

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

NOTICE OF ADOPTION OF AMENDMENTS TO
LOCAL RULES 3(b), 10(a), 25, 27(c), 28(e), 30, 31(c), 34(b), 34(c), 40(a) & 45
and INTERNAL OPERATING PROCEDURE 36.2

The notice and comment period provided by the Court's February 6, 2008, Notice of Proposed Amendments to Local Rules 3(b), 10(a), 25, 27(c), 28(e), 30, 31(c), 34(b), 34(c), 40(a), & 45, and Internal Operating Procedure 36.2 having expired and the Court having considered the comments received, the Court:

(1) further amends Local Rule 25(c)(3)(F) as shown by deleting the requirement for service of paper copies of the public version of formal briefs and other documents:

Local Rule 25(c) Confidential and Sealed Materials.

(3)(F) Number of Paper Copies Filed and Served: Sealed documents must be served in paper form because electronic access to sealed documents is restricted to the Court.

(i) Appendices: Sealed volumes – File four and serve one on each party separately represented. Unsealed volumes – File six (five if counsel was appointed, four if party is proceeding in forma pauperis without appointed counsel) and serve one on each party separately represented.

(ii) Formal Briefs: Sealed version -- File four and serve one on each party separately represented. Public version -- File eight (six if counsel was appointed, four if party is proceeding in forma pauperis without appointed counsel) ~~and serve two on each party separately represented (one if counsel was appointed or if party is proceeding in forma pauperis without appointed counsel).~~

(iii) Other Documents: Sealed version -- File one (none if filed electronically) and serve one paper copy on each party separately represented. Public version -- File one (none if filed electronically) ~~and serve one paper copy on each party separately represented.~~

(2) and, as amended, adopts the proposed amendments to Local Rules 3(b), 10(a), 25, 27(c), 28(e), 30, 31(c), 34(b), 34(c), 40(a), & 45, and to Internal Operating Procedure 36.2.

The Local Rules, as amended, are attached.

April 1, 2008

Date

s/Patricia S. Connor

Patricia S. Connor, Clerk

Local Rule 3(b). Docketing Statement.

To assist counsel in giving prompt attention to the substance of an appeal, to help reduce the ordering of unnecessary transcripts, to provide the Clerk of the Court of Appeals at the commencement of an appeal with the information needed for effective case management, and to provide necessary information for any mediation conference conducted under Local Rule 33, counsel filing a notice of appeal for any direct or cross-appeal must complete and file a docketing statement, using the form provided by the clerk of the district court. The Clerk of the Court of Appeals will provide a similar form for petitions for review, applications for enforcement, and Tax Court appeals.

The original docketing statement and any attachments must be received and filed in the Court of Appeals within 14 days of filing of the notice of appeal, petition for review, or application for enforcement, with copies served on the opposing parties. Docketing statements for petitions for review, applications for enforcement, and Tax Court appeals must be received and filed with the Clerk of the Court of Appeals within 14 days of docketing of the petition, application, or tax appeal. A copy of the docketing statement must be served on the opposing party or parties.

The docketing statement shall have attached to it any transcript order.

Although a party will not be precluded from raising additional issues, counsel should make every effort to include in the docketing statement all of the issues that will be presented to the Court. Failure to file the docketing statement within the time set forth above will cause the Court to initiate the process for dismissing a case under Local Rule 45.

If an opposing party concludes that the docketing statement is in any way inaccurate, incomplete, or misleading, the Clerk's Office should be informed in writing of any errors and any proposed additions or corrections within 7 days of service of the docketing statement, with copies to all other parties.

Local Rule 10(a). Retention of the Record on Appeal in the District Court.

In cases in which all parties are represented by counsel on appeal, the district court clerk will transmit with the notice of appeal sent to the Court of Appeals a certificate that the record of docket entries is available upon request. The district court clerk will notify the Court of Appeals of the subsequent filing of any transcript in the case. The district court will then retain the record on appeal until and unless a judge of this Court asks the Clerk of this Court to obtain it. Upon receipt of a request from the Clerk of the Court of Appeals, the clerk of the district court will assemble and transmit the record on appeal within 48 hours.

