U.S. Court of Appeals For The Third Circuit Practice Guide

(3d edition)

Prepared by The Bar Association
For The Third Federal Circuit

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Foreword

The Bar Association for the Third Federal Circuit is pleased to present this newly-updated guide to practice before the United States Court of Appeals for the Third Circuit. The Practice Guide is intended to provide straightforward and easy-to-find answers to some of the more common questions we hear from practitioners whose practices may not take them to the Third Circuit on a regular basis. This Guide necessarily is general in nature and is not a substitute for legal advice tailored to the facts and circumstance of any particular case. The Practice Guide focuses on the rules and procedures that apply in appeals from decisions rendered by a district court or an agency; it does not address matters related to the Third Circuit's original jurisdiction (*e.g.*, petitions for writ of mandamus) or practice before the Supreme Court of the United States (*e.g.*, petitions for writ of certiorari). In addition to consulting this Guide, we strongly encourage you to seek out more comprehensive guides to appellate practice, including the very thorough Third Circuit Appellate Practice Manual (2d edition, 2010; 3d edition forthcoming) published by PBI Press. We list some of our favorite resources in Appendix 6.

Many experienced federal appellate practitioners made this Guide possible. I am especially grateful to Jim Martin and Donna Doblick for their work spearheading this effort, contributing content, editing chapters submitted by others, and otherwise seeing the process through to fruition. I also extend my sincerest thanks to contributors Chip Becker, Chuck Craven, Lisa Freeland, and Andy Simpson. Kevin McNulty also contributed to the original edition before ascending to the bench; he did not participate in the revisions.

I also am grateful to the judges who have acted as the Court's official liaisons to the Bar Association of the Third Federal Circuit — Judges Thomas L. Ambro, D. Michael Fisher, Julio M. Fuentes, and Dolores K. Sloviter — and to the Clerk of the Third Circuit, Marcia Waldron. Without their support and encouragement, this Practice Guide would not have been possible. Many thanks as well to the entire Board of Governors of the Third Circuit Bar Association. All of them are seasoned appellate lawyers who work to fulfill the Association's mission of improving standards of federal practice, developing improved rules, creating educational events and programs, and facilitating relationships between the bench and bar of the Third Circuit.

Peter Goldberger
President, Bar Association
of the Third Federal Circuit
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Chapter I. Threshold Considerations

Should I Appeal? There is an understandable inclination for a losing party to want to file an appeal to try and get an adverse judgment reversed. But appeals take time (sometimes, several years) and they involve added legal fees and costs. Also, the great majority of judgments are affirmed. A reversal is the exception, not the rule. To properly present a case on appeal, a party cannot simply "redo" what he or she did at trial. The potential appellant and/or the appellant's lawyer must review the record, engage in additional legal research, evaluate the potential arguments in light of the applicable standards of review, and prepare thorough briefs that follow the controlling appellate rules.

Given the time, costs, and limited chances for success, it may be prudent to forgo an appeal or try to settle the case. It also might be advisable to consult an appellate specialist, who could provide insight into whether an appeal is advisable and help with any appeal that is taken.

Time For Filing The Notice Of Appeal. The filing of a notice of appeal is the first step in the appellate process. The notice of appeal must: (1) be timely filed; (2) correctly identify what is being appealed; and (3) identify the parties who are filing the appeal. Properly calculating the time to file the notice of appeal is critical. If the notice is untimely, the appeal will be dismissed and no appellate relief will be available. In most civil cases, the deadline is 30 days—60 days if the United States or any of its officers or agencies is a party—calculated from the entry of an appealable judgment or order on the district court's docket; in criminal cases, the time limit is 14 days for defendants and 30 days for the government. If one or more of the parties in a civil case filed a timely post-trial motion, however, this window is extended to 30 days from the date the court decides that motion. Federal Rules of Appellate Procedure ("Fed. R. App. P.") 4(a)(4)(A). If a timely motion for an acquittal or for a new trial is filed in a criminal case, the window is extended to 14 days after the court rules on that motion. Fed. R. App. P. 4(b)(3)(A). For "excusable neglect or good cause," the district court (not the Court of Appeals) may agree to extend these deadlines. Fed. R. App. P. 4(a)(5), 4(b)(4).

The notice of appeal is filed in the court from which the appeal is taken, not in the Court of Appeals. Fed. R. App. P. 3(a)(1). Because the consequences of a late-filed or otherwise defective notice of appeal are so severe, including the loss of the right to appeal, the controlling rules should be studied closely. A sample notice of appeal is included in Appendix 2. Practice guides (*see* Appendix 6) can be particularly helpful on this timing issue; consultation with an appellate specialist is advisable as well.

Appealable Judgments. With a few important exceptions, only final judgments are appealable. In the federal courts, a judgment typically is a separate document that is entered on the docket of the district court and specifically labeled as a "judgment," in accordance with Federal Rule of Civil Procedure 54. For criminal cases ending in a conviction, the

judgment records both the conviction(s) and the imposition of sentence. Federal Rules of Criminal Procedure ("Fed. R. Crim. P.") 32(k). Some federal statutes provide that certain types of non-final orders are appealable as well. For example, Section 1292 of Title 28 of the United States Code makes certain orders involving injunctions, receivers, and admiralty matters immediately appealable. Certain "collateral" orders (narrowly defined) also sometimes count as "final" for this purpose. You should consult more detailed guides to federal appellate practice to see if a special rule applies to your case.

Limited Functions Of Appellate Courts. An appellate court resolves cases differently than a district court. The district court takes evidence, decides factual and credibility issues, and rules on legal questions. Appellate courts do not take evidence or resolve credibility disputes, do not retry the case, and (with rare exceptions) do not consider evidence that was not before the district court or agency. Instead, appellate courts decide legal questions based (with the rarest of exceptions) on the record the parties made below. This is a very narrow function that limits the arguments that will have a chance of success on appeal.

The Court of Appeals also has strict limitations governing the scope of its review of cases. Because these limits influence the likelihood an argument will be successful, they should affect the choice of arguments one makes on appeal. Among the most significant of these are: presumptions in certain circumstances that the district court's rulings are correct; the Court's ability to review only the facts that are in the record; and the requirement that, generally, the legal error a party is urging on appeal must have been "prejudicial," meaning that it changed the outcome.

Standards Governing Appellate Review. With respect to specific claims of error, the Court of Appeals will apply particularized "standards of review" that also influence what arguments will have a chance of success. The principal standards of appellate review are:

- *Substantial evidence and "clear error"*: These standards govern the appellate court's review of factual findings made by a judge, jury, or agency. Basically: if there is substantial evidence in the record to support a finding of fact, the Court of Appeals will affirm it. This is why an appellant who attempts to "retry" the case in the Court of Appeals will not be successful.

- *Abuse of discretion*: This standard applies to many pre-trial rulings, trial management issues, and rulings on the admissibility of evidence. When applying this standard, the Court of Appeals will uphold the district court's ruling unless no reasonable judge could have made it. This is a very high threshold, and it applies to most rulings made in a case. Even if the appellate judges would have made a different ruling if they had been the trial judge, they will not second-guess him or her if there is a reasonable basis in the record for the ruling.

- *De novo or plenary*: This standard applies to questions of law. The Court of Appeals will make an independent examination of purely legal issues without any deference to the district court's or agency's analysis. Because this is the most favorable standard of review, a potential appellant will want to look for errors of law.

In selecting the arguments to be made, the appellant in particular should always consider the governing standard of review, as it will be the first thing the Court of Appeals looks at when evaluating a claim of error in a ruling, order or judgment.

Consult The Relevant Rules And Internal Operating Procedures. All appeals in the federal court system are governed by the Federal Rules of Appellate Procedure, which control the timing of filings, the format of papers, the content of briefs, and every other critical step in the appellate process. The Third Circuit has its own set of rules (Local Appellate Rules, or "LARs") that complement the Federal Rules. The Third Circuit also has internal operating procedures ("IOPs"), which provide further insights into case handling. The rules and IOPs can be found at the Court's official website, www.ca3.uscourts.gov. Lawyers and self-represented parties should consult and follow these rules and procedures at every step in the appellate process.

Chapter II. Mechanics Of The Appellate Process

Filing Fees. Unless the appellant is the United States government or an individual proceeding *in forma pauperis* ("IFP"), a notice of appeal must be accompanied by (or at least soon followed by) a combined filing and docketing fee of $505.00. Fed. R. App. P. 3, 24. Except where counsel previously was appointed under the Criminal Justice Act ("CJA"), 18 U.S.C. § 3006A, a motion for permission to appeal IFP and an accompanying affidavit (a form that discloses financial information, called Form FRAP4) must be filed if the appellant seeks to proceed IFP. If IFP status is granted, the filing and docketing fees are waived for non-prisoners. If representing a prisoner in a civil case, consult LAR 24.1 for additional requirements. A failure to pay the filing fee or a failure to file IFP within 14 days of the appeal being docketed will result in dismissal of the appeal. LAR Misc. 107.1(a).

Fees for an appeal from a district court are paid to the clerk of the district court. Fees for an appeal from an agency decision or for a filing in the original jurisdiction of the Court of Appeals (*e.g.*, a mandamus petition) are paid to the Clerk of the Third Circuit. The fee for these cases is $500.00. A fee for a petition for leave to appeal must be paid within 14 days after entry of an order by the Third Circuit granting leave to appeal.

In addition to the filing fee, the district court may require the appellant in a civil case to file a bond or provide other security in any form and amount necessary to ensure payment of the judgment and the costs incurred during the appeal. Fed. R. App. P. 7.

Electronic Filing. The Third Circuit uses the Electronic Case Files ("ECF") system. Attorneys are required to file documents electronically in accordance with the Local Rules. Therefore, you should sign up for an Appellate Filer Account with PACER ("Public Access to Court Electronic Records") as soon as you are contemplating an appeal. Do not assume that your registration for e-filing in a district court will allow you to file with the Court of Appeals – it won't. You can register at this link: https://www.pacer.gov/psco/cgi-bin/cmecf/ea-regform.pl.

