

## FRAP 28

### BRIEFS

(a) Brief of the appellant. The brief of the appellant shall contain under appropriate headings and in the order here indicated:

(1) A table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where they are cited.

(2) A statement of subject matter and appellate jurisdiction. The statement shall include: (i) a statement of the basis for subject matter jurisdiction in the district court or agency, with citation to applicable statutory provisions and with reference to the relevant facts to establish such jurisdiction; (ii) a statement of the basis for jurisdiction in the court of appeals, with citation to applicable statutory provisions and with reference to the relevant facts to establish such jurisdiction; the statement shall include relevant filing dates establishing the timeliness of the appeal or petition for review and (a) shall state that the appeal is from a final order or a final judgment that disposes of all claims with respect to all parties or, if not, (b) shall include information establishing that the court of appeals has jurisdiction on some other basis.

(3) A statement of the issues presented for review.

(4) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. There shall follow a statement of the facts relevant to the issues presented for review, with appropriate references to the record (see subdivision (e)).

(5) An argument. The argument may be preceded by a summary. The argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on.

(6) A short conclusion stating the precise relief sought.

(b) Brief of the appellee. The brief of the appellee shall conform to the requirements of subdivision (a)(1)-(5), except that a statement of jurisdiction, of the issues, or of the case need not be made unless the appellee is dissatisfied with the statement of the appellant.

(c) Reply brief. The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross appeal. No further briefs may be filed except with leave of court. All reply briefs shall contain a table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the reply brief where they are cited.

(d) References in briefs to parties. Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee." It

promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of parties, or descriptive terms such as "the employee," "the injured person," "the taxpayer," "the ship," "the stevedore," etc.

(e) References in briefs to the record. References in the briefs to parts of the record reproduced in the appendix filed with the brief of the appellant (see Rule 30(a)) shall be to the pages of the appendix at which those parts appear. If the appendix is prepared after the briefs are filed, references in the briefs to the record shall be made by one of the methods allowed by Rule 30(c). If the record is reproduced in accordance with the provisions of Rule 30(f), or if references are made in the briefs to parts of the record not reproduced, the references shall be to the pages of the parts of the record involved; e.g., Answer p. 7, Motion for Judgment p. 2, Transcript p. 231. Intelligible abbreviations may be used. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the appendix or of the transcript at which the evidence was identified, offered, and received or rejected.

(f) Reproduction of statutes, rules, regulations, etc. If determination of the issues presented requires the study of statutes, rules, regulations, etc. or relevant parts thereof, they shall be reproduced in the brief or in an addendum at the end, or they may be supplied to the court in pamphlet form.

(g) Length of briefs. Except by permission of the court, or as specified by local rule of the court of appeals, principal briefs shall not exceed 50 pages, and reply briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, etc.

(h) Briefs in cases involving cross appeals. If a cross appeal is filed, the party who first files a notice of appeal, or in the event that the notices are filed on the same day, the plaintiff in the proceeding below, shall be deemed the appellant for the purposes of this rule and Rules 30 and 31, unless the parties otherwise agree or the court otherwise orders. The brief of the appellee shall conform to the requirements of subdivision (a)(1)-(6) of this rule with respect to the appellee's cross appeal as well as respond to the brief of the appellant except that a statement of the case need not be made unless the appellee is dissatisfied with the statement of the appellant.

(i) Briefs in cases involving multiple appellants or appellees. In cases involving more than 1 appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

(j) Citation of supplemental authorities. When pertinent and significant authorities come to the attention of a party after the party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the court, by letter, with a copy to all counsel, setting forth the citations. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made promptly and shall be similarly limited.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Mar. 10, 1986, eff. July 1, 1986, Apr. 25, 1989,

eff. Dec. 1, 1989; Apr. 30, 1991, eff. Dec. 1, 1991.)

## 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) Appellants proceeding without the assistance of counsel may file the form brief provided by the Clerk in lieu of the brief described in the preceding paragraph.

Cross Reference: Circuit Rule 33-1, Civil Appeals Docketing Statement; Appendix of Forms, Form 6.

## CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 28-1

The rules regarding form of the brief and the colors of covers are set forth in FRAP 32. See Circuit Rule 31-1 for the number of copies required.

## CIRCUIT RULE 28-2

### CONTENTS OF BRIEFS

In addition to the requirements of FRAP 28, briefs shall comply with the following rules:  
28-2.1 Certificate as to Interested Parties [ABROGATED 7/1/90].

Cross Reference: FRAP 26.1 Corporate Disclosure Statement.

