc.*, 967 F.2d 1109, 1111 (7th Cir. 1992). Interlocutory orders of district courts sitting as appellate courts in bankruptcy are appealable if they meet the standards of 28 U.S.C. § 1292. *Connecticut National Bank v. Germain*, 112 S. Ct. 1146 (1992). The case law should be carefully reviewed to determine appealability. The court of appeals does not have jurisdiction to consider direct appeals from the bankruptcy court. *In re Andy Frain Services, Inc.*, 798 F.2d 1113, 1124 (7th Cir. 1986).

(4) *Administrative Agencies*. The authority of courts of appeals to review the administrative order derives from statute. *Alabama Tissue Center of the Univ. of Alabama Health Serv. Foundation, P.C. v. Sullivan*, 975 F.2d 373, 376 (7th Cir. 1992); *see*, *e.g.*, 28 U.S.C. § 2342. An agency order remanding a case within the agency (for example, to an ALJ) for further consideration, or a district court order remanding a case to an agency, generally is not appealable unless the task on remand will be ministerial or (equivalently) involve just mechanical computations. *Crowder v. Sullivan*, 897 F.2d 252 (7th Cir. 1990). If, however, a district court order will not be effectively reviewable by a petition to review the agency's final decision, it is appealable immediately. *Id*; *Daviess County Hospital v. Bowen*, 811 F.2d 338, 341–42 (7th Cir. 1987).

visited 7/26/2008

(III) *Interlocutory Appeals*.

Where no final judgment has been entered, an appeal may be taken only if the order sought to be appealed falls within one of the statutory or judicial exceptions to the final judgment rule. Even when there is a right of interlocutory appeal, a party can wait till the case is over and then appeal, bringing before the court all non moot interlocutory rulings adverse to the party. *Pearson v. Ramos*, 237 F.3d 881, 883 (7th Cir. 2001). But see discussion below regarding entry of partial judgment under Rule 54(b).

(1) *Rule 54(b)*. Rule 54(b) of the Federal Rules of Civil Procedure allows (but does not require) a district judge to certify for immediate appeal an order that disposes of one or more but fewer than all of the claims or parties in a multiple claim or multiple party case. The district judge must expressly direct the entry of judgment and make an express determination that there is no just reason to delay the entry of judgment. The express findings required by the rule are indispensable to appealability. *Willhelm v. Eastern Airlines, Inc.*, 927 F.2d 971, 973 (7th Cir. 1991); *Foremost Sales Promotions, Inc. v. Director, Bureau of Alcohol, Tobacco & Firearms*, 812 F.2d 1044 1046 (7th Cir. 1987); *Glidden v. Chromalloy American Corp.*, 808 F.2d 621, 623 (7th Cir. 1986); *see also Granack v. Continental Casualty Co.*, 977 F.2d 1143, 1145 (7th Cir. 1992) ("[A]n express determination cannot be made implicitly."). Although the precise language stated in the rule is not required, *Alexander v. Chicago Park District*, 773 F.2d 850, 855 (7th Cir. 1985), an appeal will be dismissed if the district court fails to indicate that there is no just reason for delay. *Johnson v. Levy Organization Dev. Co., Inc.*, 789 F.2d 601, 607 (7th Cir. 1986). There is no requirement that the findings required by the rule be entered on a separate document. *Real Estate Data, Inc. v. Sidwell Co.*, 809 F.2d 366, 370 n.4 (7th Cir. 1987).

There are limits on the district court's discretion to grant a final judgment under Rule 54(b). The rule requires a final disposition as to either a separate claim for relief, or a dispute between separate parties. *Buckley v. Fitzsimmons*, 919 F.2d 1230, 1237 (7th Cir. 1990), *vacated on other grounds*, 502 U.S. 801 (1991). An order will be appealable under the rule only if the claims designated in the order lack a substantial factual overlap with those remaining in the district court, so there will be no need for multiple appellate consideration of the same issue. *Horn v. Transcon Lines, Inc.*, 898 F.2d 589, 592 (7th Cir. 1990); *Indiana Harbor Belt R.R. v. American Cyanamid Co.*, 860 F.2d 1441 (7th Cir. 1988). More recently, the court has stated the test for separate claims under Rule 54(b) in these terms: "whether the claim that is contended to be separate so overlaps the claim or claims that have been retained for trial that if the latter were to give rise to a separate appeal at the end of the case the court would have to go over the same ground that it had covered in the first appeal." *Lawyers Title Insurance Corp. v. Dearborn Title Corp.*, 118 F.3d 1157, 1162 (7th Cir. 1997). *See also NAACP v. American Family Mutual Insurance*

visited 7/26/2008

Co., 978 F.2d 287, 292 (7th Cir. 1992); *Olympia Hotels Corp. v. Johnson Wax Development Corp.*, 908 F.2d 1363, 1367–68 (7th Cir. 1990). The court in *Lawyers Title* went on to note that the district court also has the power to enter an appealable judgment under Rule 54(b) as "to separate parties whether or not their claims are separate." *Lawyers Title Insurance Corp. v. Dearborn Title Corp.*, 118 F.3d 1157, 1162 (7th Cir. 1997); *see also Newman v. State of Indiana*, 129 F.3d 937, 940 (7th Cir. 1997).

If a judgment has been properly entered under Rule 54(b), it is a final judgment and must be appealed, if at all, within the usual time for appeals in civil cases; the judgment will not be reviewable during a subsequent appeal from a judgment disposing of the remainder of the case. *Construction Industry Retirement Fund v. Kasper Trucking, Inc.*, 10 F.3d 465, 467–68 (7th Cir. 1993); *Glidden v. Chromalloy American Corp.*, 808 F.2d 621, 623 (7th Cir. 1986). A district court's certification of an order under Rule 54(b) after the notice of appeal is filed is sufficient to vest the court of appeals with jurisdiction. *LacCourte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 760 F.2d 177, 180–81 (7th Cir. 1985); *Sutter v. Groen*, 687 F.2d 197, 199 (7th Cir. 1982); *Local P-171, Amalgamated Meat Cutters & Butcher Workmen v. Thompson Farms Co.*, 642 F.2d 1065, 1073–75 (7th Cir. 1981). *Cf. Yockey v. Horn*, 880 F.2d 945, 948 n.4 (7th Cir. 1989). Once an appeal is taken, the court of appeals on its own initiative considers whether the criteria of Rule 54(b) are met and whether it has jurisdiction. *Jack Walter & Sons Corp. v. Morton Bldg., Inc.*, 737 F.2d 698 (7th Cir. 1984); *A/S Apothekernes Laboratorium for Specialpraeparater v. IMC Chemical Group, Inc.*, 725 F.2d 1140 (7th Cir. 1984).

(2) *Section 1292(a)(1)*. Under 28 U.S.C. § 1292(a)(1), the court of appeals has jurisdiction to review interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions." Under this provision, interlocutory orders granting or denying a request for a preliminary injunction and interlocutory orders granting a permanent injunction are automatically appealable; an interlocutory order denying (or having the effect of denying) a request for a permanent injunction may be appealable. *See Carson v. American Brands, Inc.*, 450 U.S. 79, 83–84 (1981); *Switzerland Cheese Ass'n, Inc. v. E. Horne's Market, Inc.*, 385 U.S. 23, 25 (1966); *In re City of Springfield*, 818 F.2d 565 (7th Cir. 1987); *Elliott v. Hinds*, 786 F.2d 298, 300 (7th Cir. 1986); *Samayoa v. Chicago Board of Education*, 783 F.2d 102, 104 (7th Cir. 1986); *Parks v. Pavkovic*, 753 F.2d 1397, 1402–03 (7th Cir. 1985); *Donovan v. Robbins*, 752 F.2d 1170, 1172–74 (7th Cir. 1985); *Winterland Concessions Co. v. Trela*, 735 F.2d 257, 260–61 (7th Cir. 1984). But a postponement of a ruling regarding injunctive relief is not appealable unless it is so protracted that it has the practical effect of a denial; in that event the motion is deemed constructively denied and an immediate appeal is allowed. *United States v. Board of School Commissioners*, 128 F.3d 507, 509 (7th Cir. 1997). *Cf. Simon Property Group, L.P. v. mySimon, Inc.*, 282 F.3d 986 (7th Cir. 2002)(decision to postpone injunctive relief not appealable unless decision was definitive disposition of request for relief and irreparable harm will result from delay). By contrast, discovery orders that require a party to do or

visited 7/26/2008

not to do something are not deemed to be injunctions within the meaning of section 1292(a)(1). *Allendale Mutual Insurance Co. v. Bull Data Systems, Inc.*, 32 F.3d 1175, 1177 (7th Cir. 1994).

In addition, other nonappealable orders may be reviewed along with the injunction order if they are closely related and considering them together is more economical than postponing consideration to a later appeal, or if the injunction turns on the validity of the other nonfinal orders. *Resolution Trust Corp. v. Ruggiero*, 994 F.2d 1221, 1225 (7th Cir. 1993); *Artist M. v. Johnson*, 917 F.2d 980, 986 (7th Cir. 1990), *rev'd on other grounds sub nom.*, *Suter v. Artist M.*, 112 S. Ct. 1360 (1992); *Elliott v. Hinds*, 786 F.2d 298, 301 (7th Cir. 1986); *Parks v. Pavkovic*, 753 F.2d 1397, 1402 (7th Cir. 1985). The Supreme Court, however, has questioned the expansion of the scope of an interlocutory appeal to include other orders not independently appealable. *See Swint v. Chambers County Commission*, 115 S.Ct. 1203, 1211–12 (1995). See also Section IV "Pendent Appellate Jurisdiction", *infra*.

An order interpreting or clarifying an injunction is not appealable; on the other hand, a "misinterpretation" would be a modification of an injunction because it would change, rather than clarify, the meaning of the original injunction. *Association of Community Organizations for Reform Now (ACORN) v. Illinois State Board of Elections*, 75 F.3d 304, 306 (7th Cir. 1996); *Motorola, Inc. v. Computer Displays International, Inc.*, 739 F.2d 1149, 1155 (7th Cir. 1984); *see also Ford v. Neese*, 119 F.3d 560, 562 (7th Cir. 1997) (an order that expands (or refuses to expand) an injunction is a modification, not interpretation, of the injunction and is appealable).

The grant or denial of a temporary restraining order (TRO) is not appealable, *Geneva Assurance Syndicate, Inc. v. Medical Emergency Services Associates (MESA) S.C.*, 964 F.2d 599, 600 (7th Cir. 1992); *Doe v. Village of Crestwood*, 917 F.2d 1476, 1477 (7th Cir. 1990); *Manbourne, Inc. v. Conrad*, 796 F.2d 884, 887 n.3 (7th Cir. 1986); *Weintraub v. Hanrahan*, 435 F.2d 461, 462–63 (7th Cir. 1970), unless the order granting the TRO is not limited in time as Fed. R. Civ. P. 65(b) requires. *See Sampson v. Murray*, 415 U.S. 61, 86–88 (1974); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Salvano*, 999 F.2d 211, 213 n.2 (7th Cir. 1993). The character of the injunctive relief sought, not what the motion is called, will determine whether the order ruling on the request is appealable. *Geneva Assurance Syndicate, Inc. v. Medical Emergency Services Associates (MESA) S.C.*, 964 F.2d 599, 600 (7th Cir. 1992).

Failure to comply with the requirements of Rule 65(d) in granting an injunction does not scuttle appellate jurisdiction. *Schmidt v. Lessard*, 414 U.S. 473 (1974); *Metzl v. Leininger*, 57 F.3d 618, 619 (7th Cir. 1995); *Burgess v. Ryan*, 996 F.2d 180, 184 (7th Cir. 1993); *see also Chathas v. Local 134 IBEW*, 233 F.3d 508, 512–13 (7th Cir. 2000). Nevertheless, inadequate specificity in an injunction may compel the dismissal of the

visited 7/26/2008

appeal. *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 319–20 (7th Cir. 1995); *Original Great American Chocolate Chip Cookie Co., Inc. v. River Valley Cookies, Ltd.*, 970 F.2d 273, 275–76 (7th Cir. 1992) (unenforceable "injunction" creates no case or controversy under Article III of the Constitution); *Chicago & North Western Transportation Co. v. Railway Labor Executives' Ass'n.*, 908 F.2d 144, 149–50 (7th Cir. 1990), *cert. denied*, 498 U.S. 1120 (1991); *Bates v. Johnson*, 901 F.2d 1424, 1427–28 (7th Cir. 1990).

(3) *Section 1292(b)*. Under 28 U.S.C. § 1292(b), a district court has discretion to certify for immediate appeal an interlocutory order not otherwise appealable if in its opinion the "order involves a controlling question of law as to which there is substantial ground for difference of opinion" and an immediate appeal "may materially advance the ultimate termination of the litigation." *People Who Care v. Rockford Bd. of Education District No. 205*, 921 F.2d 132 (7th Cir. 1991); *see also Buckley v. Fitzsimmons*, 919 F.2d at 1239 (the district court may amend an order to add a § 1292(b) certification at any time although the procedure should be used sparingly). The statute applies to all civil cases, including bankruptcy cases, *In re Jartran, Inc.*, 886 F.2d 859, 865 (7th Cir. 1989); *In re Moens*, 800 F.2d 173, 177 (7th Cir. 1986), but does not apply to criminal cases. *United States v. White*, 743 F.2d 488 (7th Cir. 1984).

Within 10 days after the entry of a § 1292(b) certification, the party seeking to appeal must petition the court of appeals for permission to bring the appeal. Fed. R. App. P. 5(a). The court of appeals may, in its discretion, grant or deny the petition. *See generally Ahrenholz v. Board of* Trustees, 219 F.3d 674,675 (7th Cir. 2000) (court summarizes standards to be applied when determining whether to allow an interlocutory appeal under section 1292(b); Hewitt *v. Joyce Beverages of Wisconsin Inc.*, 721 F.2d 625, 626–27 (7th Cir. 1983). The district court cannot limit the issues that the court of appeals may address on appeal; the statute refers to certifying orders, not particular questions. *Edwardsville Nat'l Bank and Trust Co. v. Marion Laboratories, Inc.*, 808 F.2d 648, 650–51 (7th Cir. 1987). The court of appeal's initial decision to grant review under § 1292(b) is subject to reexamination, and the panel assigned to decide the merits of appeal may dismiss the appeal as having been improvidently granted. *Johnson v. Burken*, 930 F.2d 1202 (7th Cir. 1991). But generally, the merits panel will defer to the court's original decision on the petition for permission to appeal absent intervening circumstances or other defects in the motions panel's ability to make a fully informed decision. *In re Healthcare Compare Corp. Securities Litigation*, 75 F.3d 276, 279–80 (7th Cir. 1996); *see also Sokaogon Gaming Enterprise Corp. v. Tushie-Montgomery Associates, Inc.*, 86 F.3d 656, 658 (7th Cir. 1996).

(4) *Rule 23(f).* Under Rule 23(f) of the Federal Rules of Civil Procedure, the court of appeals may, in its discretion, permit an appeal from a district court order granting or denying class certification. The application must be made within 10 days after entry of the order. *See Gary v. Sheahan*, 188 F.3d 891 (7th Cir. 1999). In *Blair v. Equifax Check*

visited 7/26/2008

Services, Inc., 181 F.3d 832, 834–35 (7th Cir. 1999), the court identified several types of cases that may be appropriate for interlocutory review.

(5) *Collateral Order Doctrine*. The collateral order doctrine is a narrow exception to the final judgment rule. It permits an immediate appeal under 28 U.S.C. § 1291 of an interlocutory decision if the decision conclusively determines an important issue, collateral to the merits of the action, which would be effectively unreviewable if immediate appeal were not available and which threatens the appellant with irreparable harm if no appeal is permitted. *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799 (1989); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978); *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949); *United States v. Michelle's Lounge*, 39 F.3d 684, 692–93 (7th Cir. 1994). Mere cost and inconvenience to the parties is not a reason to permit an appeal under this exception. *Reise v. Board of Regents of the University of Wisconsin System*, 957 F.2d 293 (7th Cir. 1992). If a party fails to take an immediate interlocutory appeal permitted under the doctrine, it may later seek review by filing an appeal after the final judgment in the case (assuming the issue has not been mooted). *Otis v. City of Chicago*, 29 F.3d 1159, 1167 (7th Cir. 1994) (en banc); *Exchange Nat'l Bank v. Daniels*, 763 F.2d 286, 290 (7th Cir. 1985). *Cf. Behrens v. Pelletier*, 116 S.Ct. 834 (1996) (court rejects one-interlocutory-appeal rule pertaining to qualified immunity rulings).

(6) *Practical Finality Doctrine*. Closely related to the collateral order exception is the doctrine of practical finality. If an order fails to meet the requirements of *Cohen v. Beneficial Industrial Loan Corp.*, *supra*, the considerations behind the finality requirement may still favor finding a district court's order appealable under 28 U.S.C. § 1291. This doctrine requires that the order be effectively unreviewable after a resolution of the merits of the litigation. *Travis v. Sullivan*, 985 F.2d 919, 922–23 (7th Cir. 1993); *see also Richardson v. Penfold*, 900 F.2d 116, 118 (7th Cir. 1990) (a practical reason exists for allowing review of a nonfinal order where it is difficult to envisage the procedure by which the order could be reviewed at the end of the litigation).

(7) *Concept of "Pragmatic Finality"*. The doctrine of pragmatic finality is an extremely narrow exception to the final judgment rule. Interlocutory orders involving issues fundamental to the further conduct of the case may be appealable in rare instances, depending on the inconvenience and costs of piecemeal review and the danger that delay will create an injustice. *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152–54 (1964). The doctrine is analogous to certification under 28 U.S.C. § 1292(b) and its use is very limited; in fact, it may be limited to the unique circumstances of the Gillespie case. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 477 n.30 (1978); *Flynn v. Merrick*, 776 F.2d 184 (7th Cir. 1985); *Rohrer, Hibler & Replogle, Inc. v. Perkins*, 728 F.2d 860, 864 (7th Cir. 1984). The court recently questioned the doctrine's usefulness, describing it as "formless" and commenting that there are "clearer ways to address the concern that lie

visited 7/26/2008

behind it." *Bogard v. Wright*, 159 F.3d 1060 (7th Cir. 1998).

(IV) *Pendent Appellate Jurisdiction*.

Unlike the principle governing appeals from final decisions, a nonfinal order that is appealable generally does not permit review of other nonfinal orders unless the rulings come within the scope of pendant appellate jurisdiction. Its scope is narrowly construed. *qad. inc. v. ALN Associates, Inc.*, 974 F.2d 834, 837 (7th Cir. 1992). "We can review an unappealable order only if it is so entwined with an appealable one that separate consideration would involve sheer duplication of effort by the parties and this court. Any laxer approach would allow the doctrine of pendant appellate jurisdiction to swallow up the final-judgment rule." *Patterson v. Portch*, 853 F.2d 1399, 1403 (7th Cir. 1988) (citation omitted); *see also Asset Allocation & Management Co. v. Western Employers Insurance Co.*, 892 F.2d 566, 569 (7th Cir. 1989).

The Supreme Court, however, in *Abney v. United States*, 431 U.S. 651, 662–63 (1977), suggests that there is no doctrine of pendent appellate jurisdiction in criminal cases, and in *Swint v. Chambers County Commission*, 514 U.S. 35, 43–51 (1995), questions its application in civil cases. This court subsequently described it as a "controversial and embattled doctrine" in *United States v. Board of School Comm'rs,* 128 F.3d 507, 510 (7th Cir. 1997), but invoked it at least once since *Swint* was decided. *See Greenwell v. Aztor Indiana Gaming Corp.*, 268 F.3d 486, 491 (7th Cir. 2001). *See also Jones v. Infocure Corp.*, 310 F.3d 529 (7th Cir. 2002);United *States v. Bloom*, 149 F.3d 649, 657 (7th Cir. 1998) (listing cases).

(V) *Effect on District Court's Jurisdiction*.

Filing a notice of appeal divests the district court of jurisdiction over those aspects of the case involved in the appeal. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982); *Kusay v. United States*, 62 F.3d 192, 193–94 (7th Cir. 1995); *Ced's Inc. v. EPA* 745 F.2d 1092, 1095–96 (7th Cir. 1984). Upon filing a notice of appeal from a judgment which decides the entire case the district court cannot take any further action in the case, without leave of the court of appeals, except in aid of the appeal (such as deciding a motion for stay pending appeal or deciding a motion to proceed on appeal *in forma pauperis*), to award costs, to deny relief under Rule 60(b), or in aid of execution of a judgment that has not been stayed or superseded. *Lorenz v. Valley Forge Insurance Co.*, 23 F.3d 1259, 1260 (7th Cir. 1994); *Chicago Downs Ass'n. v. Chase*, 944 F.2d 366, 370 (7th Cir. 1991); *Trustees of the Chicago Truck Drivers, etc. v. Central Transport, Inc.*, 935 F.2d 114, 119–20 (7th Cir. 1991); *Henry v. Farmer City State Bank*, 808 F.2d 1228, 1240 (7th Cir. 1986); *Patzer v. Board of Regents of the University of Wisconsin*, 763 F.2d 851, 859 (7th Cir. 1985); Cir. R. 57; *see also United States V. Ienco*, 126 F.3d 1016 (7th Cir. 1997). For a list of examples, see *Kusay v. United States*, 62 F.3d 192, 194 (7th Cir.

visited 7/26/2008

1995).

A district court may again act in a case returned to it after the court of appeals issues its mandate; actions taken before then are a nullity. *Kusay v. United States*, 62 F.3d 192, 194 (7th Cir. 1995). But a 1993 amendment to Fed. R. App. P. 4(b) provides that the district court may act under Fed. R. Crim. P. 35(c), to correct a sentence, even if a notice of appeal has already been filed.

If the appeal is interlocutory, the district court retains the power to proceed with matters not involved in the appeal or to dismiss the case as settled, thereby mooting the appeal. *Shevlin v. Schewe*, 809 F.2d 447, 450–51 (7th Cir. 1987). But when a preliminary injunction has been appealed and a new motion for preliminary injunction is filed, there is no jurisdictional bar to the district court resolving that motion; however, the district court's ruling may, as a practical matter, moot an earlier ruling on, and also the appeal of, a preliminary injunction. *Adams v. City of Chicago*, 135 F.3d 1150, 1154 (7th Cir. 1998). In addition, the district court does not lose jurisdiction when there is a purported appeal from a nonfinal, nonappealable order. *United States v. Bastanipour*, 697 F.2d 170, 173 (7th Cir. 1982), *cert. denied*, 460 U.S. 1091 (1983).

(1) *Revision of Judgment During Pendency of Appeal*. A party may file a motion under Rule 60(b) of the Federal Rules of Civil Procedure directly in the district court at any time during the pendency of an appeal without seeking prior leave of the appellate court, and the district court has jurisdiction to consider the motion. *Chicago Downs Ass'n v. Chase*, 944 F.2d 366, 370 (7th Cir. 1991); *Graefenhain v. Pabst Brewing Co.*, 870 F.2d 1198, 1211 (7th Cir. 1989). "In such circumstances we have directed district courts to review such motions promptly, and either deny them or, if the court is inclined to grant relief, to so indicate so that we may order a speedy remand." *Brown v. United States*, 976 F.2d 1104, 1110–11 (7th Cir. 1992); *see also United States v. Bingham*, 10 F.3d 404 (7th Cir. 1993)(a party seeking relief under Fed. R. Crim. P. 35(b) during pendency of appeal must request the district court to make a preliminary ruling on whether it is inclined to grant the motion; if so inclined the matter will be remanded for that purpose); *United States v. Blankenship*, 970 F.2d 283, 285 (7th Cir. 1992) (although the district court may not grant a new trial in a criminal case while an appeal is pending, it may entertain the motion and either deny it or, if inclined to grant a new trial, so certify to the appellate court).

Circuit Rule 57 sets out what steps must be taken if a party, during the pendency of an appeal, files a motion under any rule that permits the modification of a final judgment. The party is directed to request the district court to make a preliminary ruling on whether it is inclined to grant the motion. If the district court is so inclined, that court or the party must provide a copy of the district court's certification of intent to the court of appeals. The matter then will be remanded for the purpose of modifying the judgment.

visited 7/26/2008

What is implied, but not stated in the rule, is that absent such a remand the district court lacks jurisdiction to modify its judgment. Of course, any party dissatisfied with the modified judgment must file a new notice of appeal.