Non-incarcerated *pro se* litigants may register to file electronically, but are not required to do so. LAR 25.1(c), 30.3(f). A summary of the Third Circuit's electronic filing requirements is reproduced in Appendix 4, and also appears (along with other helpful information about e-filing) on the Court's website. The Clerk's Office also has an ECF help desk, which is available to help with technical filing issues. The help desk operates from 10:00 a.m. to 12:00 p.m. and 2:00 p.m. to 4:00 p.m. on days when the Clerk's Office is open. The help desk also can be reached at (267) 299-4970 or via email at ecf_helpdesk@ca3.uscourts.gov.

The Record On Appeal And The Appendix. The record on appeal consists of all original papers and exhibits filed in the district court or administrative agency, the transcripts of any proceedings, and a certified copy of the docket entries. The appendix, in contrast, consists of those parts of the record that the parties designate for inclusion because

they want the Court of Appeals to have ready access to them when deciding the appeal. No matter what the parties designate for the appendix, the entire record is available to the Court of Appeals.

Transcripts And Transcript Purchase Orders. The parties determine which parts of the proceedings in the district court are to be transcribed for use in an appeal. The appellant has the burden of ensuring that all required transcripts are ordered. Transcripts are ordered by electronically filing a transcript purchase order form ("TPO") in both the district court and in the Third Circuit. All transcripts ordered by the parties are filed with the district court and become part of the record on appeal. 28 U.S.C. § 753(b).

A TPO must be filed in every appeal, even if no transcripts are needed. In order to complete the TPO, counsel must have the names of the court reporters. These names are listed on the district court docket sheet or can be obtained from the court reporter in the district court clerk's office. A separate TPO must be filed for each court reporter. A TPO form is available on the Third Circuit website. (Go to "Forms, Fees and Info Sheets," then "All Forms," then "Case Opening to Issuance of Briefing Schedule.")

A TPO must be filed within 14 days of the filing of a notice of appeal, or entry of an order disposing of a post-trial motion, whichever is latest, unless the Clerk specifies another date in the docketing letter. (Other forms to be filed are mentioned in Chapter III under "Case Opening.") The party ordering the transcript must arrange to pay the cost of transcription, either through the district court's clerk's office or directly to the stenographer, as advised by the clerk or the court reporter.

Computing And Extending Time. The rules governing the computation of deadlines in the Courts of Appeals appear in Federal Rule of Appellate Procedure 26. Note that certain of these rules are due to be amended as of December 1, 2016.

Chapter III. The Clerk's Office

Location And Available Resources. The Third Circuit's website — www.ca3.uscourts.gov — provides detailed information about the Court and the Clerk's Office. The website includes: a table that sets forth the chronology, timing, and rules affecting the major steps of a case on appeal; rules and forms for admission to the bar of the Court; information about the Court's case management and electronic case files (CM/ECF) system; access to the Court's electronic dockets; the Third Circuit's local rules and internal operating procedures; mediation information; instructions on matters such as the content of briefs and appendices; the Court's opinions; recordings of oral arguments; information about the Bar Association of the Third Federal Circuit; and other useful links, including a map and directions to the courthouse and links to other federal courts' websites.

The Third Circuit's Clerk's Office has only one physical location:

Office of the Clerk
United States Court of Appeals for the Third Circuit
21400 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106-1790.

The Clerk's Office is open on weekdays from 8:30 a.m. to 5:00 p.m., except for federal holidays. The main switchboard number for the Clerk's Office is (215) 597-2995. After-hours paper submissions may be left for filing in the "after-hours" file box for the U.S. District Court for the Eastern District of Pennsylvania, which is located on the first floor of the federal courthouse in Philadelphia. There is a time-stamp device near the box, and items will be deemed filed as of the date stamped. Electronic filing ordinarily is 24/7, with timely filing possible under 11:59 p.m.

Roles Of Various Staff. The Clerk's Office helps with the management of cases. The staff does not provide substantive legal advice to lawyers or self-represented parties, but can assist them with procedural aspects of their cases. The Clerk of the Court, Marcia Waldron, is supported by many highly-skilled individuals, including:

- the Attorney Admissions Clerk, who handles admissions of lawyers to the bar of the Court: (267) 299-4906;
- Case Opening Specialists, who handle questions about the initial intake and opening of an appeal or petition: (267) 299-4920 and (267) 299-4925;
- a team of Case Managers, who handle procedural questions about the docketing of a case, ordering transcripts of district court proceedings, entries of appearances, civil information statements, motions, briefing deadlines, and rehearing petitions; and

- Motions Attorneys, who assist the judges with motions.

Case Opening Process and Forms. When the Clerk's Office opens a case, it will electronically send a letter containing the name and telephone number of the Case Manager assigned to the case, the docket number of the appeal, the official caption, and instructions about the initial documents that must to be filed within 14 days, typically: an entry of appearance, a civil/agency/criminal "information statement," a mediation statement (civil cases only), a corporate disclosure form (if applicable), and a transcript purchase order. All forms can be downloaded from the Court's website as fillable PDF's. (The initials of the Case Manager assigned to the appeal also typically appear in parentheses at the end of ECF docket entries.) A list of the first names and telephone numbers of Case Managers also can be found in the Clerk's Office Telephone Directory on the Third Circuit's official website. (Go to "About the Court," then "Clerk's Office.") Once the case is docketed, open, and in the system, other staff specialists are involved, including:

- a Brief Team, which handles the intake, compliance, and distribution of briefs to the judges: (267) 299-4941, (267) 299-4917, (267) 299-4942 and (267) 299-4940;

- a Calendaring Team, which handles the assignment of cases to panels or for consideration by the Court *en banc*, who act as criers during oral argument sessions, and who answer questions about the scheduling of a case, oral argument, and the availability of sound recordings of oral argument: (215) 597-2995 (press 3);

- Legal Division Staff Attorneys (formerly and commonly referred to as "staff attorneys"), who primarily are involved in research and writing of draft memoranda, orders and opinions; and

- Legal Assistants, paralegals in the Clerk's Office who assist with procedural motions and help with the handling of complex cases.

Obtaining Case Information. Information about cases can be obtained by visiting the Clerk's Office, accessing the electronic docket entries for the case on PACER, or telephoning the assigned Case Manager.

Dealing With The Clerk's Office. Dealing with the Clerk's Office is most effective when counsel or a *pro se* party: makes the contact in a courteous and professional manner; does not wait until the last minute to make an "emergency" contact that could have been made sooner; considers that the staff member has responsibility for many cases and inquiries; and accepts that there may be a delay in receiving a response. Requests should be limited to contacts expressly permitted by the Local Appellate Rules and inquiries about the status of a case or the Court's procedural requirements. No member of the Clerk's Office will give legal advice.

Chapter IV. Appellate Mediation

The Appellate Mediation Program. Most civil appeals and petitions for review or enforcement of agency action potentially are subject to the Court of Appeals' mediation program. LAR 33.2 sets forth the types of cases (including *pro se* litigation) that are not eligible for mediation.

Cases are selected for mediation soon after the Case Information Statement and Concise Summary have been filed, and usually before the Clerk's Office has issued a briefing schedule. Briefing is suspended while a case is in the mediation process unless the Court or the Chief Circuit Mediator determines otherwise. Referral to mediation will not defer or extend the time for ordering transcripts. LAR 33.3.

The Court of Appeals has two full-time mediators, but a case also may be assigned to a judge or another qualified lawyer for mediation. Mediations are conducted in person for cases in which counsel are located in or near Philadelphia; occasionally they are conducted elsewhere. Other mediations are conducted by telephone. All mediations are confidential.

When a case is selected for mediation, an order is issued that identifies the mediator, sets the timetable for the parties to submit their confidential mediation position papers, provides the criteria and instructions for the papers, designates the persons who are required to participate in the mediation (typically, lead appellate counsel for each party, the parties (if individuals), and, if a company is involved, a person with settlement authority), and sets the date, time, and manner for the in-person or telephonic mediation session. On occasion, the Court will suggest mediation after oral argument; usually, the parties consent to this. In cases selected for mediation involving a *pro se* party, volunteer *pro bono* counsel will be appointed for him/her. LAR 33.6. Answers to frequently asked questions about the mediation program can be found at www.ca3.uscourts.gov/mediation_faq.

Mediation Personnel/Contact Information. The Program Director and Chief Circuit Mediator is Joseph Torregrossa, (267) 299-4130, Joe_Torregrossa@ca3.uscourts.gov. Penny Conly Ellison is also a Mediator: (267) 299-4138, Penny_Ellison@ca3.uscourts.gov. Tricia Harris is the Program Administrator (Tricia_Harris@ca3.uscourts.gov), and Sharon Yee (Sharon_Yee@ca3.uscourts.gov) is on the Legal Staff. The fax number for the Appellate Mediation Program is (267) 299-5115, and the mailing address is:

Room 20716
United States Courthouse
601 Market Street
Philadelphia, PA 19106.

Chapter V. Motions

Motions typically involve procedural matters, but also may request substantive relief. Motions are governed primarily by Fed. R. App. P. 27 and LAR 27.0.

Voluntary Dismissal. One common motion is for the voluntary dismissal of an appeal, which is appropriate where the appellant decides to withdraw the appeal. This motion should be filed in the district court if the appeal has not yet been docketed in the Court of Appeals, or in the Court of Appeals if the appeal has been docketed. Fed. R. App. P. 42.

Extension Of Time For Briefing. Another common motion is one seeking an extension of time to file a brief. The Third Circuit will grant an extension to file a brief if "good cause" is shown. The Court demands that you act diligently and promptly when seeking an extension. The Court also distinguishes between a first extension request and subsequent requests. LAR 31.4. By a "Notice to Counsel" dated October 15, 2012, the Court announced that motions for extension of time "are disfavored" and that "[m]otions seeking lengthy extensions and repeated motions for extensions of time may be denied."

With a first request, good cause generally can be shown by demonstrating that the attorney's other obligations complicate the filing of a brief by the due date. A first request for an extension of 14 calendar days or less can be made by telephone if presented to the assigned Case Manager at least 3 days before the deadline, and then confirmed by letter. However, if the first request is made less than 3 days before the deadline, counsel must file a written motion and demonstrate that the good cause on which the motion is based did not exist earlier or could not have been known or communicated to the Court earlier. All subsequent requests for an extension must be made in writing. (Note that the deadline for filing a reply brief can be extended only once.) You should always notify opposing counsel that you are seeking an extension, and attempt, if possible, to obtain their consent before approaching the Court.

