

SPECIFIC MOTIONS

Motions for Stay or Injunction Pending Appeal

Counsel wishing to stay a judgment during the pendency of an appeal must file a motion for stay pending appeal. Fed. R. App. P. 8; Loc. R. 8. See also Loc. R. 18 (stay pending consideration of petition for review); Loc. R. 21(b) (temporary relief pending consideration of mandamus petition). Filing a notice of appeal does not automatically stay the operation of the judgment. Loc. R. 8. Counsel seeking emergency relief should notify the clerk's office of the intended filing of the motion to facilitate the rapid docketing and transmission of the necessary papers.

- **Filing in District Court**

Application for a stay or injunction pending appeal must ordinarily be made in the first instance in the district court. Fed. R. App. P. 8(a)(1). If an application to the district court for temporary relief pending appeal is not practicable, counsel must make a specific showing of the reasons the application was not made to the district court in the first instance. Loc. R. 8.

- **Content**

A motion for stay shall state the reasons for the relief requested and the facts relied upon and, if the facts are subject to dispute, shall be supported by an affidavit. Fed. R. App. P. 8(a). The motion shall include copies of all previous applications for relief and their outcome; a corporate disclosure statement (unless one has been previously filed); and any parts of the record or other materials essential to a fair presentation of the issues. Loc. R. 8.

- **Emergency Applications to Single Judge**

Ordinarily, counsel shall present all motions to the clerk for presentation to the Court. Application to a single judge should be made only in exceptional circumstances where action by a panel would be impractical due to the requirements of time. In such exceptional circumstances, counsel shall attempt to notify the clerk's office that application is being made directly to a single judge, and copies of all papers presented to the judge shall be presented to the clerk as soon as practical for filing. Loc. R. 27(e).

When a single judge determines to act, the matter will be referred to a panel as early in the process as is practical. As soon as a matter has been assigned to a panel, any action in the matter will be decided by the panel. Loc. R. 27(e).

Motions for Bail Pending Appeal

- **Prior to Judgment of Conviction**

A criminal defendant may be released in accordance with the conditions set by the district court prior to judgment. If the district court refuses to release the

prisoner, or sets conditions for release that cannot be met, the order is appealable as a matter of right and will be given prompt consideration by the court of appeals. The appeal is presented without the necessity of briefs or a record upon such papers, affidavits and portions of the record as the parties shall present. Counsel should promptly submit memoranda in support of their position on appeal, and the appeal is usually decided without oral argument upon the materials presented by the parties. Fed. R. App. P. 9(a); Loc. R. 9(a).

- **After Conviction and Notice of Appeal**

Application to set bail or for reduction of bail pending appeal must be made first to the district court. After action by the district court, the appellant may, if an appeal has been taken from the conviction, file a motion for release, or for a modification of the conditions of release, in the court of appeals without noting an additional appeal. A copy of the district court statement of reasons and the judgment of conviction must accompany the motion. Fed. R. App. P. 9(b); Loc. R. 9(b).

- **Bail Appeal**

The government may file an appeal from the district judge's order concerning release pending appeal. 18 U.S.C. § 3145. The appellant may also challenge the trial judge's order by a separate appeal under this statute. The appellant should not pursue both remedies -- a Rule 9(b) motion and a § 3145 appeal. The court encourages use of the Rule 9(b) motion.

Motions to Expedite

The court on its own motion or on motion of the parties may expedite an appeal for briefing and oral argument. Any motion to expedite should state clearly the reasons supporting expedition, the ability of the parties to present the appeal on the existing record, and the need for oral argument. Loc. R. 12(c).

As required by Local Rule 27(a) for all motions, a motion to expedite should state the position of opposing counsel. If opposing counsel agrees to expedited briefing, the motion should set forth the schedule agreed to by counsel. The granting of a motion to expedite affects the briefing and/or oral argument of the case; the timing of the ultimate disposition rests within the discretion of the panel.

Motions for Abeyance

In the interest of docket control the court may, either on its own motion or upon request, place a case in abeyance pending disposition of matters before this court or other courts which may affect the ultimate resolution of an appeal. During the period of time a case is held in abeyance, the appeal remains on the docket but nothing is done to advance the case to maturity and resolution. The parties will be required to make periodic status reports and/or notify the court of appeals upon resolution of the matter for which the case was placed in abeyance. Loc. R. 12(d).