Local Rule 25(a). Electronic Case Filing System.

As authorized by FRAP 25(a)(2)(D) & (c)(2), the Court has established procedures requiring electronic filing of documents, with certain exceptions, and authorizing electronic service of documents using the Court's transmission equipment, as set forth in Administrative Order 08-01.

Local Rule 25(b). Filing Documents, Use of Facsimile Equipment, Service, Certificate of Service.

(1) **Filing Documents.** Documents, except briefs, appendices, and inmate filings, are not timely filed unless actually received by the Clerk's Office within the time fixed for filing. Documents are deemed filed upon receipt by the Clerk's Office.

(2) **Use of Facsimile Equipment.** Documents may be transmitted for filing by use of facsimile transmission equipment only when an emergency situation exists and advance permission has been obtained to use the Clerk's Office facsimile equipment. Several printing services in Richmond will accept documents by facsimile for filing with the Court. Their telephone numbers may be obtained

from the Clerk's Office. When a facsimile copy is filed, the original, signed document need not be filed.

(3) **Service.** Service on a party represented by counsel must be on all counsel of record.

(4) **Certificate of Service.** All documents must be accompanied by a valid certificate of service. The certificate of service of a brief should be bound with the brief as the last, unnumbered page. A certificate of service can be prepared in advance of actual service. If service is not actually accomplished in the manner and on the date stated in the certificate, an amended certificate of service is required.

Local Rule 25(c) Confidential and Sealed Materials.

(1) **Certificates of Confidentiality.** At the time of filing any appendix, brief, motion, or other document containing or otherwise disclosing materials held under seal by another court or agency, counsel or a pro se party shall file a certificate of confidentiality.

(A) Record material held under seal by another court or agency remains subject to that seal on appeal unless modified or amended by the Court of Appeals.

(B) A certificate of confidentiality must accompany any filing which contains or would otherwise disclose sealed materials. The certificate of confidentiality shall:

- (i) identify the sealed material;
- (ii) list the dates of the orders sealing the material or, if there is no order, the lower court or agency's general authority to treat the material as sealed;
- (iii) specify the terms of the protective order governing the information; and
- (iv) identify the appellate document that contains the sealed information.

(2) **Motions to Seal.** Motions to seal all or any part of the record are presented to and resolved by the lower court or agency in accordance with applicable law during the course of trial, hearing, or other proceedings below.

(A) A motion to seal may be filed with the Court of Appeals when:

- (i) a change in circumstances occurs during the pendency of an appeal that warrants reconsideration of a sealing issue decided below;
- (ii) the need to seal all or part of the record on appeal arises in the first instance during the pendency of an appeal; or
- (iii) additional material filed for the first time on appeal warrants sealing.

(B) Any motion to seal filed with the Court of Appeals shall:

- (i) identify with specificity the documents or portions thereof for which sealing is requested;
- (ii) state the reasons why sealing is necessary;
- (iii) explain why a less drastic alternative to sealing will not afford adequate protection; and
- (iv) state the period of time the party seeks to have the material maintained under seal and how the material is to be handled upon unsealing.

(C) A motion to seal filed with the Court of Appeals will be placed on the public docket for at least 5 calendar days before the Court rules on the motion, but the materials subject to a motion to seal will be held under seal pending the Court's disposition of the motion.

(3) Filing of Confidential and Sealed Material.

(A) Appendices: When sealed material is included in the appendix, it must be segregated from other portions of the appendix and filed in a separate, sealed volume of the appendix.

(B) Briefs, Motions, and Other Documents: When sealed material is included in a brief, motion, or any document other than an appendix, two versions of the document must be filed:

(i) a complete version under seal in which the sealed material has been distinctively marked and

(ii) a redacted version of the same document for the public file.

(C) Personal Data Identifying Information: Personal data identifying information, such as an individual's social security number, an individual's tax identification number, a minor's name, a person's birth date, a financial account number, and (in a criminal case) a person's home address, shall be filed in accordance with section 205(c)(3) of the E-Government Act of 2002 and FRAP 25(a)(5).

