

United States Court of Appeals for the Federal Circuit

FOR IMMEDIATE RELEASE

October 16, 2009

The United States Court of Appeals for the Federal Circuit proposes to amend its Rules. These amendments are subject to public notice and comment under 28 U.S.C. § 2071(b).

Attached for public comment are revisions to Federal Circuit Rules 1, 8, 15, 18, 21, 24, 26, 26.1, 27, 28, 29, 30, 31, 34, 47.3, 47.4, and 52. In addition, attached are revisions to the Practice Notes to Federal Circuit Rules 12, 15, 18, 24, 25, 27, 28, and 31. New material is underlined; stricken material is in strikethrough text.

All suggested alternatives should be submitted according to the attached "Format for Proposing Changes to Federal Circuit Rules."

Comments should be sent to:

Office of the Clerk
United States Court of Appeals for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

**Comments must be received by the close of business on
November 5, 2009.**

Rule 1. Scope of Rules; Title

(a) Reference to District and Trial Courts and Agencies

.....

(2) The term "agency" includes an administrative agency, board, commission, bureau, or officer of the United States, including each of the following:

.....

(O) the Government Accountability Office Personnel Appeals Board;

(P) the Bureau of Justice Assistance.

.....

Rule 8. Stay or Injunction Pending Appeal

.....

(d) If an initial motion for a stay or injunction pending appeal was not made in the district court under Fed. R. App. P. 8(a)(1), the movant must include in its motion in this court a statement explaining why it was not practicable to do so. If an initial motion for a stay or injunction pending appeal was made in the district court under Federal Rule of Appellate Procedure 8(a)(1) and remains pending, the movant must include in its motion in this court a statement specifically identifying when it filed the motion in the district court and why it is not practicable to await a ruling by the district court on that motion.

Rule 12. Docketing the Appeal

.....

Practice Notes

.....

OFFICIAL CAPTION; PARTICIPATION IN THE APPEAL BY APPELLEES; CONSOLIDATION OF PREVIOUSLY CONSOLIDATED CASES AND CROSS-APPEALS. The clerk will provide the parties with the official caption in the case at the time of docketing. Any objection to the official caption should be made within 14 days of receipt. It is the court's usual practice to include in the caption all parties that participated in the court below, even if they are no longer participating in the case on appeal. Parties included in the trial court title who have an adverse interest to the appellant but who are not cross-appealing will be deemed appellees. . . .

Rule 18. Stay Pending Review

....

(d) Statement. If an initial motion for a stay pending review was not made in the agency under Federal Rule of Appellate Procedure 18(a), the movant must include in its motion in this court a statement explaining why it was not practicable to do so. If an initial motion for a stay pending review was made in the agency under Federal Rule of Appellate Procedure 18(a) and remains pending, the movant must include in its motion in this court a statement specifically identifying when it filed the motion in the agency and why it is not practicable to await a ruling by the agency.

Practice Notes

....

AGENCY. The term agency in these rules includes a board, commission, bureau, or arbitrator.

Rule 21. Writs of Mandamus and Prohibition, and Other Extraordinary Writs

(a) Title; Fee; Answer

....

(2) The petition must include a certificate of interest. An entry of appearance must accompany the petition, unless the petitioner is pro se.

....

(c) Reply

If the court directs the filing of a response to a petition, then the petitioner may file a reply within 7 days of the date of the filing of the response. The court may act on the petition before the receipt of any reply, and thus the filing of a reply should be expedited if appropriate. The reply may not exceed 15 pages.

~~(e)~~(d) Service of the Order Denying Petition. . . .

Rule 24. Proceeding In Forma Pauperis

(a) Form. If an appeal or petition for review is docketed without payment of the docketing fee, the clerk in providing notice of docketing will forward to the appellant or petitioner the form prescribed by this court for the motion for leave to proceed on appeal in forma pauperis. (See Form 6.) Except as provided in Federal Rule of Appellate Procedure 24(a), if the clerk does not receive a completed motion, the docketing fee, or a completed Form 6B within 14 days of the date of docketing of the appeal or petition, the clerk is authorized to dismiss the appeal or petition. See also Federal Circuit Rule 52(d). The motion and affidavit may be made on the form provided in the Federal Rules of Appellate Procedure, but the court may request additional information from the movant.

....

Practice Notes

....