The court in *Boyko v. Anderson*, 185 F.3d 672 (7th Cir. 1999), explained that sometimes it may be necessary to order a "limited" remand to enable the district judge to conduct an evidentiary hearing to make a definitive decision whether to grant a Rule 60(b) motion. In this situation, the appeal from the original judgment remains pending while the district court conducts the hearing on the motion. A limited remand is unnecessary if the district judge merely wants to hear oral argument on the Rule 60(b) motion.

D. The Time for Filing an Appeal

The time prescribed by law for filing a notice of appeal or petition for review is mandatory and jurisdictional. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982); *Browder v. Director, Dept. of Corrections of Illinois*, 434 U.S. 257, 264 (1978). A district judge cannot affect the timeliness of an appeal by backdating an order. *Chambers v. American Trans Air, Inc.*, 990 F.2d 317, 318 (7th Cir. 1993). The court of appeals cannot extend or enlarge the time for appeal. Fed. R. App. P. 26(b). Failure to file within the time prescribed therefore will result in dismissal of the appeal or petition for lack of jurisdiction.

(I) *Criminal Cases*.

(1) *Time Prescribed*. A notice of appeal by a defendant must be filed within 10 days after the entry either of the judgment or order appealed or of a notice of appeal by the government. Fed. R. App. P. 4(b)(1)(A). An appeal by the government, where appeal is authorized by statute (see 18 U.S.C. §§ 3731 and 3742(b)), must be filed within 30 days of the entry of the judgment or order appealed or the filing of a notice of appeal by any defendant. Fed. R. App. P. 4(b)(1)(B); *see also* Fed. R. App. P. 4(c). Except as noted below, the time for appeal begins to run when a sentence (which is the judgment of conviction) is entered on the district court's criminal docket. Fed. R. App. P. 4(b); *see also United States v. Cantero*, 995 F.2d 1407, 1408 n.1 (7th Cir. 1993).

An amendment to Fed. R. App. P. 26(a)(2), effective December 1, 2002, effectively extends the time that a defendant has to appeal in a criminal case. Saturdays, Sundays, and legal holidays are excluded when computing the 10-day deadline. As a practical matter, a defendant now has at least 14 actual (or calendar) days to file an appeal in a criminal case. Intermediate legal holidays could extend that period even more.

At times, appellate jurisdiction hangs on whether the appeal is properly labeled "criminal" (10-day appeal limit) or "civil" (60-day appeal limit). To determine whether an

visited 7/26/2008

appeal involving criminal matters is treated as civil or criminal for purposes of Rule 4's filing requirements, the court looks to the "substance and context" of the underlying proceeding. *United States v. Lilly*, 206 F.3d 756, 761 (7th Cir. 2000) (appeal from order ruling on defendant's "Petition for Clarification" in which defendant sought to have district court declare that he had satisfied restitution obligation subject to 10-day filing requirement); *see also United States v. Apampa*, 179 F.3d 555, 556–57 (7th Cir. 1999) (per curiam) (appeal from forfeiture order that constitutes part of punishment in criminal prosecution subject to 10-day rule).

A 1998 amendment to Rule 4 takes care of a disparity that previously existed between civil and criminal appeals. A notice of appeal in either a civil or (now) criminal case that is mistakenly filed in the court of appeals is considered filed in the district court on the date that it is received by the court of appeals. Fed. R. App. P. 4(d).

(2) *Effect of Certain Post-Trial Motions*. If a defendant timely makes any of the motions here listed, the time for appeal is extended and runs from the date on which the order disposing of the last such outstanding motion is entered on the district court's criminal docket:

(a) a motion for a new trial on the ground of newly discovered evidence, provided it is made within 10 days of the entry of judgment;

(b) a motion for a new trial on grounds other than newly discovered evidence, provided it is made within the time prescribed by Fed. R. Crim. P. 33;

(c) a motion for arrest of judgment, provided it is made within the time prescribed by Fed. R. Crim. P. 34;

(d) a motion for judgment of acquittal, provided it is made within the time prescribed by Fed. R. Crim. P. 29.

Fed. R. App. P. 4(b)(3). The rule makes clear that a notice of appeal need not be filed before entry of judgment since it is common for the district court to dispose of post-judgment motions before sentencing. The rule also provides that a notice of appeal filed after the court announces a decision, sentence or order, but before disposition of the post-judgment tolling motions, becomes effective upon disposition of the motions. The rule further provides that a notice of appeal is unaffected by the filing of a motion or the correction of a sentence under Fed. R. Crim. P. 35(a). Fed. R. App. P. 4(b)(5). An amendment to Rule 4(b)(5) makes clear that the time to appeal continues to run, even if a motion to correct sentence is filed.

(3) *Appeals From Interlocutory Orders*. Where an appeal may be taken from an in-

visited 7/26/2008

terlocutory order under the collateral order doctrine, the time for appeal begins to run when the order is entered on the district court's criminal docket.

(4) *Extension Of Time*. The court of appeals cannot extend or enlarge the time for appeal. Fed. R. App. P. 26(b). The district court may, in certain circumstances, extend the time for appeal for up to 30 days. *United States v. Mosley*, 967 F.2d 242, 243 (7th Cir. 1992); *United States v. Dumont*, 936 F.2d 292, 295 (7th Cir. 1991); Fed. R. App. P. 4(b). Unlike civil appeals, a motion for extension of time in a criminal case can be filed at any time. *Id.*; *United States v. Dominguez*, 810 F.2d 128, 129 (7th Cir. 1987). Appellate review of the district court's ruling on a motion to extend the time to appeal is only for abuse of discretion. *United States v. Alvarez-Martinez*, 286 F.3d 470, 472 (7th Cir. 2002).

It would be a mistake, however, to rely on the district court to revive an untimely appeal. A defendant who files an untimely appeal essentially throws himself on the mercy of the district judge who must decide as a matter of discretion whether to forgive the defendant's neglect; in close cases the court of appeals may not reverse a district judge's refusal to exercise lenity. *See United States v. Brown*, 133 F.3d 993, 997 (7th Cir. 1998). Further, some reasons for the failure to file a timely appeal will not be excused no matter the countervailing circumstances.

Rule 4(b) requires that the neglect resulting in the failure to comply with the ten-day deadline be "excusable." The Court of Appeals has made clear that not every instance of neglect to file on time is excusable. *See United States v. Guy*, 140 F.3d 735 (7th Cir. 1998). Indeed, whether or not appellate jurisdiction is contested, the court will review a district court's determination to allow an untimely appeal to proceed, and will dismiss the appeal if that review fails to disclose a reason to believe that the neglect was excusable. *United States v. Marbley*, 81 F.3d 51 (7th Cir. 1996); *see also Prizevoits v. Indiana Bell Telephone Co.*, 76 F.3d 132 (7th Cir. 1996).

A 1998 amendment to Rule 4(b) permits the district court to extend the time to appeal for good cause as well as for excusable neglect, as Rule 4(a)(5) permits. Fed. R. App. P. 4(b)(4). The Advisory Committee Notes go on to point out that "[t]he amendment does not limit extensions for good cause to instances in which the motion for extension of time is filed before the original time has expired." The amendment further requires only a "finding", rather than a "showing", of excusable neglect or good cause because the district court is authorized to extend the time for appeal without a motion.

(II) *Civil Cases—Appeals from the District Court*.

(1) *Time Prescribed*. Rule 4(a)(1)(A) requires that the notice of appeal must be filed within 30 days of the entry of the judgment or order appealed. *See Darne v. State of*

visited 7/26/2008

Wisconsin, 137 F.3d 484, 486 n.1 (7th Cir. 1998) (entry date, not date judgment or order is signed, issued or filed, triggers the time for filing a notice of appeal); *see also SEC v. Waeyenberghe*, 284 F.3d 812, 815 (7th Cir. 2002)(per curiam). If the federal government (including officers and agencies of the United States) is a party to the case, the notice of appeal (of any party) must be filed within 60 days of the entry of judgment. Fed. R. App. P. 4(a)(1)(B). *See Helm v. Resolution Trust Corp.*, 43 F.3d 1163 (7th Cir. 1994) (court uses definitional provision of 28 U.S.C. § 451 to determine whether party is an "agency" of the United States for purposes of Rule 4(a)(1)). The 60-day period does not apply, however, if the United States is only a nominal party in the district court. *In re Burlington Northern, Inc. Employment Practices Litigation*, 810 F.2d 601, 606 (7th Cir. 1986).

If one party files a timely notice of appeal, any other party may file its notice of appeal (if it wishes to alter the judgment, *Sellers v. United States*, 902 F.2d 598, 603 (7th Cir. 1990); *Jordan v. Duff and Phelps, Inc.*, 815 F.2d 429, 439 (7th Cir. 1987); *see also Warner/Elektra/Atlantic Corp. v. County of DuPage*, 991 F.2d 1280, 1282–83 (7th Cir. 1993)) within 14 days from the date on which the first notice of appeal was filed even though the usual time for appeal has expired. Fed. R. App. P. 4(a)(3); *see also* Fed. R. App. P. 4(c). But if the first party did not have a right to appeal, the second party must file its notice of appeal within the normal time limit. *Abbs v. Sullivan*, 963 F.2d 918, 925 (7th Cir. 1992); *First Nat'l Bank of Chicago v. Comptroller of the Currency*, 956 F.2d 1360, 1363–64 (7th Cir. 1992).

Failure to receive notice of entry of judgment does not toll the time for filing an appeal. *Spika v. Village of Lombard*, 763 F.2d 282 (7th Cir. 1985). Parties that either do not receive notice of entry of judgment or receive the notice so late as to impair the opportunity to file a timely appeal, however, are not without a remedy. The district court may reopen briefly the appeal period if it finds that a party did not receive notice of entry of a judgment or order from the district court or another party within 21 days of its entry and that no party would be prejudiced. Fed. R. App. P. 4(a)(6). The rule establishes an outer limit of 180 days (counting from the entry of the judgment or order appealed), requiring the party to file a motion within that time or within 7 days of the receipt of notice of entry, whichever is earlier. (Note: A 2002 amendment to Fed. R. App. P. 26(a)(2) effectively extends the deadline since intermediate Saturdays, Sundays, and legal holidays are excluded when computing the 7 days.) If the motion is granted, the district court may reopen the appeal period only for 14 days from its order. *Id*. It is important to note that the district court's exercise of discretion under Rule 4(a)(6) requires that it establish as a matter of fact that the conditions prescribed by the rule have been satisfied. *In re Marchiando*, 13 F.3d 1111, 1114–15 (7th Cir. 1994).

Ordinarily, the consequence of filing a notice of appeal too early is dismissal of the appeal. Rule 4(a)(2) of the Federal Rules of Appellate Procedure, however, allows certain premature appeals to relate forward to the date of the entry of judgment. "[A] notice of

visited 7/26/2008

appeal from a nonfinal decision . . . operate[s] as a notice of appeal from the final judgment only when a district court announces a decision that *would be* appealable if immediately followed by the entry of judgment." *FirsTier Mortgage Co. v. Investors Mortgage Insurance Co.*, 498 U.S. 269, 276 (1991) (emphasis in original). *Cf. Albiero v. City of Kankakee*, 122 F.3d 417 (7th Cir. 1997) (plaintiff may appeal immediately from order dismissing a suit but allowing plaintiff the option of reinstating the case within a certain period of time; no judgment entered following expiration of time). Patently interlocutory decisions, such as discovery rulings or sanctions orders, do not merit the savings provision of Rule 4(a)(2), while dispositive rulings such as orders granting default judgments do. The central question as to the applicability of the rule is whether the district court announced a decision purporting to end the case. *Strasburg v. State Bar of Wisconsin*, 1 F.3d 468 (7th Cir. 1993). But appellants that choose to file an appeal from a final decision, rather than wait for entry of the Rule 58 judgment, must comply with the appropriate appeal deadline. If an appellant misses the deadline by one day he will have to wait and appeal from the Rule 58 judgment — and could do so consistent with the "safe haven" function of that rule. *Dzikunoo v. McGaw YMCA*, 39 F.3d 166, 167 (7th Cir. 1994). *But see* Fed. R. App. P. 4(a)(2).

(2) *When Time Begins to Run*. Except as provided below, the time for appeal begins to run the day after a final judgment disposing of the entire case has been entered on the district court's civil docket pursuant to Fed. R. Civ. P. 58. *United States v. Indrelunas*, 411 U.S. 216 (1973); *In re Kilgus*, 811 F.2d 1112, 1117 (7th Cir. 1987). The date the judge signed the order is irrelevant. *Williams v. Burlington Northern, Inc.*, 832 F.2d 100, 102 (7th Cir. 1987); *Stelpflug v. Federal Land Bank*, 790 F.2d 47, 50–51 (7th Cir. 1986); *Bailey v. Sharp*, 782 F.2d 1366, 1369 (7th Cir. 1986) (Easterbrook, J., concurring); *Loy v. Clamme*, 804 F.2d 405, 407 (7th Cir. 1986). A trivial or clerical correction to a judgment does not restart the time for appeal. *American Federation of Grain Millers, Local 24 v. Cargill Inc.*, 15 F.3d 726, 728 (7th Cir. 1994); *Exchange Nat'l Bank v. Daniels*, 763 F.2d 286, 289 (7th Cir. 1985).

(3) *Effect of Certain Post-Judgment Motions*. If any of the motions listed below is timely filed, the time for appeal does not begin to run until entry of the order disposing of the last such motion outstanding. Fed. R. App. P. 4(a)(4). *Cf. United States EEOC v. Gurnee Inns, Inc.*, 956 F.2d 146, 149 (7th Cir. 1992) (order disposing of the motion must be explicit). The motions are:

(a) a motion for a new trial under Fed. R. Civ. P. 59;

(b) a motion to alter or amend the judgment under Fed. R.Civ. P. 59, *see Simmons v. Ghent*, 970 F.2d 392 (7th Cir.1992);

(c) a motion for judgment under Fed. R. Civ. P. 50(b);

visited 7/26/2008

(d) a motion to amend or make additional findings of fact under Fed. R. Civ. P. 52(b); *see Financial Services Corp. v. Weindruch*, 764 F.2d 197, 199 (7th Cir. 1985);

(e) a motion for relief under Fed. R. Civ. P. 60, provided the motion is filed no later than 10 days after entry of judgment;

(f) a motion for attorney's fees under Fed. R. Civ. P. 54, provided the district court orders, before a notice of appeal is filed and becomes effective, that the final judgment is suspended to resolve the motion for fees. *See also* Fed. R. Civ. P. 58.

It is important to recall that Rules 50, 52 and 59, and correspondingly Rule 4(a)(4), were revised in 1995 to provide that "filing" must occur within the 10-day period to affect the finality of the judgment and extend the time to appeal. It is preferable, therefore, that parties file jurisdictionally critical motions like those under Rule 59(e) directly with the clerk rather than the district judge (which Rule 5(e) of the Federal Rules of Civil Procedure permits) to avoid unnecessary jurisdictional issues. *See Life Insurance Co. of North America v. VonValtier*, 116 F.3d 279, 282–53 (7th Cir. 1997).

Additionally, any other motion that substantively challenges the judgment and is filed within 10 business days *(see* Fed. R. Civ. P. 6(a)) of the entry of judgment will be treated as based on Rule 59, "no matter what nomenclature the movant employs." *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 957 F.2d 515, 517 (7th Cir. 1992); *see also Lentomyynti Oy v. Medivac, Inc.*, 997 F.2d 364, 366 (7th Cir 1993); *Charles v. Daley*, 799 F.2d 343, 347 (7th Cir. 1986). An appeal from the order disposing of any such post-judgment motion brings up for appellate review all orders (except those that have become moot) that the trial court previously rendered in the litigation. *In re Grabill Corp.*, 983 F.2d 773, 775–76 (7th Cir. 1993).

Rule 4(a)(4) further provides that an appeal filed before the disposition of any listed motion is suspended and springs into force when the district judge acts on the motion. The original notice of appeal is sufficient to bring up for review the underlying case, as well as any orders specified in the notice. But if the party additionally wants to appeal the disposition of the post-judgment motion or any alteration or amendment to the judgment, the party must file a new appeal or amend the original notice of appeal to so indicate.

An order granting a Rule 59 motion for a new trial is ordinarily not appealable because it is non-final. *Tikalsky v. Chicago*, 687 F.2d 175, 178 n.3 (7th Cir. 1982); Fed. R. App. P. 4(a)(4). In addition, a Rule 59 motion that contains no grounds for granting the motion may be treated as a nullity and therefore will not toll the time for appeal. *Western Transportation Co. v. E.I. DuPont DeNemours & Co.*, 682 F.2d 1233, 1236 (7th Cir. 1982);

visited 7/26/2008

Martinez v. Trainor, 556 F.2d 818 (7th Cir. 1977). In similar fashion, a Rule 59 motion that seeks to vacate dictum, rather than the court's judgment, is outside the scope of the rule, and an appeal from a denial of such a motion does not invoke appellate jurisdiction. *Abbs v. Sullivan*, 963 F.2d 918, 925 (7th Cir. 1992).

The district court cannot extend the time for filing any of the listed motions. Fed. R. Civ. P. 6(b); *Prizevoits v. Indiana Bell Telephone Co.*, 76 F.3d 132, 133 (7th Cir. 1996); *Marane, Inc. v. McDonald's Corp.*, 755 F.2d 106, 111 (7th Cir. 1985). If such a motion is not timely filed, it will not toll the time for appealing the original judgment and will not affect a notice of appeal that has been filed already. *See*, *e.g.*, *Simmons v. Ghent*, 970 F.2d 392 (7th Cir. 1992); *Wort v. Vierling*, 778 F.2d 1233 (7th Cir. 1985). But if a party relies on the district court's assurances that an untimely Rule 59 motion is timely (and that the party still has time to appeal) and forgoes a timely appeal, the appeal may be deemed timely. *See Thompson v. INS*, 375 U.S. 384 (1964); *Varhol v. Nat'l R.R. Passenger Corp.*, 909 F.2d 1557, 1561–63 (7th Cir. 1990) (*en banc*); *Wort v. Vierling*, 778 F.2d at 1234–36 (collecting cases); *Sonicraft, Inc. v. NLRB*, 814 F.2d 385 (7th Cir. 1987). *But see Bailey v. Sharp*, 782 F.2d 1366, 1370–73 (7th Cir. 1986). Successive post-judgment motions not filed within 10 days of the entry of the judgment are of no effect. *See United States EEOC v. Gurnee Inns, Inc.*, 956 F.2d 146 (7th Cir. 1992); *Charles v. Daley*, 799 F.2d 343, 347 (7th Cir. 1986); *Needham v. White Laboratories, Inc.*, 639 F.2d 394, 397 (7th Cir. 1981). But when a court alters its judgment—enters a new judgment—the time for filing a new Rule 59 motion starts anew. *Charles v. Daley*, 799 F.2d at 348.

A motion to reconsider or vacate the judgment filed after 10 days will not be treated as a timely Rule 59 motion but may be treated as having been made under Fed. R. Civ. P. 60(b) (motion for relief from judgment). *See Browder v. Director, Dept. of Corrections*, 434 U.S. 257, 263 (1978); *id.* at 273–74 (Blackmun, J., concurring); *Otto v. Variable Annuity Life Ins. Co.*, 814 F.2d 1127, 1139 (7th Cir. 1987); *Labuguen v. Carlin*, 792 F.2d 708, 709 (7th Cir. 1986). However, a Rule 60(b) motion (other than one filed within 10 days of judgment, Fed. R. App. P. 4(a)(4)(A)(vi)) has no effect on the finality of the original judgment and does not toll the time for appeal. *Browder v. Director, Dept. of Corrections*, 434 U.S. at 263 n.7; *Cange v. Stotler & Co.*, 913 F.2d 1204, 1213 (7th Cir. 1990); *Wort v. Vierling*, 778 F.2d 1233, 1234 n.1 (7th Cir. 1985). An appeal from the denial of a Rule 60(b) motion does not bring up for review the underlying judgment. *McKnight v. United States Steel Corp.*, 726 F.2d 333, 338 (7th Cir. 1984).

(4) *Interlocutory Appeals*.

(a) *Appeals under 28 U.S.C. § 1292(a)(1)*. The time for appeal runs from the date on which the district court enters the order "granting, denying, continuing, modifying, or dissolving" injunctive relief irrespective of when the written findings of fact are

visited 7/26/2008

entered. *See Financial Services Corp. v. Weindruch*, 764 F.2d 197 (7th Cir. 1985); *see also SEC v. Quinn*, 997 F.2d 287 (7th Cir. 1993). *Cf. Chicago & North Western Transportation Co. v. Railway Labor Executives' Ass'n.*, 908 F.2d 144, 149–50 (7th Cir. 1990). The pendency of a motion to reconsider, filed within the 10-day period after entry of the district court's order, renders a notice of appeal ineffective. *Square D Company v. Fastrak Softworks, Inc.*, 107 F. 3d 448 (7th Cir. 1997).

(b) *Permissive Appeals Under 28 U.S.C. § 1292(b)*. The petition for permission to appeal must be filed in the court of appeals within 10 days from the date on which the district court enters the order containing a proper § 1292(b) certification. *See* Fed. R. App. P. 5(a); *In re Cash Currency Exchange, Inc.*, 762 F.2d 542, 547 (7th Cir. 1985). The time to file the petition is actually greater than 10 days since intermediate Saturdays, Sundays, and legal holidays are excluded from the computation under a 2002 amendment to Fed. R. App. P. 26(a)(2).

(c) *Appeals Under Collateral Order Doctrine*. The time for an appeal of an interlocutory order under the collateral order doctrine begins to run when the order is entered on the district court's civil docket. There is, however, no obligation to take an immediate appeal; a party may wait until final judgment is entered. *Exchange Nat'l Bank v. Daniels*, 763 F.2d 286, 290 (7th Cir. 1985).

(5) *Extensions of Time*. The court of appeals cannot extend or enlarge the time for appeal. Fed. R. App. P. 26(b). The district court may, if an appellant shows good cause or excusable neglect, grant an extension of time. Fed. R. App. P. 4(a)(5). A motion for extension of time must be filed within 30 days after expiration of the normal appeal period. *Harrison v. Dean Witter Reynolds, Inc.*, 974 F.2d 873, 886 (7th Cir. 1992); *Labuguen v. Carlin*, 792 F.2d 708, 710 (7th Cir. 1986); *United States ex rel. Leonard v. O'Leary*, 788 F.2d 1238, 1239 (7th Cir. 1986). Rule 4(a)(5) allows the district court to grant an extension of no more than 30 days past the normal appeal period or ten days from entry of the order granting the extension, whichever occurs later. But if the appellant relies on a longer extension and files the appeal within the extended time period the appeal will be considered timely. *Bernstein v. Lind-Waldock & Co.*, 738 F.2d 179, 182–83 (7th Cir. 1984). Litigants should be mindful that the court will not close its eyes and accept an unchallenged district court finding of excusable neglect if it has reason to doubt that the appellant established neglect which can be interpreted as "excusable." *Prizevoits v. Indiana Bell Telephone Co.*, 76 F.3d 132 (7th Cir. 1996). *See also* discussion at Part D(I)(4), *supra*. *Cf. Norgaard v. DePuy Orthopaedics, Inc.*, 121 F.3d 1074 (7th Cir. 1997) (losing side cannot revive suit and proceed to court of appeals by the expedient of filing a motion under Rule 60(b)(6)).

The text of Rule 4(a)(5) does not distinguish between motions file before or after the original appeal deadline. A 2002 amendment to the rule makes clear that an extension

visited 7/26/2008

can be granted for either good cause or excusable neglect regardless of when the motion is filed. The Committee notes to the 2002 amendment to Rule 4(a)(5) point out that good cause and excusable neglect have different domains and are not interchangeable terms. The excusable neglect standard applies in situations in which there is fault. The good cause standard, on the other hand, applies in situations in which there is no fault - excusable or otherwise.

(III) *Pro Se Prisoner Cases*.

