

June 26, 2019



Pursuant to 28 U.S.C. § 2071(b), comments are invited on proposed revisions to Circuit Rule 27-3, Emergency Motions; and minor revisions to various other Miscellaneous Rules. The proposed changes are primarily designed to clarify the requirements for filing emergency motions and eliminate the separate concept of urgent motions, to reduce the number of paper copies of briefs and excerpts of record required by the rules, and to clarify language and mirror existing practice with respect to various other rules. If ultimately approved by the Court, these rules would become effective December 1, 2019.

Please direct comments to Molly C. Dwyer, Clerk of Court at Molly_Dwyer@ca9.uscourts.gov, and Susan V. Gelmis, Chief Deputy Clerk at Susan_Gelmis@ca9.uscourts.gov. Comments must be submitted no later than July 31, 2019.

CIRCUIT RULE 3-6. SUMMARY DISPOSITION OF CIVIL APPEALS

(a) At any time prior to the completion of briefing in a civil appeal or petition for review, if the Court determines:

- (a) (i) that clear error or an intervening court decision or recent legislation requires affirmance, reversal or vacation of the judgment or order appealed from, the grant or denial of a petition for review, or a remand for additional proceedings; or
- (ii) that it is manifest that the questions on which the decision in the appeal or petition for review depends are so insubstantial as not to justify further proceedings;
- (b) the Court may, upon motion of a party, or after affording the parties an opportunity to show cause, issue an appropriate dispositive order.

(b) At any time prior to the disposition of a civil appeal if the Court determines that the appeal is not within its jurisdiction, the Court may issue an order dismissing the appeal without notice or further proceedings. (*Eff. 7/95; Rev. 12/1/19*)

CIRCUIT RULE 4-1. COUNSEL IN CRIMINAL APPEALS

This rule applies to appeals in categories of cases listed in 18 U.S.C. § 3006A.

(a) Continuity of Representation on Appeal

Counsel in criminal cases, whether retained or appointed by the district court, shall ascertain whether the defendant wishes to appeal and file a notice of appeal upon the defendant's request. Retained ~~C~~counsel shall continue to represent the defendant on appeal unless and until counsel is relieved and replaced by substitute counsel or by the defendant pro se in accordance with this rule. If counsel was appointed by the district court pursuant to 18 U.S.C. § 3006A and a notice of appeal has been filed, counsel's appointment automatically shall continue on appeal unless and until counsel is relieved in accordance with this rule. *(Rev. 12/1/19)*

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CIRCUIT RULE 17-1. EXCERPTS OF RECORD ON REVIEW OR ENFORCEMENT OF AGENCY ORDERS

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17-1.3. Petitioner's Initial Excerpts of Record *(Rev. 12/1/09)*

The petitioner shall, unless exempt pursuant to Circuit Rule 17-1.2, submit the initial excerpts of record at the time petitioner's opening brief is submitted. The excerpts shall be separate from the brief and submitted electronically unless petitioner is exempt from the electronic filing requirement. On the same day the excerpts are submitted electronically, petitioner shall serve ~~one~~ 1 paper copy of the excerpts on any other party that is not registered for electronic filing, but shall defer submission of the paper copies of the excerpts to the Court until directed by the Clerk to do so. If petitioner is exempt from the electronic filing requirement, petitioner shall file 3 ~~the 4~~ paper copies of the excerpts at the time the brief is submitted, bound separately from the brief, and serve ~~one~~ 1 paper copy on each of the other parties. *(Rev. 12/1/09; 6/1/19; 12/1/19)*

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17-1.9. Additional Copies of the Excerpts of Record

Should the Court of Appeals consider a case en banc, the Clerk of the Court of Appeals will require counsel to submit an additional ~~20~~ 10 copies of the excerpts of record. *(Rev. 7/95; 12/1/19)*

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CIRCUIT RULE 27-1. FILING OF MOTIONS

(1) Form and Length of Motions

(a) *[Abrogated 7/1/06]*

(b) If electronic filing of the motion, response or reply is not required, the Court requires an original of that filing. The Clerk may direct a party to submit additional paper copies of a motion, response and/or reply when paper copies would aid the Court's review of the motion. *(Rev. 7/1/02; 12/1/09)*

(c) The provisions of FRAP 27(d)(1) otherwise govern the format of motions. *(New 1/1/06)*