PROCEEDING ON ORIGINAL RECORD. A request under Federal Rule of Appellate Procedure 24(c) that an appeal be heard on the original record is rarely granted because the available informal brief procedure permits an appendix consisting only of a copy of the decision or order sought to be reviewed. See Federal Circuit Rules ~~28(h)~~, 28(g), 30(i), 31(e), and 32(c). See Forms 11-16.

....

USERRA CASES. In a petition for review of a Merit Systems Protection Board decision, a petitioner is not required to pay the docketing fee or costs if the case involved a claim under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). 38 U.S.C. § 4323. A petitioner claiming exemption from the fee pursuant to USERRA should submit Form 6B within 14 days of the date of docketing of the petition and may be required to submit documentation that his or her case before the Board involved a USERRA claim.

Rule 25. Filing and Service

.....

Practice Notes

Because of occasional delays with some mail transmitted by the United States Postal Service, due to screening or other issues, if a document such as a notice of appeal, petition for review, motion, or other document must be received by the court on a particular date, then the filer might consider using an alternative method of delivering the document to the court, such as a commercial carrier or hand-delivery. The court cannot waive the deadlines for filing a notice of appeal or petition for review, even if the document was deposited in the mail in a timely fashion. Federal Rule of Appellate Procedure 26(b).

Rule 26. Computing and Extending Time

....

(b) Motion to Extend Time.

(1) A motion to extend the time prescribed by the Federal Rules of Appellate Procedure, the Federal Circuit Rules, or an order of this court must be made at least 7 calendar days before the date sought to be extended, except that in extraordinary circumstances a motion may be made later than that deadline if accompanied by an affidavit or unsworn declaration under penalty of perjury under 28 U.S.C. § 1746 that describes the extraordinary circumstances.

~~—————(A)—— a motion to extend the time to respond to a motion must be made at least 5 calendar days before the date sought to be extended; and~~

~~—————(B)—— in extraordinary circumstances, a motion may be made later than the deadlines prescribed in this rule, but an accompanying affidavit or unsworn declaration under penalty of perjury under 28 U.S.C. § 1746 must describe the extraordinary circumstances.~~

....

Rule 26.1. Corporate Disclosure Statement

The corporate disclosure statement must be included in the certificate of interest prescribed in Federal Circuit Rule 47.4. A certificate of interest must be filed by any party represented by counsel within 14 days of the date of docketing of the appeal or petition. See Fed. Cir. R. 47.4 for additional requirements.

....

Rule 27. Motions

(a) Content of Motion. The preferred content and organization of a motion are:

....

(5) the movant's statement of consent or opposition to the motion. The movant must state in the motion that the movant has discussed the motion with the other parties, whether any party will object, and whether any party will file a response. ~~A party withholding consent when the motion is made will nevertheless be deemed to have consented if that party fails to file a response within the time permitted by Fed. R. App. P. 27(a)(3)(A);~~

....

(d) Length of Motion, Response, or Reply; Cover and Backing; Attachments. Items listed in Federal Circuit Rule 27(a)(7)-(9)(10) do not count toward the page limitation in Federal Rule of Appellate Procedure 27(d)(2). Cover and backing for a motion, response, or reply are not required ~~prohibited~~. If a motion includes several attachments or exhibits, the court prefers that the attachments or exhibits be separately tabbed for ease of reference.

....

(h) Delegation of Authority to the Clerk. The clerk is authorized to act on any procedural motion or unopposed nonprocedural motion, but may not act on an opposed nonprocedural motion or any motion that requires action by a judge or panel of judges. The clerk may also direct an expedited response to a motion or petition and may direct the parties to show cause why an appeal or petition should not be dismissed. Even if the clerk is authorized to act on a particular motion, the clerk may nonetheless refer the matter to a judge or panel, or may defer the matter to the merits panel, when appropriate.

~~The clerk is authorized to act on consented to or unopposed motions to:~~

~~—— (1) dismiss an appeal, petition for review, or application for an extraordinary writ, with or without prejudice to reinstatement;~~

~~—— (2) remand or transfer a case;~~

~~—— (3) reinstate a case that was dismissed by the clerk for failure to comply with the rules;~~

~~—— (4) extend for not more than 60 days the time for filing a principal brief and extend for not more than 30 days the time for taking any other action required or permitted by the rules or an order of the court;~~

~~—— (5) extend the time for a court reporter to file the transcript of the trial proceedings with the clerk of the district court;~~

— (6) stay issuance of a mandate for not more than 30 days pending application to the Supreme Court of the United States for a writ of certiorari;

— (7) consolidate appeals;

— (8) correct a brief or other paper;

— (9) correct or modify a record in accordance with Federal Rule of Appellate Procedure 10(e) or 16(b);

— (10) stay further proceedings;

— (11) withdraw or substitute an appearance;

— (12) advance or continue a case;

— (13) file a supplemental appendix of material inadvertently omitted from the joint appendix; or

— (14) proceed in forma pauperis.