Filing Under Seal. Another common motion is to file papers under seal. The Court is reluctant to authorize filing under seal, more so than many district court judges. However, if you believe that access to a brief or other document should be limited to judicial personnel and the parties to the appeal, you should file a motion explaining with particularity the reasons why sealing is necessary and the desired duration of the sealing. LAR Misc. 106.1(a); *see also* Judicial Conference Policy on Sealed Cases (setting forth the limited circumstances under which an entire civil case file may be sealed). Another party may file objections within 7 days. If the motion to seal itself contains confidential material, the motion may be filed provisionally under seal. If you are filing a sealed document through the ECF system, use the "Events" specifically created for sealed documents, which will automatically restrict access to the parties and Court staff. Documents sealed in a civil case in the district court ordinarily remain sealed in the Court of Appeals for only 30 days after the filing of the notice of appeal, unless a party moves to continue the impoundment. LAR Misc. 106.1(c)(2).

Timing. Motions can be filed at any time — although, as noted above, a motion for an extension of time should be filed promptly. Any party may file a response to a motion within 10 days after service. A reply may be filed within 7 days after service of the response. Fed. R. App. P. 27(a)(3), 27(a)(4). A party may ask the Court for expedited consideration of a motion by contacting the Clerk's Office and giving advance notice that such a motion will be forthcoming. If the Court agrees that expedited consideration is warranted, it generally will direct a response to be filed within 7 days after service, with replies due 3 days thereafter. LAR 27.7.

If a party seeks to file a motion on an emergency basis, permission first must be obtained from the Clerk's Office, which also will coordinate the availability of a judge and guide the parties on the need to submit supporting documents and the deadline for responses and replies.

Technical Requirements And Approach. The technical requirements for motions appear in Fed. R. App. P. 27 and LAR 32.0. The motion's title should provide a short description of the relief sought and identify the moving party. Motions must comply with the typeface requirements of Fed. R. App. P. 32(a)(5). A motion or response to a motion must not exceed 20 pages (excluding the corporate disclosure statement and exhibits required by LAR 26.1.1 or authorized by Fed. R. App. P. 27(a)(2)(B) (supporting affidavits and the trial court/agency decision)). Fed. R. App. P. 27(d)(2). A reply to a response may not exceed 10 pages. *Id*.

All grounds supporting the relief sought should be set forth in the motion itself; the movant should not file a separate brief or memorandum of law in support, nor a proposed order. However, the movant must attach all affidavits or other documents necessary to support his argument if the facts are not already of record or undisputed and personally known to the attorney (such as the basis for needing an extension of time). Fed. R. App. P. 27(a)(2). In the vast majority of cases, the Court will decide the motion without hearing oral argument. LAR 27.1.

A direct and straightforward approach is always wise, whether you are filing the motion or opposing it. The Third Circuit places a premium on collegiality and decorum, so use restraint in your writing and avoid *ad hominem* attacks on the opposing party or its counsel. It often is appropriate to consent to an adversary's motion, particularly if the motion is procedural in nature. If you have questions about the procedure governing a particular motion, contact your Case Manager or a Motions Attorney.

Chapter VI. Briefing The Appeal

The Court's decision on appeal principally will be based on the parties' written briefs. The Third Circuit's website has two handy charts for the technical requirements for briefs and appendices; the substance of those charts also appear in Appendix 5.

The Briefing Schedule. The briefing process starts when the Clerk sends out the briefing schedule. This schedule specifies when the appellant's opening brief (and the appendix) must be filed (typically, 30 days after the date of the Clerk's notice), and how many days after the opening brief the appellee's brief is due (typically, 21 days). The appellant's optional reply brief is due 14 days after service of the appellee's brief. The Clerk can extend these deadlines. *See* Chapter V.

Because the deadlines for the appellee's brief and the reply brief are measured from "service" of the preceding brief, 3 days are added to the stated time period unless service was made by hand-delivery. Note that the electronic service that is effected by ECF filing is not treated as hand delivery for this purpose. Fed. R. App. P. 26(c). Cross-appeals have their own, more complex schedule; consult Federal Rule of Appellate Procedure 28.1(f).

Appellant's Opening Brief. The technical requirements for the appellant's opening brief are found in Federal Rules of Appellate Procedure 28(a), 31 and 32, as supplemented by the Local Rules. Briefs must be filed electronically and on paper (seven copies). LAR 31.1(b), as modified by April 29, 2013 Order. The paper copies must be mailed to the Court on the same day as the electronic version is filed. LAR 31.1(b)(3). (In practice, paper copies mailed soon after the electronic filing also are accepted without question.) For information about electronic filing requirements, *see* Chapter II. (The only special requirement so far as briefs are concerned is that the electronic copy of the brief, not including Volume I of the Appendix, must be a single PDF file. LAR 28.1(c), 31.1(b)(2), 32.1(d).) Briefs should be converted to PDF from a word processing document, not simply scanned in by a printer.

Covers And Binding. The paper copies of the appellant's opening brief must have blue cardstock covers, front and back, and the brief must be bound so that it can "lie reasonably flat when open." Fed. R. App. P. 32(a). This means that "spiral" or "comb" binding is preferred over "velobinding," although the latter is acceptable. LAR 32.1(a). The information that must appear on the cover, and the order in which it must appear, are laid out in Federal Rule of Appellate Procedure 32(a)(2), namely: the Third Circuit docket number; the name of the Court; the official caption of the case (as provided by the Clerk with the case-opening documents); the nature of the proceeding; the name of the court or administrative agency from which the appeal arises; the title of the brief, including identification of the party or parties for whom the brief is filed; and, the name, office address, and telephone number of counsel for that party.

Reproduction. Briefs must be reproduced in black ink on opaque, white, 8½ x 11 inch paper, with 1-inch margins left and right, and at least ¾ inch at top and bottom; the pages

must be numbered (in the bottom margin). Fed. R. App. P. 32(a)(4); LAR 32.1(b). Double-sided printing of briefs is not permitted. The typeface must be either proportionally spaced computer-style, using a font with serifs (*e.g.*, Times New Roman, Century, Bookman, Baskerville, Cambria, or Garamond), and 14 point size, or non-proportionally spaced (typewriter-style, such as Courier) with at least 10½ characters per inch (typically, 12 point size).[1] Italics and boldface may be used (sparingly) for emphasis; case names must be italicized or underlined. Fed. R. App. P. 32(a)(5), 32(a)(6). Headings may use a font that does not have serifs and may be single-spaced; footnotes and block quotes of over two lines also may be single-spaced, but are subject to the same type-size requirements.

Briefs must be written or redacted to exclude the use of certain personal identifiers. LAR 32.2(e).

Contents. The appellant's opening brief must contain, in this order:

- A Corporate Disclosure Statement (if required by LAR 26.1.1).
- A Table of Contents, with page references.
- A Table of Authorities, divided into at least three categories: (a) cases, alphabetically arranged; (b) constitutions and statutes (subgrouped and then numerically arranged); and (c) other authorities. Regulations and rules may be listed either with statutes or with "other authorities."
- A Jurisdictional Statement, citing the basis for subject matter jurisdiction in the district court or agency and in the Court of Appeals. A short statement of the relevant jurisdictional facts, including dates, must be included. Fed. R. App. P. 28(a)(4).
- A Statement of the Issues presented for review, typically presented either in the form of questions, or as statements beginning with "Whether . . . ." After each issue, the appellant must state (with a reference) where in the record the issue was raised and/or an objection lodged in the district court or agency, and where it was ruled upon. Fed. R. App. P. 28(a)(5); LAR 28.1(a)(1).
- A statement identifying any related cases and proceedings, including closed and pending cases in any court or agency (state or federal), and stating whether the case has been before the Court previously, all with specific citations or references. LAR 28.1(a)(2).

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[1] For those unfamiliar with printing terminology: This typeface has serifs. This one does not.

- A succinct Statement of the Case explaining the facts relevant to the issues submitted for review, relevant procedural history, and all rulings that are to be reviewed. Fed. R. App. P. 28(a)(6). All assertions must be accompanied by references to the record. *Id.*; LAR 28.3(c). Even where the issues presented by the appeal are purely legal in nature, it is always important to place them in the factual context of your case. The appellant should be particularly careful to be candid about adverse findings of fact made below. For clarity, it is preferable to use descriptive names for the parties ("the employee," "the government," "Mr. Smith"), rather than generic labels ("appellant," "appellee"), especially when discussing the facts of the case. It is not necessary to formally separate the "statement of facts" and the "procedural history," but both should be covered.

- A Summary of the Argument that succinctly previews the forthcoming arguments (not just their conclusions). Fed. R. App. P. 28(a)(7). This section typically will be one to four pages long.

- The Argument, with citations to the authorities and parts of the record on which the appellant relies. Fed. R. App. P. 28(a)(8)(A). The argument is divided into points (if there are more than one), each of which should have a short, explanatory heading (*e.g.*, "The Evidence Was Insufficient To Establish Malice."). Under the heading for each point of the Argument, include a short statement, with citation, of the "scope and standard of review," with a subheading identifying it as such. Fed. R. App. P. 28(a)(8)(B); LAR 28.1(b) (providing examples of standards of review). The discussion of the issue then follows. Not only as a matter of ethics, but also to comply with a Local Rule, counsel must cite any controlling authority adverse to the position she is arguing. LAR 28.3(b).

- A "Short Conclusion" that states the precise relief sought (*e.g.*, outright reversal, a new trial, remand for some limited purpose, etc.). Fed. R. App. P. 28(a)(9). Do not treat the Conclusion section as a mere formality. Think long and hard about the precise relief you or your client need the Court to award and which your arguments support. It is traditional, at the close of the Conclusion, to state, "Respectfully submitted," followed by the signature (ink or electronic) of counsel of record (or the signature of the party, if proceeding *pro se*), full name and address block, and date. Fed. R. App. P. 32(d).

- The required signed Certifications (which may be combined into a single, multi-part certification), namely, that: (a) at least one attorney whose name appears on the brief is a member of the Third Circuit's bar or has applied for admission, unless otherwise provided by law (*e.g.*, government attorneys), LAR 28.3(d); (b) the brief complies with the type-volume limitation if the alternative page limit is exceeded, including the name of the computer

program used to count the words, if counted electronically (Fed. R. App. P. 28(a)(10) and 32(a)(7)(C)), or that it complies with an exemption granted by the Court; and (c) the text of the electronic document is identical to the paper copies, and that a virus detection program (identify it by name and version) has been run against the final PDF version of the brief prior to filing, and no virus was detected. LAR 31.1(c).