(D) Marking of Sealed and Ex Parte Material: The first page of any appendix, brief, motion, or other document tendered or filed under seal shall be conspicuously marked SEALED and all copies shall be placed in an envelope marked SEALED. If filed ex parte, the first page and the envelope shall also be marked EX PARTE.

(E) Method of Filing:

(i) Appendices: Appendices are filed in paper form only, with sealed material placed in a separate, sealed volume, accompanied by a certificate of confidentiality or motion to seal. A Notice of paper filing and either a certificate of confidentiality or a motion to seal are filed in electronic form.

(ii) Formal Briefs: The sealed and public versions of formal briefs are filed in both paper and electronic form. The sealed version is accompanied by a certificate of confidentiality or motion to seal, that is also filed in both paper and electronic form. The electronic sealed version of the brief is filed using the entry SEALED BRIEF FILED, which automatically restricts electronic access to the Court. The electronic public version of the brief is filed using the entry BRIEF FILED.

(iii) Other Documents: Any other sealed document is filed electronically using the entry SEALED DOCUMENT FILED, which automatically restricts electronic access to the Court. A certificate of confidentiality or motion to seal is also filed electronically. If filed electronically, paper copies of the sealed document are not required unless requested by the Court.

(F) Number of Paper Copies Filed and Served: Sealed documents must be served in paper form because electronic access to sealed documents is restricted to the Court.

(i) Appendices: *Sealed volumes* – File four and serve one on each party separately represented. *Unsealed volumes* – File six (five if counsel was appointed, four if party is proceeding in forma pauperis without appointed counsel) and serve one on each party separately represented.

(ii) Formal Briefs: *Sealed version* -- File four and serve one on each party separately represented. *Public version* -- File eight (six if counsel was appointed, four if party is proceeding in forma pauperis without appointed counsel).

(iii) Other Documents: *Sealed version* -- File one (none if filed electronically) and serve one paper copy on each party separately represented. *Public version* -- File one (none if filed electronically).

(G) Responsibility for Compliance: The responsibility for following the required procedures in filing confidential and sealed material rests solely with counsel and the parties. The clerk will not review each filing for compliance with this rule.

(H) Public Access: Parties must remember that any personal information not otherwise protected by sealing or redaction may be made available over the internet. Counsel should notify clients of this fact so that an informed decision may be made on what information is to be included in a document filed with the Court.

Local Rule 27(c). Form of Motions.

All motions should be filed with the clerk and comply with FRAP 27(d). A Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation statement must accompany the motion unless previously filed with the Court. See FRAP 26.1, Local Rule 26.1, and Form A. Counsel should always review carefully the specific rule which authorizes relief to ascertain the requirements, and any motion should contain or be accompanied by any supporting documents required by a specific rule. If a motion is supported by attachments, these materials should also be served and filed with the motion. The parties should not make requests for procedural and substantive relief in a single motion, but should make each request in a separate motion.

Local Rule 28(e). Citation of Additional Authorities.

Counsel may, without leave of Court, present a letter drawing the Court's attention to supplemental authorities under Rule 28(j) and serve a copy on all counsel of record. The Court may grant leave for or direct the filing of additional memoranda, which may include additional argument before, during or after oral argument.

Local Rule 30(b). Appendix Contents; Number of Copies.

In designating or agreeing upon the contents of the appendix, and in assembling the appendix, the parties should avoid unnecessary duplication of materials. The appellee's designation should only include those additional parts of the record to which it wishes to direct the Court's attention that have not already been designated by the appellant.

The use of a selectively abridged record allows the judges to refer easily to relevant parts of the record and saves the parties the considerable expense of reproducing the entire record. Although there is no limit on the length of the appendix except as provided in Local Rule 32(a), it is unnecessary to include everything in the appendix. The appendix should, however, contain the final order or order appealed from, the complaint or petition, as finally amended (civil appeals) or indictment (criminal appeals), as well as all other parts of the record which are vital to the understanding of the basic issues on appeal. Although the entire record is available to the Court should it believe that additional portions are important to a full understanding of the issues, citations to portions of the record not included in the appendix is not favored.