#### 28-2.2 Statement of Jurisdiction

In a statement preceding the statement of the case in its initial brief, each party shall demonstrate the jurisdiction of the district court or agency and of this Court by stating, in the following order:

(a) The statutory basis of subject matter jurisdiction of the district court or agency;  
(b) The basis for claiming that the judgment or order appealed from is final or otherwise appealable (e.g., Fed. R. Civ. P. 54(b); 28 U.S.C. 1292), and the statutory basis of jurisdiction of this Court.

(c) The date of entry of the judgment or order appealed from; the date of filing of the notice of appeal or petition for review; and the statute or rule under which it is claimed the appeal is timely.

If the appellee agrees with appellant's statement of 1 or more of the foregoing matters, it will be sufficient for the appellee to state such agreement under an appropriate heading.

### 28-2.3 Attorneys Fees

Any party in a civil case, including administrative agency adjudications under 28 U.S.C. 2412(d)(3), who intends to seek attorneys fees for the appeal must include a short statement to that effect and must identify the authority under which the attorneys fees will be sought.

### 28-2.4 Bail Status

The opening brief in a criminal appeal shall contain a statement as to the bail status of the defendant. If the defendant is in custody, the projected release date should be included.

### 28-2.5 Reviewability and Standard of Review

As to each issue, appellant shall state where in the record on appeal the issue was raised and ruled on and identify the applicable standard of review.

In addition, if a ruling complained of on appeal is one to which a party must have objected at trial to preserve a right of review, e.g., a failure to admit or exclude evidence or the giving or refusal to give a jury instruction, the party shall state where in the record on appeal the objection and ruling are set forth.

### 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. 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;
- (c) raise the same or closely related issues; or
- (d) involve the same transaction or event. If no other cases in this Court are deemed related, a statement shall be made to that effect. The appellee need not include any case identified as related in the appellant's brief.

### 28-2.7 Addendum to Briefs

If determination of the issues presented requires the study of statutes, regulations or rules, relevant parts thereof shall be reproduced in an addendum at the end of a party's brief. The addendum shall be separated from the brief by a distinctively colored page.

### 28-2.8 Record References

Every assertion in briefs regarding matters in the record shall be supported by a reference to the

page or document number of the original record where the matter relied on is to be found.

## 28-2.9 Bankruptcy Appeals

If the appeal arises out of the bankruptcy court, the name, address and court of the bankruptcy judge initially ruling on the matter shall be furnished to the clerk of this court by the appellant with the opening brief.

## CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 28-2

Sanctions may be imposed for failure to comply with this rule, particularly with respect to record references. See *Mitchel v. General Elec. Co.*, 689 F.2d 877 (9th Cir. 1982).

## CIRCUIT RULE 28-3

### LENGTH OF BRIEFS; MOTIONS TO EXCEED PAGE LIMITS

#### 28-3.1 Length of Briefs

The length of briefs may be limited by court order, or by order under the prebriefing conference program. In the absence of such an order, the parties will observe the page limitations in FRAP 28(g).

Appeals Docketing Statement; Prebriefing Conference Program.

#### 28-3.2 Computation

The certificate as to interested parties, statement of related cases and any addendum under Circuit Rule 28-2.7 shall not be counted in determining the length of a brief. All other material in the brief, including all materials required by these rules, shall be counted in determining the length of briefs, and none of the requirements of this rule is a justification for filing a motion to exceed page limits. Parties must not append or incorporate by reference briefs submitted to the district court or agency, or refer this Court to such briefs for their arguments on the merits of the appeal.

#### 28-3.3 Motions to Exceed Page Limits

The Court looks with disfavor on motions to exceed the page limits in FRAP 28(g) or established under the prebriefing conference program and such motions will be granted only for extraordinary and compelling reasons. A motion for permission to exceed page limits must be filed at least 14 days before the brief is due to be filed (7 days in the case of a reply brief) and must be accompanied by an affidavit stating in detail the reasons for the motion. The cost of preparing and revising the brief will not be considered by the Court in ruling on a motion to exceed page limits.

## CIRCUIT RULE 28-4

## JOINT BRIEFS IN CIVIL CASES

In civil cases involving more than 1 appellant or appellee, and in cases consolidated for purposes of the appeal, all parties on a side shall join in a single brief to the greatest extent practicable. Upon application, the clerk may extend the time for filing a joint brief up to 21 days and may allow the joint parties up to 5 additional pages in which to discuss any differences in their positions.

## CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 28-4

**Joint Briefs in Multi-Defendant Criminal Appeals:** In multi-defendant criminal appeals raising common issues, parties are encouraged to file a joint brief with respect to the common issues.