(d) Except by permission of the Court, a motion or a response to a motion may not exceed 20 pages. A reply to a response may not exceed 10 pages. The documents listed at FRAP 27(a)(2)(B) and 32(f) are excluded from the length limit calculation. *(New 12/1/16)*

(2) Position of Opposing Counsel

If counsel for the moving party learns that a motion is unopposed, counsel shall so advise the Court. *(Eff. 1/1/99)*

(3) Relief Needed by Date Certain

If a motion requests relief by a date certain to avoid irreparable harm, the motion must specify that date in bold on the caption page. *(New 12/1/19)*

Circuit Rule 27-3. Emergency and Urgent Motions

~~(a) **Emergency Motions.** If a movant needs relief within 28 days certifies that to avoid irreparable harm relief is needed in less than 21 days, the movant must ~~tion~~ shall be governed by the following requirements:~~

~~(a) before filing the motion, the movant shall make every practicable effort to notify the Court Clerk and opposing counsel, and to serve the motion, at the earliest possible time; ~~(2) the motion shall be filed electronically or, if proceeding pro se or if counsel is exempt from using the Appellate Electronic Filing System, by paper with the Clerk in San Francisco. Any motion under this Rule shall have a~~~~

~~(b) clearly state on the cover/caption page bearing of the motion the date by which relief is needed under the legend “Emergency Motion Per Circuit Rule 27-3;” and ~~and the caption of the case. A~~~~

~~(c) submit a certificate prepared by or counsel for the movant (or by the unrepresented movant), entitled “Circuit Rule 27-3 Certificate.” shall ~~The~~ The Certificate must follow the ~~cover~~ caption page and must ~~shall~~ contain:~~

~~(i) contain ~~t~~ The names, telephone numbers, e-mail addresses, and office addresses of the attorneys for all ~~the~~ parties;~~

~~(ii) state the ~~f~~ Facts showing the existence and nature of the claimed emergency;-~~

~~(iii) explain why the motion could not have been filed earlier; ~~and~~~~

~~(iv) state w ~~h~~ When and how the movant did or will give notice to, and serve the motion on, counsel for the other parties or on any unrepresented parties, and if known -- what the other parties’ positions are on the motion; ~~were notified and whether~~~~

~~they have been served with the motion; or, if not notified and served, why that was not done~~ ~~and-~~

~~(v) explain whether ~~I~~ if the relief sought in the motion was available ~~first~~ sought in the district court;~~

~~Bankruptcy Appellate Panel or agency, the motion shall state whether all grounds advanced in support thereof in this Court were submitted to the district court, panel or agency, and, if not, why the motion should not be remanded or denied.~~

~~(b) **Urgent Motion**~~

~~If a movant certifies that to avoid irreparable harm, action is needed by a specific date or event but not within 21 days as in (a) above, the motion shall be governed by the following requirements.~~

~~(1) before filing the motion, the movant shall notify opposing counsel and serve the motion at the earliest possible time;~~

- ~~(2) the movant shall file the motion electronically or, if proceeding pro se or if counsel is exempt from using the Appellate Electronic Filing System, by paper with the Clerk in San Francisco;~~
- ~~(3) any motion under this section shall have a cover page bearing the legend “Urgent Motion Under Circuit Rule 27-3(b),” the caption of the case, and a statement immediately below the title of the motion that states the date or event by which action is necessary;~~
- ~~(4) if the relief sought in the motion was available in the district court, Bankruptcy Appellate Panel or agency, the motion shall state whether all grounds advanced in support thereof in this Court were submitted to the district court, panel or agency, and if not, why the motion should not be remanded or denied.~~

The motion ~~shall~~ must otherwise comport with FRAP 27.

