

Chapter 4

Appellate Court Procedures

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§400 COMMENCING AN APPEAL

An appeal is commenced by filing a Notice of Appeal in the district court from which the appeal is taken. A notice of appeal must be filed in the district court within 30 days after entry of the judgment from the lower court (60 days if the United States is a party). (FED. R. APP. P. 4(a)) This time may be extended upon a showing of good cause by motion filed within 30 days of the expiration of the thirty-day appeal period. In criminal cases, a notice of appeal must be filed within 10 days after entry of judgment (30 days if the United States is a party). In admiralty and tax court cases, a notice of appeal must be filed within 90 days after entry of the order or judgment. (FED. R. APP. P. 13) A cross-appeal must be filed within 14 days of the filing of the first notice of appeal. (FED. R. APP. P. 4(a))

The notice should specify: (1) the parties taking the appeal, (2) the judgment, order, or portion of the judgment or order appealed from, and (3) the name of the court from which the appeal is taken. See §401 for an example notice of appeal.

§401 SAMPLE NOTICE OF APPEAL

Use abbreviated caption

UNITED STATES DISTRICT COURT
 _____ DISTRICT OF ____ [STATE] _____

<i>NAME OF PLAINTIFF,</i>)	
)	
Plaintiff,)	Civil Action No.
)	
vs.)	
)	NOTICE OF APPEAL
<i>NAME OF DEFENDANT,</i>)	
)	
Defendant.)	
_____)	

NOTICE IS HEREBY GIVEN that [Name all parties taking the appeal], (Plaintiff(s)/Defendant(s)) in the above named case, hereby appeal(s) to the United States Court of Appeals for the [Indicate Circuit] Circuit (from the final judgment) OR (from an order describe) entered in this action on the ____ day of _____, ____.

Name of Attorney
Attorney for [party]
Address and telephone number
Insert state bar number if applicable.

§402 SERVING THE NOTICE OF APPEAL

The clerk of the district court will mail a copy of the notice to all parties' attorney of record unless otherwise provided by local rule. (FED. R. APP. P. 3) In a criminal case, the Clerk will also mail a copy of the notice to defendant. The appellant must provide the clerk with sufficient copies for all parties. Some courts require that the appellant provide envelopes addressed to each party with postage prepaid. Be sure to check your local rules. The clerk of the district court notes in the docket the names of the parties to whom the notices were mailed with the date of mailing. The clerk will send a copy of the notice and docket entries to the clerk of the court of appeals named in the notice.

When the clerk of the court of appeals receives a copy of the notice of appeal and docket entries, the clerk will enter the appeal into the docket.

§403 APPEALS FROM AN INTERLOCUTORY ORDER

Only certain types of interlocutory orders may be immediately appealed to the Court of Appeals. If the order qualifies for an immediate appeal, the appellant must file a petition for permission to file an appeal with the clerk of the court of appeals within 10 days after entry of the interlocutory order. The petition must contain a statement of facts and a statement as to why an immediate appeal will resolve the dispute. It must also contain a copy of the order from which the appeal is sought and any findings of fact and conclusions of law relating thereto. A proof of service by mail that all parties were mailed a copy of the petition must be attached. The opposition may file an answer to the petition within seven (7) days of service of the petition. File the original and three copies of the petition unless local rules have a different requirement.

Within 10 days after entry of the order granting permission to file an appeal, the appellant must file a bond for costs, if required by the court, and pay the filing and docket fees. The clerk of the district court will notify the clerk of the court of appeals that the fee has been paid. When the clerk of the court of appeals receives such notice, the clerk will enter the appeal in the docket. A formal notice of appeal is not filed. (FED. R. APP. P. 5)

§404 REPRESENTATION STATEMENT

Within ten days of filing the notice of appeal, the appellant must file a representation statement with the clerk of the court appeals naming all parties represented by that attorney with the clerk of the Circuit Court. (FED. R. APP. P. §12(b))

§410 RECORD ON APPEAL

The record on appeal consists of: (1) original papers and exhibits filed in the case, including the judgment, ruling or order being appealed, any supporting opinion, memoranda of decisions, or findings of fact; and conclusions of law or statement of reasons; (2) a transcript of the proceedings; and (3) a certified copy of docket entries prepared by the clerk of the district court. (FED. R. APP. P. 10(a)) The record on appeal is bound separately, has a white cover, and is entitled "Record Excerpts."