Motions to Intervene

A party who appeared as an intervenor in a lower court proceeding shall be considered a party to the appeal upon filing a notice of appearance. Otherwise, a motion for leave to intervene must be filed with the court of appeals. Any notice of appearance or motion to intervene should indicate the side upon which the movant proposes to intervene. Loc. R. 12(e).

- **Intervention in Agency Review Proceeding**

Intervention in agency review proceedings is governed by Fed. R. App. P. 15(d). A motion for leave to intervene in an agency review proceeding shall be filed in the court of appeals and served on all parties to the proceeding within 30 days of the date on which the petition for review was filed. The motion shall contain a concise statement of the interest of the moving party and the grounds upon which intervention is sought.

- **Government Intervention in Challenge to Constitutionality of Law**

Under Fed. R. App. P. 44, it is the duty of a party who draws into question the constitutionality of any federal or state statute in any proceeding to which the federal or state government is not a party, to give immediate notice in writing to the court of the existence of said question. The clerk shall thereupon certify such fact to the Attorney General of the United States or the appropriate state. The government may thereafter intervene to defend the constitutionality of the federal or state law at issue in the appeal. 28 U.S.C. § 2403; Fed. R. App. P. 44.

- **Joint Briefing and Argument**

Intervenors are required to join in the brief for the side which they support unless leave to file a separate brief is granted by the court. Loc. R. 12(e) & 28(a). Intervenors share as parties in the argument time allotted under Local Rule 34(d) to the side they support.

Motions to Dismiss

To avoid unnecessary briefing of the case on the merits, motions to dismiss on jurisdictional or other procedural grounds should be filed within the time allowed for the filing of the response brief. Loc. R. 27(f). The clerk's office will obtain a response, and the motion and response will be referred to a randomly selected motions panel.

Briefing is not automatically stayed upon filing of a motion to dismiss. Accordingly, counsel wishing a stay of the briefing schedule should file a motion to suspend briefing pending disposition of the motion to dismiss.

Motions for Summary Affirmance or Reversal

Motions for summary affirmance or reversal filed prior to completion of briefing should include a showing that the issues raised are manifestly unsubstantial and appropriate

for disposition by motion. Local R. 27(f). Absent such a showing, the court will defer action on the motion until briefing is complete. Local R. 27(f).

The court may summarily dispose of any appeal at any time. Loc. R. 27(f).

Motions to Submit on the Briefs

As soon as possible upon completion of the briefing schedule, or within 10 days of tentative notification of oral argument, whichever is earlier, any party may file a motion to submit the case on the briefs without the necessity of oral argument. Loc. R. 34(e). The clerk's office notice tentatively calendaring a case for oral argument generally affords the parties 10 days to file a motion to submit on the briefs or other motion that will affect the scheduling of the case.

Motions for Voluntary Dismissal

When an appeal has not been docketed in the court of appeals, the district court may dismiss on a stipulation of dismissal signed by the parties or on the motion and notice of appellant. Fed. R. App. P. 42(a). Since the time between notice of appeal in the district court and docketing in the court of appeals is short, such dismissals are unusual. Once the appeal is docketed, the court of appeals may dismiss upon filing with the clerk an agreement signed by the parties stipulating dismissal and specifying the terms of payment of costs, and paying any outstanding fees. An appeal may also be dismissed on motion of the appellant according to terms agreed to by the parties or set by the court. Fed. R. App. P. 42(b). As an additional protection in criminal appeals, Local Rule 42 requires that the defendant must personally sign a Rule 42(b) motion to dismiss a criminal appeal.

Related Links

- [Rule 8. Stay or Injunction Pending Appeal \(with Local Rule\)](#)
- [Rule 9. Release in a Criminal Case \(with Local Rule\)](#)
- [Rule 12. Docketing the Appeal; Filing a Representation Statement; Filing the Record \(with Local Rules\)](#)
- [Rule 15. Review or Enforcement of an Agency Order – How Obtained; Intervention \(with Local Rules\)](#)
- [Rule 18. Stay Pending Review \(with Local Rule\)](#)
- [Rule 21. Writs of Mandamus and Prohibition, and Other Extraordinary Writs \(with Local Rule\)](#)
- [Rule 27. Motions \(with Local Rules\)](#)
- [Rule 42. Voluntary Dismissal \(with Local Rule\)](#)