- The First Volume of the Appendix, if it is to be bound with the brief. *See* discussion in later section.

- A Certificate of Service, stating (in most cases) that the electronic copy was filed and served via ECF. It is also a common courtesy, but not required, to serve one paper copy of the brief and the appendix by mail on the attorney for each other party that is separately represented. Include the date and means of that service on the certificate. (Under LAR 39.3(b), if costs are later claimed for providing paper copies to parties who have consented to electronic service, the Clerk may ask for proof if the certificate of service does not specify that paper copies were also provided.) This certificate is signed by the attorney who filed and served (or supervised the filing and service of) the brief.

Length. The Third Circuit requires strict compliance with the limitation on the length of briefs imposed by the Federal Rules, and only a special motions panel of judges can grant exceptions. 3d Cir. Standing Order, 1/9/12. The "type-volume limitation" of Federal Rule of Appellate Procedure 32(a)(7)(B) dictates that an opening appellant's or appellee's brief must not exceed 14,000 words (including headings and footnotes, but excluding the cover, table of contents, table of authorities, and certifications); a reply brief must not exceed 7,000 words. (Under a pending amendment to the Federal Rules, these limits will change to 13,000/6,500 words as of December 1, 2016.) The words need not be counted if the opening brief is no longer than 30 pages or if the reply is no longer than 15 pages. A brief containing 14,000 words, produced in a compliant typeface and with proper margins, typically will be 50-60 pages. Counsel who do file a motion for extra words, requiring referral to the special motions panel, should not assume that the motion will be granted (regardless of the proffered justification), at least not to the full extent requested. Counsel also should anticipate that filing the motion may delay the progress of the case.

Appendix. At the same time as or shortly before filing the opening brief, the appellant also is responsible for preparing and filing an appendix. The appendix consists of documents carefully selected from the record – pleadings, transcripts, orders, and evidence, but, in most instances, *not* trial court briefs – that the parties deem most important for the judges to be able to reference quickly while reviewing the briefs. Only a relatively few items *must* be included in the appendix, namely: (1) a table of contents; (2) the "relevant docket entries" (although it is customary to include a complete copy of the docket); (3) the notice of appeal; (4) the relevant pleadings, charge, findings or opinions; (5) the judgment, order, or decision in question, including a certificate of appealability where appropriate; and (6) the

relevant portions of the transcript(s), exhibit(s) and other parts of the record referred to in the brief. Fed. R. App. P. 30(a)(1); LAR 30.3(a).

Ordinarily, the appendix should be prepared by appellant in consultation with the appellee, and is designated a "Joint Appendix." Fed. R. App. P. 30(b)(1). Consultation should begin as soon as appellant's counsel knows, at least tentatively, what issues he or she intends to raise on appeal. The Local Rules require that an appellant challenging a verdict on the basis of insufficient evidence or challenging a factual finding as "clearly erroneous" must include in the appendix all evidence of record that arguably supports the challenged finding. LAR 30.3(a).

The parties must include all relevant parts of the record in a context that enables the Court to understand their significance, but must omit unimportant or irrelevant materials from the appendix. Generally, motions and briefs should not be included in the appendix unless necessary to show that an issue or argument was raised below. LAR 30.3. "Necessary" is generally understood to apply to circumstances where one party disputes (or is expected to dispute) that the issue was raised or where the lower court stated that the issue was not raised. For example, usually it is unnecessary, when appealing the grant of summary judgment, to include any of the briefs; if, however, the district court ignored a summary judgment argument you wish to advance on appeal, it might be appropriate to include enough of the brief to show that the argument was made. Even in that circumstance, though, it usually is sufficient simply to cite the brief by reference to its number on the trial court docket (including page number), without reprinting it in the appendix.

If an appellant believes that the appellee has designated unnecessary documents for inclusion in the joint appendix, he should notify the appellee, who then must advance the cost of including those parts. Fed. R. App. P. 30(b)(2). Absent extraordinary circumstances (such as a party seeking to include a document that was not part of the record below), the procedure for dealing with such a dispute is not by filing a motion with the Court of Appeals. Ultimately, at the conclusion of the appeal, when costs are taxed, you can object to costs of the appendix being taxed against you if the prevailing party made it unnecessarily large. LAR 30.5.

Volume One of the appendix must contain *only* the notice of appeal, the formal order(s) and opinion(s) of the lower court or agency that are the subject of the appeal, and the final appealable order. LAR 32.2(c). These materials may be bound under the blue covers, as an addendum to the paper copies of the opening brief. (Volume One is electronically filed separately, however. LAR 30.1(a).) Appendix pages are numbered sequentially through all volumes. Two-sided printing of appendices *is* permissible. Subsequent volumes are bound separately, under white covers stating which pages are included in that volume. Fed. R. App. P. 32(b), LAR 32.2(c) and (d). Any materials filed in the trial court under seal, but which should be part of the appendix, must be placed in a separate, sealed volume, prominently so labeled on the cover. In a criminal appeal challenging the sentence, there is a special rule describing how to supply the Court with

copies of the Presentence Investigation Report and the district court's non-public Statement of Reasons for the sentence. LAR 30.3(c).

Assembling the appendix, numbering its pages, composing and completing its table of contents, and dividing it into appropriate volumes can take some time. Counsel then will need to insert references to pages of the appendix into the opening brief. Compliance with the redaction rules for electronic privacy also may take some time, particularly where such matters as Social Security numbers, children's names, and witnesses' home addresses were stated aloud at trial, or where they appear in documents included in the appendix (*e.g.,* bank records). For these reasons, counsel for the appellant should set an informal "deadline" for completing the appendix that is at least a few days prior to the due date for the brief.

The Third Circuit offers two options for filing the appendix. Under either option, four paper copies must be submitted. LAR 30.1(b). Under Option A, all volumes of the appendix are filed electronically by the due date, and then in paper form within five days after the date of electronic filing. Under this option, the electronic filing of the appendix also constitutes service. Under Option B, only paper copies are filed and served.
See www.ca3.uscourts.gov/brief-and-appendix-information ("Options for Filing the Appendix"). If Option B is elected, there are more complex, time-consuming, and word-count-inflating requirements for referencing the appendix in the brief (with only a modest increase in the word count allowed as compensation). For this reason, counsel who can learn to produce and file the appendix electronically normally will find that Option A is preferable. (Most district court CM/ECF programs have a tool for compiling the appendix.)

Writing The Appellant's Brief: Strategies And Considerations. From the appellant's perspective, every part of the brief should be written with an eye to the desired result – persuading the Court to reverse or remand. The Statements of the Case and the Facts should be written to inspire confidence in your reliability and to generate a feeling that an injustice may have been done, or at least that serious legal errors may have occurred. Issues should be selected with the standards of review in mind, so that reversal can be a real possibility.

Simply rearguing the facts will not produce favorable results. The writer should avoid inflammatory phrasing and should not adopt an accusatory or deprecating tone toward opposing counsel, an adverse party, or the district court judge. Where an issue being raised arises under a statute or rule, it is best to quote and explain the application of that statute (or rule) itself, and not rely exclusively on case law. If there are Third Circuit or U.S. Supreme Court cases, they should be cited and discussed, along with helpful cases from other circuits or from district courts. (In the Third Circuit, only decisions of the U.S. Supreme Court and "published"/"precedential" (reported in F., F.2d, or F.3d) decisions of the Third Circuit itself constitute binding precedent.) Similarly, in cases involving state law, discuss opinions from the state's appellate courts (note that only decisions of a state's highest court on points of that state's substantive law bind the Third Circuit).

Write with the standard of review in mind. As the appellant, you must squarely address a standard, such as abuse of discretion, that commands deference to the decision being reviewed. It does no good to pursue on appeal matters—witness credibility, for example—that are all but foreclosed by a highly-deferential standard of review. Counsel for the appellant should avoid the temptation to recite every mistake made below, and should concentrate instead on the few issues (seldom more than three or four, no matter how complicated the case) that stand a real chance of securing the desired relief.

Finally, pay special attention to the quality of your work product. A professional-looking, carefully proofread brief that complies with the Court's formatting rules makes the best impression.

Appellee's Brief. Most of the foregoing discussion of the appellant's brief applies to the appellee's brief, with some exceptions:

- The length limitation is the same (most commonly, 14,000 words) (13,000 words as of December 1, 2016), unless there is a cross-appeal (see below). Fed. R. App. P. 32(a)(7)(B).

- The front and back covers must be red.

- The required Statements of Jurisdiction, Issues, Related Cases, the Case, Facts, and Standard of Review are optional in an appellee's brief. Fed. R. App. P. 28(b); LAR 28.2. Most appellees, however, will want to write their own Statement of the Case and (if warranted) the applicable Standards of Review with an eye to advocacy. Also keep in mind that counsel for an appellee has a continuing ethical obligation to advise the Court of any defect in subject matter jurisdiction.

- An appellee commonly will rely heavily on the standard of review when it is a deferential one, such as "clear error" or "abuse of discretion." Appellees, much more so than appellants, also tend to rely on other doctrines—waiver, harmless error, plain error, the presence of alternative grounds for affirmance—that generally favor affirmance.

- Counsel for an appellee who has cooperated with the appellant by designating items for a joint appendix will save herself the trouble of submitting a supplemental appendix along with her brief. However, if despite best efforts at cooperation, the appendix or joint appendix that was submitted along with the appellant's brief is incomplete, you should by all means seek leave to file a supplemental appendix of your own.

Appellant's Reply Brief. The appellant has the option of filing a reply to the appellee's brief. As the name implies, a reply brief should respond to the arguments in the

appellee's brief. New arguments are not permitted, nor should a reply brief be used simply to restate or elaborate on an argument made in the opening brief. A good reply brief should do two things: (1) respond to specific points made by the appellee; and (2) point out any arguments the appellee failed to address.

A reply brief is limited to half of the maximum length for an opening brief. Under the common word-count method, it may not exceed 7,000 words (6,500 words as of December 1, 2016). Fed. R. App. P. 32(a)(7)(B). In practice, it should be as short as possible.