A pro se prisoner's notice of appeal will be deemed to have been filed within the time to appeal if it is delivered within the appropriate appeal period to prison authorities for forwarding to the district court. *Houston v. Lack*, 487 U.S. 266, 270 (1988). *Cf. United States v. Kimberlin*, 898 F.2d 1262, 1265 (7th Cir. 1990) (*Houston* does not apply to prisoners represented by counsel). This is known as the "mailbox rule." The Federal Rules of Appellate Procedure have been amended to reflect the *Houston* decision. Rule 4(c)(1) provides that a prisoner's notice of appeal in either a civil or a criminal case, to be timely, must be deposited in the prison's "internal mail system" by the due date. Fed. R. App. P. 4(c)(1). A 1998 amendment to the rule requires an inmate to use the system that the prison has designed for legal mail, if there is one, in order to receive the benefit that the rule provides. *See also Thomas v. Gish*, 64 F.3d 323, 324 (7th Cir. 1995).

Prisoners may establish the timely filing of their appeal under this rule by a notarized statement or a declaration (in compliance with 28 U.S.C. § 1746) setting forth the date of deposit and stating that first class postage has been prepaid. Fed. R. App. P. 4(c)(1). However, the date that the district court dockets the prisoner's notice of appeal, not the date that it is mailed or received, commences the 14-day period for a second or subsequent appeal under rule 4(a)(3) and the 30-day period for a government appeal under Rule 4(b). Fed. R. App. 4(c)(2), (3).

A prisoner represented by an attorney, however, can have that attorney file the notice of appeal. Therefore, the mailbox rule does not apply to prisoners who are represented by counsel. *Rutledge v. United States,* 230 F.3d 1041, 1052 (7th Cir. 2000).

(IV) *Appeals from Tax Court Decisions*.

(1) *Time Prescribed*. A notice of appeal must be filed with clerk of the Tax Court in Washington, D.C., within 90 days from the date on which the Tax Court's decision is entered on its docket. If, however, one party files a timely notice of appeal, any other party may file its notice of appeal within 120 days from the date on which the decision was entered. Fed. R. App. P. 13(a)(1). If the notice of appeal is filed by mail, the appeal will be timely if it is postmarked within the time prescribed. Fed. R. App. P. 13(b); *Estate of Lidbury v. Commissioner*, 800 F.2d 649, 655 n.6 (7th Cir. 1986).

visited 7/26/2008

(2) *Effect of Certain Post-Decision Motions*. If a motion to vacate a decision or a motion to revise a decision is made within the time prescribed by the Rules of Practice of the Tax Court, the full time for appeal (90 or 120 days) runs from the date on which the order disposing of the motion(s) is entered or the date on which the final decision is entered, whichever is later. Fed. R. App. P. 13(a)(2).

(3) *Interlocutory Appeals*. Certain interlocutory orders of the Tax Court may be appealed. *See* 26 U.S.C. § 7482(a)(2)(A). The statute operates like 28 U.S.C. § 1292(b).

(V) *Appeals from Administrative Agencies*.

Like a notice of appeal, the timely filing of a petition for review is jurisdictional and cannot be waived by the court. *Arch Mineral Corp. v. Director, Office of Workers' Compensation Programs, United States Dept. of Labor*, 798 F.2d 215, 217 (7th Cir. 1986); *Sonicraft, Inc. v. NLRB*, 814 F.2d 385 (7th Cir. 1987); Fed. R. App. P. 26(b). Parties should consult the applicable statutes for filing deadlines and tolling provisions.

E. Content of the Notice of Appeal

The notice of appeal (1) must identify the party or parties taking the appeal, (2) designate the judgment or order appealed, and (3) name the court to which the appeal is taken. Fed. R. App. P. 3(c)(1). *See Badger Pharmacal, Inc. v. Colgate-Palmolive Co.*, 1 F.3d 621, 624–26 (7th Cir. 1993).

It remains the general rule that each party wanting to appeal should be identified by name in either the caption or the body of the notice, but Rule 3(c)(1)(A) permits an attorney representing more than one party the flexibility to indicate which parties are appealing without naming them individually. *Cf. Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988). The designation is sufficient if it is objectively clear from the notice that a party intended to appeal. *Spain v. Bd. of Educ. of Meridian Community Unit School District No. 101*, 214 F.3d 925, 929 (7th Cir. 2000). The rule also provides that a pro se appeal is filed on behalf of the notice's signer and the signer's spouse and minor children, if they are parties, unless the notice clearly indicates a contrary intent. Fed. R. App. P. 3(c)(2). In a class action, whether or not certified as such, the notice is sufficient if it names one person qualified to bring the appeal as representative of the class. Fed. R. App. P. 3(c)(3). The court will not review the award of sanctions against a lawyer personally unless the lawyer is identified in the notice of appeal as the party taking the appeal. *Allison v. Ticor Title Ins. Co.*, 907 F.2d 645, 653 (7th Cir. 1990); *FTC v. Amy Travel Service, Inc.*, 894 F.2d 879 (7th Cir. 1989). Rule 3(c) does not require that the notice of appeal name each appellee. *House v. Belford*, 956 F.2d 711, 717 (7th Cir. 1992).

visited 7/26/2008

Rule 3(c)(1)(B) has not been interpreted to mean that every individual order in a case that preceded final judgment must be separately designated in order to be part of the appeal. *Kunik v. Racine County*, 106 F.3d 168, 172 (7th Cir. 1997); *see also Allied Signal, Inc. v. B. F. Goodrich Co.,* 183 F.3d 568, 571–72 (7th Cir. 1999). A notice of appeal that merely names the Rule 58 final judgment or the order disposing of a Rule 59 motion (or its equivalent) as "the judgment, order, or part thereof appealed from" brings up for review all of the issues in the case. *Kunik v. Racine County*, 106 F.3d at 172–73. In fact, the court has gone so far as to caution litigants that "[i]t is never necessary — and may be hazardous — to specify in the notice of appeal the date...of an interlocutory order or a post-judgment decision..., unless the appellant wants to confine the appellate issues to those covered in the specific order." *Librizzi v. Children's Memorial Medical Center*, 134 F.3d 1302, 1306 (7th Cir. 1998). *Cf. Dzikunoo v. McGaw YMCA*, 39 F.3d 166 (7th Cir. 1994) (the naming of the wrong order in the notice of appeal does not affect appellate jurisdiction, although it may limit the appeal to questions raised by the order designated in the notice).

Although Rule 3(c)(1)(C) makes the naming of the court to which the appeal is taken mandatory, an appeal generally will not be dismissed on this ground. Litigants, however, are advised to review the court's decision in *Bradley v. Work*, 154 F.3d 704, 707 (7th Cir. 1998), for a case that the court considered "to be on the margins of informality of form.'" *Cf. Ortiz v. John O. Butler Co.*, 94 F.3d 1121, 1125 (7th Cir. 1996) (sufficient that appellant's intent to appeal to Seventh Circuit is evidenced by the fact that, except in circumstances not applicable to case, it's the only court to which appellant could have appealed and appellee not misled).

A document that contains all of the information that Rule 3(c)(1) requires may be treated as a notice of appeal. *See Smith v. Barry*, 502 U.S. 244 (1992) (pro se's informal brief treated as functional equivalent of notice of appeal); *Remer v. Burlington Area School District,* 205 F.3d 990, 994–95 (7th Cir. 2000) (petition for interlocutory appeal functional equivalent of notice of appeal); In *re Davenport*, 147 F.3d 605, 608 (7th Cir. 1998) (petitions for leave to file successive 2255 motions treated as notices of appeal); *Nichols v. United States*, 75 F.3d 1137, 1140 (7th Cir. 1996) (motion to proceed on appeal in forma pauperis contained all information required by Rule 3(c)); *Listenbee v. Milwaukee*, 976 F.2d 348, 350–51 (7th Cir. 1992) (motion to extend time qualified as a notice of appeal); *Bell v. Mizell*, 931 F.2d 444 (7th Cir. 1991) (application for certificate of probable cause treated as the notice of appeal).

F. Mandamus

A mandamus petition can provide a litigant an opportunity to challenge some unappealable orders, *In re Barnett*, 97 F.3d 181 (7th Cir. 1996); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1294 (7th Cir. 1995), and to confine a judge or other official to his or

visited 7/26/2008

her jurisdiction. *In Re Page*, 170 F.3d 659, 661 (7th Cir. 1999). But litigants must be mindful that mandamus is an extraordinary remedy reserved for extreme situations. *United States ex rel. Chandler v. Cook* County, 277 F.3d 969, 981 (7th Cir. 2002); *United States v. Byerley*, 46 F.3d 694, 700 (7th Cir. 1995).

As a practical matter, an order that is effectively reviewable cannot be challenged in a mandamus petition. "[T]he possibility of appealing would be a compelling reason for denying mandamus." *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d at 1294. Virtually all interlocutory orders that can be reviewed after entry of a final judgment will preclude mandamus relief since "it cannot be said that the litigant 'has no other adequate means to seek the relief he desires.'" *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980). But on occasion an order that so far exceeds the proper bounds of judicial discretion (such that the district court's action can fairly be characterized as lawless or, at the very least, patently wrong) and cannot be effectively reviewable at the end of the case may satisfy the conditions for mandamus relief. *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d at 1295. The court will not, however, "treat attempted interlocutory appeals as petitions for mandamus when no arguments have been made that would support the issuance of an extraordinary writ." *Simmons v. City of Racine, PFC*, 37 F.3d 325, 329 (7th Cir. 1994).

visited 7/26/2008

VI. Scope of Review

The court of appeals considers questions of fact as well as questions of law. It does not, however, substitute its judgment for the verdict of a jury, or for the findings of a trial judge or an administrative agency; the scope of its factual review is limited to determining whether or not there is sufficient evidence to support the verdict or finding.

When the court reviews cases tried by a judge without a jury, it accords respect to the trial judge's superior opportunity to evaluate the credibility of witnesses, and ordinarily limits itself to reviewing the inferences and legal decisions which have been made. While questions of law are reviewed *de novo*, factual questions are reviewed deferentially and will not be reversed on the facts unless the court concludes that the findings of the district judge are "clearly erroneous." Fed. R. Civ. P. 52(a). Mixed questions of law and fact, where the legal conclusions are based on the application of a legal rule or standard to the facts of the case, are reviewed deferentially for clear error. *See United States v. Spears*, 965 F.2d 262, 270–71 (7th Cir. 1992).

Appellant's counsel must include, in their briefs, a statement of the appropriate appellate standard of review for each separate issue raised in the brief. Fed. R. App. P. 28(a)(9)(B). The statements may be in a separate section preceding the discussion of the issues or as a statement preceding the discussion of each individual issue. The appellee's brief need not include a statement of the standard of review unless the appellee disagrees with the appellant's statement. In that situation the appellee should set forth its contention as to the correct standard of review in its brief. Fed. R. App. P. 28(b)(5).

visited 7/26/2008

VII. MOTIONS AND DOCKET CONTROL

All motions should be filed in accordance with Fed. R. App. P. 27 and 32(c), and other applicable rules with copies served on "all other parties." They may be typewritten and three copies must be filed with the original. Motions in the form of a letter to the clerk or to a judge are not allowed. Fed. R. App. P. 27 , adds a requirement that all legal arguments should be presented in the body of the motion; a separate brief or memorandum must not be filed. Any affidavit in support of a motion should contain only factual information and not legal argument. In the case of a motion for extension of time within which to file a brief, Circuit Rule 26 requires the filing of a supporting affidavit. Motion, affidavit, and proof of service are ordinarily bound together, preferably with the motion on the top. They should be on letter-size paper, 8½" by 11", and double-spaced. The motion should include a caption, the title of the appeal, its docket number, and a brief heading descriptive of the relief sought therein (e.g., "Motion for Extension of Time Within Which to File Appellant's Brief and Appendix"). Any affidavit or other paper necessary to support a motion must be served and filed with the motion. Whenever a motion requests substantive relief, a copy of the trial court's opinion or agency's decision must be attached. A notice of motion is unnecessary.

All motions are decided upon the papers filed, without oral hearing, unless otherwise ordered by the court. Fed. R. App. P. 27(e). Oral hearing is rarely granted. Therefore, it is imperative that counsel attach copies of all documents necessary to decide the motion, particularly in emergency situations. Since the judges rule on numerous motions each week, brevity in motion procedure is becoming increasingly important. A terse and lucid statement of the facts and the relief sought is always to be preferred to a lengthy presentation in both the motion and any accompanying documents. A 1998 amendment establishes a 20 page limit for a motion or a response. Fed. R. App. P. 27(d)(2).

Motions are always to be submitted to the court by filing with the clerk's office. Some procedural motions are decided by court staff. 7th Cir. Oper. Proc. 1(c)(2); Fed. R. App. P 27(b). Most motions will be submitted to and determined by a single judge, referred to as the "motions judge." However, an order that will dismiss or otherwise determine an appeal on the merits requires the agreement of two or more judges. Fed. R. App. P. 27(c).

Procedural motions, such as those for extensions of time, demand no responses; the court will act on them immediately unless it desires a response. Fed. R. App. P. 27(b). A motion for extension of time for filing a brief must be filed at least five days before the due date of the brief. Cir. R. 26. Motions in which time is of the essence, such as those for stay, injunction, or bail, will go to the motions judge or panel of judges immediately. The judge(s) may grant or deny the motion outright, or enter an order requesting a response within a certain period of time. Unless otherwise ordered, an adversary may have ten days to respond to any other type of motion. Fed. R. App. P. 27(a)(3). A timely response

visited 7/26/2008

filed after a ruling will be considered a motion to reconsider. 7th Cir. Oper. Proc. 1(c)(5).

Rule 27 permits a reply to a response; the reply must be filed within seven days after service of the response. Fed. R. App. P. 27(a)(4). As a general matter, a reply should not reargue propositions presented in the motion or present matters that do not relate to the response. A reply is limited to 10 pages.

visited 7/26/2008

VIII. Temporary Relief Pending Appeal

If a party desires to request any relief in the court of appeals before the record can be transmitted, they may request the clerk of the district court, pursuant to Fed. R. App. P. 11(g), to send up any relevant portions of the record. The minimal "short record", which the district court clerk sends to the court of appeals at the time the appeal is filed, consists of certified copies of three items: (1) docket entries, (2) the judgement or order sought to be reviewed, and (3) the notice of appeal as well as the "Seventh Circuit Appeal Information Sheet". Often counsel will designate some other documents, such as findings of fact and conclusions of law, transcripts, affidavits, exhibits, etc., to be included in the "short record". This type of record is ordinarily used in conjunction with motions made in the court of appeals for injunctions or stays pending appeal, or for bail or for reduction of bond pending appeal. Counsel may attach to a motion any necessary documents which have not yet been sent to the clerk, and is required to do so on motions for release. Fed. R. App. P. 9(a) & (b). If, in an emergency, the appealed order is not available, counsel's statement of the reasons given by the district court for its action should be attached to the motion. The motion will usually be considered by a panel of judges but, if time is of the essence, a single judge may determine the motion. Fed. R. App. P. 8(a), 9(a), and 18(a).

If any party deems other parts of the record essential to a fair presentation of the issues, he may request the clerk of the district court to certify and transmit them to the court of appeals. Fed. R. App. P. 11(g).

If time is of the essence, counsel may wish to advise the clerk's office that they will be filing an emergency motion. The motion should explain the necessity for having a quick response and should, if possible, be personally served on the other parties. Counsel should not wait until the last minute to make the request. Counsel should also include copies of all relevant district court orders and documents which the court may need to make a ruling. Cir. R. 8.

Although the Federal Rules of Appellate Procedure do not provide for service by facsimile (FAX) or electronic transmission, counsel should do so in addition to personal service and service by mail in emergency proceedings.

A. *Civil Cases*.

Filing a notice of appeal does not automatically stay the operation of the judgment or order of which review is sought. Application for a stay should be made first to the district court. Fed. R. App. P. 8(a). A stay pending appeal may be conditioned upon the filing of a supersedeas bond in the district court. Fed. R. App. P. 8(a)(2)(E).

visited 7/26/2008

The court will consider the following factors in determining the request for stay or injunction:

(1) the showing of likelihood of success on appeal.
(2) the likelihood of irreparable harm absent the court order.
(3) the harm to other parties from a possible court order.
(4) the public interest.

Hilton v. Braunskill, 481 U.S. 770, 776 (1987); *Glick v. Koenig*, 766 F.2d 265, 269 (7th Cir. 1985), *see also, Bradford-Scott Data Corp. v. Physician Computer Network, Inc.*, 128 F.3d 504, 505 (7th Cir. 1997).

B. *Motions Concerning Custody Pending Trial or Appeal*.

1. *Before sentencing*.

Fed. R. Crim. P. 46 and 18 U.S.C. §§ 3142 and 3143 set forth the criteria governing the release of a defendant before trial, during trial, and after conviction but before sentencing. The order refusing or imposing conditions of release may then be appealed to the court of appeals which may order the release of the defendant pending the appeal. Fed. R. App. P. 9(a); 18 U.S.C. § 3145. Unlike the normal appeal, the defendant, after filing a notice of appeal files a motion and the case is decided upon the motion and response. Cir. R. 9. All requests for relief from custody or from an order granting bail or enlargement shall be by motion accompanied by a memorandum of law. Cir. R. 9(d).

2. *After sentencing*.

Fed. R. Crim. P. 38 allows the district court to stay the execution of a judgment of conviction upon such terms as the court sets. The defendant should initially request release pending appeal or modification of conditions of release in the district court. That court's order may then be reviewed on motion in the pending appeal of the conviction to the court of appeals, pursuant to Fed. R. App. P. 9(b) and 18 U.S.C. § 3145. "All requests for release from custody after sentencing and pending the disposition of the appeal shall be by motion" in the appeal of the conviction; no separate notice of appeal is needed. Cir. R. 9(c).

C. *Administrative Agency Cases*.

Application should be made first to the agency. Fed. R. App. P. 18. If the agency denies relief or does not afford the relief requested, you can then apply to the court of appeals by motion. The motion may be made, on whatever notice is feasible, as soon as the agency

visited 7/26/2008

order is entered. The motion should state what previous application for relief was made and what the result was. Grounds for the relief sought should be stated and the supporting material should be furnished.

visited 7/26/2008

IX. Expedited Appeals

In emergency situations an appeal may be expedited. If there is a need to expedite the appeal, counsel should promptly file the notice of appeal and be willing to file the brief in a severely shortened time period.

In the Seventh Circuit, the usual practice is to move simultaneously for an advancement of hearing and a stay of the judgment or order appealed from if that is necessary. Fed. R. App. P. 8 and 18. *See* Temporary Relief Pending Appeal, Section VIII of this Handbook.

The motion to advance should at a minimum describe the order or judgement appealed and explain why expedited treatment is necessary. If the advancement is granted, whether or not a stay is granted, the appeal will be set for oral argument at an early date even though the time usually permitted to file briefs may not have expired by the day of the hearing. Sometimes an appeal will be submitted to the court for decision without oral argument as a means of expediting. Sometimes expedited scheduling is arranged via a docketing conference held by the court in accordance with Circuit Rule 33. Counsel may request a docketing conference.

visited 7/26/2008

X. Appeals Involving Petitions for Relief
Under 28 U.S.C. § 2254 and § 2255; Death Penalty Cases; Prisoner Litigation

Title I of the "Antiterrorism and Effective Death Penalty Act of 1996", enacted April 24, 1996, made significant amendments to the law affecting actions under 28 U.S.C. §§ 2254 and 2255. The Act also provides special procedures in capital cases. Certificates of appealability are governed by the provisions of new Fed. R. App. P. 22(b). Applications for leave to file a second or successive petition for collateral review are governed by 28 U.S.C. §2244(b) and Circuit Rule 22.2.

The "Prison Litigation Reform Act", enacted April 26, 1996, placed new restrictions on civil litigation by prisoners and made substantial amendments to 28 U.S.C. §1915 and Fed. R. App. P. 24. The Act requires the assessment and collection of a filing fee, even in cases where the prisoner is granted leave to proceed in forma pauperis, and restricts a prisoner's ability to file successive civil actions in federal court.

These new laws made sweeping changes to the law governing habeas corpus and prisoner suits in federal court. There is now a substantial body of case law by the Seventh Circuit and other federal courts interpreting the legislative mandates. Counsel handling appeals in habeas corpus or prisoner civil cases must review the statutes as well as the most recent court rules and case law interpreting them.

Death Penalty Appeals. All death penalty appeals, direct criminal appeals in federal cases, federal collateral attacks under 28 U.S.C. §2255, and state prisoner habeas corpus petitions under 28 U.S.C. §2254, proceed pursuant to the special procedures in Circuit Rules 22 and 22.2. The Antiterrorism and Effective Death Penalty Act of 1996 adds chapter 154 to Title 28 of the U.S. Code and changed the law governing death penalty cases pending as of the date of enactment of the statute (April 24, 1996). Counsel handling death penalty appeals must carefully review the Act and any rules and case law addressing it. Appeals in capital cases are expedited. Therefore, counsel must insure that preliminary matters handled by the district court, such as issuance of a certificate of appealability, motions for leave to proceed on appeal in forma pauperis, and motions for a stay of execution (both in state and federal court) are dealt with quickly. Circuit Rule 22 directs counsel to do several things specific to death cases. Lawyers handling these cases must consult the rule for guidance. Appointed counsel must also consult the court's Criminal Justice Act Plan, 18 U.S.C. §3006A, and 21 U.S.C. §848(q).

visited 7/26/2008

XI. CROSS-APPEALS AND JOINT APPEALS

A. *Cross-Appeals*.

The appellee may, without having to file a cross-appeal, defend a judgment on any ground consistent with the record and not waived, even if the ground is rejected in the lower court. A cross-appeal should not be filed in this instance. *Rose Acre Farms, Inc. v. Madigan*, 956 F.2d 670 (7th Cir. 1992). But an appellee cannot attack the judgment, either to enlarge the appellee's own rights thereunder or to lessen the rights of the adversary unless the appellee files a cross-appeal. *Doll v. Brown*, 75 F.3d 1200, 1207 (7th Cir. 1996); *Tredway v. Farley*, 35 F.3d 288, 296 (7th Cir. 1994). A cross-appeal is necessary when alteration of a judgment is sought, even if the appellee seeks merely to correct an error in the judgment or to supplement the judgment with respect to a matter not dealt with below. *Jordan v. Duff & Phelps, Inc.*, 815 F.2d 429 (7th Cir. 1987). Thus, the court of appeals is often called upon to decide more than one appeal from a single district court judgment.

Where there are cross-appeals, the court designates which party will file the opening brief as the main appellant, generally, the party most aggrieved by the judgment below. *See* 7th Cir. Oper. Proc 8. The court sets a briefing schedule in all cases involving cross-appeals. There will be three briefs filed by the two parties in the cross-appeal situation. The parties will not be allowed to file separate briefs, in each appeal. The brief of the appellee will serve as the answering brief on appellant's appeal and as the main brief on appellee's cross-appeal and should have a red cover. Fed. R. App. P. 28(h). The type volume limitations of a main brief apply to both the opening brief and the combined responsive brief in the main appeal and opening brief in the cross-appeal. Appellant's reply brief, if any, would also incorporate the answering brief on appellee's cross-appeal, is limited to the type volume limitations for reply briefs, is to be filed within 30 days of the cross-appellant's brief and should have a grey cover. Cir. R. 28(d)(1)(a). All docket numbers should be on all briefs. Additional briefing requires leave of court. The court will entertain motions for realignment of the briefing schedule and enlargement of the type volume limit when the norm proves inappropriate. Cir. R. 28(d)(1)(b).