§411 TRANSCRIPT OF PROCEEDINGS

A transcript of the proceedings must be ordered from the court reporter within 10 days after the filing the notice of appeal. The order must be in writing and directed to the reporter with a copy filed with the clerk of the district court. The party taking the appeal must order either the entire transcript or those portions of the transcript that should be included in the record.

If a portion of the transcript is ordered, the appellant must file a statement of issues the appellant wishes to present on appeal and mail a copy of the statement and transcript order to the appellee within 10 days of filing the notice of appeal. If the appellee does not agree with the statement and wants to add additional material in the transcript, the appellee has 10 days after service of a copy of the transcript order to file a designation of additional parts of the transcript to be included. The appellant has 10 days after receipt of appellee's designation to order any additional records. (FED. R. APP. P. 10(b))

Upon receipt of the transcript order, the reporter will write the date he or she expects to complete the transcript at the bottom of the order and will transmit it to the clerk of the court of appeals. The reporter has 30 days in which to complete the transcript of the proceedings. However, he or she may request an extension from the clerk of the court of appeals. If the reporter fails to complete the transcript on time, the circuit clerk will notify the district court judge. When the transcript is completed, the reporter transmits it to the clerk of the district court who will transmit it, along with court documents and list of docket entries, to the clerk of the court of appeals. If the record on appeal is unusually voluminous, or the exhibits are very large or bulky, the appellant (or requesting party) must make arrangements to have them transported to the court of appeals. (Fed. R. App. P. 11(b)) The parties may stipulate that the district clerk temporarily retain the record so appellate documents can be prepared. If this is the case, the district clerk must certify to the circuit clerk that the record on appeal is complete. The appellant must request that the district clerk forward the record no later than receipt of the appellee's brief.

When the record on appeal is received by the clerk of the court of appeals, the clerk will file it and notify the parties of the date the record is filed. (Fed. R. App. P. 12) The date the record is filed marks the beginning of the time period within which appellate briefs must be filed.

§420 APPELLATE BRIEFS

§421 APPELLANT'S BRIEF

The appellant's brief must contain the following material which must be under separate headings in the order indicated (FED. R. APP. P. 28):

1. Corporate disclosure statement, if applicable;
2. A table of contents with page references (see §424.5);
3. A table of cases, statutes and authorities cited, alphabetically arranged with page references (see §424.6);
4. Statement of subject matter and appellate jurisdiction;
5. Statement of the issues presented for review;
6. Statement of the case indicating the nature of the case, course of proceedings and disposition by the lower court;
7. Statement of facts relevant to the issues with references to the record;
8. A summary of the argument made in body of the brief;
9. Argument including standard of review for each issue;
10. A short conclusion stating the relief sought; and
11. Certificate of compliance that the brief complies with the type-volume limitations of Fed. R. App. P. 32(7)(B).

§421.1 WHEN TO FILE

Appellant must serve and file his brief within 40 days after the date the record is filed, unless local rules require otherwise. Some courts require the Appellant's brief to be filed according to a briefing or scheduling order. Appellant may serve and file a reply brief within 14 days after service of the appellee's brief, so long as it is filed three days before argument. (FED. R. APP. P. 31(a)) If a brief or appendix is mailed to the court via first class mail, it is deemed filed on the date of mailing. (FED. R. APP. P. 25(a))

§421.2 NUMBER OF COPIES

Twenty-five (25) copies of appellant's brief are required to be filed with the clerk and two copies are served on each party separately represented unless local rule provides otherwise. (FED. R. APP. P. 31(b)) An unrepresented party proceeding in forma pauperis must file four (4) copies of the brief with the clerk, and one copy on the attorney for each separately represented party. Some courts require a different number of printed briefs to be filed than word processed briefs. Check your local rules.