Cross Reference:

- FRAP 8. Stay or Injunction Pending Appeal
- FRAP 25. Filing and Service
- Circuit Rule 27-1(3). Motions requiring relief by a date certain.
- Circuit Rule 27-5. Emergency Motions for Stay of Execution of Sentence of Death

CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 27-3

~~(1) **Procedures for Motions.** When an emergency motion is filed with the Clerk in San Francisco, it is immediately referred to the motions attorney unit. A motions attorney will contact the lead judge of the motions panel, or, if he or she is unavailable, the second judge and then the third judge of the motions panel. (See Advisory Committee Note to Rule 27-1.) That judge then may either grant temporary relief or convene the motions panel (usually by telephone) to decide the motion. (Rev. 12/1/09)~~

~~(2) **Emergency Telephone Number.** The clerk’s office provides 24-hour telephone service for calls placed to the main clerk’s office number, (415) 355-8000. Messages left at times other than regular office hours are recorded and monitored on a regular basis by the motions attorneys.~~

~~Messages should be left only with regard to matters of extreme urgency that must be handled by the Court before the next business day. Callers should make clear the nature of the emergency and the reasons why next-business-day treatment is not sufficient.~~

~~(3) **Appropriate Application of Rule.** The provisions of Circuit Rule 27-3 are intended to be employed in instances where the absence of a response from the~~

~~Court by a date certain would result in irreparable or significant harm to a party, e.g., a motion to reinstate an immigration petition where petitioner faces imminent removal or to stay enforcement of a district court order. The provisions of the rule are not intended for application to requests for procedural relief, e.g., a motion for an extension of time to file a brief.~~

If irreparable harm will occur within 28 days absent relief, the movant must contact the court's emergency motions unit via email (emergency@ca9.uscourts.gov) or telephone (415.355.8020) before or upon filing the motion.

This rule is meant for parties facing significant harm, e.g. imminent removal, not for parties seeking procedural relief, e.g. more time to file a brief.

Cross Reference:

- Circuit Advisory Committee Note to Rule 31-2.2
- Circuit Advisory Committee Note to Rule 32-2

CIRCUIT RULE 28-1. BRIEFS, APPLICABLE RULES

- (a) Briefs shall be prepared and filed in accordance with the Federal Rules of Appellate Procedure except as otherwise provided by these rules. *See* FRAP 28, 29, 31 and 32. Briefs not complying with FRAP and these rules may be stricken by the Court.
- (b) Parties must not append or incorporate by reference briefs submitted to the district court or agency or this Court in a prior appeal, or refer this Court to such briefs for the arguments on the merits of the appeal. (*New Rule 7/1/00*)
- (c) Appellants proceeding without assistance of counsel may file the informal form briefs provided by the Clerk in lieu of the briefs described in ~~the preceding paragraph FRAP 28(a) and (c), and. If an appellant uses the informal opening brief form, the optional reply brief~~ need not comply with the technical requirements of FRAP ~~28(e) or 32(a)~~. (*Rev. 1/96; 12/1/19*)

CIRCUIT RULE 28-2. CONTENTS OF BRIEFS

In addition to the requirements of FRAP 28, briefs shall comply with the following rules:

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28-2.6. Statement of Related Cases

Each party shall identify in a statement on the last page of its initial brief any known related case pending in this Court. ~~This statement constitutes a certificate of counsel, excluded from the page and word limitations pursuant to FRAP 32(f) and Circuit Rule 32-1(c).~~ As to each such case, the statement shall include the name and Court of Appeals docket number of the related case and describe its relationship to the case being briefed. Cases are deemed related if they:

(a) arise out of the same or consolidated cases in the district court or agency;

~~(b) — are cases previously heard in this Court which concern the case being briefed;~~

~~(e)(b)~~ raise the same or closely related issues; or

~~(d)(c)~~ involve the same transaction or event.

If no other cases in this Court are deemed related, a no statement ~~shall be made to that effect is required.~~ The appellee need not include any case identified as related in the appellant's brief.
(Rev. 12/1/19)

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**CIRCUIT RULE 29-2. BRIEF AMICUS CURIAE SUBMITTED
TO SUPPORT OR OPPOSE A PETITION FOR PANEL OR EN
BANC REHEARING OR DURING THE PENDENCY OF
REHEARING**

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(d) Number of Copies.

- (1) If a petition for rehearing en banc has been granted and the brief is not required to be submitted electronically, an original and 18 ~~20~~ copies of the brief shall be submitted.
- (2) For all other briefs described by this rule that are not required to be submitted electronically, an original shall be submitted.