B. *Joint Appeals*

Persons entitled to appeal whose interests are such as to make joinder practicable may file a joint notice of appeal or petition for review. The court may consolidate appeals when parties have filed separate timely notices or petitions. Fed. R. App. P. 3(b) and 15(a). Regardless of the substance of the matter, a separate appeal must be docketed and separate filing and docketing fees paid to the district court clerk for each notice of appeal filed. Cooperation among counsel on the same side is essential in ordering the transcript. *See* Cir. R. 10(a).

visited 7/26/2008

The parties on the same side, or any number of them, may join in a single brief and are encouraged to do so. One party may adopt by reference any part of the brief of another. Fed. R. App. P. 28(i). Parties adopting, in total, the brief of another party should do so by motion. Repetitious statements and arguments are to be avoided and can result in sanctions. *See United States v. Ashman*, 964 F.2d 596 (7th Cir. 1992). If more than one case involves the same question on appeal, they may be ordered by the court to be heard together as one appeal, Fed. R. App. P. 34(d), or the appeal in one may be suspended pending the decision in the other.

visited 7/26/2008

XII. APPEALS IN FORMA PAUPERIS AND COURT-APPOINTED COUNSEL

A. *Appeals In Forma Pauperis.*

The district court and the court of appeals are authorized by 28 U.S.C. § 1915(a), as amended, and Fed. R. App. P. 24 to allow an appeal to be taken without prepayment of fees and costs or security for costs by a party who makes an affidavit that he or she cannot pay them. The affidavit must also state the issues that the party intends to present on the appeal and the party's belief that he or she is entitled to redress. *See* Form 4, Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis, Appendix of Forms to Federal Rules of Appellate Procedure. Form 4 was recently amended to require a great deal more information, including all the information required by the Prison Litigation Reform Act.

Once the district court allows a party to proceed in forma pauperis, the party may continue on appeal in forma pauperis without further authorization unless that court states that the appeal is not taken in good faith or the party's financial status has changed. Application may be made to the court of appeals only after the district court denies leave to proceed on appeal in forma pauperis.

Counsel handling civil litigation for incarcerated litigants must note that on April 26, 1996, Congress enacted the Prison Litigation Reform Act, Pub. L. No. 104–134, Title VIII 110 Stat. 1321, which changed the existing in forma pauperis statute, 28 U.S.C. §1915 to provide for installment payment of filing fees by prisoners. One needs to consult the statute, Fed. R. App. P. 24, and case law interpreting the statute before proceeding with these cases.

Court authorization is needed to obtain the necessary transcript for an indigent appellant. In a criminal case, court-appointed trial counsel should request the preparation of the transcript at the time of the determination of guilt, by filing C.J.A. Form 24 with the district court. If the district judge believes that an appeal is probable, the district judge will order transcription of the parts of the transcript necessary for the appeal. The transcript is to be filed 40 days after the determination of guilt or seven days after sentencing, whichever is later. If the court has not yet ordered the transcript by the time the notice of appeal is filed, counsel must renew the request in the district court immediately after filing the notice of appeal. Counsel for a defendant found guilty and later granted leave to appeal in forma pauperis should request the preparation of a transcript immediately. Cir. R. 10(d)(1). Counsel must utilize the "Seventh Circuit Transcript Information Sheet" as prescribed in Circuit Rule 10(c) when ordering transcripts or certifying that none will be ordered.

visited 7/26/2008

If the appeal is under the Criminal Justice Act, the district court or the court of appeals need only determine that the parts of the transcript requested are necessary to the issues to be raised on appeal. *See* 18 U.S.C. § 3006A(d)(1),(6); Fed. R. App. P. 10(b)(1). In every other in forma pauperis case, the appeal and transcript preparation are conditioned on a determination by the district court or the court of appeals that the appeal is not frivolous and that the transcript sections are necessary to the appeal; request must first be made to the district court. Absent such a determination, the Administrative Office of the United States Courts will not pay for the transcript. *See* 28 U.S.C. § 753(f); Fed. R. App. P. 10(b).

B. *Court-Appointed Counsel Under the Criminal Justice Act.*

Until the passage of the Criminal Justice Act of 1964, 18 U.S.C. § 3006A, lawyers representing indigents were rewarded for their services only by the professional satisfaction of upholding an honorable tradition of the bar. That Act authorized the payment of some compensation to lawyers who represent defendants in criminal cases. The amount of compensation authorized has been increased but it is not meant to equal the rates charged by private counsel. The current rate of compensation for legal services provided after May 1, 2002 is $90 for in-court and out-of-court services, plus allowable expenses. The statutory compensation maximum amount is $3700.00 for direct criminal appeals. The statute also allows compensation for discretionary appointment of counsel in habeas corpus cases, motions to vacate sentences, and certain other proceedings not formerly falling within the terms of the statute. 18 U.S.C. § 3006A(g). The compensation maximum amount for these appeals is $3700.00. Appointed counsel in capital cases need to see 18 U.S.C. § 3006A and 21 U.S.C. § 848(q)(10) which limits attorneys' fees in death penalty cases to $125.00 per hour.

The Criminal Justice Act required each circuit to put into effect a plan for furnishing representation for defendants charged with other than petty offenses who are financially unable to obtain an adequate defense. The Seventh Circuit Plan provides for a panel of attorneys from which counsel will be appointed by the court to represent defendants or other parties covered by the act.

Attorneys wishing their names added to the panel of attorneys may simply write a letter to the clerk of the court. The letter should specify whether counsel would be willing to handle appeals in which compensation is provided under the Criminal Justice Act or appeals in equal employment opportunity and civil rights cases in which no compensation is available. *See Plan, infra*, for specifics. Letters of counsel offering to serve as volunteers will be immediately acknowledged. Appointment to a specific appeal will not be made until some later date, after counsel has first been notified by telephone as to the particular appeal.

visited 7/26/2008

The appointment of counsel on appeal is usually made by the court of appeals a short time after the appeal is docketed. Although the court is free to appoint other counsel, it will usually appoint the attorney who represented the defendant in the district court. The attorney appointed, in a criminal case, by the district court must continue to represent his client on appeal unless and until he or she has been relieved of that responsibility by the court of appeals. *See* Plan, *infra*, and Cir. R. 51(a). A 1998 amendment to Circuit Rule 51(a) changes the past presumption from automatically appointing trial counsel on appeal to allowing trial counsel to withdraw freely and for new counsel to be appointed. Court-appointed counsel wishing to withdraw because the appeal is believed frivolous must consult Circuit Rule 51(b); *Anders v. California*, 386 U.S. 738 (1967); *United States v. Edwards*, 777 F.2d 364 (7th Cir. 1985); and *United States v. Wagner*, 103 F.3d 551 (7th Cir. 1996). The indigent defendant is not entitled to counsel of his choice. *See Oimen v. McCaughtry*, 130 F.3d 809, 811 (7th Cir. 1997). To compensate counsel for prior work on the appeal, the appointment may be made retroactive to include any representation furnished pursuant to the Plan before appointment. However, trial counsel who handles the appeal must file separate vouchers for the representation of the indigent before the trial and appellate courts. Thus there must be a reappointment by the court of appeals if counsel is to be paid under the Act for work on appeal.

The duty of counsel appointed under the Criminal Justice Act in the court of appeals extends through preparing the case for the Supreme Court by filing a petition for a writ of certiorari if the appellant so requests in writing and there are reasonable grounds for filing a petition. *See Plan, infra*. Counsel are paid after appellate representation is finished.

Briefs should not be printed since counsel appointed under the Criminal Justice Act will not be reimbursed for printing. *See* "Plan of the U.S. Court of Appeals for the Seventh Circuit" (Para. VI, Section 4).

In the spring of 1998 and the fall of 2002, the court presented day-long seminars for court-appointed counsel in federal criminal appeals in Chicago, Milwaukee and Indianapolis. Judges, court staff and experienced appellate practitioners covered topics that every practitioner needs to know in representing indigent defendants in criminal appeals. Video tapes of the Chicago program are available for viewing. Counsel may contact staff at the William J. Campbell Library of the United States Courts, or any of its branch libraries throughout the circuit, to check out a set of the videos. Written course materials for any of the programs can be obtained by contacting Donald J. Wall, Counsel to the Circuit Executive.

visited 7/26/2008

C. *Pro Bono Civil Appointments.*

Often counsel will provide representation on appeal after accepting *pro bono* appointment from the district or appellate court in civil cases not falling under the Criminal Justice Act. These attorneys not only provided free legal services to their clients but were also forced to absorb many incidental expenses of appeal.

To recognize the fine appellate representation provided by attorneys who accept *pro bono* civil appointments in the appellate court and district courts of this circuit, the United States Court of Appeals for the Seventh Circuit has implemented an appellate expense reimbursement program. Through this pilot program, the Court hopes to encourage and enable more lawyers to accept *pro bono* appointments and provide much needed appellate representation by providing reimbursement for some of the necessary costs of appeal that lawyers must now absorb. The Court of Appeals will reimburse certain out-of pocket-expenses incurred by appointed counsel providing *pro bono* representation on appeal up to a maximum of $1000.00.

Counsel who are appointed by a district court or the court of appeals and provide *pro bono* representation in the court of appeals may submit, at the conclusion of the appeal, an itemized request for reimbursement of certain necessary appellate expenses. Reimbursable expenses include the cost of reproducing and filing briefs and appendices, telephone charges for collect or long distance calls, and reasonable costs of accommodations and travel to the court for oral argument. All expenses must be supported by a receipt and lodging expenses are subject to the same per diem amounts that apply to Criminal Justice Act appointments. Attorneys should try to keep their expenses to a minimum and always use the most cost effective services. Expenses which are not supported by a receipt or that are deemed to be excessive or unnecessary will not be reimbursed. All requests for reimbursement and supporting documents should be submitted to the Clerk of the Court of Appeals after final disposition of the appeal.

visited 7/26/2008

XIII. General Duties of Counsel In the Court of Appeals

Cases in the court of appeals are governed by the Circuit Rules of the United States Court of Appeals for the Seventh Circuit, the Federal Rules of Appellate Procedure and procedural orders of the court issued in most appeals. Consistent and strict compliance with these rules and court orders is required of all attorneys handling appeals in this court. This enables the court to handle its cases effectively and smoothly, while lack of compliance causes needless delay and can result in dismissal of appeals or disciplinary action.

A. *Settlement*.

Counsel, as an officer of the court, has a professional obligation to discuss with the client and opposing counsel the possibility of settling or otherwise disposing of the appeal without the need of a court decision. An agreed settlement is often superior to the remedy provided by a court decision since it provides a quicker, more certain resolution of the dispute and conserves scarce judicial resources. Counsel should keep the court informed of the progress of all settlement negotiations, especially appeals under advisement or set for oral argument, by filing status reports with the clerk. When settlement becomes reasonably certain, counsel must so advise the clerk so that the court can decide whether to suspend its consideration of the appeal in anticipation of the appeal becoming moot. *See Selcke v. New England Insurance Co.*, 2 F.3d 790, 791 (7th Cir. 1993). Once settlement is complete, counsel should immediately file an appropriate motion with the clerk.

On its own initiative, the court schedules settlement conferences in some appeals. Counsel in civil appeals (other than pro se, prisoner rights, immigration, social security, 28 U.S.C. § 2254 and § 2255 cases) may also request that such a conference be scheduled. Fed. R. App. P. 33; Cir. R. 33; see also Section XVII(E) of this Handbook.

B. *Appearance of Counsel.*

When an appeal is docketed by the court of appeals, the clerk will designate the counsel of record based on the first filed document from a party. *See* Cir. R. 3(d). If an attorney is not representing the party on appeal, he or she should notify the court immediately of this fact in writing by filing a notice of non-involvement. The lawyer seeking non-involvement should also provide address and telephone information for the party, if he or she is proceeding pro se, or for any substitute attorney. If the court is not made aware of counsel's non-involvement and the appeal is not prosecuted pro se or by another lawyer, needless delay ensues and the case may get dismissed. Counsel of record may not withdraw from representation without leave of court unless another attorney of record is simultaneously substituted. Cir. R. 3(d). Trial counsel in all criminal cases must continue their representation on appeal unless relieved of this responsibility by the court of appeals on motion to withdraw. Cir. R. 51(a). Only the court of appeals may

visited 7/26/2008

make appellate appointments or relieve counsel of their duty to handle an appeal. *See also* Appeals In Forma Pauperis and Court-Appointed Counsel, and Duties of Trial Counsel in Criminal Cases, Sections XII and XIV of this Handbook.

C. *Jurisdiction.*

A sizable minority of appeals are dismissed for lack of jurisdiction. Sometimes this occurs after the case has been fully briefed and many hours of staff and judge time have been invested in the case. *All counsel have a duty to ascertain appellate jurisdiction and trial court or administrative agency jurisdiction at the outset of the appeal process*. Thus, Circuit Rule 3(c) requires the early filing of an appellant's docketing statement (which must include a complete jurisdictional statement per Cir. R. 28(a)), either with the notice of appeal in the district court or within seven days thereafter in the court of appeals. Appellees must provide a complete statement on jurisdiction if they believe appellant's statement is not complete and correct. Simply pointing out the deficiencies in one's opponent's brief is not sufficient. Also, counsel are often asked to submit "jurisdictional memoranda" addressing specific problems the court may have flagged. Circuit Rule 28(a) sets forth, in detail, the requirements for a comprehensive jurisdictional summary to be filed with the notice of appeal per Cir. R. 3(c) and with the appellant's brief. An appeal obviously lacking a jurisdictional basis will be considered frivolous. See Section V of this Handbook.

D. *Requirements for Filing Briefs.*

The court of appeals strictly enforces rules involving the timeliness and content of briefs, and the clerk's office will question deficient filings. Counsel should review and follow closely the rules and orders governing this important stage of the appellate process. Briefing schedules in the court of appeals are established in most cases automatically by operation of Cir. R. 31(a) and Fed. R. App. P. 31(a) or by order of the court. Counsel must strictly adhere to all schedules.

If a brief cannot be filed by the date due, counsel must file a motion for extension of time at least five days prior to the due date. These motions are not favored and must be supported by a detailed and complete affidavit in compliance with all provisions of Cir. R. 26. The fact that attorneys are busy and involved in other matters will not justify extensions of deadlines or failure to comply with the court's rules and orders. Attorneys practicing in this court must manage their practices so as to comply with this court's rules and orders. Not doing so can subject counsel to sanctions.

Also important are the form and content requirements for briefs filed in the court of appeals. *See* Fed. R. App. P. 28, 30, 31, 32; Cir. R. 12(b), 26.1, 28, 30, 31, 32 and Section XIX, XX, XXI of this Handbook. Lack of compliance with these rules, or attempts to circumvent them (i.e., using type fonts not allowed under Fed. R. App. P. 32(a), not double spacing, or using improper margins) can result in rejection of the brief by the

visited 7/26/2008

clerk's office or sanctions.

In rare cases, counsel may find that an adequate argument cannot be presented within the type volume limitations of Fed. R. App. P. 32(a)(7). Extra text is allowed only by leave of court. Because of the court's heavy workload and desire for concise and refined briefs, these enlargements are granted only in truly exceptional circumstances. Counsel should file a motion for leave to file an oversize brief well in advance of the due date. These motions are seldom granted and even then only for a specific amount of additional text. Producing an oversized brief before receiving permission can only result in needless delay and unnecessary production costs. The practice of tendering an oversized brief with a motion for leave to file has been unequivocally forbidden by this court. *See United States v. Devine*, 768 F.2d 210 (7th Cir. 1985) (en banc). Generally, a responding party should not need as many pages and such party is not given extra pages simply because the other side was. *Green v. Carlson*, 813 F.2d 863 (7th Cir. 1987).

E. *Requirement That All Appeals and Arguments Be Well Grounded; Sanctions for Frivolous Appeals Under Fed. R. App. P. 38*

Counsel are advised to evaluate their appeal most carefully before proceeding in the court of appeals. Appellants must assure that any argument presented to this court, whether in motions, memoranda, or briefs, is well grounded in both law and fact. Frivolous appeals abuse the right of access to the court, cause needless delay and expense, and can result in sanctions. *See, e.g., Rumsavich v. Borislow*, 154 F.3d 700, 703–704 (7th Cir. 1998).

Federal Rule of Appellate Procedure 38 provides that "[i]f a court of appeals shall determine that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee." Rule 38 is taken most seriously in this circuit. The rule serves to compensate prevailing parties in district courts for defending against meritless arguments on appeal and deters such appeals so that the court has adequate time to consider non-frivolous appeals. *See A.V. Consultants, Inc. v. Barnes*, 978 F.2d 996, 1003 (7th Cir. 1992); *A-Abart Elec. Supply, Inc. v. Emerson Elec. Co.*, 956 F.2d 1399, 1406 (7th Cir. 1992). The court applies a two-part test for Rule 38 sanctions: (1) is the appeal frivolous and (2) are sanctions appropriate. *Lorentzen v. Anderson Pest Control*, 64 F.3d 327, 331 (7th Cir. 1995). An appeal is frivolous if the result is foreordained by a lack of substance of appellant's arguments. *Ashkin v. Time Warner Cable Corp.*, 52 F.3d 140, 146 (7th Cir. 1995); *East St. Louis v. Circuit Court*, 986 F.2d 1142, 1145 (7th Cir. 1993). An appeal that is not necessarily groundless but was filed for an improper purpose, such as delay, is an abuse of process and is also sanctionable under the rule. *In re Hendrix*, 986 F.2d 195, 201 (7th Cir. 1993). Rule 38 sanctions are appropriate if an appeal is perfunctory and makes no more than a cursory effort in challenging the district court's decision, *Clark v. Runyon*, 116 F.3d 275, 279 (7th Cir. 1997), is prosecuted with no reasonable expectation of altering the district court's judgment and for purposes of delay

visited 7/26/2008

or harassment, or out of sheer obstinacy, *Smith v. Blue Cross & Blue Shield United*, 959 F.2d 655, 661 (7th Cir 1992), or when there is some evidence of bad faith. *See Ross v. Waukegan*, 5 F.3d 1084, 1090 (7th Cir. 1993); *Preze v. Board of Trustees, Pipefitters Welfare Fund Local 597*, 5 F.3d 272, 275 n.6 (7th Cir. 1993); *Koffski v. North Barrington*, 988 F.2d 41, 45 n.8 (7th Cir. 1993).

Although Fed. R. Civ. P. 11 does not apply to pleadings filed in the court of appeals, the provisions of that rule prohibiting groundless assertions and allowing severe penalties for noncompliance are looked to in interpreting Fed. R. App. P. 38. *See Sparks v. NLRB*, 835 F.2d 705, 707 (7th Cir. 1987); *Thornton v. Wahl*, 787 F.2d 1151, 1153 (7th Cir. 1986).

Rule 38 sanctions can be imposed either on motion of the appellee or on the court's own motion, and counsel can be sanctioned personally when it is clear that the appellant is not at fault in filing a frivolous appeal. *Osuch v. Immigration & Naturalization Service*, 970 F.2d 394, 396 (7th Cir 1992). Fed. R. App. P. 38 provides that before imposing sanctions, the court will give reasonable notice to the persons that it is contemplating sanctioning and will allow them an opportunity to respond. When appellees request sanctions in their brief, the court will give notice that it is contemplating sanctions and an opportunity to respond before imposing sanctions. *McDonough v. Royal Caribbean Cruises, Ltd.*, 48 F.3d 256, 258 (7th Cir. 1995).

In extreme cases where a litigant has so abused his or her access to the court and monetary or other sanctions have proven ineffective, the court may bar that litigant from filing any pleading (other than as a defendant in a criminal action or habeas corpus action involving the litigant) in any federal court in the circuit. In such case, the court will direct the clerks of federal courts in the circuit not to accept filings from the litigant until the litigant complies with all prior sanction orders. *See Support Systems International, Inc. v. Mack*, 45 F.3d 185 (7th Cir. 1995).

Federal Rule of Appellate Procedure 46(c) authorizes the court to discipline any attorney for conduct unbecoming a member of the bar or for failure to comply with the Federal Rules of Appellate Procedure or any rule of the court. A thoughtful analysis of one's appeal, careful review of the procedural and substantive rules of practice, and compliance with those rules fosters a smooth and effective appeal process. Attorneys practicing in this court must proceed accordingly.

visited 7/26/2008

XIV. Duties of Trial Counsel in Criminal Cases with Regard to Appeals

A. *Counsel Who Does Not Wish To Proceed On Appeal.*

When a convicted defendant wants to appeal and appointed trial counsel wishes to withdraw, counsel is still responsible for representing defendant until relieved by the court of appeals. *See* Cir. R. 51(a) and Plan, *infra*. Circuit Rule 51(a) requires retained trial counsel to continue representation on appeal, unless relieved of this responsibility by the court of appeals. If the defendant lacks funds to pay his previously retained attorney for the appeal, the attorney should file a motion with the district court requesting leave to appeal in forma pauperis. If denied, the motion may be renewed in the court of appeals. If the district court grants the motion, counsel may proceed without further application to the court of appeals. Fed. R. App. P. 24. The court of appeals may then appoint counsel pursuant to the Criminal Justice Act. 18 U.S.C. § 3006A.

Counsel should not move to withdraw until the appeal is docketed. If counsel wishes to withdraw as counsel, a motion in the proper form, pursuant to Fed. R. App. P. 27, must be filed within 10 days of filing of the notice of appeal. Cir. R. 51(c). The motion should set out fully the reasons why permission to change counsel is being sought and contain a proof of service on both the defendant and the appropriate U.S. Attorney. The court of appeals will freely grant such motions and make all appellate appointments. Cir. R. 51(a).

If substitute counsel is retained, the motion to withdraw must show that new counsel has been retained to represent the defendant on appeal. The signed appearance of the new counsel should be tendered with the motion.

Generally the court does not look with favor on the substitution of new counsel, unfamiliar with the record and the issues on appeal, for it is likely to result in appellate delay. Counsel might move to withdraw because of inability to agree with the defendant as to the issues to be argued on appeal, or because after study he finds the appeal to be without merit. In the latter case, counsel must follow the procedure set forth in Circuit Rule 51(b). *See* Withdrawal of Court-Appointed Counsel, Section XV(c) of this Handbook.

If such a motion is granted in the case of an indigent defendant, the court may order the appointment of new counsel from the panel of attorneys maintained by the clerk for that purpose. Compensation will be made under the Criminal Justice Act. 18 U.S.C § 3006A.

No defendant, indigent or otherwise, will be allowed to proceed pro se (on his own behalf) on a criminal appeal except on a clear showing that he insists upon doing so after having been advised of his constitutional right to counsel. If a defendant does so insist,

visited 7/26/2008

counsel must advise the defendant of the brief filing requirements.

B. *Perfecting The Appeal*.

Court-appointed trial counsel must handle the appeal unless relieved by the court of appeals. Retained trial counsel are generally appointed to represent the defendant on appeal if the defendant is no longer able to afford counsel and is granted leave to proceed on appeal in forma pauperis by the district court or the court of appeals. The order of appointment, a Criminal Justice Act voucher, and instructions will be sent to counsel upon appointment. Trial counsel should take the following necessary steps to perfect the appeal:

1. Appointed counsel must request a transcript at the time guilt is determined and must renew that request at sentencing if the district judge has not ordered the transcript prepared. Cir. R. 10(d)(1).

2. Counsel must file a timely notice of appeal and pay the $5.00 filing fee and $100.00 docketing fee to the district court clerk unless defendant has been granted leave to proceed as a pauper. Fed. R. App. P. 3(e).

3. Within 10 days after filing the notice of appeal, retained counsel must order and arrange payment for the transcript or complete the necessary CJA forms. Fed. R. App. P. 10(b); Cir. R. 10(d).

4. Retained and appointed counsel should utilize the prescribed form in ordering transcripts or certifying that none will be ordered. This form, the "Seventh Circuit Transcript Information Sheet," may be obtained from the district court clerk or the court reporter. Cir. R. 10(c).

5. The record (excluding certain types of exhibits and procedural filings) unless ordered by the court of appeals or specifically designated within 10 days of the filing of the notice of appeal, will be prepared by the clerk of the district court and retained until requested by the court of appeals. The clerk of the Eastern Division of the Northern District of Illinois will transmit records to the court of appeals within 14 days after the notice of appeal is filed. Cir. R. 11(a).