....

Practice Notes

....

AUTHORITY TO ACT ON ~~LIMITS ON CONSENT~~ MOTIONS; MOTIONS REFERRED TO PANEL. Neither the clerk nor the court is required to grant relief just because the parties agree it should be granted. The clerk's authority to act on procedural or unopposed nonprocedural ~~certain~~ motions includes the authority to grant or deny the requested relief in whole or in part or to refer the motion to a judge or a panel. Examples of procedural motions include motions for extensions of time, motions to reform the caption, motions for leave to file various documents, motions for leave to proceed in forma pauperis, etc. Examples of nonprocedural motions include motions to dismiss, motions to remand, motions to transfer, motions to summarily affirm judgments, motions for stays of injunctions, motions to strike portions of briefs or appendices, motions for leave to intervene, motions for leave to file briefs as amici curiae, etc. Motions to exceed the permitted word or page limitation for a brief will be decided by a judge. If the clerk grants an ~~unopposed~~ motion to extend the time to file a principal brief by 60 days, no further extensions should be anticipated. Once a case is assigned to a merits panel, the clerk refers all motions to the merits panel.

TELEPHONE INQUIRY ABOUT PENDING MOTIONS; ACCESS TO ORDERS ON WEBSITE. Telephone inquiries about pending motions are discouraged because they divert the clerk's office staff from more pressing duties. When an order on a motion directs counsel to take prompt action, the clerk's office will telephone counsel. All other orders are considered routine

and counsel may await notification by mail. Alternatively, counsel or the parties may often determine the status of a pending motion and obtain copies of court orders on this court's website, <http://www.cafc.uscourts.gov/index.html>. First, one may view on PACER the court's current docket sheet in any pending appeal or petition, to determine the current status of a motion. Second, if a motion was processed by the court's senior staff attorney, then the order will normally be available on the website the same day it is filed. Third, many other pertinent orders, including en banc orders, are promptly posted on the court's opinions and orders page. Under no circumstances should anyone telephone a judge or the office of the senior staff attorney about a motion. In an emergency, call the clerk's office.

Rule 28. Briefs

(a) Contents of Brief; Organization of Contents; Addendum; Binding. Briefs must be bound as prescribed in Rule 32 of the Federal Rules of Appellate Procedure and must contain the following in the order listed:

.....

(12) The judgment, order, or decision in question, and any opinion, memorandum, or findings and conclusions supporting it, as an addendum placed last within the initial brief of the appellate or petitioner. This requirement is met when the appendix is bound with the brief. (See Federal Circuit Rule 30(c)(1) and (d) for a duplicative requirement of the appendix.) Additionally, in an appeal involving a patent, the patent in suit may be included within the addendum of the initial brief and, if included, must be reproduced in its entirety. (See also Federal Circuit Rule 30(a)(2)(A)(iii) and Federal Circuit Rule 30(a)(3) for a requirement that the patent in suit be included in its entirety in the appendix.)

.....

Practice Notes

.....

MULTIPLE PARTIES. When there are multiple parties represented by the same counsel or counsel from the same firm, a combined ~~only one~~ brief ~~can be~~ must be filed on behalf of all the parties represented by that counsel or firm.

Rule 29. Brief of an Amicus Curiae

....

(c) Consent. If an amicus brief is filed on consent of all parties, then no motion for leave is required and the brief should state, pursuant to Federal Rule of Appellate Procedure 29(a), that all parties have consented to its filing.

Rule 30. Appendix to the Briefs

....

(a) Purpose; Content of Appendix; Time for Filing; Number of Copies; Cover; Service

....

(2) Contents; Indiscriminate Referencing to Blocks of the Record Prohibited.

(A) In addition to the matters required by Federal Rule of Appellate Procedure 30(a)(1)(A), (B), and (C), the appendix must include:

....

(iv) any nonprecedential opinion or order cited in accordance with Federal Circuit Rule 32.1(c)(b).

....

(4) Time for Filing. The appellant must serve and file an appendix within 7 ~~calendar~~ days after the last reply brief is served and filed. When there is no cross-appeal, if the appellant does not file a reply brief, the appendix must be served and filed within the time for filing the reply brief. In a cross-appeal, if the cross-appellant does not file a reply brief, the appendix must be served and filed within 7 ~~calendar~~ days after the time for filing the cross-appellant's reply brief has expired.