A reply brief must contain a Table of Contents, a Table of Authorities, a Certificate of Compliance with the type-volume requirements, and a Certificate of Service. There are no other formal requirements for content. The covers of a reply brief must be gray.

Briefs Where There Is A Cross-Appeal. A cross-appeal involves four briefs and modified page limits for each brief:

- *Appellant's principal brief*. Blue covers. Maximum 14,000 words (13,000 words as of December 1, 2016) or 30 pages.

- *Appellee's/Cross-Appellant's Principal and Response ("step two") Brief*. Red covers. Maximum 16,500 words (15,300 words as of December 1, 2016) or 35 pages. Fed. R. App. P. 28.1(d), (e). As to the issues on cross-appeal, this brief generally must conform to the requirements of a principal brief (see above), except that it may omit the Statement of the Case if the appellee is satisfied with the appellant's statement. Fed. R. App. P. 28.1(c)(2); LAR 28.2.

- *Appellant's Response and Reply ("step three") Brief*. Yellow covers. Maximum 14,000 words (13,000 words as of December 1, 2016) or 30 pages. Fed. R. App. P. 28.1(d), (e). As to the cross-appeal, this generally must conform to the requirements of a responding (appellee's) brief, including the option to dispense with certain statements if appellant is satisfied with those of appellee/cross-appellant (see above). Fed. R. App. P. 28.1(c)(3).

- *Appellee/Cross-Appellant's Reply ("step four") Brief*. Gray covers. Maximum 7,000 words (6,500 words as of December 1, 2016) or 15 pages. Fed. R. App. P. 28.1(d), (e). A "step four" brief must be limited to the issues presented by the cross-appeal. Fed. R. App. P. 28.1(c)(4).

Chapter VII. Oral Argument

Notice Of Oral Argument Date; Composition Of Panel. Most cases do not get oral argument. For those that do, counsel will be notified at least 10 days prior to the disposition date (IOP 2.5), although, in practice, considerably more than 10 days' notice often is given. That notice reveals the names of the three judges assigned to the panel, tells you where the argument will be held, and advises how much time per side will be allowed (typically, 15 or 20 minutes per side). Otherwise, a notice of submission without oral argument will be sent (which also mentions the names of the assigned judges). A lack of oral argument does not mean that affirmance is inevitable. Many weeks prior to that time, the Clerk's Office sends counsel a notice indicating possible weeks when the case might be argued and inquiring about counsel's availability. (No response is required unless counsel knows he will be unavailable.) The tentative notice does *not* mean that the case will be selected for oral argument.

Preparing For Oral Argument. Thorough preparation for oral argument is critical and it takes time. After you receive the notice of the oral argument date, re-read the briefs and update the legal research. You can expect to be asked about recent Third Circuit or U.S. Supreme Court decisions, including those published since the briefs were filed. If your supplemental research unearths important new legal developments, consider filing a letter under Federal Rule of Appellate Procedure 28(j) to bring the new authority to the Court's attention.

As the argument date approaches, counsel should again re-read the briefs and the district court's or agency's decision, and at least page through the entire appendix. Prepare notes, as well as a file or notebook of materials to keep at hand during the argument. If the meaning or construction of a statute or rule is at issue, it is useful to have a copy handy. Also have nearby the most important pages of the appendix (*e.g.*, the critical provision of a contract, the colloquy with the trial court or agency on a contested objection, or the terms of a key jury instruction).

Whatever your personal style, it is important to remember that oral argument is a conversation, not a lecture or a closing argument to a jury; lawyers who can resist the temptation to read verbatim from their notes generally are much more successful in engaging the Court.

Logistics. Counsel who do not reside within an hour of the courthouse (most arguments are heard in Philadelphia, but cases also may be called for Newark, Pittsburgh, Wilmington, St. Croix or St. Thomas) should consider reserving a nearby hotel room for the evening before argument to ensure that they will arrive for argument on time, well-rested and relaxed.

Typically, all of the cases to be heard on a given morning or afternoon are called for the same starting time, and will then be heard according to an order set by the panel.

Counsel should arrive at the courtroom at least a half hour before that time, and check in with the crier, who sits at the front corner of the courtroom below the bench. (Counsel can learn the order in which the cases will be called by contacting the Calendar Department of the Clerk's Office a few days before argument, but it is not uncommon for the order to change, even as late as the date of argument, so do not assume you can show up later in the day.) The crier will ask how many minutes counsel for the appellant would like to reserve for rebuttal argument. Typical rebuttal requests are for two to five minutes.

By Third Circuit tradition, the appellee's table is to the left (facing the bench) and the appellant's table is to the right. Arguments are held in public courtrooms: clients, colleagues and family can attend and observe, but they should sit behind the railing, not at counsel table. Incarcerated clients are not transported to court for oral arguments.

The Argument Itself. During the argument, listen to each question and be sure you understand it before answering. If you do not understand the question or cannot answer it as asked, say so. Refusing to answer the precise question asked (which includes avoiding the question) is never a good idea and puts you at risk of having the judges "tune out." If a question calls for a yes-or-no answer, try to provide such an answer first before explaining or qualifying. Several of the resources in Appendix 6 provide excellent insights into how to make the most effective argument.

There is a digital timer on the podium which counts down the advocate's remaining time. When one minute remains, the light changes from green to amber. When the red light goes on, counsel may do no more than finish her sentence, unless a judge asks another question or the Court grants permission to continue. The podium has a button that allows it to be raised or lowered for counsel's convenience; the microphone also is moveable.

Rebuttal. If you (the appellant) reserved rebuttal time, consider addressing one or two (at most) of the questions the panel asked your opponent. Another good use of rebuttal is to focus on one or two clear misstatements of the law or of the record your opponent made, *if* you can refute them succinctly. Then, reiterate the essence of your principal argument and conclude.

Chapter VIII. Petitions For Rehearing And Rehearing *En Banc*

Although counsel for the party that did not prevail tend to reflexively file a petition for rehearing, it is important to recognize that petitions for rehearing, whether by the panel or by the Court *en banc*, are granted only in very rare and "exceptional" circumstances. Exceptional circumstances include instances in which: the panel overlooked or misapprehended points of law or fact that truly affect the outcome of the appeal; the panel opinion directly conflicts with another panel decision; or a pivotal point of the case has been affected by a new precedential decision or by a new statute that could not have been cited in the briefs or at oral argument (and was not cited in the Court's decision). Rehearing *en banc* must be based on an issue of exceptional importance or on a need to resolve an intra-circuit split of authority. Because such petitions are granted only rarely, counsel should balance the effort and expense involved in preparing the petition against the very high likelihood that the petition will be denied.

Timing. A petition for rehearing must be filed within 14 days after entry of judgment (45 days in civil cases in which the United States is a party). Fed. R. App. P. 40(a)(1). That deadline can be extended for good cause.

Technical Requirements. A petition for rehearing must be filed electronically. Paper copies are not filed unless requested by the Clerk. Mind the 15-page limitation and the 14-point, double-space requirements. Fed. R. App. P. 40(b). Only one petition should be filed per party, even if both panel and *en banc* rehearing are suggested. The petition must include a copy of the Court's decision (the opinion, if any; otherwise, the order or judgment) as an exhibit. LAR 40.1(a). If your petition relies on a new decision or statute, attach a copy.

Substantive Requirements. A petition for rehearing must specify: (a) the point(s) of law or fact that the panel overlooked or misapprehended and that affected the outcome of the appeal; (b) the pivotal effect of a new precedential decision or statute; or (c) the issue of exceptional importance that calls out for *en banc* attention. In the Third Circuit, a petition for rehearing is presumed to seek both panel and *en banc* rehearing unless the petition expressly requests only panel rehearing. IOP 9.5.1.

Where the party is seeking rehearing *en banc*, the petition must contain this statement and its required citations:

> I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to decisions of the United States Court of Appeals for the Third Circuit or the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court, *i.e.*, the panel's decision is contrary to the decision of this court or the Supreme Court in [citing specifically the case or cases], OR, that this appeal involves a question of exceptional importance, *i.e.*, [set forth in one sentence]."

LAR 35.1. Also keep in mind that the Court ordinarily will not grant rehearing *en banc* either when: (a) the panel's statement of the law is correct and the issue is solely the application of the law to the facts of the case; or (b) the only issue presented is one of state law. IOPs 9.3.2, 9.3.3.

Answer To A Petition For Rehearing. No response to a petition for rehearing is required; in fact, none will be accepted unless the Court directs that one be filed. Fed. R. App. P. 40(a)(3). Usually, no answer will be requested unless an active judge asks for one within 10 days of the filing of the petition. IOP 8.1. Often (but not necessarily), a petition for rehearing will not be granted unless the Court gives the opposing party the opportunity to file an answer. If the Court requests an answer (typically due in 14 days), opposing counsel should explain in concise terms why the decision was correct, why rehearing would not alter the outcome of the case, or why the petition does not meet the standards for rehearing. If the movant is seeking rehearing *en banc*, the opposing party will want to argue that the petition does not meet the "rigorous requirements" of Fed. R. App. P. 35(a) and LAR 35.4. The answer is limited to 15 pages and must be in 14-point type, double-spaced.

Chapter IX. Post-Decision Proceedings

The Mandate. The mandate is the official document the Court issues to conclude its proceedings and return jurisdiction over the case to the district court or agency. Typically, the Court will issue the mandate within 7 days after the time to petition for rehearing expires (or, if a petition for rehearing or rehearing *en banc* was filed, within 7 days of ruling on the petition). Fed. R. App. P. 41.

Although the mandate is automatically stayed while a petition for panel rehearing or rehearing *en banc* is pending, it is *not* automatically stayed pending the filing and resolution of an application to the U.S. Supreme Court for a writ of certiorari. Thus, a losing party that wants a stay of the mandate under that circumstance needs to file a motion. In order to persuade the Court to grant a stay, you must show that: (a) your forthcoming certiorari petition will present a substantial question (in other words, that there is a reasonable possibility that the Supreme Court will grant it); and (b) there is good cause for a stay (*e.g.*, your client will suffer some concrete harm if the mandate issues before the petition is filed and resolved). Fed. R. App. P. 41(d)(2)(A); *see* IOP 10.8.2. The Court may require the movant to post a bond (or other security) as a condition of staying the mandate. Fed. R. App. P. 41(d)(2)(C).