§422 APPELLEE'S BRIEF

The appellee's brief must conform to the above requirements for an appellant's brief except that statements of jurisdiction, issues, standard of review, and statements of case and facts need not be made unless the appellee disagrees with the appellant's statements. (FED. R. APP. P. 28(b))

§422.1 WHEN TO FILE

Appellee must serve and file an answering brief within 30 days after service of the appellant's brief unless otherwise required by local rule. If a brief is mailed to the court via overnight mail, it is deemed filed on the date of mailing. (FED. R. APP. P. 25(a))

§422.2 NUMBER OF COPIES

Twenty-five (25) copies of appellee's brief are required to be filed with the clerk and two copies are served on each party separately represented unless local rule provides otherwise. (FED. R. APP. P. 31(b)) Some courts require a different number of printed briefs to be filed than word processed briefs. Check your local rules.

§423 REPLY BRIEF

Appellant may file a brief in reply to appellee's brief. An appellee who has cross-appealed may file a brief in reply to the appellant's response to the issues presented in the cross-appeal. A reply brief must contain a table of contents with page references, and a table of authorities in alphabetical order with page references. A reply brief may be no more than 15 pages and cannot contain more than 7,000 words or 650 lines of monospaced text. Some courts do not allow reply briefs. Check your local rules.

§424 AMICUS CURIAE BRIEF

The term "Amicus Curiae" is Latin meaning "friend of the court." An amicus curiae brief is filed by a non-party who has an interest in the outcome of the case. The non-party supports either the appellant, appellee, or other party, to help the court reach a decision in the case by providing the judge additional law and information supporting their side of the issue.

An amicus curiae brief is not filed as a matter of right. The non-party must either have the written consent of all parties or obtain the court's permission through a noticed motion. If the brief is presented by the United States, a U.S. officer or agency, or State, consent or permission is not required.

The motion for leave to file an amicus curiae brief must identify the interest of the applicant and state reasons why an amicus curiae brief is desirable. The proposed brief is attached to the motion. If granted, the amicus brief must be filed within the time period allotted for the party it supports, unless the court otherwise grants (FED. R. APP. P. 29).

Some circuit courts of appeals do not require the court's permission to file an amicus brief. As of this writing, the following circuits regulate amicus curiae filings: D.C. Circuit, First Circuit, Sixth Circuit, Ninth Circuit, and Tenth Circuit. Be sure to check your local rules.

§424.1 CONTENT AND FORM

An amicus curiae brief is prepared like other briefs (see §425). In addition, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. If an amicus curiae is a corporation, the brief must include a disclosure statement (see §425.3). An amicus curiae contains:

1. Table of contents with page references;
2. Table of authorities in alphabetical order with page references;
3. A statement of the identity including interest in the case and the source of authority to file;
4. Argument which may be preceded by a summary (a statement of the standard of review is not necessary); and
5. A certificate of compliance with Rule 32(a)(7), if required.

§424.2 LENGTH OF BRIEF

An amicus curiae may be no more than one-half of the maximum length of the supported party's principal brief. If the court allows the supported party to file a longer brief, the extension does not apply to an amicus curiae brief.

§424.3 WHEN TO FILE

A motion for leave to file an amicus curiae brief and brief must be filed no later than seven (7) days after the supported party's principal brief is filed. If the brief does not support either party, the motion and brief must be filed no later than seven (7) days after the appellant's principal brief is filed. The court may grant permission for later filing.

§425 BRIEF PREPARATION

Briefs may be professionally printed or produced by standard computer and printer and duplicated on a copy machine. The process used must produce a clear black image on white paper. Carbon copies are not permitted without permission of the court (except for parties proceeding in forma pauperis).