6. Counsel must participate in any docketing conference. Cir. R. 33.

7. Counsel must insure the timely transmission of the record to the court of appeals. Fed. R. App. P. 10.

8. Within 7 days after the appeal is filed, counsel must appear and file a docketing statement. Cir. R. 3(c).

visited 7/26/2008

XV. Dismissal of Any Type of Appeal and Withdrawal of Court-Appointed Counsel

A. *Voluntary Dismissal*.

If an appeal has not been docketed, it may be dismissed by the district court on stipulation or upon motion and notice by the appellant. Fed. R. App. P. 42(a). Once docketed in the court of appeals, an appeal may be dismissed in that court on the stipulation of all parties or on motion of appellant. The stipulation or motion should state who is to bear the costs on appeal. Fed. R. App. P. 42(b).

If the appeal is from a criminal conviction, there must be a signed acknowledgment and consent from the defendant in the form of Appendix III to the Circuit Rules. Cir. R. 51(f).

B. *Dismissal For Failure To Perfect Appeal*.

The clerk is authorized to dismiss the appeal if the docketing fee is not paid within 14 days. Cir. R. 3(b). Failure of the appellant to file a brief when due may also result in dismissal of the appeal, Cir. R. 31(c), or the imposition of disciplinary sanctions. Fed. R. App. P. 46(c). Failure to timely file a docketing statement will result in fines or dismissal of the appeal. Cir. R. 3(c)(2). *See also* 7th Cir. Oper. P. 7(a).

C. *Withdrawal of Court-Appointed Counsel*.

Appointed counsel who wishes to withdraw because the appeal is frivolous must file a brief in accord with *Anders v. California*, 386 U.S. 738 (1967), and *United States v. Edwards*, 777 F.2d 364 (7th Cir. 1985), along with a motion to withdraw. The brief should refer to "anything in the record that might arguably support the appeal." *Anders v. California*, 386 U.S. at 744. A motion to withdraw accompanied by a brief which merely certifies that there is nothing in the record which might support an appeal is insufficient and does not comply with *Anders'* prohibition against "no merit" letters. Counsel seeking to withdraw on the ground that there are no non-frivolous grounds for appeal must file a brief which "should (1) identify, with record references and case citations, any feature of the proceeding in the district court that a court or another lawyer might conceivably think worth citing to the appellate court as a possible ground of error; and (2) sketch the argument for reversal that might be made with respect to each such potential ground of error; and (3) explain why counsel nevertheless believes that none of these arguments is non-frivolous." *United States v. Edwards*, 777 F.2d at 366. *See also United States v. Wagner*, 103 F.3d 551 (7th Cir. 1996). The clerk then serves notice on the client along with a copy of counsel's motion and *Anders* brief, who is then given 30 days to file a response. *See* Appendix II to Circuit Rules. This same procedure is to be followed when the appellee moves to dismiss and counsel for the

visited 7/26/2008

appellant believes that any argument that could be made in opposition to that motion would be frivolous. Cir. R. 51(b).

We will grant counsel's motion to withdraw and dismiss the appeal as frivolous if, after an examination of the *Anders* brief, we are satisfied that counsel has conscientiously examined the case and that the issues raised in the *Anders* brief are fully and intelligently discussed but nonetheless are groundless in light of legal principles and rulings. *United States v. Wagner*, 103 F.3d 551, 553 (7th Cir. 1996). The court will not conduct an independent top-to-bottom review of the record in search of additional issues that may not be frivolous. On the other hand, if the *Anders* brief is inadequate on its face, the court will deny the motion and either direct counsel to file a new brief or discharge counsel and appoint a new lawyer for the defendant. *Id*. Preparation of the record, including the transcripts, is necessary for the court to satisfy itself that counsel has been diligent in examining the record for meritorious issues and that the appeal is indeed frivolous.

D. *Dismissal in Pro Se Appeals to Review a Conviction*.

As to a government motion to dismiss a pro se appeal to review a conviction for any reason other than failure to file a brief on time, *see* Cir. R. 51(d) and Appendix II to the Circuit Rules.

E. *Incompetent Appellants*.

As to an incompetent appellant, *see* Cir. R. 51(g).

visited 7/26/2008

XVI. How an Appeal is Taken

The Federal Rules of Appellate Procedure cover the means of access to a United States Court of Appeals, whether by appeal from a district court as a matter of right or with permission or allowance; by appeal from the United States Tax Court; by petition to review or enforce an administrative determination; or by an original proceeding. Fed. R. App. P. 1. The parties on appeal are designated as they appeared in the district court. Depending upon the type of appellate proceedings, the party commencing the appeal is captioned "appellant" or "petitioner" and the adversary, "appellee" or "respondent", respectively. Actions seeking habeas corpus shall be designated Petitioner v. Custodian and not United States ex rel. Petitioner v. Custodian. Cir. R. 12(b). Since this Handbook cannot be exhaustive, parties should also consult the Federal Rules of Appellate Procedure, the Circuit Rules and current case law.

A. *Appellate Jurisdiction*.

Counsel should check to make sure that the court of appeals has jurisdiction to handle the appeal. Common errors include appealing a conviction before sentencing, an order which is not final as to all parties and all claims, and a decision in which no judgment has been entered. *See* Appellate Jurisdiction, Section V of this Handbook.

B. *Civil And Criminal Appeals From The District Court As A Matter Of Right*.

An appeal is taken by filing a notice of appeal with the clerk of the district court within the time prescribed. Fed. R. App. P. 3(a); Cir. R. 3(a). The notice of appeal must state the court to which the appeal is taken, individually name the parties taking the appeal, and designate the judgment or order appealed from. Fed. R. App. P. 3(c). *See* Form 1, Appendix of Forms to Federal Rules of Appellate Procedure. The clerk of the district court notifies the other parties by mail that a notice of appeal has been filed and forwards the notice of appeal (together with a certified copy of the district court docket sheets and a completed copy of the "Seventh Circuit Appeal Information Sheet") to the clerk of the court of appeals. Fed. R. App. P. 3(d); Cir. R. 3(a).

C. *Bond for Costs on Appeal in Civil Cases. Fed. R. App. P. 7*.

The district court may require an appellant to file a bond or provide other security to ensure payment of costs on appeal. A supersedeas bond may include payment for these costs.

D. *Appeals By Permission From Interlocutory Orders of The District Court Under 28 U.S.C. § 1292(b)*.

The petition for permission to appeal must state the controlling question of law which is being appealed, the facts necessary to understand the question, the reasons why there

visited 7/26/2008

is substantial ground for difference of opinion and why an immediate appeal may materially advance the ultimate disposition of the case. *See Ahrenholz v. Bd. of Trustees of the Univ. of Illinois*, 219 F.3d 674 (7th Cir. 2000). The petition must not exceed 20 pages, exclusive of the disclosure statement, proof of service, and other required documents. Fed. R. App. P. 5(c). The order complained of must be included, as well as any related findings, conclusions, or opinion and any order stating the district court's permission to appeal. However, no "original record on appeal" need be certified and transmitted by the district court clerk as in ordinary appeals. No docketing fee is required at that time. The petition for leave to appeal will immediately be placed on the docket by the court of appeals clerk. The adverse party may answer the petition within seven days. Unless otherwise ordered by the court of appeals, the application is submitted without oral argument after the expiration of the seven day period or after the filing of the answer, whichever first occurs. If permission to appeal is granted, a notice of appeal need not be filed. Fed. R. App. P. 5(d). However, the docketing fee must then be paid to the district court clerk and the bond for costs on appeal, if required, must be filed. Both must be done within 10 days after entry of the order granting permission to appeal. Transmitting the record and docketing the appeal then proceed as in other civil appeals. The time for docketing the record runs from the date of the order of the court of appeals granting permission to appeal. That order is, for procedural purposes, analogous to a notice of appeal. Fed. R. App. P. 5(d)(2). Normally, briefing is set by court order.

E. *Bankruptcy Appeals*.

The appeal route is from the bankruptcy court to the district court to the court of appeals. Fed. R. App. P. 6.

F. *Review Of Decisions of The United States Tax Court*.

A notice of appeal, and a $100.00 appellate docketing fee are filed with the Tax Court clerk in Washington, D.C., within the 90 or 120 days prescribed by Fed. R. App. P. 13(a). Filing by mail is permitted. Fed. R. App. P. 13(b). The clerk mails the other parties a copy of the notice of appeal. Fed. R. App. P. 13(c). The content of the notice of appeal is the same as in appeals from district courts. *See* Form 2, Appendix of Forms to Federal Rules of Appellate Procedure. The Tax Court clerk sends a copy of the notice of appeal and docket entries to the clerk of the court of appeals who dockets the appeal.

G. *Review Of Orders Of Certain Administrative Agencies, Boards, Commissions, Or Officers*.

Review of administrative decisions is taken by filing a petition for review, as prescribed by the applicable statute, with the clerk of the court of appeals. Fed. R. App. P. 15(a). The form of petition for review is similar to that of a notice of appeal. *See* Form 3, Appendix of Forms to Federal Rules of Appellate Procedure. The respondent is the appropriate agency, board, or officer, as well as the United States, if so required by

visited 7/26/2008

statute. The original and a copy for each respondent is filed with the court of appeals clerk. By custom the Seventh Circuit requests a minimum of an original and three copies, the same as is required of any motion (*see* Fed. R. App. P. 27(d)). Payment of the $100.00 docketing fee to the court of appeals clerk is required at the time of the filing of the petition for review. The clerk serves each respondent with a copy of the petition but the petitioner himself must serve a copy on all the other parties to the administrative proceeding and file with the clerk a list of those so served. Fed. R. App. P. 15(c). The agency need not file a response to the petition for review.

H. *Enforcement Of Orders Of Certain Administrative Agencies*.

When a statute provides for enforcement of administrative orders by a court of appeals, an application for enforcement may be filed with the court of appeals clerk. Fed. R. App. P. 15(b). The clerk serves the respondent with a copy of the application but the petitioner must serve a copy on all the other parties to the administrative proceeding and file a list of those so served with the clerk. Fed. R. App. P. 15(c). No docketing fee is paid by a governmental agency. A cross-application for enforcement may be filed by the respondent to a petition for review if the court has jurisdiction to enforce the order. Fed. R. App. P. 15(b). The cross-application is filed and docketed as a separate action and payment of a separate docketing fee is required. The matters will be consolidated and heard as one appeal.

1. *Contents and number of copies of application for enforcement; answer required*: An application for enforcement must contain a concise statement describing the proceeding in which the order sought to be enforced was entered, any reported citation of the order, the facts upon which venue is based, and the relief prayed. Fed. R. App. P. 15(b). The original and a copy for each respondent are filed with the court of appeals clerk. Fed. R. App. P. 15(c). The Seventh Circuit requests at least an original and three copies. The respondent must serve and file his answer with the clerk within 20 days; otherwise judgment will be entered for the relief prayed. Fed. R. App. P. 15(b).

I. *Original Proceedings*.

An application for writ of mandamus or prohibition directed to a judge, or a petition for other extraordinary writ, is originated by filing an original and three copies of a petition with the clerk of the court of appeals. The case caption is "In re [name of petitioner]. Fed. R. App. P. 21(a). Proof of service is required on the respondent judge or judges and all parties to the action in the trial court. The papers must conform to the reproduction requirements of Rule 32(a)(1). Fed. R. App. P. 21(d). The clerk does not submit the petition to the court until the prescribed docket fee has been paid. Fed. R. App. P. 21(a). Then the petition is immediately taken to the motions judge without awaiting a response.

visited 7/26/2008

1. *Time prescribed*: Extraordinary writs are usually not issued except in matters of great urgency; no time limit is prescribed.

2. *Contents of the petition*: No record is required; the petition must contain a statement of the issues and of the facts necessary to an understanding of them, the relief sought, and the reasons why the writ should issue. Copies of any opinion or order or other necessary parts of the record must also be included. Fed. R. App. P. 21(a). The ordinary "original record on appeal" is not, however, required.

3. *Further proceedings*: The court may either deny the petition without calling for an answer or call for an answer within a specified time. Relief is ordinarily not granted, except *pendente lite*, without first calling for an answer. The clerk serves the order calling for an answer on the judge or judges named respondents and on all trial court parties. Fed. R. App. P. 21(b). All parties other than petitioners are deemed respondents for all purposes. Ordinarily the party which stands to benefit by the challenged order of the respondent judge will assume the burden of proceeding on behalf of the respondent. Answers filed by respondents must also be served on petitioners. Ordinarily the court will decide the petition on its merits at this point. Occasionally, however, briefs may subsequently be called for and oral argument may even be scheduled.

visited 7/26/2008

XVII. DOCKETING STATEMENT, REPRESENTATION STATEMENT AND DISCLOSURE STATEMENT; DOCKETING CONFERENCE AND SETTLEMENT CONFERENCE

A. *Docketing: Fees And Filing*.

Unless granted leave to appeal in forma pauperis, an appellant must pay his $5.00 filing fee and $100.00 appellate docketing fee to the district court clerk when filing the notice of appeal. The appeal may be dismissed by the clerk of the court of appeals if the docket fee is not paid. Cir. R. 3(b). Federal Rule of Appellate Procedure 12(a) requires that the appeal be immediately docketed upon receipt from the district court of copies of the notice of appeal and the district court docket entries. At that time the matter is assigned a general docket number in numerical sequence separate from the district court docket number that had been assigned to the case. All subsequent filings in the court of appeals must bear that new appellate docket number.

B. *Docketing Statement*.

To enable the court to determine at the earliest possible time whether or not it has jurisdiction of each appeal, whether an appeal is related to other appeals, where an incarcerated party is housed, and who current public officials are in official capacity suits, the appellant is required to file a docketing statement at the earliest possible stage of the appellate process. Circuit Rule 3(c) dictates that the appellant file a docketing statement, which must include such a jurisdictional statement in compliance with Circuit Rule 28(a), with the district court clerk at the time its notice of appeal is filed or with the clerk of the court of appeals within seven days of filing the notice of appeal. The earlier filing with the district court clerk is preferred. The appellee has an obligation to file its own complete docketing statement if it disagrees with the appellant's or determines that it is not complete and correct. If such an appellee's docketing statement is necessary, it is to be filed with the clerk of the court of appeals within 14 days of the filing of the appellant's docketing statement. Cir. R. 3(c). These early filings do not relieve either the appellant or the appellee of their obligations to file jurisdictional statements in their respective briefs pursuant to Circuit Rule 28(a) and (b).

C. *Representation Statement; Disclosure Statement; Corporate Disclosure Statement*.

The attorney who files a notice of appeal must, within 10 days after filing the notice, file a statement with the clerk of the court of appeals naming the parties that the attorney represents on appeal. Fed. R. App. P. 12(b).

Every attorney for a non-governmental party or amicus and any private attorney representing a governmental party must file a disclosure statement/corporate disclosure

visited 7/26/2008

statement no later than 21 days after the docketing of the appeal, at the time of filing the principal brief or upon filing a motion or response in this court (whichever occurs first). The statement must disclose the names of all law firms whose partners or associates have appeared or are expected to appear for the party in this court or any lower court or administrative agency. All non-governmental parties must also: (1) identify any parent corporation; and (2) list any publicly held company that owns 10% or more of the party's stock. A signed original must be filed if the statement is filed before inclusion in the party's brief. Additionally, the statement must be included in the party's principal brief even if earlier filed. Fed. R. App. P. 26.1; Cir. R. 26.1. Parties must file an updated disclosure statement within 14 days of any subsequent change in the information during the course of the appeal.

D. *Docketing Conferences*.

Conferences are sometimes held to work out a schedule for filing the transcript and briefs, to consolidate related appeals, and to examine the court's jurisdiction. These conferences, generally with the counsel to the circuit executive, may be held at the court or by telephone.

E. *Settlement Conferences*.

Pursuant to Fed. R. App. P. 33 and Cir. R. 33, the court schedules settlement conferences in many civil appeals. Counsel, and sometimes the litigants, are directed to meet with one of the court's settlement conference attorneys for the purpose of exploring a voluntary disposition of the appeal. Before the conference counsel are required to review the case thoroughly with their clients and obtain maximum feasible settlement authority. Rule 33 conferences may be conducted in person or by telephone. Counsel in most kinds of civil appeals may also request, individually or jointly, that a Rule 33 conference be convened. Such a request is made by letter or telephone, not by motion, and may be made in confidence. Requests for Rule 33 conferences are accommodated whenever possible. Conferences are not conducted, however, in pro se, prisoner rights, immigration, social security, 28 U.S.C. § 2255, or habeas corpus cases. Good-faith participation in Rule 33 conferences is mandatory. Whether and on what terms to settle is ultimately for the parties to decide. Proceedings under Rule 33 are entirely confidential. Members of the court and their staffs are not informed of what counsel, the parties, and the settlement conference attorney discuss in their efforts to reach a settlement. Inquiries about the court's settlement conference program and requests for Rule 33 conferences should be directed to the Settlement Conference Office, United States Court of Appeals, 219 South Dearborn Street, Chicago, Illinois 60604 (Tel. 312-435-6883/Fax 312-435-6888).

visited 7/26/2008

XVIII. RECORD ON APPEAL

A. *Ordering And Filing The Transcript*.

Within 10 days after filing the notice of appeal, or entry of the district court order disposing of the last timely motion of those listed in Fed. R. App. P. 4(a)(4)(A), whichever occurs last, appellant must order from the court reporter the parts of the transcript not already on file that will be needed on appeal. Fed. R. App. P. 10(b). Counsel and court reporters are to utilize the "Seventh Circuit Transcript Information Sheet," which may be obtained from the district court clerk or the court reporter. If no transcript is needed, they must use the same form and so certify. Cir. R. 10(c). Upon its completion a copy of the form is to be sent immediately to the court of appeals clerk by the court reporter. Counsel in criminal cases should consult Circuit Rule 10(d) and Section XIV of this Handbook.

When less than the entire transcript is ordered, the appellant must file and serve on the appellee a description of the parts to be included and a statement of the issues to be presented on appeal. Appellee has 10 days thereafter to counter-designate additional parts. Note that Circuit Rule 10(e) requires the indexing of all transcripts included in the record on appeal.

If the transcript cannot be completed by the due date, the court reporter must request an extension of time from the clerk of the court of appeals. Fed. R. App. P. 11(b). Requests to extend time for more than 60 days from the date of the ordering of the transcript must include a statement from the trial judge or the chief judge of the district that the request has been brought to the judge's attention and that steps are being taken to insure that all ordered transcripts will be promptly prepared. Cir. R. 11(c)(2).

B. *Transcription Fees*.

The Judicial Conference of the United States has provided that penalties will be assessed against the court reporter if the transcript is not filed within 30 days of being ordered. A court reporter may only bill for 90 percent of the normal fee if the transcript is filed more than 30 days after it is ordered and only 80 percent if it is filed more than 60 days from being ordered. Only the clerk of the court of appeals can grant a waiver of these provisions, and then only upon a showing of good cause by the court reporter.

C. *Composition & Transmission Of Trial Court Record*.

In district court or Tax Court cases, the record on appeal includes the original papers and exhibits and the transcript of proceedings. In addition, a certified copy of the docket entries prepared by the trial court clerk must be included. Fed. R. App. P. 10(a).

visited 7/26/2008

Certain types of exhibits and procedural filings in the trial court will not be included in the record unless specifically designated or ordered by the court of appeals. *See* Fed. R. App. P. 11(b)(2) and Cir. R. 10(a). Counsel should note that in cases on appeal from pre-trial motions such as summary judgement the "briefs and memoranda" excluded by the rule will often include the portions of the record, such as the statements of undisputed material facts, affidavits, exhibits, etc., most critical to the appeal. Counsel proceeding in this court on these types of appeal should always specifically designate those parts of the record necessary for appellate review.

Appellate records from the Eastern Division of the Northern District of Illinois are to be sent to the court of appeals within 14 days of the filing of the notice of appeal. Prepared appellate records from all other courts in the Seventh Circuit are to be temporarily retained in the district court clerk's office until the court of appeals notifies that district court clerk's office that the appeal is ready to be scheduled for oral argument or submission without oral argument. The record is then to be transmitted to the clerk of the court of appeals. Additionally, the parties may agree or the court of appeals may order that the record be sent to the court of appeals at an earlier time, as for use in the resolution of an emergency motion. See Cir. R. 11(a). Counsel should note that briefing dates run from the date the appeal is docketed if the court does not have a conference and set a schedule. Cir. R. 31(a). If not ready when the record is sent to the court of appeals, the transcript is due 30 days after it is ordered by counsel. Later filed transcripts are sent to the court of appeals as soon as they are filed in the district court. Cir. R. 11(b).

The record on appeal, except original exhibits and items under seal, may be withdrawn by counsel for use in preparing the briefs or a petition for rehearing. Such withdrawal must obviously be from the office of the clerk with whom custody resides. It must likewise be timely returned to the clerk's office from which it was withdrawn. Once a panel of judges is assigned to an appeal, the record may not be withdrawn without leave of court. Cir. R. 11(d). Exhibits may be examined in the office of the clerk possessed of the record or physically withdrawn if allowed by court order. A party who has withdrawn the record may not file a brief or petition for rehearing until the record has been returned. Failure to return the record may be treated as contempt of court. Cir. R. 11(d).

The parties should be sure that anything conceivably relevant to the issues on appeal is included in the record. Since the court has the record available to them, an appendix, if filed, should include only the material significant enough that it should be immediately available with the brief. *See* Fed. R. App. P. 30 and Cir. R. 30(a), (b), discussed in Section XXIII of this Handbook. For the rare case in which no transcript is available, *see* Fed. R. App. P. 10(c). For the seldom used procedure whereby parties prepare and sign a statement of the case in lieu of the record on appeal, *see* Fed. R. App. P. 10(d).

If counsel, after the record is filed in the court of appeals, discovers that the record is incomplete, he should seek an agreement of opposing counsel to file a stipulation in the

visited 7/26/2008

district court that a supplemental record be prepared and sent to the court of appeals by the district court clerk. Counsel may also so move in the district court or in the court of appeals. However, if there is a dispute as to what is part of the record, the parties should resolve that in the district court. *See* Fed. R. App. P. 10(e); Cir. R. 10(b). Of course, the record on appeal cannot be supplemented with new evidentiary materials not before the district court. *See Berwick Grain Company, Inc. v. Illinois Dept. of Agriculture*, 116 F.3d 231, 234 (7th Cir. 1997).

D. *Retention Of Record In Trial Court.*

Circuit Rule 11(a) governs the record transmission practices in this circuit. All district court clerk's offices (except the one in Chicago) retain the records on appeal until directed to transmit them to the court of appeals. Counsel preparing briefs and appendices on appeal may withdraw such records from the district court clerk's offices.

The parties may also agree that parts of the record be retained in the trial court. Unless the court of appeals or any party requests their transmittal, those parts of the record will never be sent to the court of appeals. Fed. R. App. P. 11(f). Although not transmitted they are still considered part of the records before the court of appeals.

E. *Composition And Transmission Of Administrative Record.*

Within 40 days of the filing of the petition for review or application for enforcement (unless the statute authorizing review fixes a different time), the agency must transmit the record, or a certified list of what is included in the record, to the court of appeals. Fed. R. App. P. 17(a), (b). The record on review consists of the order sought to be reviewed or enforced, the findings or report on which it is based, and the pleadings, evidence, and transcript of proceedings before the agency. Fed. R. App. P. 16(a). A 1998 amendment permits the filing of less than the entire record even when the parties do not agree as to which part should be filed; each party can designate the parts that it wants filed; the agency then sends the parts designated by each party. Fed. R. App. P. 17(b). The record may be corrected or supplemented by stipulation or by order of the court of appeals. Fed. R. App. P. 16(b). The National Labor Relations Board usually follows this latter procedure. The parties may also stipulate to dispense with the filing of the certified list. Fed. R. App. P. 17(b). However, where the record itself is not filed the appendix must contain a copy of the parts of the record the court will need to see in order to review the case. *See United States Steel Corp. v. Train*, 556 F.2d 822, 839, n.24 (7th Cir. 1977).