Taxation Of Costs. Federal Rule of Appellate Procedure 39 contains the default rules regarding the assessment of the costs of an appeal. Generally speaking, if the Court affirms the judgment in a civil case, costs are taxed against the appellant; if the Court reverses, costs are taxed against the appellee. Costs are rarely taxed in criminal appeals. *See* Fed. R. App. P. 39(b). The Court is free to modify these default rules in particular cases. If the Court's decision is something other than a straight affirmance or reversal, costs are taxed only as the Court orders.

The categories of costs that are recoverable on appeal (namely, the docketing fee and the costs of reproducing the briefs and the appendix) are described on the Court's website. The Information & Forms tab of the website also contains instructions and a form you should download, complete, and electronically file within 14 days after the Court enters its judgment. The Clerk will deny an untimely bill of costs unless it is accompanied by a motion that shows good cause for the delay. LAR 39.4(a). The opposing party has 14 days to object to a bill of costs. Fed. R. App. P. 39(d)(2). An answer to the objections may be filed within 14 days. LAR 39.4(c). Some additional appeal-related costs can be taxed in the district court.

Chapter X. Certiorari Review From The Supreme Court Of The Virgin Islands

Final decisions of the Virgin Islands Supreme Court may be directly reviewed by the U.S. Supreme Court, not by the Third Circuit, by a petition for writ of certiorari. 28 U.S.C. § 1260; *see* Pub. L. 112-226. The Third Circuit has concluded, however, that it retains certiorari jurisdiction over proceedings that were filed in the Virgin Islands courts before December 28, 2012.

The Third Circuit's jurisdiction also encompasses appeals from the U.S. District Court for the U.S. Virgin Islands, which is a federal court.

Third Circuit Certiorari Jurisdiction. With respect to cases filed prior to Pub. L. 112-226, the Third Circuit has jurisdiction to grant a writ of certiorari, in its discretion, to review a "final decision" of the V.I. Supreme Court. Not every V.I. Supreme Court decision is a "final decision" in this sense; the Third Circuit decides what decisions are "final" by reference to standards that were developed by the U.S. Supreme Court when it exercises its own certiorari jurisdiction to review decisions of state supreme courts. The standards for the exercise of this discretion and the procedures for invoking it are set forth in LAR 112.0. In short, if the V.I. Supreme Court appears to have decided an important question that ought to be authoritatively decided by the Third Circuit, or in a manner that conflicts with a decision of the Third Circuit or another appellate court, or has departed from the usual course of judicial proceedings, the Court of Appeals may grant a petition for a writ of certiorari. Questions of territorial law do not fall outside this jurisdiction, but the Court of Appeals is deferential to the V.I. Supreme Court on questions of local law. The option of petitioning the U.S. Supreme Court for further review (by writ of certiorari) exists once the Third Circuit either denies certiorari or rules on the case after granting certiorari.

Technical Requirements. A petition for certiorari must not exceed 5,600 words, which in 14-point type is about 15-20 pages. LAR 112.9(b). It takes the same general form as a brief, with an appendix. LAR Misc. 112.7(a). The petition should focus more on why the Court should accept the case for review than on the merits. LAR Misc. 112.6(a). An original and three copies must be filed in paper form, and received by the clerk in Philadelphia by the due date. Unless the petitioner has IFP or CJA status, a $500 docketing fee applies. LAR Misc. 112.2(b). If certiorari is granted, the case proceeds from that point like any other Third Circuit appeal.

Timing. The deadline for filing a certiorari petition in a pre-December 28, 2012, Virgin Islands case is 60 days after the entry of judgment by the V.I. Supreme Court, subject to a single 30-day extension. LAR Misc. 112.2(d), 112.4(a). To obtain an extension, counsel ordinarily must apply at least five days in advance, and explain why there is "good cause" to expand the time for filing. LAR Misc. 112.4(a). The respondent may waive the right to respond; any response is due within 30 days of receipt of the petition. The petitioner may file a reply. LAR Misc. 112.8.

Chapter XI. Frequently Asked Questions

Facts and Figures

Q. How many judges sit on the U.S. Court Of Appeals for the Third Circuit, and what is its caseload?

A. The Court consists of 14 judges in regular service plus 11 judges in senior status. For the twelve-month period ending December 31, 2015, 3,216 appeals were filed and 3,380 appeals were terminated.

Q. How often do cases get oral argument?

A. Statistics from 2015 show that the Court decided about 90% of cases without oral argument. That figure covers all cases; the chances of getting oral argument in a counseled, non-frivolous civil or criminal appeal are actually quite a bit higher than 10%.

Q. What percentage of cases is decided by a precedential opinion?

A. The Court may write a precedential opinion or may opt for a "not precedential" opinion intended only for the parties. Recent statistics show that over 90% of cases were disposed of by an opinion designated as "not precedential." Because such opinions are freely accessible online or in the Federal Appendix, the term "unpublished opinion" has become a misnomer.

Q. How long does the appellate process take?

A. For the year ending September 30, 2015, the average duration of an appeal, measured from the filing of the notice of appeal to disposition, was 10.6 months, for both civil cases (non-prisoner) and criminal cases.

Q. How soon after oral argument may I expect a decision?

A. For the fiscal year ending September 30, 2015, the average time from oral argument to decision in the Third Circuit was 3.4 months. The time in any given case can, however, vary widely from the average.

Q. What is the rate of reversal in the Third Circuit?

A. Most appeals result in affirmance of the district court's decision. In 2015:

- The overall rate of reversal was 6.7%.
- For private (non-prisoner, non-U.S. government) civil cases, the reversal rate was 11.1%, lower than the overall rate nationwide (14.2%).

- For criminal cases, the reversal rate was 4.3%, lower than the overall rate nationwide (6.9%).

It is important to remember, however, that an appeal is not a probabilistic event. Statistics provide context, but reversal rates say little about the merits or prospects of any individual appeal.

The Appellate Process

Initiating The Appeal

Q. Where do I file a notice of appeal? Can I do so without being admitted to practice before the Third Circuit?

A. File the notice of appeal in the district court, not in the Court of Appeals. (This is contrary to the practice in many states.) The filing fees should be paid at the time of filing, but a notice of appeal filed without payment of the fees is nevertheless effective to render the appeal timely. Counsel need not be admitted to the Third Circuit to file the notice of appeal, but should promptly apply for admission if they plan to continue in the case. Forms are available on the Third Circuit website, although use of the form is not required.

Q. I was retained by a client today and it appears that the time to file a notice of appeal expired yesterday. Can anything be done?

A. One potential source of relief is the provision in the Federal Rules of Appellate Procedure that the district court (not the Court of Appeals) may grant a single extension if (a) you seek the extension within 30 days of the deadline and (b) you establish "excusable neglect or good cause." In a criminal case, you should *not* wait for court approval to file the notice of appeal, because the notice must be filed within thirty (30) days of the otherwise applicable deadline to preserve even the possibility that the appeal will be deemed timely. The procedural alternatives are complex, and they diverge somewhat between civil and criminal cases. Consult the rule, file a notice immediately, and make the appropriate motion as soon as possible, preferably within the 30-day extension period. *See* Fed. R. App. P. 4(a)(5), 4(b)(4).

Q. How do I find the forms I have to fill out in connection with filing an appeal?

A. Within 14 days of docketing the appeal, counsel will have three or four forms to file: a notice of appearance; a case information statement; a transcript purchase order; and, in civil cases, a mediation statement. Links to the necessary forms, such as the case information statement, which appear on the Court's website (www.ca3.uscourts.gov), will be included in the clerk's invaluable case opening letter (sometimes called a docketing letter), which you

will receive shortly after you file the notice of appeal. The transcript purchase order form also is available from the district court website. It must be submitted, even if there are no transcripts or the transcripts already have been obtained.

Appellate Mediation

Q. Is my case going to be selected for mediation? If so, is it mandatory? How long will that take?

A. The mediators decide whether to include a case in the appellate mediation program, generally within a day of receiving the initial case opening documents. If your case is selected, good-faith participation is mandatory. The mediation session usually is scheduled for about 30 days later. A subsequent session may be scheduled if it appears progress can be made. The briefing schedule is suspended while mediation is in progress. If the mediation is unsuccessful, the appeal process resumes; if it is successful, the parties are directed to wind up the settlement within 30 days.

Preparing and Filing Appellate Briefs

Q. It seems to say in Federal Rule of Appellate Procedure 31(a) that the appellant's brief is due in 40 days. Is that right?

A. No. The Court will supersede the Federal Rules' presumptive schedule by order. When the record is complete (and, if applicable, mediation is complete), the Clerk will send counsel a briefing schedule. A typical schedule in a criminal case is 30/21/14, *i.e.,* 30 days for appellant's brief, 21 days thereafter for appellee's brief, and 14 days thereafter for any reply brief. A typical schedule in a civil case is 40/30/14.

Q. With electronic filing, when is my brief actually "due?"

A. A brief or other filing is timely if you complete the e-filing (ECF) transaction by 11:59 p.m. (Eastern Time) on the due date, unless a Court order specifies a different time.

Q. When I attempted to e-file a brief, I encountered technical problems and missed the deadline by several hours. What should I do now?

A. As soon as possible after the technical problem has been resolved, e-file the brief. At the same time, file a motion for leave to file it out of time in which you explain the nature of the problem you encountered.

Q. I need more time to complete my brief. What should I do?

A. There is a procedure for a party to obtain one extension of 14 days or less without undue difficulty if "good cause" is stated. (The Court cautions that "generalities," such as counsel's statement that he or she is busy, will not suffice.) If the request is made at least three days in advance of the due date, it may be made orally and the Clerk may grant it by telephone. If not, the request must be in writing. Opposing counsel should be notified in advance of the request. Other requests—for example, a second request, or a request for an extension of longer than 14 days—must be made by motion. *See* LAR 31.4 (grounds and procedures for obtaining extensions), and the Order dated October 14, 2012, that is posted on the Court's website.