Briefs that are professionally printed must be bound in volumes and be 6 1/8" by 9 1/4". The printed material must be 4 1/6" by 7 1/6". Briefs that are not professionally printed must have pages 8 1/2 by 11 inches. The typed material may not exceed 6 1/2 by 9 1/2 inches. The material must be double spaced. Patent documents may be of such size necessary for those documents. All briefs must be in at least 11 point type on opaque, unglazed paper.

Appellate briefs are prepared according to the guidelines stated in the Rules of Appellate Procedure 32. The brief must be double spaced on 8 1/2 by 11 paper. Use either a proportionally spaced or monospaced font. For a proportionally spaced type, use a serif font in 14 points or larger. A sans-serif font may be used in headings and captions. If you are using a monospaced type, it may not contain more than 10 1/2 characters per inch. When binding the brief, be sure that it lies flat when opened.

Some pointers to assist you in preparing briefs are as follows:

1. When referring to specific parties, refer to them by their name or other descriptive term identifying the party and the party's role in the litigation. Do not use the terms "appellant" or "appellee." (FED. R. APP. P. 28(d))
2. When referring to a specific page in the transcript or appendix (see §430), indicate the exact page of the appendix where the information appears. (FED. R. APP. P. 28(e))
3. If a statute, rule or regulation is quoted and the court's direction is referred thereto, the statute or regulation must be copied and either attached to:
 - a. The brief;
 - b. The addendum at the end of the brief; or
 - c. In pamphlet form filed with the brief. (See §435) (FED. R. APP. P. 28(f))
4. Double-space text. Quotations more than two (2) lines long may be indented and single spaced. Headings and footnotes may be single spaced.
5. Use boldface type or italics for emphasis only.
6. Case names must be italicized or underlined.

§425.1 LENGTH OF BRIEFS

Principal briefs (appellant's and appellee's opening brief) may not exceed thirty (30) pages and reply briefs may not exceed fifteen (15) pages unless otherwise required by local rule. However, the appropriate method of determining the adequate length of briefs is to count the number of words or lines in the brief. A principal brief (appellant and appellee) may contain no more than 14,000 words or 1,300 lines of monospaced text.

When counting a brief's length, do not count the table of contents, table of citations, addenda, corporate disclosure statement, statement regarding oral argument, addendum containing statutes rules or regulations and certificate of compliance. Headings, footnotes, and quotations count toward the word and line limitation.

§425.2 CERTIFICATE OF COMPLIANCE

A brief must contain a certificate of compliance that it is within the type-volume limitation imposed by Rule 32. It must state either the number of words in the brief or the number of lines of monospaced type in the brief. Most word processors have a word count feature. Be sure to exclude the table of contents, table of authorities and addenda when counting words. The certificate of compliance is inserted at the end of the brief.

§425.3 CORPORATE DISCLOSURE STATEMENT

If a party is a non-governmental corporation, a corporate disclosure statement must be filed identifying its parent companies, subsidiaries, and affiliates that have issued shares to the public. The statement must be filed with the principal brief, or upon filing a motion, of each party who is a corporation. The statement is inserted in front of the table of contents of each party’s opening brief. If it is filed before the brief, file the original and three copies, unless local rules require otherwise. The corporate disclosure statement must be inserted before the table of contents of the party’s principle brief even if it was filed before the brief was due. (FED. R. APP. P. 26.1)

§425.4 PREPARATION OF BRIEF COVER

The brief cover consists of the same information as the caption, but the information is positioned differently on the page (see §425.5). The party references are changed from “Defendant” to “Defendant-Appellant.”

A brief cover contains the following requirements:

1. Docket number;
2. Title of court;
3. Name of parties in district court action;
4. Name of parties in court of appeals action;
5. Name of court from which action is appealed;
6. Title of case;
7. Nature of proceeding;
8. Title of document, including name of party for whom document is filed;
9. Attorneys’ name, address and telephone number with title, if any.

The standard colors of brief covers are as follows:

Appellant (party making appeal)-----	Blue
Appellee (party opposing appeal) -----	Red
Intervenor or amicus curiae -----	Green
Reply briefs -----	Gray
Supplemental briefs -----	Yellow
Appendices/record excerpts -----	White