The Clerk may order the submission of paper copies or additional copies of any brief filed pursuant to this rule. (Rev. 12/1/09; 12/1/19)

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CIRCUIT RULE 30-1. THE EXCERPTS OF RECORD

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30-1.3. Appellant's Initial Excerpts of Record

The appellant shall, unless exempt pursuant to Circuit Rule 30-1.2, submit the initial excerpts of record at the time appellant's opening brief is submitted. The excerpts shall be separate from the brief and submitted electronically unless appellant is exempt from the electronic filing requirement. On the same day the excerpts are submitted electronically, appellant shall serve ~~one~~ 1 paper copy of the excerpts on any other party that is not registered for electronic filing, but shall defer submission of the paper copies of the excerpts to the Court until directed by the Clerk to do so. If appellant is exempt from the electronic filing requirement, appellant shall file ~~3~~ the 4 paper copies of the excerpts at the time the brief is submitted, bound separately from the brief, and serve ~~one~~ 1 paper copy on each of the other parties. (Rev. 12/1/09, 3/23/16; 12/1/19)

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30-1.6. Format of Excerpts of Record

(a) Excerpts of record that exceed 75 pages

The first volume of the excerpts of record shall be limited to specific portions of the transcript containing any oral statements of decisions, the orders to be reviewed, any reports, opinions, memoranda or findings of fact or conclusions of law prepared by the district, magistrate, bankruptcy judge, bankruptcy appellate panel, and, in proceedings governed by 28 U.S.C. § 2254, the state reviewing court disposition, that relate to the issues being appealed. All additional documents shall be included in subsequent volumes of the excerpts. The documents in the first volume of the excerpts normally shall be arranged by file date in chronological order beginning with the document with the most recent file date. The documents in subsequent volumes also normally shall be arranged by file date in chronological order beginning with the document with the most recent file date. Reporter's transcripts or portions thereof shall be placed according to the date of the hearing. The trial court docket shall always be the last document in the excerpts. The ~~paper 4~~ copies of the excerpts are to be reproduced on letter size light paper by any duplicating or copying process capable of producing a clear black image. Each copy must be securely bound on the left side and must have a white cover styled as described in FRAP 32(a), except that the wording "Excerpts of Record" shall be substituted for "Brief of Appellant." The cover shall include the volume number. The excerpts must be either consecutively paginated beginning with page 1, or the documents marked with tabs corresponding to the tab number, if any, of the documents in the clerk's record. If tabs are used, the pages within the tabs must be consecutively paginated. The excerpts must begin with an index organized in the order the documents are presented describing the documents, exhibits and portions of the reporter's transcript contained therein, the location where the documents and exhibits may be found in the district court record, and the page where the documents, exhibits or transcript portions may be found in the excerpts. The excerpts shall be filed in multiple volumes, with each

volume containing three hundred (300) pages or fewer. (Rev. 7/1/98; 12/02; 7/1/07; 12/1/09; 12/1/19)

(b) Excerpts of Record that do not exceed 75 pages

The documents in the excerpts normally shall be arranged by file date in chronological order beginning with the document with the most recent file date. Reporter's transcripts or portions thereof shall be placed according to the date of the hearing. The document with the most recent file date should appear under the first tab or should be paginated beginning with page 1. The trial court docket shall always be the last document in the excerpts. The paper 4 copies of the excerpts are to be reproduced on letter size light paper by any duplicating or copying process capable of producing a clear black image. Each copy must be securely bound on the left side and must have a white cover styled as described in FRAP 32(a), except that the wording "Excerpts of Record" shall be substituted for "Brief of Appellant." The excerpts must be either consecutively paginated beginning with page 1, or the documents marked with tabs corresponding to the tab number, if any, of the documents in the clerk's record. If tabs are used, the pages within the tabs must be consecutively paginated. The excerpts must begin with an index organized in the order the documents are presented describing the documents, exhibits and portions of the reporter's transcript contained therein, the location where the documents and exhibits may be found in the district court record, and the page where the documents, exhibits or transcript portions may be found in the excerpts. (Rev. 7/1/98, 12/02, 7/1/07; 12/1/09; 12/1/19)

(c) Excerpts of Record that include materials to be sealed

When the excerpts of record include documents: (1) required to be sealed pursuant to statute or rule and submitted under Ninth Circuit Rule 27-13(d); or (2) that are being submitted provisionally under seal pursuant to Ninth Circuit Rule 27-13(e) or (f); those documents shall be submitted in a separate, final volume of the excerpts. That volume is exempt from the chronological sequence set forth in subsections (a) and (b). If the prior volumes of the excerpts are consecutively paginated, that pagination shall continue in the final separate volume. (Rev. 3/23/16)