F. *Sealed Items In The Record.*

In November 2000 the court enacted a new operating procedure number 10 regarding record items held under seal. Except to the extent portions of the record are required to be sealed by statute (e.g., 18 U.S.C. §3509(d)) or a rule of procedure (e.g., Fed. R. Crim. P. 6(e), Circuit Rule 26.1(b)), every document filed in or by this court (whether or not the

visited 7/26/2008

document was sealed in the district court) is in the public record unless a judge of this court orders it to be sealed. Documents sealed in the district court will be maintained under seal in this court for 14 days, to afford time to request the approval required. 7th Cir. Oper. P. 10. Any party that wants a document which was sealed by the district court to remain under seal in the court of appeals must immediately make an appropriate motion in the court of appeals. Such sealing is no longer automatic so counsel must demonstrate sufficient cause, with specificity, in their motion for sealing items.

visited 7/26/2008

XIX. WRITING A BRIEF

Federal Rule of Appellate Procedure 28(a) sets forth specifically the appropriate subdivisions, and their sequence, of a brief. These requirements have been supplemented by Circuit Rules 12(b), 26.1, 28, 30, and 52. Note that Fed. R. App. P. 32 and Cir. R. 32 severely shortens the page limitations for briefs unless the brief meets strict type face and "type volume limitations" and counsel certifies compliance. Counsel must assure that the required subdivisions are provided under an appropriate heading and in the proper sequence. The clerk's office strictly enforces this rule and non-complying briefs may be rejected.

The judges must rely on the opposing advocates to state the facts of record, point out the applicable rules of law, and make them aware of the equities of a particular case. Most appeals are decided largely on the basis of the briefs.

In writing the brief, one must bear in mind that the Seventh Circuit judges read the briefs in advance of oral argument. Thus, it is the first step in persuasion, as well as being by far the more important step. After oral argument, it is usually reexamined by the judges and will be used in the writing of the opinion.

In general the briefs should contain all that the judges will want to know, including references to anything other than the briefs that may have to be consulted in the record or in the precedents.

Pursuant to Fed. R. App. P. 28(a), an appellant's principal brief must contain the following sections in the order indicated (appellees' opening briefs also must comply subject to the exceptions of Fed. R. App. P. 28(b)):

a. A disclosure statement, if required. *See* Fed. R. App. P.26.1, Cir. R. 26.1.

b. A table of contents, with page references.

c. A table of authorities-cases (alphabetically arranged), statutes, and other authorities, with page references for each section and citation.

d. A concise and comprehensive jurisdictional statement in the appellant's or petitioner's brief explaining the statutory basis for appellate and district court jurisdiction. Fed. R. App. P. 28(a)(4); Cir. R. 28(a). Circuit Rule 28(a) is very extensive and specific as to the contents of the statement of jurisdiction. It must be consulted. The appellee or respondent must check the appellant/petitioner's statement of jurisdiction to see if it complies with Rule 28. If it does not, the appellee/respondent must explicitly state that the appellant's jurisdictional statement is "not complete and correct" and include a complete and correct statement of jurisdiction in its brief, not merely point out the incorrect portion. Cir. R. 28(b). *See Freeman v. Mayer*, 95

visited 7/26/2008

F.3d 569, 571 (7th Cir. 1996).

e. A statement of the issue or issues presented for review. This requires careful selection and choice of language. An appellee or respondent need not state the issues unless dissatisfied with appellant's or petitioner's statement. See Fed. R. App. P. 32(a)(4) for proper form.

The main issue should be stressed and an effort made to present no more than two or three questions. The questions selected should be stated clearly and simply.

Examples:

(1) Which court, the district court or the court of appeals, has jurisdiction to review certain regulations promulgated under the Federal Water Pollution Control Act of 1972, 33 U.S.C. §§ 1251-1376?

(2) Whether police officers' removal of heroin from the defendant's automobile after stopping him for a traffic violation and the subsequent introduction of the heroin at trial violated his rights under the Fourth Amendment?

(3) Whether a private cause of action for damages against corporate directors is to be implied in favor of a stockholder under 18 U.S.C. § 610, which makes it an offense for a corporation to make "a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors . . . are to be voted for?"

(4) Whether state regulations that permit welfare payments to workers on strike are inconsistent with and, therefore, precluded by
(a) federal labor policy (cite statute and regulations)?
(b) federal welfare policy (cite statute and regulations)?

(5) Was there a material issue of fact as to whether the contract had been revoked which precluded summary judgment?

On occasion, although not usually, the questions may be better understood, or stated more simply, if preceded by an introductory factual paragraph.

As you can see, the given examples are concise without being vague or too general. The following issues are not well stated. Did the district court err in granting [failing to grant] a directed verdict? Was summary judgment properly granted? Was there sufficient evidence to support the jury's verdict? Did the order obtained by the prosecutors after indictment requiring defendant Doe to furnish evidence directly to the prosecutors grant the government a mode and manner of discovery not sanctioned by the law and in violation of the Fourth, Fifth, Sixth, and

visited 7/26/2008

Fourteenth Amendment rights of defendant Doe, thereby rendering evidence relating thereto as inadmissible?

f. A concise statement of the case indicating the nature of the case, the course of proceedings, and the disposition in the court below. The appellee or respondent may omit this section from its brief if satisfied with appellant's or petitioner's statement.

g. A concise and objective statement of the facts relevant to the issues presented for review. Every fact must be supported by a reference to the page or pages of the record or appendix where the fact appears. Fed. R. App. P. 28(e). The statement must be a fair summary without argument or comment. Cir. R. 28(c).

The statement should be a narrative chronological summary, rather than a digest or an abstract of what each witness said. The judges view the statement of facts as a very important part of the brief. Great care should be taken that the facts are well marshaled and stated. If this is done, the facts themselves will often develop the relevant and governing points of law. An effective statement summarizes the facts so that the reader is persuaded that justice and the precedents both require a decision for the advocate's client. While Fed. R. App. P. 28(b) provides that the appellee need not make any statement of the case or of the facts unless controverting that of the appellant, the appellee should present a statement if the appellee believes that the relevant facts have not been fairly presented by the appellant or that the appellant has omitted or stated them incorrectly.

A long factual statement should be suitably divided by appropriate headings. Nothing is more discouraging to the judicial reader than a great expanse of print with no guideposts and little paragraphing. Short paragraphs with topic sentences and frequent headings and subheadings assure that the court will follow and understand the points that are being made.

h. 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 not merely a repeat of the argument headings. For longer summaries it is useful to the court that the summary include references to the pages of the brief at which the principal contentions are made. Fed R. App. P. 28(a)(8).

i. A statement of the appellate standard of review. The brief must contain a statement of the standard of review for each individual issue raised. Fed. R. App. P. 28(a)(9)(B). This can be a separate section or precede each argument depending on how it is best presented to the reader. If the appellee or respondent disputes appellant's or petitioner's statement, appellee's or respondent's brief should contain a statement of the standard of review.

visited 7/26/2008

j. The argument. It should be suitably broken up into the main points with appropriate headings and contain the reasons in support of one's position, including an analysis of the evidence, if that is called for, and a discussion of the authorities. Where possible, the emphasis should be on reason, not merely on precedent, unless a particular decision is controlling. A few good cases on point, with a sufficient discussion of their facts to show how they are relevant, are preferred over a profusion of citations. Quotations should be used sparingly. If a case is worth citing, it usually has a quote which will drive the point home, and one or two good cases are ordinarily sufficient. If the case cited does not have a good quote, a terse summary in a sentence or two will show the court that the case should be read. A long discussion of the facts of the cases cited is usually not needed, except where there is a precedent so closely on point that it must be distinguished if the party is to prevail. The pertinent part of relevant statutes or regulations, with citations to the United States Code, Code of Federal Regulations, or state statutory compilation should be set out in the brief. If these are voluminous, they should be incorporated in the appendix. Fed. R. App. P. 28(f)

Where state law is applicable, the federal courts must take the law as it has been laid down by the state courts. The state court interpretation of state law will control and a federal court cannot disregard state decisions even though it may disagree with them. However, if the law of the state appears to be uncertain, it is desirable not to confine discussion of the law to the particular state involved if helpful precedents exist elsewhere. For certifying question of state law, *see* Cir. R. 52 and discussion, *infra* at Section XXII of this Handbook. References to and quotations from law reviews and legal writers are always permissible and desirable.

The brief writer should never forget that the judges are reading the briefs in six cases in preparation for each day of oral argument. The writer must select what is important and deal only with that; all that is not necessary should be ruthlessly discarded. Except in unusually complicated cases, a brief that treats more than three or four matters runs a serious risk of becoming too diffused and giving the overall impression that no one claimed error can be very serious.

The appellee's brief should squarely meet the appellant's points. The same care should be taken by the appellee to avoid diffusion and yet present all substantial additional arguments available in support of the judgment below. Finally, a reply brief shall be limited to matters in reply. New arguments raised for the first time in a reply brief may be stricken and deemed waived.

The writing style in a brief should be simple, graceful, and clear. To achieve these qualities, the writer will usually need to revise carefully the initial draft and subsequent drafts. The court prefers that italics, underlining, bolding and

visited 7/26/2008

footnotes be used sparingly and all caps should not be used in headings. Accuracy is imperative in statements, record references, citations, and quotations.

k. A short concluding paragraph stating the exact relief that the party is seeking on appeal.

l. A certification that the type-volume limitation of Fed. R. App. P. 32(a)(7) has been complied with.

m. Appendix. *See* Circuit Rule 30 and discussion *infra* at Section XXIII of this Handbook. Note particularly the requirement of Circuit Rule 30(d) of a statement that all required materials are in the appendix. Counsel should err on the side of inclusion, especially of relevant statutes or decisions claimed to be controlling.

n. Amicus briefs. An amicus brief need not comply with Fed. R. App. P. 28, but nonetheless must include the following sections: a table of contents; a table of authorities cited; a concise statement of the identity of the amicus; its interest in the case and the source of its authority to file; an argument; and a Rule 32(a)(7) certification. Additionally, the cover of the brief must identify the party supported and indicate whether the amicus supports affirmance or reversal. Fed. R. App. P. 29(c).

visited 7/26/2008

XX. REQUIREMENTS AND SUGGESTIONS FOR TYPOGRAPHY IN BRIEFS AND OTHER PAPERS

Federal Rule of Appellate Procedure 32 contains detailed requirements for the production of briefs, motions, appendices, and other papers that will be presented to the judges. Rule 32 is designed not only to make documents more readable but also to ensure that different methods of reproduction (and different levels of technological sophistication among lawyers) do not affect the length of a brief. The following information may help you better understand Rule 32 and associated local rules. The Committee Note to Rule 32 provides additional helpful information.

This section of the handbook also includes some suggestions to help you make your submissions more legible—and thus more likely to be grasped and retained. In days gone past lawyers would send their work to printers, who knew the tricks of that trade. Now composition is in-house, done by people with no education in printing. Some of the printer's toolkit is simple to use, however. Subsection 5, below, contains these hints.

1. Rule 32(a)(1)(B) requires text to be reproduced with "a clarity that equals or exceeds the output of a laser printer." The resolution of a laser printer is expressed in dots per inch. First generation laser printers broke each inch into 300 dots vertically and horizontally, creating characters from this 90,000-dot matrix. Second generation laser printers use 600 or 1200 dots per inch in each direction and thus produce a sharper, more easily readable output; commercial typesetters use 2400 dots per inch.

Any means of producing text that yields 300 dots per inch or more is acceptable. Daisy-wheel, typewriter, commercial printing, and many ink-jet printers meet this standard, as do photocopies of originals produced by these methods. Dot matrix printers and fax machines use lower resolution, and their output is unacceptable. Although Rule 32(a) applies only to briefs and motions, we urge counsel to maintain this standard of clarity in appendices. A faxed copy of the district court's opinion, or text from Lexis or Westlaw printed by a dot-matrix printer, is needlessly hard to read. Use photocopies of the district court's original opinion and other documents in the record.

2. Rule 32(a)(5) distinguishes between proportional and monospaced fonts, and between serif and sans-serif type. It also requires knowledge of points and pitch.

Proportionally spaced type uses different widths for different characters. Most of this handbook is in proportionally spaced type. A monospaced face, by contrast, uses the same width for each character. Most typewriters produce monospaced type, and most computers also can do so using fonts with names such as "Courier," "Courier New," or "Andale Mono." The rule leaves to each lawyer the choice between proportional and monospaced type.

visited 7/26/2008

> This sentence is in a proportionally spaced font; as you can see, the m and i have different widths.
>
> `This sentence is in a monospaced font; as you can see, the m and i have the same width.`

Serifs are small horizontal or vertical strokes at the ends of the lines that make up the letters and numbers. The next line shows two characters enlarged for detail. The first has serifs, the second does not.

Y Y

Studies have shown that long passages of serif type are easier to read and comprehend than long passages of sans-serif type. The rule accordingly limits the principal sections of submissions to serif type, although sans-serif type may be used in headings and captions. This is the same approach magazines, newspapers, and commercial printers take. Look at a professionally printed brief; you will find sans-serif type confined to captions, if it is used at all.

> This sentence is in New Century Schoolbook, a proportionally spaced font with serifs. Baskerville, Bookman, Caslon, Garamond, Georgia, and Times are other common serif faces.
>
> This sentence is in Helvetica, a proportionally spaced sans-serif font. Arial, Eurostile, Trebuchet, Univers, and Verdana are other common sans-serif faces.

Variations of these names imply similar type designs.

Type must be large enough to read comfortably. For a monospaced face, this means type approximating the old "pica" standard used by typewriters, 10 characters per horizontal inch, rather than the old "elite" standard of 12 characters per inch. Because some computer versions of monospaced type do not come to exactly 10 characters per inch, Rule 32(a)(5)(B) allows up to 10½ per inch, or 72 characters (including punctuation and spaces) per line of type.

Proportionally spaced characters vary in width, so a limit of characters per line is not practical. Instead the rules require a minimum of 12-point type. Circuit Rule 32 permits the use of 12-point type in text and 11-point type in footnotes; Fed. R. App. P. 32(a)(5)(A) standing alone would have required you to use 14-point type throughout.

"Point" is a printing term for the height of a character. There are 72 points to the inch, so capital letters of 12-point type are a sixth of an inch tall. This advice is in 12-point type. Your type may be larger than 12 points, but it cannot be smaller. See Circuit Rule 32(b). Word processing and page layout programs can expand or condense the type using tracking controls, or you may have access to a condensed version of the face (such as Garamond Narrow). Do not use these. Condensed type is prohibited by Rule 32(a)(6). It offers no benefit to counsel under an approach that measures the length of briefs in

visited 7/26/2008

words rather than pages, and it is to your advantage to make the brief as legible as possible.

This is 9-point type.

This is 10-point type.

This is 11-point type.

This is 12-point type.

This is 12-point type, condensed. Condensed type is not acceptable.

This is 13-point type.

This is 14-point type.

3. Rule 32(a)(6) provides that the principal type must be a plain, roman style. In other words, the main body of the document cannot be bold, italic, capitalized, underlined, narrow, or condensed. This helps to keep the brief or motion legible. Italics or underlining may be used only for case names or occasional emphasis. Boldface and all-caps text should be used sparingly.

4. Rule 32(a)(7) determines the maximum length of a brief. It permits you to present as much argument as a 50-page printed brief. The variability of proportionally spaced type makes it necessary to express this length in words rather than pages. Other rules extend this approach to other documents. For example, Fed. R. App. P. 29(d) provides that an *amicus* brief may be no more than half the length allowed by Rule 32(a)(7).

Lawyers who choose monospaced type may avoid word counts by counting lines of type. Unless the brief employs a lot of block quotes or footnotes it will be enough to count pages and multiply by the number of lines per page. (Fifty pages at 26 lines per page is 1,300 lines.) The line-count option is not available when the brief uses proportional type.

Principal briefs of 30 pages or less, and reply briefs of 15 pages or less, need not be accompanied by a word or line count. Think of Rule 32(a)(7)(A) as a safe harbor. Lawyers who need more should use Rule 32(a)(7)(B). A brief that meets the type volume limitations of Rule 32(a)(7)(B) is acceptable without regard to the number of pages it contains.

5. What has gone before has been a description of requirements in Fed. R. App. P. 32 and Circuit Rule 32. Now we turn to advice, offered for mutual benefit of counsel seeking to make persuasive presentations and judges who want the most legible briefs so that they can absorb what counsel have to offer. Nothing in what follows is mandatory.

Typographic decisions should be made for a purpose. *The Times of London* chose the typeface Times New Roman to serve an audience looking for a quick read. Lawyers don't want their audience to read fast and throw the document away; they want to maximize retention. Achieving that goal requires a different approach—different typefaces, different column widths, different writing conventions. Briefs are like books rather than newspapers. The most important piece of advice we can offer is this: read some good books and try to make your briefs more like them.

visited 7/26/2008

This requires planning and care. A business consultant seeking to persuade a client prepares a detailed, full-color presentation using the best available tools. An architect presenting a design idea to a client comes with physical models, presentations in software, and other tools of persuasion. Law is no different. Choosing the best type won't guarantee success, but it is worth while to invest some time in improving the quality of the brief's appearance and legibility.

Judges of this court hear six cases on most argument days and nine cases on others. The briefs, opinions of the district courts, essential parts of the appendices, and other required reading add up to about 1,000 pages per argument session. Reading that much is a chore; remembering it is even harder. You can improve your chances by making your briefs typographically superior. It won't make your arguments better, but it will ensure that judges grasp and retain your points with less struggle. That's a valuable advantage, which you should seize.

Two short books by Robin Williams can help lawyers and their staffs produce more attractive briefs. *The PC is not a Typewriter* (1990), and *Beyond the PC is not a Typewriter* (1996), contain almost all any law firm needs to know about type. These books have counterparts for the Mac OS: *The Mac is not a Typewriter* and *Beyond the Mac is not a Typewriter*. Larger law firms may want to designate someone to learn even more about type. For this purpose, Robert Bringhurst, *The Elements of Typographic Style,* offers the same value for a brief's layout and type as Strunk & White's *The Elements of Style* and Bryan A. Garner's *The Elements of Legal Style* do for its content. Ruth Anne Robbins, *Painting with print: Incorporating concepts of typographic and layout design into the text of legal writing documents*, 2 J. Ass'n Legal Writing Directors 108 (2004), sums up much of this learning with special reference to legal documents. For the convenience of counsel (and with the permission of Professor Robbins) a copy of this article is posted on the court's web site.

Another way to improve the attractiveness and readability of your brief or motion is to emulate high-quality legal typography. The opinions of the Supreme Court, and the briefs of the Solicitor General, are excellent models of type usage. The United States Reports are available online in Acrobat versions that retain all of their original typography. You can find them at <http://www.supremecourtus.gov/opinions/boundvolumes.html>. Briefs of the Solicitor General also are available online in Acrobat versions. Go to <http://www.usdoj.gov/osg/briefs/search.html>. The Supreme Court's opinions and the SG's briefs follow all of the conventions mentioned below, as do the printed opinions of the Seventh Circuit.

Herewith some suggestions for making your briefs more readable.

• Use proportionally spaced type. Monospaced type was created for typewriters to cope with mechanical limitations that do not affect type set by computers. With electronic type it is no longer necessary to accept the reduction in comprehension that goes with monospaced letters. When every character is the same width, the eye loses valuable cues that help it distinguish one letter from another. For this reason, no book or magazine is set in monospaced

visited 7/26/2008

type. If you admire the typewriter look, choose a slab-serif face with proportional widths. Caecilia, Clarendon, Lucida, Officina Serif, Rockwell, and Serifa are in this category.

• Use typefaces that were designed for books. Both the Supreme Court and the Solicitor General use Century. Professional typographers set books in New Baskerville, Book Antiqua, Calisto, Century, Century Schoolbook, Bookman Old Style and many other proportionally spaced serif faces. Any face with the word "book" in its name is likely to be good for legal work. Baskerville, Bembo, Caslon, Deepdene, Galliard, Jenson, Minion, Palatino, Pontifex, Stone Serif, Trump Mediäval, and Utopia are among other faces designed for use in books and thus suitable for brief-length presentations.

Use the most legible face available to you. Experiment with several, then choose the one you find easiest to read. Type with a larger "x-height" (that is, in which the letter x is taller in relation to a capital letter) tends to be more legible. For this reason faces in the Bookman and Century families are preferable to faces in the Garamond and Times families. You also should shun type designed for display. Bodoni and other faces with exaggerated stroke widths are effective in headlines but hard to read in long passages

Professional typographers avoid using Times New Roman for book-length (or brief-length) documents. This face was designed for newspapers, which are printed in narrow columns, and has a small x-height in order to squeeze extra characters into the narrow space. Type with a small x-height functions well in columns that contain just a few words, but not when columns are wide (as in briefs and other legal papers). In the days before Rule 32, when briefs had page limits rather than word limits, a typeface such as Times New Roman enabled lawyers to shoehorn more argument into a brief. Now that only words count, however, everyone gains from a more legible typeface, even if that means extra pages. Experiment with your own briefs to see the difference between Times and one of the other faces we have mentioned.

• Use italics, *not* underlining, for case names and emphasis. Case names are not underlined in the United States Reports, the Solicitor General's briefs, or law reviews, for good reason. Underlining masks the descenders (the bottom parts of g, j, p, q, and y). This interferes with reading, because we recognize characters by shape. An underscore makes characters look more alike, which not only slows reading but also impairs comprehension.

• Use real typographic quotes (" and ") and real apostrophes ('), not foot and inch marks. Reserve straight ticks for feet, inches, and minutes of arc.

• Put only one space after punctuation. The typewriter convention of two spaces is for monospaced type only. When used with proportionally spaced type, extra spaces lead to what typographers call "rivers"—wide, meandering areas of white space up and down a page. Rivers interfere with the eyes' movement from one word to the next.

• Do not justify your text unless you hyphenate it too. If you fully justify unhyphenated text, rivers result as the word processing or page layout program adds white space between words so that the margins line up.

visited 7/26/2008

• Do not justify monospaced type. Justification is incompatible with equal character widths, the defining feature of a monospaced face. If you want variable spacing, choose a proportionally spaced face to start with. Your computer *can* justify a monospaced face, but it does so by inserting spaces that make for big gaps between (and sometimes within) words. The effects of these spaces can be worse than rivers in proportionally spaced type.

• Indent the first line of each paragraph ¼ inch or less. Big indents disrupt the flow of text. The half-inch indent comes from the tab key on a typewriter. It is never used in professionally set type, where the normal indent is one em (the width of the letter "m").

• Cut down on long footnotes and long block quotes. Because block quotes and footnotes count toward the type volume limit, these devices do not affect the length of the allowable presentation. A brief with 10% text and 90% footnotes complies with Rule 32, but it will not be as persuasive as a brief with the opposite ratio.

• Avoid bold type. It is hard to read and almost never necessary. Use italics instead. Bold italic type looks like you are screaming at the reader.

• Avoid setting text in all caps. The convention in some state courts of setting the parties' names in capitals is counterproductive. All-caps text attracts the eye (so does boldface) and makes it harder to read what is in between—yet what lies between the parties' names is exactly what you want the judge to read. All-caps text in outlines and section captions also is hard to read, even worse than underlining. Capitals all are rectangular, so the reader can't use shapes (including ascenders and descenders) as cues. Underlined, all-caps, boldface text is almost illegible.

One common use of all-caps text in briefs in argument headings. Please be judicious. Headings can span multiple lines, and when they are set in all-caps text are very hard to follow. It is possible to make headings attractive without using capitals. Try this form:

visited 7/26/2008

ARGUMENT

I. The Suit is Barred by the Statute of Limitations

A. Perkins had actual knowledge of the contamination more than six years before filing suit

This form is harder to read:

ARGUMENT

I. THE SUIT IS BARRED BY THE STATUTE OF LIMITATIONS

A. *Perkins had actual knowledge of the contamination more than six years before filing suit*

If you believe that italics and underscores are important to getting your idea across, try something like this (replacing underlining with a rule line beneath the text):

ARGUMENT

I. The Suit is Barred by the Statute of Limitations

A. Perkins had actual knowledge of the contamination more than six years before filing suit

visited 7/26/2008

XXI. FILING AND SERVING BRIEFS

Listed below are the technical and procedural requirements pertaining to briefing the appeal. The required contents of briefs are set out in Fed. R. App. P. 28 and Circuit Rules 26.1, 28, 31 and 32. The requirements and suggestions for brief writers appear, *supra* at Sections XIX and XX of this Handbook. If in doubt, counsel should check the court's web site for checklists and sample documents. Counsel are encouraged to contact the clerk's office for assistance if this handbook or the court's web site does not provide the information that counsel is seeking.