....

Rule 31. Serving and Filing Briefs

(a) Time for Service and Filing.

(1) Brief of Appellant or Petitioner.

....

(B) In an appeal from an agency, the petitioner or appellant must serve and file its initial brief within 60 days after the certified list or index is served pursuant to Federal Circuit Rule 17(c). In an appeal from the Patent and Trademark Office, the appellant's brief is due within 60 days after the date of docketing.

....

(5) Reply Brief; Oral Argument. A reply brief that is filed within ~~4 business days~~ 7 days of oral argument must be served so that it reaches all parties before the argument.

....

Practice Notes

REPLY BRIEFS DUE AT LEAST ~~3~~ 7 DAYS BEFORE ORAL ARGUMENT; EXPEDITED SERVICE. The reply brief of the appellant (or cross-appellant in a cross-appeal) is due to be served and filed within 14 days of the preceding brief. The ~~3~~ 7-day provision of Federal Rule of Appellate Procedure 31(a)(1) means that the reply brief period is automatically shortened if the end of the 14-day period is within ~~3~~ 7 days of oral argument. The briefing schedule will not ordinarily run so close to oral argument, but if it does -- because of extensions or otherwise -- the reply brief must be filed early. Federal Circuit Rule 31(a)(5) provides that when that happens, a reply brief filed within ~~4 business~~ 7 days of oral argument must be filed and served in an expedited manner. Regular mail would be inappropriate.

Rule 34. Oral Argument

....

(c) Visual Aids.

....

(3) **Objection to the Use of Visual Aids.** An objection to the proposed use of a visual aid at oral argument must be in writing, served on all parties, and filed no later than ~~5~~ 7 days before the oral argument. If a party objects, the parties' written submissions will be treated as a motion and response and will be referred to the panel.

....

Rule 47.3. Appearance

....

(c) Appearance; Contents, Service of Papers Before Appearance; Withdrawal of Counsel.

(1) Appearance. Each attorney who intends to participate in an appeal must promptly file, within 14 days of docketing, an entry of appearance on the form provided by the clerk. A pro se party must also file an entry of appearance unless all the necessary information appears on the petition for review or notice of appeal. Any attorney retained for the case later must file an entry of appearance within 14 days after being retained. An attorney representing a party seeking or permitted to intervene, and for each amicus curiae, must file an entry of appearance with the motion for leave to intervene (if required) or with the brief amicus curiae. If an attorney's entry of appearance is first submitted within 30 days of the scheduled argument, then the attorney must file a motion for leave to file the entry of appearance. The motion for leave will be transmitted to the merits panel assigned to the case.

....

(3) Certificate of Interest. A certificate of interest must be filed with the first-filed entry of appearance. See Federal Circuit Rule 47.5. Both documents are due within 14 days of the date of docketing of the appeal or petition.

....

Rule 47.4. Certificate of Interest

(a) Purpose; Contents. To determine whether recusal by a judge is necessary or appropriate, an attorney -- except an attorney for the United States -- for each party, including a party seeking or permitted to intervene, and for each amicus curiae, must file a certificate of interest. The certificate of interest must be filed within 14 days of the date of docketing of the appeal or petition, except that for an intervenor or amicus curiae, the certificate of interest must be filed with the motion for leave to intervene (if required) or with the brief amicus curiae.

.....

Rule 52. Fees.

....

(d) Dismissal of Appeal or Petition for Failing to Pay Docketing Fee. If a proceeding is docketed without prepayment of the docketing fee, the appellant or petitioner must pay the fee within 14 days after docketing. ~~If the appellant fails to do so,~~ the clerk does not receive the docketing fee, a completed motion for leave to proceed in forma pauperis, or a completed Form 6B within 14 days of the date of docketing of the appeal or petition, the clerk is authorized to dismiss the appeal or petition ~~the clerk may dismiss the appeal.~~

FORMAT FOR PROPOSING CHANGES TO FEDERAL CIRCUIT RULES

Current Rule	Proposed Rule	Rationale
If there is an existing rule, set it forth verbatim in this column.	When there is an existing rule, please put it verbatim in this column with the deletions lined out and the new material highlighted. If there is no pre-existing rule, simply set forth the proposed rule.	Provide as much background and rationale as you believe is necessary.

The Court would appreciate written submissions being accompanied by a diskette annotated with the word processing and virus scanning programs used.