The table of contents to the appendix should be sufficiently detailed to be helpful to the Court. Referring to the transcript of a trial under a single reference to "proceeding" or "trial transcript" is not sufficient. When the testimony of a witness is included in the appendix, the testimony should be clearly identified in the table of contents, beneath the proceeding in which it occurred. The name of the testifying witness and the type of examination (e.g., direct, cross, redirect, or recross) should also be clearly indicated at the top of each page of the appendix where the witness's testimony appears. Exhibits should be listed in the table of contents by number or letter and by name or brief description.

In all criminal appeals seeking review of the application of the sentencing guidelines, appellant shall include the sentencing hearing transcript and presentence report in the appendix. The presentence report must be included in a separate sealed volume, stamped "SEALED" on the volume itself and on the envelope containing it, and be accompanied by a certificate stating that the volume contains sealed material.

Pursuant to the authority granted by FRAP 30(a)(3), the Court requires that only six copies of the appendix must be filed with appellant's opening brief and a copy served on counsel for each party separately represented. Appointed counsel may file five copies and any party proceeding in forma pauperis who is not represented by Court-appointed counsel may file four copies. If the Court allows a deferred appendix, the parties file their page-proof briefs in electronic form only. After the deferred appendix is filed, the parties file their final briefs in electronic form in addition to filing the requisite number of paper copies. The final briefs must contain proper references to the appendix.

Local Rule 30(d). Dispensing with Appendix.

Motions to proceed on the original record pursuant to FRAP 30(f) are carefully reviewed in the Fourth Circuit and are not usually granted unless the appellant is proceeding in forma pauperis, the record is short, or the appeal is expedited. Even if the motion is granted, counsel must include an abbreviated appendix consisting of:

- i. pertinent district court docket entries,
- ii. indictment or complaint,
- iii. judgment or order being appealed,
- iv. notice of appeal,
- v. any crucial portions of the transcript of proceedings referred to in appellant's brief, and
- vi. a copy of the order granting leave to proceed on the original record.

The requisite number of copies of the abbreviated appendix as set forth in Local Rule 30(b) must be filed with the brief.

Local Rule 31(c). Filing and Service.

Briefs and appendices in paper form are deemed filed on the date of mailing if first class mail or other classes of mail at least as expeditious are used. If a courier service is used, the briefs and appendices are deemed timely filed if the briefs and appendices are given to the courier service on or before the due date to be dispatched to the Clerk's Office for delivery within three calendar days. Filing must be within the time allowed by the briefing order. A brief must be accompanied by a valid certificate of service, which should be bound with the brief as the last, unnumbered page. A certificate of service can be prepared in advance of actual service. If service is not actually accomplished in the manner and on the date stated in the certificate, an amended certificate of service is required.

Extensions will be granted only when extraordinary circumstances exist. A motion for an extension of time to file a brief must be filed well in advance of the date the brief is due and must set forth the additional time requested and the reasons for the request. The Court discourages these motions and may deny the motion entirely or grant a lesser period of time than the time requested.

Local Rule 34(b). Informal Briefs.

Whenever the Court determines pursuant to Local Rule 22(a) that briefing is appropriate on an appeal in a non-capital case from the denial of a writ of habeas corpus or of a motion under 28 U.S.C. § 2255, or whenever any pro se appeal is filed from any other type of judgment or order, the clerk shall notify the appellant that appellant shall file, within twenty-one days after receipt of such notice, an informal brief, listing the specific issues and supporting facts and arguments raised on appeal. Appellant's informal brief and any informal brief filed by appellee shall be considered, together with the record and other relevant documents, by the panel to which the proceeding has been referred. The Court will limit its review to the issues raised in the informal brief.

The informal brief may be submitted on a form provided by the clerk and shall provide the specific information required by the form. The parties need not limit their briefs solely to the form. An additional supporting memorandum may be attached if a party deems it necessary in order to address adequately the issues raised, but the informal brief and any supporting memorandum shall not exceed the length limitations established by FRAP 32(a)(7). It is unnecessary to attach record excerpts since the record is before the Court. It is not necessary to cite cases in an informal brief. Unless additional copies are requested by the Clerk, only the original informal brief must be filed with the Court and copies served on the other parties to the case.