A. *Time for Filing and Serving Briefs*.

Briefs must be filed and served as set forth in the scheduling order. If there has been no scheduling order, the appellant or petitioner has 40 days from the docketing of the appeal to file and serve his brief even if the record was incomplete at the time that the appeal was docketed. Cir. R. 31(a). The opening brief in any petition for review or application for enforcement of an order of an administrative agency (in NLRB applications for enforcement, the private party - respondent files the first brief) is due 40 days from the filing of the administrative record or certified list of the record. Fed. R. App. P. 31(a).

The appellee or respondent then has 30 days from the service of the opening brief to file and serve a brief. Within 14 days after service of the appellee's or respondent's brief and at least three days before oral argument, appellant or petitioner may file and serve a reply brief. Fed. R. App. P. 31(a).

In cross-appeals a three brief schedule is established by court order, usually as follows: (1) the appellant files an opening brief in the main appeal; (2) the appellee-cross-appellant files a combined responsive brief in the main appeal and opening brief in the cross-appeal 30 days later; and (3) the appellant-cross-appellee files a combined reply brief in the main appeal and responsive brief in the cross-appeal 30 days later. Cir. R. 28(d)(1). The scheduling order usually will call on the party principally aggrieved by the judgment to file the opening brief. The court will entertain motions to realign briefing or increase the volume of text allowed when the norm established by the rule proves inappropriate.

A party who has a set number of days to file a responsive brief or other document in response to a document served on him by mail will have three additional days. For example, if service of appellant's or appellee's brief is by mail, the appellee or appellant has three additional days to file his responsive brief. If appellant's brief is filed by mail on the 40th day, the appellee's brief is due 33 days thereafter. Fed. R. App. P. 26(c). However, when the due dates for briefs are set by order of the court, this provision of Fed. R. App. P. 26(c) does *not* apply. All briefs are due by the dates ordered.

visited 7/26/2008

Only briefs are considered filed for purposes of the rules on the date that they are mailed. Fed. R. App. P. 25(a). For administrative efficiency the brief is filed as of the date of receipt (if there is compliance with all other prerequisites). Briefs are not back-dated for filing by the court of appeals clerk's office. All other documents, including petitions for rehearing, are considered filed only upon actual receipt by the clerk of the court.

A brief or other document due on a Saturday, Sunday, or holiday is due on the next business day. Fed. R. App. P. 26(a).

B. *Extension Of Time*.

Extensions of time to file briefs are not favored. A motion for an extension, with supporting affidavits and proof of service on opposing counsel, must be filed at least five days before the brief is due. Cir. R. 26. An original and three copies are required. Fed. R. App. P. 27(d). The motion and affidavit shall set forth with specificity the due date for the brief, any previous requests for extension of time and the court's ruling on each request, the date for which the appeal is scheduled for oral argument, if it is scheduled, and facts that establish why, with due diligence and priority given to the preparation of the brief, it will not be possible to file the brief on time. In criminal or other cases in which such information is pertinent, the custodial status and bail conditions of the party must be set forth in the affidavit.

Consult Circuit Rule 26 for grounds which may merit consideration. The court strictly enforces the provision of this rule and failure to comply can result in dismissal of the appeal or disciplinary sanctions.

C. *Failure Of A Party To Timely File A Brief*.

If appellant's retained counsel fails to file a brief, the clerk enters an order directing counsel to show cause within 14 days why the appeal should not be dismissed. If counsel is court-appointed or retained in a criminal appeal, the clerk enters an order directing counsel to show cause within 14 days why disciplinary action should not be commenced. Fed. R. App. P. 46(c); Cir. R. 31(c). If the appellee fails to file a brief, the clerk enters an order to show cause why the appellee should not be denied oral argument. Fed. R. App. P. 31(c); Cir. R. 31(d).

Good reason must be shown by the tardy party to allow the late filing of such brief; otherwise, Seventh Circuit Operating Procedure 7(a) authorizes the clerk to dismiss appeals. In criminal appeals with court-appointed counsel, the clerk will discharge counsel and order them to show cause why the abandonment of the client should not lead to disbarment.

visited 7/26/2008

D. *Additional Authority*.

Pertinent and significant authorities coming to the attention of a party after its brief has been filed or after oral argument but before decision may be cited to the court by a letter to the clerk (original and ten copies) with a copy to the adversary. The letter must refer either to a page of the brief or a point orally argued to which the citations pertain and state the reasons for the supplemental citations. A 2002 amendment to Fed. R. App. P. 28(j) limits these letters to 350 words or less. When filing a Rule 28(j) letter with the clerk, counsel should provide a certification that the letter does not exceed 350 words. A copy of any authority not yet published must accompany each copy of the letter. Fed. R. App. P. 28(j), Cir. R. 28(e) and 34(g).

E. *Brief Of An Amicus Curiae*.

Court permission or consent of all parties is required in order to file an amicus brief, unless the brief is filed by one of the listed governmental entities. Fed. R. App. P. 29(a). The rule requires the applicant to identify its interest and state the reason why an amicus brief is desirable and the relevance of the matters asserted to the disposition of the case. The applicant must attach its brief to the motion. Fed. R. App. P. 29(b). The court will scrutinize such motions carefully, and lawyers are advised to review the court's decision in *Ryan v. Commodity Futures Trading Commission*, 125 F.3d 1062 (7th Cir. 1997).

In order to avoid repetition or restatement of arguments, counsel for an amicus curiae should ascertain, before preparing his brief, the arguments that will be made in the brief of any party whose position counsel is supporting. The brief of an amicus curiae can be filed only with the written consent of all parties, or leave of court. The United States, an agency or officer thereof, or any state may file an amicus brief without leave of court. Absent consent by all parties or leave of court, an amicus curiae brief must be filed no later than 7 days after the principal brief of the party whose position it supports is filed. Fed. R. App. P. 29(e). The brief may not exceed one-half the maximum length authorized by the rules for a party's principal brief (15 pages or 7000 words). Fed. R. App. P. 29(d). Participation by an amicus curiae in oral argument will be allowed only with the court's permission. Fed. R. App. P. 29(g).

F. *Citation Of Unreported Opinion*.

When a decision not yet reported or reported only in abstract form is cited in a brief or other document filed with the court, a copy of that decision should be attached to each copy of the document, or in the appendix to a brief, including those served upon opposing counsel.

visited 7/26/2008

G. *Number Of Copies*.

Fifteen copies of each brief must be filed and two copies served on each party or on counsel for each party separately represented. Fed. R. App. P. 31(b); Cir. R. 31(b). At least one copy of the brief should be signed.

H. *Digital Version of Brief and Appendix.*

A digital version of each brief, including appendix materials required by Circuit Rule 30, must be furnished to the court at the time the brief is filed, unless counsel certifies that the material is not available electronically (i.e. produced on a typewriter). The digital version must be in Portable Document Format (also known as PDF or Acrobat format) generated by printing to PDF from the original word processing format so that the text is searchable. PDF image files created by scanning a paper document are not allowed. See Cir. R. 31(e). Most word processing software is capable of producing a PDF file. Also, many commercial printers or copy centers will produce a PDF file from the original word processing file for a small fee.

The preferred method of transmission is to upload the electronic version of the brief and appendix to the court's web cite, <http://www.ca7.uscourts.gov> via the internet, although floppy disk or CD-ROM is allowed. Counsel will find detailed instructions on the court's web page for completing the upload process. A floppy disk or CD-ROM, if used, must contain nothing more than the text of the brief in a single file, and the label of the disk must include the case name and docket number and on whose behalf the brief is filed. One copy of the digital version must be furnished to each party separately represented by counsel. Counsel should note that the digital copy of the brief must contain a PDF file which includes the entire brief from cover to conclusion. Disclosure statements, tabular matter, or other sections of the brief not included in the word count should not be omitted. Please note that uploading the digital copy <u>does</u> <u>not</u> constitute "filing" in the court. Filing with the court is not accomplished until the complying "paper" briefs are received and accepted by the clerk's office.

I. *Format*.

The front of each brief must set forth: (1) the name of the court; (2) the docket number of the appeal centered at the top; (3) the title of the appeal; (4) the nature of the proceeding, the case number below, and the name of the court and trial judge or agency below (e.g., Appeal from the United States District Court for the Northern District of Illinois; Petition to Review Order of the National Labor Relations Board); (5) the title of the document (e.g., Appellant's Reply Brief); and (6) the names, addresses, and telephone numbers of counsel representing the party filing the brief. Fed. R. App. P. 32(a)(2). Briefs may be photocopied or reproduced by any process that produces a clear black image on a single side of light paper. Binding is acceptable if it is secure and does not obscure the text. Briefs must have pages no larger than 8-1/2" by 11" and type matter not exceeding 6-1/2" by 9-1/2", with double spacing between each line of text. Fed. R. App. P. 32(a).

visited 7/26/2008

Allowable typefaces and type styles are detailed in Fed. R. App. P. 32(a)(5)&(6) which provides as follows:

(5) **Typeface.** Either a proportionally spaced or monospaced typeface 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 12-point or larger.

(B) A monospaced face may not contain more than 10.5 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. Circuit Rule 32 allows variance from the 14-point type requirement of Fed. R. App. P. 32(a)(5)(A). A brief is acceptable if proportionally spaced type is 12-points or larger in the body of the brief, and 11-points or larger in footnotes. Italics or underlining may be used only for case names or occasional emphasis. Boldface should be used sparingly. The court discourages the use of all-capitals text for any purpose other than the caption on the cover and first page, and section headings such as "ARGUMENT". See Section XX of this Handbook.

Because of the problem of legibility, carbon copies are discouraged and may not be submitted without the court's permission except by pro se parties allowed to proceed in forma pauperis. Fed. R. App. P. 32(d). Counsel must ensure that each page of photocopied briefs and appendices are legible. Briefs must have covers colored as follows:

Appellant ..... blue
Appellee ..... red
Appellee/Cross Appellant..... red
Cross-Appellee..... grey
Intervenor or amicus curiae ..... green
Reply brief ..... grey
Appendix (if separately prepared).... white

J. *Contents*.

Consult Fed. R. App. P. 28; Circuit Rule 28 and discussion, *supra* at Section XIX of this Handbook.

K. *Length of Briefs*.

The court has moved from a page count to a type volume limit governed by Fed. R. App. P. 32(a)(7). The rule provides specific line and word counts for principal and reply briefs with a "safe harbor" page limit for those who choose it. The rule allows one to rely on the counting feature of their word processing package and requires certification of compliance. Fed. R. App. P. 32(a)(7)(C). Without the court's permission, the briefs cannot

visited 7/26/2008

exceed the following lengths, and in most cases should be substantially shorter than the lengths permitted:

Appellant's brief and appellee's brief: 30 pages, or comply with the Fed. R. App. P. 32(A)(7) type volume limits.

Reply brief: 15 pages, or comply with the Fed. R. App. P. 32(a)(7) type volume limits.

Cross-appellant's combined reply/response in cross-appeal: 15 pages, or comply with the Fed. R. App. P. 32(a)(7) type volume limits for reply briefs. Cir. R. 28(d).

Amicus brief: one-half the length of a party's principal brief meaning it may not exceed 15 pages or 7000 words. Fed. R. App. P. 29(d)

The type volume limitation in Rule 32(a)(7) approximates the number of words and characters in 50-page printed principal briefs and 25-page reply briefs. Parties must consult Fed. R. App. P. 32(a)(7) and Cir. R. 32 for the specifics of allowable type sizes and volume.

Permission to submit a brief in excess of the type volume limit may be obtained from the court on motion supported by affidavit. Such motions are not favored however and will be granted only when exceptional circumstances are shown. The motion must be filed well before the date the brief is due to be filed. *United States v. Devine*, 768 F.2d 210 (7th Cir. 1985) (*en banc*); *Fleming v. County of Kane*, 855 F.2d 496 (7th Cir. 1988). Pages of the brief (starting with the jurisdictional statement) should be sequentially numbered through the conclusion. The disclosure statement and tabular matter may be separately numbered.

L. *Required Short Appendix.*

The decision being appealed must always be bound with the appellant's brief as an attached appendix. Certain other required contents of the appendix may also be bound with the brief if the total pages of the appendix does not exceed 50 pages. Cir. R. 30(a)&(b). See Section XXIII of this Handbook.

M. *References To The Record.*

No fact shall be stated in the statement of facts unless it is supported by a reference to the page or pages of the record or appendix where the fact appears. Fed. R. App. P. 28(a)(7).

N. *Agreement of Parties to Submit Without Oral Argument.*

Federal Rule of Appellate Procedure 34(f) provides that the parties may agree to submit a case without oral argument but the court will make the final determination

visited 7/26/2008

whether to hear oral argument. Circuit Rule 34(f) allows a party to include, as part of a principal brief, a short statement explaining why oral argument is or is not appropriate under the criteria of Fed. R. App. P. 34(a).

O. *Sequence Of Briefing in National Labor Relations Board Proceedings*.

Each party adverse to the NLRB in an enforcement or a review proceeding shall proceed first on briefing and at oral argument. Fed. R. App. P. 15.1. Even though a party adverse to the Board in an enforcement proceeding is actually the respondent, it must file the opening blue-covered brief. That same party is allowed to file a grey-covered reply brief in response to the red-covered responsive brief of the NLRB. The same party will also proceed first at oral argument.

P. *Summary Of Certain Technical Requirements*.

Document	Cover Color	Copies	Time	Page Limit
Separate Appendix	White	10	40 Days	No limit
Appellant's Brief	Blue	15	40 Days	30 Pages†
Appellee's Brief	Red	15	30 Days	30 Pages†
Combined Appellee/Cross Appellant's Brief	Red	15	30 Days	30 Pages†
Reply/Cross Appellee's Brief	Grey	15	30 Days	15 Pages†
Reply Brief	Grey	15	14 Days	15 Pages†
Amicus Brief	Green	15	††	†††
Intervenor's Brief	Green	15	††	30 Pages†
Petition for Rehearing	White	15	14 Days	15 Pages
Petition for Rehearing En Banc	White	30	14 Days	15 Pages

† Page limits apply unless brief complies with the type volume limitations of Fed. R. App. P. 32(a)(7)(B) which provides that a principal brief may contain no more than 14,000 words; or, if it uses monospaced type, no more than 1300 lines. A reply brief may contain no more than half of the above.

†† An intervenor brief is due on the same date as that of the party whose position it supports. Amicus brief due within 7 days of the brief it supports.

††† *Amicus* brief is not more than one-half of a principal brief.

visited 7/26/2008

XXII. CERTIFICATION OF STATE LAW

When the rules of the highest court of a state provide for certification to that court by a federal court of state law questions which will control the outcome of an appeal, the court of appeals, *sua sponte* or on motion of one of the parties, may certify such a question to the state court. Cir. R. 52(a). The Illinois, Indiana, and Wisconsin Supreme Courts have such rules. Motions to certify are to be included in the brief, but the moving party should call it to the clerk's attention by noting it on the cover of the brief. The decision as to certification will be made after the briefs have been filed and may be deferred until after oral argument.

A 1998 amendment to Circuit Rule 52 sets out the procedure after the state supreme court has decided the certified issues. Within 21 days after the state supreme court issues its decision, the parties must file a statement of their position about what action the court should take to complete the resolution of the appeal. Cir. R. 52(b).

visited 7/26/2008

XXIII. Preparing and Serving Appendix

Circuit Rule 30(a) requires that "[t]he appellant shall submit, bound with the main brief, an appendix containing the judgment or order under review and any opinion, memorandum of decision, findings of fact and conclusions of law, or oral statement of reasons delivered by the trial court or administrative agency upon the rendering of that judgment, decree, or order." Counsel must also provide digital copies of any required appendix material pursuant to Circuit Rule 31(e), if these materials are available. If appendix materials are not available digitally, counsel should certify this to the clerk when filing. See Section XXI(H) of this Handbook.

Circuit Rule 30(b) requires that the appellant also include in an appendix:

(1) Copies of any other opinions or orders in the case that address the issues sought to be raised. If appellant's brief challenges any oral ruling, the portion of the transcript containing the judge's rationale for that ruling,

(2) Copies of any opinions or orders in the case rendered by magistrate judges or bankruptcy judges that address the issues sought to be raised,

(3) Copies of all opinions, orders, findings of fact and conclusions of law rendered in the case by administrative agencies (including their administrative law judges and adjudicative officers such as administrative appeals judges, immigration judges, members of boards and commissions, and others who serve functionally similar roles). This requirement applies whether the original review of the administrative decision is in this court or was conducted by the district court,

(4) If collaterally attacking a criminal conviction, appendix must include copies of all opinions by any federal court or state appellate court previously rendered in the criminal prosecution, any appeal, and any earlier collateral attack,

(5) An order concerning a motion for new trial, alteration or amendment of the judgment, rehearing, and other relief sought under Fed. R. Civ. P. 52(a) or 59,

(6) Any other short excerpts from the record, such as essential portions of the pleading or charge, disputed provisions of a contract, pertinent pictures, or brief portions of the transcript, that are important to a consideration of the issues raised on appeal.

The documents required by Cir. R. 30(b) may also be included with the brief if the total of the documents required by Circuit Rule 30(a) and (b) do not exceed 50 pages. Otherwise the documents required by Circuit Rule 30(b) should be separately bound. Counsel is free to include other documents in a separately bound appendix but should note the warning in Circuit Rule 30(e) that an appendix should not be lengthy and costs for a lengthy appendix will not be awarded.

visited 7/26/2008

The parties may file a joint appendix or the appellee may file with his brief a supplemental appendix containing relevant material not included in an appendix previously filed. Deferred appendices filed pursuant to Fed. R. App. P. 30(c) are seldom allowed.

If the parties choose to file a stipulated joint appendix, as provided in Cir. R. 30(e), counsel for the appellant should consult with the other parties as soon as the record is ready to be filed in order to reach agreement as to the contents of the appendix. It is important to note that, regardless of whether a stipulated joint appendix is filed, the brief of the appellant or petitioner must include, bound at the back of the brief, an appendix consisting of the order, judgment or opinion under review, no matter what its length. Cir. R. 30(a).

Only 10 copies of an appendix not attached to the brief are required. If bound with the party's brief, 15 copies are required.

Federal Rule of Appellate Procedure 30(e) permits the separate filing of a book of exhibits. This is rarely used. This should contain only exhibits which are important to a consideration of the issues raised on appeal. Four copies must be filed, and one copy served on each party separately represented.

The appendix must include its own table of contents, describing each item included and listing the appendix page on which each item or portion of the transcript can be found. Fed. R. App. P. 30(d). References should also include the volume and the respective pages of the transcripts. If the appendix contains portions of the transcript of proceedings, the appendix shall also contain an index which complies with Circuit Rule 11(d). Cir. R. 30(f).

Please note the requirement of Circuit Rule 30(d) that the appellant's appendix contain a statement, which should be at the front of the appendix, certifying that such appendix does in fact include all the materials required by Circuit Rule 30(a) and (b). Sanctions can be imposed on counsel who fail to comply. *See United States v. Rogers*, 270 F.3d 1076, 1084 (7th Cir. 2001)(counsel sanctioned for certifying that appendix contained all required materials when, in fact, it did not); *United States v. Evans*, 131 F.3d 1192 (7th Cir. 1997); *Matter of Galvan*, 92 F.3d 582 (7th Cir. 1996); *Hill v. Porter Memorial Hospital*, 90 F.3d 220 (7th Cir. 1996); *Guentchev v. INS*, 77 F.3d 1036 (7th Cir. 1996); *United States v. Smith*, 953 F.2d 1060 (7th Cir. 1992)

The court hopes to limit the expense and work of producing an appendix without sacrificing the material necessary for the judges' convenient consideration of the appeal. It is unnecessary to include everything in the appendix, as the entire record is readily accessible to each of the judges. Although both the appellant and appellee may pay for the preparation of the appendices, those expenses are recoverable if the court awards costs to the winning party. However, the court will not award costs for a lengthy appendix. Cir. R. 30(e).

visited 7/26/2008

XXIV. ORAL ARGUMENT AND SUBMISSION WITHOUT ORAL ARGUMENT

A. *Submission Without Oral Argument.*

Many cases are decided after oral argument. However, some cases are decided without oral argument, pursuant to Fed. R. App. P. 34(a) and (f). The parties may agree, with the court's approval, to submit a case without oral argument. Fed. R. App. P. 34(f). An appellee seeking affirmance or an administrative agency seeking enforcement of its order may suggest that a case be decided without oral argument. Circuit Rule 34(f) allows a party to include, as part of a principal brief, a short statement explaining why oral argument is or is not appropriate under the criteria of Fed. R. App. P. 34(a). Oral argument is to be allowed unless a panel of three judges, after examination of the briefs and record, shall be unanimously of the opinion that oral argument is not needed for one of the following reasons:

(1) the appeal is frivolous; or

(2) the dispositive issue or set of issues has been authoritatively decided; or

(3) 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. Fed. R. App. P. 34(a)(2).

B. *Scheduling Oral Argument.*

The time between the filing of the appellee's brief and oral argument will vary, depending on the type of case and the size of the court's docket. Criminal cases and other matters entitled to priority by statute or by their nature are given precedence. Cir. R. 34(b)(1). Appeals are set for oral argument about a month before argument. Appeals will usually be scheduled for oral argument shortly after the last brief is due. In criminal cases the setting of oral argument often occurs as soon as the appellant's brief is filed, and in civil cases after the appellee's or respondent's brief is filed. Counsel for the parties, or the parties themselves if they are without counsel, are notified of the setting approximately 21 days before the scheduled date of oral argument. All oral arguments scheduled for a certain day will be heard on that day even if the court has to sit beyond its usual time. Court regularly convenes at 9:30 A.M. Generally six appeals are scheduled for oral argument at 9:30 A.M. Cir. R. 34(b)(1).

Since the court generally hears six appeals each day, it screens appeals in advance to determine how much time should be sufficient in each case, and limits the time in many to 10 to 20 minutes per side. This does not mean the court will not give the case its full attention, but only that the court believes the issues should be capable of full presentation within that allotted time. On some occasions more than 30 minutes per side

visited 7/26/2008

is allowed. This may be done by the court *sua sponte* in a complex case, or on motion of counsel.

Multiple appellants or appellees with a common interest constitute a single "side" for purposes of oral argument. Thus there are only two "sides" to an appeal unless the court rules that a particular appeal is an exception.

Any request for waiver or postponement of a scheduled oral argument must be made by formal motion. Cir. R. 34(e). Because of its heavy caseload, the court denies practically all motions for postponement of a scheduled oral argument. A postponement will be granted to a lawyer with no associate counsel who is scheduled to argue a case before the Supreme Court of the United States on the same day his appeal is scheduled in the Seventh Circuit. In almost all other situations, except that of serious illness, motions for continuance are denied. The panel of three judges assigned to hear a particular oral argument may not be available to sit together again for some time, and it would be extremely wasteful of judicial time to have to assign other judges after the briefs have been read by the assigned panel. Further, the court's calendar may be booked solid for months in advance and it might be difficult to reschedule the oral argument for the near future. If counsel will be unavailable at some date in the future, counsel should advise the clerk of the specific facts by letter far enough in advance so that, if feasible, the unavailability may be taken into account in the original scheduling of the argument. Cir. R. 34(b)(3). Consideration will also be given to requests addressed to the clerk by out-of-town counsel to schedule more than one appeal for oral argument on the same or successive days so as to minimize travel time and expenses. Cir. R. 34(b)(2). Like a request to avoid scheduling an oral argument on a certain day or certain days, a request to set cases on the same or successive days should be made before the appeal is scheduled for oral argument.

After receipt of the court's "Notice of Oral Argument," counsel are directed to notify the clerk, at least two days in advance of the scheduled oral argument date, of the name of counsel who will be appearing in court to present the oral arguments. Cir. R. 34(a). A return postcard is enclosed with the "Notice of Oral Argument" for this purpose. It must be completed and returned to the clerk immediately.