(d) Double-Sided Excerpts of Record

The paper copies of the excerpts of record may be printed on both sides of the paper, but only when the method of binding allows each volume to lie completely flat when open, such as comb, spiral, coil, or wire binding. In addition, the weight of the paper must be sufficient to prevent bleeding through when marked on one side in ink or highlighter.
(New 12/1/19)

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30-1.8. Further Excerpts of Record

- (a)** If the reply brief requires review of portions of the reporter's transcript or other documents not included in the previously filed excerpts, appellant shall, unless exempt pursuant to Circuit Rule 30-1.2, at the time the reply brief is submitted, submit further

excerpts of record. The further excerpts shall be separate from the brief and submitted electronically unless appellant is exempt from the electronic filing requirement. On the same day the further excerpts are submitted electronically, appellant shall serve ~~1-one~~ paper copy of such excerpts of record on any other party that is not registered for electronic filing, but shall defer submission of the paper copies of the excerpts to the Court until directed by the Clerk to do so. If appellant is exempt from the electronic filing requirement, appellant shall file ~~3-the-4~~ paper copies of the excerpts at the time the brief is submitted, bound separately from the brief, and serve ~~1-one~~ paper copy on each of the other parties. (*Rev. 12/1/09, 3/23/16; 12/1/19*)

- (b) If a supplemental brief filed pursuant to court order requires review of portions of the reporter's transcript or other documents not included in any previously filed excerpts, the party filing the supplemental brief, shall, at the time the supplemental brief is submitted, submit further excerpts of record. The further excerpts shall be separate from the brief and submitted electronically unless the filing party is exempt from the electronic filing requirement. On the same day the excerpts are submitted electronically, the filing party shall serve ~~1-one~~ paper copy of such excerpts of record on any other party that is not registered for electronic filing, but shall defer submission of the paper copies of the excerpts to the Court until directed by the Clerk to do so. If the filing party is exempt from the electronic filing requirement, the party shall file ~~3-the-4~~ paper copies of the excerpts at the time the brief is submitted, bound separately from the brief, and serve ~~1-one~~ paper copy on each of the other parties. (*Eff. 7/1/98; Rev. 12/1/09, 3/23/16; 12/1/19*)

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30-1.9. Additional Copies of the Excerpts of Record

Should the Court of Appeals consider a case en banc, the Clerk of the Court of Appeals will require counsel to submit an additional ~~10-20~~ copies of the excerpts of record. (*Rev. 12/1/19*)

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CIRCUIT RULE 31-1. NUMBER OF BRIEFS

Parties submitting a brief electronically shall defer submission of paper copies of the brief until directed by the Clerk to do so, but must serve any unregistered party or exempt counsel with 1 paper copy of the brief on the day that the brief is submitted electronically. Any unregistered party or exempt counsel shall file ~~In lieu of the 25 copies required by FRAP 31(b),~~ an original and ~~6-7~~ copies of each brief ~~shall be filed. Parties submitting a brief electronically shall defer submission of paper copies of the brief pending a directive from the Clerk to do so, but must serve any unregistered party or exempt counsel with one paper copy of the brief on the day that the brief is submitted electronically.~~ If a petition for hearing or rehearing en banc is granted, each party shall file ~~18-20~~ additional copies of its briefs and 10. ~~The appellant shall also file 20~~ additional copies of ~~its~~the excerpts of record. (Rev. 12/1/09; 12/1/19)

CIRCUIT RULE 39-1. COSTS AND ATTORNEYS FEES ON APPEAL

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39-1.2. Number of Briefs and Excerpts

Costs will be allowed for the required number of paper copies of briefs and ~~1-one~~ additional copy. Costs will also be allowed for any paper copies of the briefs that the eligible party was required to serve. (Rev. 1/1/05; 1/1/09; 12/1/09)

If excerpts of record were filed, costs will be allowed for ~~5-the number of~~ copies of the excerpts of record ordered by the Court to be produced, plus 1 copy for the filer and 1 copy for each party required to be served in paper form, ~~unless the Court shall direct a greater number of excerpts to be filed than required under Circuit Rules 30-1.3 and 17-1.3.~~ (Rev. 12/1/09; 12/1/19)

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