Q. The issues in my appeal are complex, and I cannot make my brief fit within the length limitations. What should I do?

A. First, strongly reconsider seeking additional words. The Third Circuit recently has warned that "motions to exceed the page or word limitations for briefs are strongly disfavored and will be granted only upon demonstration of extraordinary circumstances." If you nevertheless intend to make such a motion, it should be filed as early as possible, and the reasons given should be specific and compelling. Even so, you cannot count on your motion being granted, at least not to the full extent.

Q. During my research, I found a number of Third Circuit decisions touching on my issue, but they are marked "Not Precedential." May I cite them in my brief? Should I?

A. "Not precedential" decisions are just that. They are no more binding on a panel than a reported decision of a district judge or of a panel in another Circuit—perhaps even less so (non-precedential opinions are written primarily for the parties, with the assumption that important aspects of the case not mentioned in the opinion are understood). Federal Rule of Appellate Procedure 32.1 prohibits courts from restricting the citation of non-precedential federal opinions issued on or after January 1, 2007. Any citation of the case, however, must specify parenthetically that the opinion is "not precedential," and counsel also should take care not to use misleading language like "this Court held" when referring to an opinion that is not precedential.

Preparing and Filing the Appendix

Q. Do I have to put everything in the appendix in order for it to be part of the record?

A. No. The *record on appeal* consists of everything filed in the proceeding below. The function of the *appendix*, in contrast, is merely to make the most important documents conveniently available to the judges.

Q. At the outset of the case, counsel for appellant and appellee conferred and designated the contents of the appendix. What if I realize after the appendix was filed that something important was left out?

A. The Court prefers that the parties agree on the contents of a single, joint appendix. (For appellee, this has the additional advantage of shifting most of the work and cost to the appellant, who must include the appellee's designated documents.) Should you later discover that you need to cite other items, however, you have two options.

- Cite to the record (by its number in the district court docket), particularly if a document is not critical; or
- file a motion for leave to file a supplemental appendix, particularly if it is important that the Court have the omitted document available while reading your brief. The Court has been fairly liberal about granting motions to supplement the appendix.

Q. I represent the appellant, and I'm pressed for time. Wouldn't it be easier to concentrate on preparing my brief and use the "deferred appendix" method of Fed. R. App. P. 30(c)?

A. In a word, no. The deferred appendix method "is not favored." LAR 30.4. It is quite cumbersome for the Court and the parties, and probably entails more time and trouble than just preparing an appendix at the outset, even if it means filing a motion for an extension of time to file the appellant's opening brief and the appendix.

Oral Argument and Resolution

Q. Is it possible to expedite the appellate process?

A. A motion to expedite the appeal must be filed within 14 days of the notice of appeal (or within 14 days of a subsequent emergency giving rise to the request). It should set forth "the exceptional reason that warrants expedition," and should include a suggested briefing schedule, preferably one agreed upon by the parties. A response generally will be required within 7 days, and any reply 3 days thereafter. LAR 4.1. If the Court denies the motion, it is still possible to "self-expedite" the briefing schedule, at least in part, by filing your brief(s) well before the deadline. In criminal cases, an expedited appeal may be a second-best alternative if bail pending appeal was denied.

Q. A judge has ruled on a motion in my case; will that judge be on the panel that decides the merits? When will I know the identities of my panel members?

A. The Court's procedures for handling motions are in chapter 10 of the Court's Internal Operating Procedures ("IOPs"). Most motions are referred to a standing motions panel, or a member thereof, so no conclusions can be drawn about the composition of the merits panel. After a case has been assigned to a merits panel, however, motions (particularly motions concerning the scheduling of argument) are referred to that panel, so it may be possible to make some educated guesses. Typically, a case is assigned to a merits panel shortly after the reply brief is due, but the parties are not advised of the assignment at that time.

The composition of the merits panel is formally disclosed in the notification of oral argument or submission, which is sent to counsel at least 10 days (and often more than two weeks) before the first day the panel will sit. IOP 2.5.

Q. The Clerk asked about my availability for oral argument, and then later sent a letter stating that the Court will not hear oral argument. What does that mean?

A. Around the time briefing is complete, the Clerk typically will send counsel a letter stating that the matter is likely to have a disposition date some six to eight weeks in the future, and inquiring as to potential scheduling conflicts. A second letter will identify a probable disposition date, which will usually be accurate within one or two days. Neither of these letters implies that oral argument has been granted; rather, they are a means of ensuring counsel's availability *if* argument is allowed. The decision whether to hear oral argument is made by the panel. At least 10 days before the first day of the panel sitting (and usually somewhat earlier) the Clerk will notify counsel whether oral argument will occur.

Q. My case has been remanded. Will it be heard by the same district judge whose decision was reversed?

A. Most likely, yes. The Court is empowered to direct that a matter be reassigned to a different district judge, either on a showing of actual judicial bias or under a less stringent "appearance of bias" standard, but such an order is relatively uncommon.

Appendix 1: Court Locations

The Third Circuit is based in Philadelphia, and all communications with the Clerk's Office (including non-electronic filings) must be filed with the Clerk's Office in Philadelphia. Although the Court hears more than 90% of its oral arguments in Philadelphia, panels also periodically sit in the U.S. courthouses located in each district within the Third Circuit throughout the year.

Philadelphia (Main Office for the U.S. Court of Appeals for the Third Circuit):

21400 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

U.S. District Court for the Western District of Pennsylvania:
700 Grant Street
Pittsburgh, PA 15219

U.S. District Court for the District of New Jersey:
150 Walnut Street
Newark, NJ 07101

U.S. District Court for the District of Delaware:
844 N. King Street, Unit 18
Wilmington, DE 19801

U.S. District Court for the District of the Virgin Islands:
5500 Veterans Drive Room 310
St. Thomas, VI 00802

3013 Estate Golden Rock, Suite 219
St. Croix, VI 00820

Appendix 2: Sample Notice Of Appeal

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JAMES WATERS and TRI-STATES SPORTS,	:	CIVIL ACTION
	:	No. 16-_____
	:	JUDGE _____
Plaintiffs,	:	
	:	
v.	:	
	:	
SPORTS MEMORABILIA DEPOT, INC.,	:	
	:	
Defendant.	:	
	:	
	:	

NOTICE OF APPEAL

Notice is hereby given that Sports Memorabilia Depot, Inc. ("SMD"), defendant in the above-named case, hereby appeals to the United States Court of Appeals for the Third Circuit from: (1) the January xx, 2016 Order (Dkt. No. xxx) entering final judgment in favor of Plaintiffs and against SMD on the jury's verdict; and (2) the April xx, 2016 Order (Dkt. No. xxx) denying SMD's motion for a new trial.

Respectfully submitted,
[SIGNATURE BLOCK]
Counsel for Sports Memorabilia Depot, Inc.

Dated: _____, 2016

Appendix 3: Major Appellate Deadlines

Event	Due	Source
The Notice of Appeal	30 days after entry of judgment in a civil case if U.S. is not a party; otherwise, 60 days. 14 days after entry of judgment for defendant's appeal in a criminal case; 30 days for the government's notice of appeal.	FRAP 4
Pay Filing Fee/Docketing Fee[2]	$505.00 payable to the Clerk of the district court. Failure to pay the fee or seek *in forma pauperis* status within 14 days of docketing results in dismissal of appeal.	LAR Misc. 107.1
File Civil Appeal Information Statement; Concise Statement of Facts and Issues; Entry of Appearance; Corporate Disclosure Form	Due within 10 days from docketing of the Notice of Appeal or as stated in the Clerk's docketing letter.	
Submit Transcript Purchase Order	Order transcript(s) or file a certificate stating that a transcript is unnecessary and a statement of issues to be raised on appeal within 14 days of filing the notice of appeal.	FRAP 10, 11; LAR 11.1
Designate the Contents of the Joint Appendix	If possible, Appellant should serve a designation of the proposed content of the appendix on appellee within 14 days of the date the record is filed in the Court of Appeals. Appellee may counter-designate within 14 days.	FRAP 30(a), (f); LAR 30.0

[2] The fee for an original proceeding is $500.00 payable to the Clerk of the Third Circuit at the time of filing.

File Appellant's Brief and the Joint Appendix	Presumptively due 40 days from the date the record is filed, although the Third Circuit's Clerk will issue a briefing schedule.	FRAP 31(a)
File Appellee's Brief	Presumptively due 30 days from service of appellant's brief, but see the briefing schedule.	FRAP 31(a)
File Appellant's Reply Brief	Presumptively due 14 days from service of the appellee's brief, but see the briefing schedule.	FRAP 31(a)
Request for Oral Argument	Within 7 days of the date appellee's brief is filed.	LAR 34.0, 34.1(b); IOP 2
Court's Notification of Disposition Date and Panel	The Clerk typically will notify the parties of the disposition date (*e.g.*, oral argument or submitted on the briefs) approximately 6-8 weeks in advance. The identity of the panel and whether the Court will entertain oral argument will be disclosed 10-14 days before the disposition date.	FRAP 34; LAR 34.0
File Petition for Rehearing/Rehearing *En Banc*	Due 14 days from the date judgment was entered; 45 days in civil cases in which the United States is a party.	FRAP 35, 40; LAR 35.0; IOPs 8, 9
Bill of Costs	Filed within 14 days from entry of judgment; objections due 14 days after service.	FRAP 39, 30(b); LAR 39, 30.5
Court Issues the Mandate	The Court will issue the mandate 7 days after expiration of the time for filing a rehearing petition, or, if a petition is filed, 7 days after disposition of the petition.	FRAP 41
File an Application for Attorney Fees (when permitted by statute or otherwise)	Within 30 days of entry of judgment unless a timely rehearing petition has been filed, in which case due within 14 days after disposition of the petition.	LAR Misc. 108.0

Appendix 4: Summary Of Electronic Filing Requirements[3]

Attorneys are required to file all documents electronically beginning December 15, 2008. Attorneys must register with the PACER Service Center as a Filing User. The PACER Service Center notifies the Clerk's Office, which will check that the attorney is admitted to the bar of the court and will then approve the registration. This process can take a few days. As of June 2016, the Third Circuit was not yet using "NextGen CM/ECF."

COMMUNICATION FROM CLERK'S OFFICE

Filing User: Notice of Docket Activity
Non-Filing User: Paper

FILING WITH THE CLERK'S OFFICE

Forms

Attorneys: electronic only
Pro Se Litigants: may file electronically or in paper

Motions (including attachments or exhibits)

Attorneys: electronic only
Pro Se Litigants: may file electronically or in paper

Briefs

Attorneys: electronic and seven (7) paper copies
Pro Se Litigants: may file electronically or in paper; if filing electronically, must also file seven (7) paper copies.