C. *Courtroom Procedures*.

When the court is sitting, oral arguments are generally scheduled for 9:30 A.M. The panel of judges and the order of cases to be argued that day is posted at 9:00 A.M. each morning that the court is in session. Counsel presenting argument must sign in at the clerk's office at least 5 minutes before the scheduled time. Topcoats, packages and other outerwear garments are not allowed in the courtroom and should be left in the attorneys' room closet adjacent to the main courtroom. No food or beverages are allowed in the courtroom.

Counsel presenting argument shall sit at the appropriate table in the courtroom. As

visited 7/26/2008

you enter the courtroom, appellant's table is located to the left and appellee's table is to the right. Do not approach the podium from the gallery. Be seated at the appropriate counsel's table and wait for the presiding judge to call your case. Because oral arguments occasionally end before their allotted time expires, counsel are expected to be in the courtroom during the case immediately preceding theirs. To allow a prompt transition between arguments, counsel for the next scheduled case should be seated in the front row of the public gallery, if possible, and move to the appropriate counsel table upon conclusion of the preceding case. Counsel should remain at counsel table during their opponent's entire argument and leave promptly when the case is taken under advisement or otherwise concluded.

The notice of oral argument states the scheduled date and time and advises how many minutes of argument per side will be allowed. Counsel must advise the court's calendar clerk at least 2 business days prior to the scheduled argument who will be presenting oral argument. Only appellants are allowed to present rebuttal argument and counsel wishing to reserve time for rebuttal must advise the calendar clerk in advance how many minutes of their allotted time they wish to reserve for rebuttal. This information is provided to the panel of judges prior to the oral argument. Whenever more than one attorney will share the total time allotted for a "side," the sequence of argument and the amount of time each attorney is to speak (to be arrived at by consensus between counsel prior to argument) must also be provided to the calendar clerk. Do not initiate your argument with a recitation of who will be splitting time with whom and/or how much time you have decided to reserve for rebuttal. The judges will already have this information.

The podium is equipped with three lights, one white, one yellow and one red, The courtroom deputy clerk will activate the white light when an appellant is entering the time reserved for rebuttal; when an individual attorney's time has expired in an instance where more than one attorney is presenting oral argument for one "side"; or when an appellee has five minutes remaining. The yellow light will indicate when one minute of an attorney's entire allotted time remains. The red light indicates that all of the time allocated to a side has expired. When time expires, counsel should quickly finish their thought, but not continue argument beyond the allotted time unless instructed to do so by the court.

D. *Preparation For Argument*.

Counsel who will argue the appeal should study the case again even though counsel has worked on the brief and tried the case in the court below. It does not necessarily follow that counsel who tried the case below is best equipped to handle the appeal. Only counsel who will take the time to become thoroughly familiar with the record will be able to do justice to the argument. Counsel should consider having a mock oral argument in order to prepare for the real thing.

The oral argument and brief complement each other. For counsel, the oral argument

visited 7/26/2008

provides an opportunity to point out the key facts and to summarize the principal contentions and supporting reasoning, with all the advantages of face-to-face communication. For the judges, the oral argument provides not only the benefits of this kind of presentation but also an opportunity to seek answers to questions remaining in their minds after they have read the briefs and cited authorities, and looked at the record. The oral argument is ordinarily not a suitable medium for a detailed recital of the facts or a painstaking analysis and dissection of authorities. These are matters best left to the brief, where a detailed and documented statement of facts and a complete argument with supporting reasoning and precedent may more effectively be made. In preparing and presenting an oral argument, counsel should be mindful of the limitations inherent in an oral communication of short duration.

If possible, counsel should become familiar with the court by listening to other arguments. Counsel should know the names of the judges. A card on the rostrum that day will list the names of the panel and their respective positions on the bench. The clerk's office supplies the judges on the panel with cards naming the attorneys (or parties pro se) who are going to appear that day.

E. *The Opening Statement*.

Counsel should introduce themselves in their opening statements. Appellant's counsel should normally tell the court in the first few words how the case got to the court of appeals, the nature of the case, the issues, and the relief requested. A statement that counsel intends to save a portion of the allotted time for rebuttal is unnecessary and inappropriate. Whether time for rebuttal is saved depends entirely on how much time the opening consumes. It is counsel's own responsibility to watch the time. Counsel should address members of the court as "judge" not "justice".

F. *The Statement Of Facts*.

Because the judges will have already read the briefs before oral argument, it is unnecessary for counsel to state the facts in detail. The oral argument should, however, cover facts which bear specifically upon the issues to be argued, omitting extraneous and immaterial matter. Usually a chronological statement is easiest for the court to follow. But sometimes the facts on each point should be incorporated into the discussion of that point instead of being placed at the beginning. The court will not wish to hear a reading of any testimony unless counsel first explains the necessity for doing so. The facts pertaining to a point should be fairly stated from the record and, of course, unfavorable but relevant facts should not be omitted.

visited 7/26/2008

G. *The Argument*.

1. *The applicable law*.

Counsel should state the applicable rules of law relied upon. If any precedents are discussed, enough should be said about them so that the court may see at once that they are on point. These rules of law should be stated in general terms. A minute dissection of precedents should be avoided except where one or a few cases clearly would control the outcome. Quotations from cases should be avoided and citation of cases is better left to the brief.

2. *Emphasis*.

While the brief may cover several points for the sake of completeness, counsel's oral argument should be limited to the major points that can be adequately handled in the time allowed. At the same time, counsel must be prepared to answer questions that may be asked about any point. By rehearsing the argument aloud, counsel will learn how best to allocate the time among the points to be covered, leaving ample time for questioning. Trivia and unnecessary complexity must be avoided. Through preparation and rehearsal of the argument, counsel will be better able to separate the important from the unimportant.

3. *Answering questions*.

Counsel should answer questions as directly and as categorically as possible. Do not postpone an answer until later in the argument. If counsel does not know the answer, counsel should not hesitate to say so. Occasionally, the court may ask counsel to address an issue or point which was not covered in the briefs and arises for the first time at oral argument. Counsel should respond as directly as possible. If counsel does not know the answer to a question or is not prepared to address a particular point, he or she should clearly state that he or she is not prepared to address it and ask for leave to file a short post-argument memorandum. Often, the panel will direct the filing of post-argument memoranda on their own. If, during questioning by the panel, one states a position or makes a concession which, after reflection, proves to be wrong or ill advised, counsel may send a letter to the panel "taking back" the concession or restating their position on a particular point. The letter must be filed with the clerk and served on all parties.

If the questioning has been extensive, the presiding judge in his or her discretion may allow additional time upon request, depending on such factors as whether the main issues have been covered and the state of the calendar. Counsel may be besieged by numerous questions, allowing insufficient time to complete the planned argument. This should not disturb counsel for the main purpose of oral argument is to answer the court's questions. Counsel may be assured that the court will have studied all points made in the written briefs even if all are not discussed orally.

visited 7/26/2008

4. *Delivery*.

Never read your argument; points are more forcefully made by speech that has at least the appearance of spontaneity. When counsel reads the argument, a veil is created between the court and the advocate. Moreover, counsel is likely to be unable to deal effectively with questions from the court. Questions from the bench should be answered promptly and counsel should never tell the judge asking the question that it will be answered later. Notes, an outline, or key words may be used to remind counsel of the points to be covered. Of course, where the precise wording is important, as in statutes or contracts, they may have to be read. The reading of a few short significant quotations from cases or the record may occasionally be justifiable.

A memorized argument, like one that is read, will probably sound mechanical, and may disintegrate when counsel is interrupted. Seldom does an oral argument ever follow an exact, prepared pattern. The advocate must be so well-prepared that the argument can be reworked according to the questions asked, the court's interest, and what adversary counsel has said, leaving off at any point and picking up the threads again.

In delivering the argument, the techniques of good public speaking should be kept in mind. Counsel should speak clearly and loudly enough to be heard. Counsel should avoid speaking in a monotone and should not race through the argument so rapidly as to make it unintelligible. Oral arguments in the Seventh Circuit are currently tape-recorded. A well-presented oral argument should be clearly understandable, even on tape.

5. *Avoid personalities*.

Do not speak disparagingly of opposing counsel or the trial court—although you may criticize their reasoning.

6. *Know the record*.

Counsel should know the record from cover to cover. There are very few arguments which do not produce some question regarding the record. Yet all too often counsel does not know whether something is in the record or the appendix or where it may be found. Nothing wins the confidence of the court more than an ability to answer accurately and immediately questions from the bench about the record.

7. *Guidelines for the appellee*.

Although the above suggestions have been mainly concerned with the appellant's presentation, most of them also apply to the appellee. Appellant's counsel knows in advance what ground he must cover. Appellee's counsel can never be sure how much

visited 7/26/2008

will need to be said in reply as it cannot be known what appellant will say and the court's reaction to the appellant's argument cannot be foretold. As to facts, usually the appellee should be content with correcting or adding to the appellant's statement.

Frequently the appellee must change the order of the response to meet, at the outset, points which have been raised in the court's questions. If the judges have asked questions and the appellee disagrees with appellant's answer, it is advisable for the appellee to answer those questions before proceeding with the planned argument. Occasionally a particular point, or even an entire appeal, is in such a posture, by reason of the court's questions and the attitudes of the judges, that appellee's counsel is well-advised to say as little as possible. Above all the appellee must be flexible, with sufficient mastery of the case to know how much or how little to say.

H. *No Oral Reference to Cases Which Have Not Already Been Cited to the Court in Writing*.

Circuit Rule 34(g) prohibits citing a case at oral argument that was not cited in one of the briefs or in a Fed. R. App. P. 28(j) supplemental authority. Counsel who becomes aware of a case that should be cited should file a written Fed. R. App. P. 28(j) authority and provide ten copies of the decision to the court and to other parties if it is unreported. Cir. R. 28(e).

I. *Order of Oral Argument in NLRB Proceedings*.

Fed. R. App. P. 15.1 requires that parties adverse to the National Labor Relations Board, even in enforcement proceedings in which such parties are designated as respondents, proceed first at oral argument. The rationale is that a party challenging a Board decision should logically proceed first and carry the burden of stating the reasons why the order should not be enforced. The Board attorney, like the appellee in a district court appeal, will then defend the Board's order.

visited 7/26/2008

XXV. DECIDING AN APPEAL

Although the court will occasionally decide the case from the bench, it usually reserves judgment at the conclusion of the oral argument. A conference of the panel is held promptly after oral arguments. Normally a tentative decision is reached at this conference. Additional conferences sometimes are necessary. The presiding judge of the panel assigns the cases for preparation of the signed opinions, per curiam opinions, or orders. Copies of a proposed opinion or order are circulated to members of the panel, who may approve, offer suggestions, or circulate a concurring or dissenting opinion. When a proposed opinion or order has the approval of at least two judges and the third judge has had an opportunity, if he or she so desires, to prepare a separate opinion, the decision is ready for release.

Whether the decision will be by published opinion or unpublished order is determined by a majority of the panel, based on the guidelines set forth in Circuit Rule 53(c). Unpublished orders are issued in frivolous appeals and in appeals which involve only factual issues or concern the application of recognized rules of law. An order will include a summary statement of the reasoning on which the court's decision is based. Orders may not be cited or used as precedent in any federal court within the circuit except to support a claim of res judicata, collateral estoppel, or law of the case. Any person may request that a decision by unpublished order be issued as a published opinion, but the requesting party must state why the publication of the decision as an opinion is consistent with the guidelines set forth in Circuit Rule 53(c)(1).

If the decision is by opinion, it will be printed and then released. If the decision is by order, the original will be duplicated and released. A copy of the opinion or order is mailed to every party who has filed an appearance. Copies of opinions are forwarded to the various legal publishers.

visited 7/26/2008

XXVI. REMANDS

A. *Remands For Revision of Judgment*.

Once an appeal from a final judgment is docketed in this court, the district court can deny motions to modify the judgment but lacks authority to grant the motion and modify the judgment. "A party who during the pendency of an appeal has filed a motion in the district court under Fed. R. Civ. P. 60(a) or (b), Fed. R. Crim. P. 35(b), or any rule which permits modification of a final judgment, should request the district court to indicate whether it is inclined to grant the motion. If the district court so indicates, this court will remand the case back to the district court. Any party dissatisfied with the judgment as modified must file a fresh notice of appeal." Cir. R. 57. See also, Section V of this Handbook.

B. *Remands For a New Trial*.

A judge other than the original trial judge will try a case remanded for a new trial unless the remand order provides, or all parties request, that the original judge retry the case. The court may apply this rule to remanded cases which do not literally come under its terms. Cir. R. 36.

C. *Limited Remands*.

In order for the court of appeals to effectively review the actions of a district court, it must have the reasoning of the district court. Circuit Rule 50 requires that "[w]henever a district court resolves any claim or counterclaim on the merits, terminates the litigation in its court (as by remanding or transferring the case, or denying leave to proceed in forma pauperis with or without prejudice), or enters an interlocutory order that may be appealed to the court of appeals, the judge shall give his or her reasons, either orally on the record or by written statement. The court urges the parties to bring to this court's attention as soon as possible any failure to comply with this rule." The rule requires that the judge provide reasons but also puts the burden on the parties to alert the court to any lack thereof.

If reasons for an appealable ruling are not provided, this court will normally, sua sponte or upon motion of a party, remand the case to the district court for the limited purpose of providing reasons. Note that such a remand is "limited" and the court of appeals retains jurisdiction of the action. Normally appellate proceedings are suspended during the remand and the parties are directed to file periodic status reports until the district court enters the necessary findings.

Limited remands may also be entered on a party's motion or the court's own motion for other purposes. Generally, these involve matters in aid of the court's jurisdiction, or fact-finding that would assist this court in the resolution of a pending motion or matter but that fall outside the scope of Circuit Rule 50. *See, e.g., Caterpillar, Inc. v. NLRB*, 138

visited 7/26/2008

F.3d 1105 (7th Cir. 1998).

D. *Cases Remanded From the Supreme Court*.

"When the Supreme Court remands a case to this court for further proceedings, counsel for the parties shall, within 21 days after the issuance of a certified copy of the Supreme Court's judgment pursuant to its Rule 45.3, file statements of their positions as to the action which ought to be taken by this court on remand."Cir.R. 54.

visited 7/26/2008

XXVII. PETITION FOR REHEARING

A party may file a petition for rehearing within 14 days after entry of the judgment. In all civil cases in which the United States or an officer or agency thereof is a party, the time within which any party may seek rehearing shall be 45 days after entry of judgment unless the time is shortened or enlarged by order. Fed. R. App. P. 40(a). The petition must be physically filed with the clerk by the due date. The "mail box rule," which deems briefs filed upon mailing, Fed. R. App. P. 25(a), does not apply to petitions for rehearing and answers to petitions for rehearing. In appeals decided from the bench, the 14-day time limit runs from the entry of the court's written order. Cir. R. 40(d). (This written order in such cases is usually entered within a week of the oral argument and is mailed to all parties to the appeal.) Note that in the case of a decision enforcing an administrative agency order, "the date on which the court enters an order or files an opinion holding that an agency order should be wholly or partially enforced, is the date of the entry of judgment for the purpose of starting the running of the 45 days for filing a petition for rehearing in accordance with Rule 40(a), Fed. R. App. P., notwithstanding the fact that a formal detailed judgment is entered at a later date." Cir. R. 40(c).

A motion to extend the time for filing a petition for rehearing may be made only during the 14-day period. Because of the interest in expediting the ultimate resolution of appeals, such motions are not viewed with favor.

Petitions for rehearing are filed in many cases, usually without good reason or much chance of success. Few are granted. The filing of such a petition is not a pre-requisite to the filing of a petition for writ of certiorari in the Supreme Court of the United States. However, the time for such filing in the Supreme Court is tolled by the timely filing of a petition for rehearing in the court of appeals. Time for filing a petition for writ of certiorari does not begin to run until the court of appeals has disposed of the petition for rehearing. S. Ct. Rule 13.3.

Only 15 copies of a petition for rehearing must be filed, except that 30 copies must be filed if the petitioner suggests a rehearing en banc. Cir. R. 40(b). The petition may be no longer than 15 pages. Fed. R. App. P. 40(b). The cover to the petition should be white. Fed. R. App. P. 32(c)(2)(A). No answer may be filed to a petition for rehearing unless the court calls for one, in which event the clerk will so notify counsel. Fed. R. App. P. 40(a). A 10 day time limit for the answer is usually set. In the absence of such a request, a petition for rehearing will "ordinarily not be granted." Fed. R. App. P. 40(a)(3).

Upon filing, the petition is circulated to the same panel of judges that decided the appeal originally. These judges vote on the petition; a majority rules. There is no oral argument in connection with a petition for rehearing.

In the relatively rare instance in which a petition for rehearing is granted, the procedure is discretionary with the court and parties will be directed by court order how to proceed.

visited 7/26/2008

XXVIII. EN BANC PROCEDURE

En banc hearings or rehearings, i.e., hearings by all the judges currently in regular active service on the court, are infrequent. "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 decision, or (2) the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a). Such a hearing or rehearing will be held only if a majority of the circuit judges who are in regular active service so determine. Although the judges may order a hearing en banc on their own initiative before the oral argument, this rarely occurs in the Seventh Circuit. A more frequent occurrence is for the panel after oral argument to circulate a proposed opinion, which would establish a new rule of procedure or overrule a prior decision of the court, to all the active judges. Cir. R. 40(e).

A request for a hearing en banc is to be made by the filing date of the appellee's brief. Fed. R. App. P. 35(c). En banc hearings are even rarer than en banc rehearings.

A petition for rehearing en banc must be made within the time allowed by Rule 40(a) for the filing of a petition for rehearing. Fed. R. App. P. 35(c). Thirty copies must be filed. The title page and cover should reflect that a petition for rehearing en banc is being made in order to facilitate its distribution.

A party who petitions that an appeal be reheard en banc must state in a concise sentence at the beginning of the petition why the appeal is of exceptional importance or with what decision of the United States Supreme Court, this court, or another court of appeals the panel decision is claimed to be in conflict. Fed. R. App. P. 35(b). A party who files a petition for rehearing en banc without complying with this provision runs a serious risk of sanctions. *See H M Holdings v. Rankin, Inc.*, 72 F.3d 562, 563 (7th Cir. 1995).

When a petition for rehearing en banc is made, the petition for rehearing is distributed to each active judge on the court, including the panel that originally heard and decided the appeal. Unless a judge in regular active service or a judge who was a member of the initial panel requests that a vote be taken on the en banc request, no vote will be taken. Fed. R. App. P. 35(f). If no vote is requested, the panel's order acting on the petition for rehearing will bear the notation that no member of the court requested a vote on the en banc request. Only active circuit judges are authorized to vote. Rehearing en banc will be granted only if a majority of the voting active judges vote to grant such a rehearing. 28 U.S.C. § 46(c), Fed. R. App. P. 35(a), 7th Cir. Oper. P. 5(d)(1).

Only active Seventh Circuit judges and senior circuit judges who were members of the original panel are authorized to sit on a rehearing en banc. 28 U.S.C. § 46(c). The order

visited 7/26/2008

granting rehearing en banc vacates the panel decision. Thus, if the court en banc should be equally divided, the judgment of the district court and not the judgment of the panel will be affirmed.

It bears repeating that hearings and rehearings en banc are very rare.

visited 7/26/2008

XXIX. COSTS

A bill of costs must be filed within 14 days after entry of the judgment. If there is a reversal, the docket fee may be taxed against the losing party. The cost of printing or otherwise reproducing the briefs and appendix is also ordinarily recoverable by the successful party on appeal. Fed. R. App. P. 39(c); Cir. R. 39. So also is the cost of reproducing parts of the record pursuant to Fed. R. App. P. 30(f) and that of reproducing exhibits pursuant to Rule 30(e). However, costs for a lengthy appendix will not be awarded. Cir. R. 30(e).

The bill of costs must contain an affidavit itemizing allowable costs. The affidavit may be made by a party, counsel, or the printer with proof of service upon opposing counsel. A bill of costs filed after the 14 days will rarely be allowed and it must be accompanied by an affidavit showing that extraordinary circumstances prevented the filing of the bill on time. No court action is necessary on a timely filed bill of costs unless it is objected to by opposing counsel. The reasonableness of the charges contained in the affidavit is about the only reason for objection. Fed. R. App. P. 39(c), Cir. R. 39. The court must determine whether the costs are reasonable. Usually, the matter of costs in the court of appeals is settled before issuance of the mandate; but, if not, the clerk may send a supplemental "bill of costs" to the district court for inclusion in the mandate at a later date. The clerk prepares an itemized statement of costs for insertion in the mandate. Fed. R. App. P. 39(d).

Although taxable in the court of appeals, the costs are actually recoverable only in the district court after issuance of the mandate with its attached "bill of costs." The money involved never physically changes hands at the court of appeals level.

Various costs incidental to appeal must be settled at the district court level. Among such items are: (1) the cost of the reporter's transcript; (2) the fee for filing the notice of appeal; and (3) the premiums paid for any required appeal bond. Fed. R. App. P. 39(e). Application for recovery of these expenses by the successful party on appeal must be made in the district court after the mandate issues.

visited 7/26/2008

XXX. ISSUANCE OF MANDATE

The mandate of the court of appeals will ordinarily issue 21 days after entry of judgment or seven days after denial of a petition for rehearing. Fed. R. App. P. 41(a). The mandate issues immediately when an appeal is dismissed voluntarily, for failure to pay a docketing fee, for failure to file a docketing statement under Cir. R. 3(c) or, for failure by appellant to file a brief. Cir. R. 41. The trial court record is usually returned to the clerk of that court with the mandate. A stay of mandate may be sought pending the filing of a petition for certiorari in the Supreme Court, but a motion for such a stay must be filed before the regularly scheduled date for issuance of the mandate, Fed. R. App. P. 41(d)(2) and must show that the petition for a writ of certiorari will present a substantial question and that there is good cause for a stay. These stays are not automatic. See Fed. R. App. P. 41(d)(2)(A); *Books v City of Elkhart*, 239 F.3d 826 (7th Cir. 2001)(Ripple, J)(in chambers).

If, during the period of the stay, the party who obtained the stay files a petition for writ of certiorari, the stay continues until final disposition by the Supreme Court. Fed. R. App. P. 41(d)(2)(B). The attorney, however, must notify the clerk of the court of appeals by telephone on the date that the petition for certiorari was filed or mailed. This is necessary to keep the mandate from being issued before the court of appeals receives notice of docketing in the Supreme Court from the clerk of that court. If the petition is denied, the mandate issues immediately upon the filing of the order of denial. Fed. R. App. P. 41(d)(2)(D).

No mandate will be stayed except upon a specific motion substantiated by a showing, or an independent determination by the court, of probable cause to believe that the petition for certiorari will not be frivolous or filed merely for delay. Additionally, the motion for stay must include a certification of counsel that a petition for certiorari to the Supreme Court is being filed and is not merely for delay, a statement of the specific issues to be raised in the petition for certiorari, and a substantial showing that the petition for certiorari raises an important question meriting review by the Supreme Court. Fed. R. App. P. 41(d)(2)(A). The issuance of the mandate by the court of appeals does not affect the right to apply for a writ of certiorari or the power of the Supreme Court to grant the writ.

Mandates are generally not issued in administrative proceedings. An attorney who wishes to stay the enforcement of an administrative agency decision in order to file a petition for certiorari should file a motion to stay the judgement pending a ruling on the petition for a writ of certiorari.

In any case, civil or criminal, a party has 90 days from the date of the judgment or, if a petition for rehearing was filed, from the date of the denial of rehearing, within which to file a petition for writ of certiorari in the United States Supreme Court. The court of appeals has no authority to enlarge time, but the Supreme Court may, on application, showing good cause, allow up to 60 additional days. 28 U.S.C. § 2101(c) and S. Ct. Rule

visited 7/26/2008

13.5.

It is important to note that the successful party on appeal cannot enforce its judgment in the district court until the issuance of the mandate has formally revested jurisdiction in that district court.

visited 7/26/2008

XXXI. ADVISORY COMMITTEE

Circuit Rule 47 provides for an advisory committee to be composed of federal trial judges, private attorneys, law professors and court personnel. The committee studies the procedures and rules of the court, and suggests changes where they are considered necessary or desirable. Suggestions for consideration by the advisory committee may be filed with the clerk of this court. The advisory committee also arranges for notice of proposed rules changes, and considers the comments received.