Once an informal briefing schedule has been established the parties may file a formal brief only with the permission of the Court. The Court initially reviews cases that are informally briefed under its procedures set forth in Local Rule 34(a) pertaining to pre-argument review.

If the panel reviewing an informal brief submitted by an indigent pro se litigant determines that further briefing and possible oral argument would be of assistance, counsel will be appointed and directed to file additional formal briefs. In any appeal that has been informally briefed, the Court may direct that additional briefs be filed prior to oral argument.

Local Rule 34(c). Court Sessions and Notification to Counsel.

The Court sits in Richmond, Virginia, to hear cases during six to eight separate argument weeks scheduled between September and June. The Court also sits at law schools within the Circuit and at other special argument sessions. The Court's oral argument schedule is available on the Court's Internet site, www.ca4.uscourts.gov.

The Court initially hears and decides cases in panels consisting of three judges with the Chief Judge or most senior active judge presiding. Each panel regularly hears oral argument in four cases each day during court week; additional cases are added as required.

Attorneys appearing for oral argument must register with the Clerk's Office on the morning of argument to learn of courtroom assignment, order of appearance, and allocation of oral argument time. Counsel not already a member of the Fourth Circuit bar will be admitted to practice before the Court at that time upon compliance with the provisions of Local Rule 46(b).

The Court convenes at 9:30 a.m., with the exception of Friday, when it convenes at 8:30 a.m.

Preparation for the argument calendar begins in the Clerk's Office at least two months prior to argument. Upon receiving notice that a case has been tentatively assigned to an argument session, counsel must inform the clerk, within the time provided in the notice, of any conflict or other matter that would affect scheduling of the case for that session. After a case has been scheduled for argument, any motion that would affect the argument date must show good cause for the requested relief and that the relief could not have been requested within the period set by the Court for notice of conflicts. Continuance of an established oral argument date is not granted because of a prior professional commitment. Although a case will not be removed from the calendar because of a scheduling conflict

by counsel after the notification of oral argument has been issued, the Court may direct another lawyer from the same firm to argue the appeal if counsel of record cannot be present.

I.O.P.-36.2. Circulation of Opinions in Argued Cases.

Although one judge writes the opinion, every panel member is equally involved in the process of decision. An appeal may be heard and decided by two of the three judges assigned to a panel, when one judge becomes unavailable. If a panel is reduced to two and the two cannot agree, however, the case will be reargued before a new three-judge panel which may or may not include prior panel members.

When a proposed opinion in an argued case is prepared and submitted to other panel members, copies are provided to the non-sitting judges, including the senior judges, and their comments are solicited. The opinion is then finalized. The Clerk's Office never receives advance notice of when a decision will be rendered, so counsel should not call for such information.

Local Rule 40(a). Filing of Petition.

Although petitions for rehearing are filed in a great many cases, few are granted. Filing a petition solely for purposes of delay or in order merely to reargue the case is an abuse of privilege. Whenever a request for rehearing en banc is contained in a petition, such fact must be stated plainly on the cover of and in the title of the document. Only the original petition for rehearing or rehearing en banc is required unless additional copies are requested by the Clerk.

Local Rule 45. Dismissals for Failure to Prosecute.

When an appellant in either a docketed or non-docketed appeal fails to comply with the Federal Rules of Appellate Procedure or the rules or directives of this Court, the clerk shall notify the appellant or, if appellant is represented by counsel, appellant's counsel that upon the expiration of 15 days from the date thereof the appeal will be dismissed for want of prosecution, unless prior to that date appellant remedies the default. Should the appellant fail to comply within said 15-day period, the clerk shall then enter an order dismissing said appeal for want of prosecution, and shall issue the mandate. In no case shall the appellant be entitled to reinstate the case and remedy the default after the same shall have been dismissed under this rule, unless by order of this Court for good cause shown. The dismissal of an appeal shall not limit the authority of this Court, in an appropriate case, to take disciplinary action against defaulting counsel.