Appendix

Attorneys: electronic and four paper copies
[Note: There is a 50 MB limit on size for PDF documents. If the document exceeds 50 MB, it must be divided into parts for uploading, even if the parts comprise a single paper volume. Sealed documents should be filed as a separate sealed volume.]
Pro Se Litigants: may file electronically or in paper; if filing electronically, must also file four paper copies

Post-judgment (petition for rehearing, bill of costs, stay of mandate, etc.)

Attorneys: electronic only
Pro Se Litigants: may file electronically or in paper

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[3] The content of Appendices 4 and 5 is taken from the Third Circuit's website.

Sealed documents

File as above, i.e. attorneys must file all documents electronically; briefs and appendices to be filed electronically and in paper. Docketing system automatically locks sealed documents so that they cannot be viewed by non-parties. *Pro se* litigants may file in paper or electronically. A motion for leave to file under seal can be filed provisionally under seal.

Ex Parte motions

Attorneys: paper only
Pro Se litigants: paper only

Case Originating Documents (i.e. there is no case in the court of appeals yet, *e.g.* petition for writ of mandamus, petition for review of agency order, petition for permission to appeal, petition for certiorari to V.I. Supreme Court)

Attorneys: paper only; if case is an emergency, call Clerk's Office to get permission to e-mail

Pro Se litigants: paper only; timely filing by "prisoners' mailbox" for *pro se* prisoners

SERVICE

On Filing User: Notice of Docket Activity sent automatically by CM/ECF is sufficient. Certificate of Service must state that service was through CM/ECF. Registration as a Filing User is consent to accepting electronic service through CM/ECF. Check court docket to determine if opposing party is a Filing User.

On Non-Filing User (*e.g. pro* se litigant): Must serve paper copies unless party has consented to other form of service such as e-mail. Certificate of Service must state how service was accomplished.

SIGNATURES

Electronic signatures or "s/ typed name" are acceptable on E-documents. Paper documents must be signed.

ACCESS TO DOCUMENTS ON PACER

Remote electronic access to documents in immigration cases and Social Security cases is limited to parties to the case. Non-parties can view documents by coming to the Clerk's Office.

Remote electronic access to appendices in criminal cases is limited to parties to the case. Non-parties can view appendices in criminal cases by coming to the Clerk's Office.

Remote electronic access to sealed documents is limited to parties to the case. Non- parties **cannot** view sealed documents either remotely or by coming to the Clerk's Office.

Appendix 5: Brief and Appendix Formatting And Service Requirements

CONTENT OF BRIEFS

CORPORATE DISCLOSURE STATEMENT

See F.R.A.P. 26.1(b).

TABLES

1. Table of Contents
2. Table of Citations. LAR 28.3.

STATEMENTS & SUMMARIES

1. Subject Matter & Appellate Jurisdiction
2. *Issues
3. *Related Cases and Proceedings
4. *Concise Statement of the Case setting out the following:
   a. Relevant facts
   b. Procedural history
   c. Rulings presented for review
5. Summary of Argument

*Optional in Appellee/Respondent brief unless dissatisfied with statements of Appellant/Petitioner

ARGUMENT

1. Argument with each issue prefaced by its Standard or Scope of Review. LAR 28.1(b).
2. Conclusion
3. Signatures of Counsel of Record.

An attorney from each listed office must file an Entry of Appearance.

COMBINED CERTIFICATIONS

1. Bar Membership
2. Word Count
3. Service
4. Identical Compliance of Briefs
5. Virus check

ATTACHMENTS TO BRIEFS

1. Volume I of Appendix to Appellant/ Petitioner Brief to include:
   a. Notice of Appeal or Petition for Review
   b. Order being appealed
   c. Opinion under review
   d. Order granting certificate of appealability where applicable
2. Statutes, rules, regulations or unpublished opinions if not readily available

FORM OF BRIEFS

COVER

1. Color of Front & Back Covers
   a. Appellant/Petitioner/1st Step: Blue
   b. Appellee/Respondent/2nd Step: Red
   c. 3rd Step: Yellow (Cross-Appeals)
   d. Appellant/Petitioner Reply/4th Step: Grey
   e. Amicus/Intervenor: Green
   f. Supplemental: Tan

2. Content of Front Cover
   a. Name of Court
   b. Appellate Docket Number(s)
   c. Official Court Caption
   d. Nature of Proceeding
   e. Title of Document
   f. Name(s) & Address(s) of Counsel of Record

BODY/TEXT OF BRIEF

1. 8 ½ " x 11" opaque paper with clear black image with 1" margins
2. Double spaced text (quotations over 2 lines may be indented and single spaced; headings and footnotes may be single spaced)
3. Only one side of the paper may be used. See F.R.A.P. 32(a)(1)(A).
4. †Length:
   a. Principal & Intervenor briefs – 30 pages/14,000 words/1,300 *lines
   b. Reply & Amicus briefs – 15 pages/7,000 words/650 *lines
   c. 2nd Step Cross-Appeal Brief – 35 pages/6,500 words/1,500 *lines
5. Font:
   a. Proportional (14 pt. with serifs)
   b. Monospaced (10 ½ cpi)

†A certification of word or line count must be included when a brief exceeds the required 30, 35 or 15 page limit. Tables, certifications and addenda do not count toward the word or line limitation.
*Monospaced text

NOTE: Word limits change 12/1/16.

BINDING

Firmly bound at the left margin. Metal fasteners must be covered. Velo or spiral binding acceptable.

ELECTRONIC BRIEFS

REQUIREMENTS

1. The brief must be in a PDF text format. LAR 113.3(b).
2. The brief must contain an electronic signature or s/ first name last name.
3. Seven (7) hard copies of the brief must be delivered to the Clerk's Office within 5 days of the electronic filing.
4. Simultaneous service to counsel of record is required.
5. The PDF file and hard copies of the brief must include a certification verifying that the text of the electronic brief and hard copies are identical.
6. The PDF file and hard copies of the brief must include a certification that a virus check was performed indicating the vendor and version information of the virus software.
7. A Notice of Docketing Activity (NDA) will be issued upon the filing of the electronic brief and the receipt of the hard copies.

See F.R.A.P. 25, 28 and 32 and LAR 25, 28, 32 and Misc. 113 for the full text of rules and requirements accessible under "Rules & Procedures" from the Third Circuit website.

CONTENT OF APPENDIX	FORM OF APPENDIX
TABLE of CONTENTS 1. Each document entry must: a. Be sequentially numbered b. Be titled as originally submitted c. Include the page number of the appendix on which it begins **REQUIRED CONTENTS** 1. *Notice of Appeal or Petition for Review 2. *Order(s) being appealed 3. *Opinion(s) under review 4. *Order granting certificate of appealability where applicable 5. Docket entries from the originating court/agency 6. Any and all relevant portions of the record filed in the originating court/agency to which the brief cites. LAR 30.3(a). 7. Certification of Service upon counsel or litigants *Volume I of the appendix must include these documents and no others. Volume I of the appendix may be bound with the brief, which is the preference of the Court, or bound separately. See F.R.A.P. 25, 30, and 32 and LAR 25, 30, 32 and Misc. 113 for the full text of rules and requirements accessible under "Rules & Procedures" from the Third Circuit website. Rules regarding redaction: Fed. R. App. P. 25(a)(5) Fed. R. Civ. P. 5.2 Fed. R. Crim. P. 49.1 Fed. R. Bankr. P. 9037	**COVER** 1. Color of front and back covers: White 2. Content of front cover a. Name of court b. Appellate docket number c. Official Court caption d. Nature of proceeding in originating court/agency e. Title of document f. Name and address of counsel of record g. The designated volume number h. The page numbers contained therein **PAGES** 1. 8 ½ " x 11" opaque paper with clear black image 2. Double-sided copies are acceptable 3. Must be consecutively paginated **BINDING** 1. Must be firmly bound along the left margin 2. Metal fasteners must be covered with tape 3. Volumes that are Velo bound and more than 1" thick must be reinforced along the binding See Order – Options for Filing the Appendix (on Court's website) **NUMBER OF PAPER COPIES TO BE SENT TO THE COURT IN ADDITION TO THE ELECTRONIC APPENDIX – 4** 3rd Circuit Home Page: www.ca3.uscourts.gov CM/ECF Website http://www.ca3.uscourts.gov/cmecf-case-managementelectronic-case-files

Appendix 6: Other Important Resources

J. Martin and N. Winkelman, eds., *Third Circuit Appellate Practice Manual*, 2d edition (Practicing Bar Institute 2010; 3d edition forthcoming 2016): The Practice Manual contains in-depth treatment of the subjects covered in this Guide.

Moore's Federal Practice, 3d ed. (Michie-Lexis/Nexis 1997 and frequent updates): This comprehensive, multi-volume treatise has chapters devoted to appellate practice in the federal courts.

C. A. Wright, A. Miller and M. K. Kane, *Federal Practice and Procedure* (West 1978 and annual updates): Also a comprehensive, multi-volume treatise with chapters devoted to federal appellate practice.

Mayer Brown, LLP, P. Lacovara, ed., *Federal Appellate Practice* (BNA 2008).

M. Tigar and J. Tigar, *Federal Appeals: Jurisdiction and Practice*, 3d ed. (West 1999 & pocket part updates).

R. Aldisert, *Winning on Appeal: Better Briefs and Oral Argument*, 2d ed. (NITA 2003): A classic book written by the late former Chief Judge of the Third Circuit with tips on appellate brief writing and argument.

The official website of the U.S. Court of Appeals for the Third Circuit, www.ca3.uscourts.gov, contains a wealth of information, downloadable forms, and access to the electronic dockets (PACER).

For information about the Third Circuit's workload, average time to decision, reversal rates, and other statistics, see the tables that are published periodically at www.uscourts.gov/statistics-reports.

The website for the Bar Association for the Third Federal Circuit ("3CBA"), www.thirdcircuitbar.org, contains links to the Court's local rules and various forms and information, the 3CBA's newsletters, and written CLE materials on federal appellate practice.