## FRAP 29

### BRIEF OF AN AMICUS CURIAE

A brief of an amicus curiae may be filed only if accompanied by written consent of all parties, or by leave of court granted on motion or at the request of the court, except that consent or leave shall not be required when the brief is presented by the United States or an officer or agency thereof, or by a State, Territory or Commonwealth. The brief may be conditionally filed with the motion for leave. A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae is desirable. Save as all parties otherwise consent, any amicus curiae shall file its brief within the time allowed the party whose position as to affirmance or reversal the amicus brief will support unless the court for cause shown shall grant leave for later filing, in which event it shall specify within what period an opposing party may answer. A motion of an amicus curiae to participate in the oral argument will be granted only for extraordinary reasons.

## CIRCUIT RULE 29-1

### REPLY BRIEF OF AN AMICUS CURIAE

No reply brief of an amicus curiae will be received.

## FRAP 30

### APPENDIX TO THE BRIEFS

(a) Duty of appellant to prepare and file; content of appendix; time for filing; number of copies. The appellant shall prepare and file an appendix to the briefs which shall contain: (1) the relevant docket entries in the proceeding below; (2) any relevant portions of the pleadings, charge, findings or opinion; (3) the judgment, order or decision in question; and (4) any other parts of the record to which the parties wish to direct the particular attention of the court. Except where they have independent relevance, memoranda of law in the district court should not be

included in the appendix. The fact that parts of the record are not included in the appendix shall not prevent the parties or the court from relying on such parts.

Unless filing is to be deferred pursuant to the provisions of subdivision (c) of this rule, the appellant shall serve and file the appendix with the brief. Ten copies of the appendix shall be filed with the clerk, and 1 copy shall be served on counsel for each party separately represented, unless the court shall by rule or order direct the filing or service of a lesser number.

(b) Determination of contents of appendix; cost of producing. The parties are encouraged to agree as to the contents of the appendix. In the absence of agreement, the appellant shall, not later than 10 days after the date on which the record is filed, serve on the appellee a designation of the parts of the record which the appellant intends to include in the appendix and a statement of the issues which the appellant intends to present for review. If the appellee deems it necessary to direct the particular attention of the court to parts of the record not designated by the appellant, the appellee shall, within 10 days after receipt of the designation, serve upon the appellant a designation of those parts. The appellant shall include in the appendix the parts thus designated with respect to the appeal and any cross appeal. In designating parts of the record for inclusion in the appendix, the parties shall have regard for the fact that the entire record is always available to the court for reference and examination and shall not engage in unnecessary designation. The provisions of this paragraph shall apply to cross appellants and cross appellees.

Unless the parties otherwise agree, the cost of producing the appendix shall initially be paid by the appellant, but if the appellant considers that parts of the record designated by the appellee for inclusion are unnecessary for the determination of the issues presented the appellant may so advise the appellee and the appellee shall advance the cost of including such parts. The cost of producing the appendix shall be taxed as costs in the case, but if either party shall cause matters to be included in the appendix unnecessarily the court may impose the cost of producing such parts on the party. Each circuit shall provide by local rule for the imposition of sanctions against attorneys who unreasonably and vexatiously increase the costs of litigation through the inclusion of unnecessary material in the appendix.

(c) Alternative method of designating contents of the appendix; how references to the record may be made in the briefs when an alternative method is used. If the court shall so provide by rule for classes of cases or by order in specific cases, preparation of the appendix may be deferred until after the briefs have been filed, and the appendix may be filed 21 days after service of the brief of the appellee. If the preparation and filing of the appendix is thus deferred, the provisions of subdivision (b) of this Rule 30 shall apply, except that the designations referred to therein shall be made by each party at the time each brief is served, and a statement of the issues presented shall be unnecessary.

If the deferred appendix authorized by this subdivision is employed, references in the briefs to the record may be to the pages of the parts of the record involved, in which event the original paging of each part of the record shall be indicated in the appendix by placing in brackets the number of each page at the place in the appendix where that page begins. Or if a party desires to refer in a brief directly to pages of the appendix, that party may serve and file typewritten or page proof copies of the brief within the time required by Rule 31(a), with appropriate references to the pages of the parts of the record involved. In that event, within 14 days after the appendix

is filed the party shall serve and file copies of the brief in the form prescribed by Rule 32(a) containing references to the pages of the appendix in place of or in addition to the initial references to the pages of the parts of the record involved. No other changes may be made in the brief as initially served and filed, except that typographical errors may be corrected.

(d) Arrangement of the appendix. At the beginning of the appendix there shall be inserted a list of the parts of the record which it contains, in the order in which the parts are set out therein, with references to the pages of the appendix at which each part begins. The relevant docket entries shall be set out following the list of contents. Thereafter, other parts of the record shall be set out in chronological order. When matter contained in the reporter's transcript of proceedings is set out in the appendix, the page of the transcript at which such matter may be found shall be indicated in brackets immediately before the matter which is set out. Omissions in the text of papers or of the transcript must be indicated by asterisks. Immaterial formal matters (captions, subscriptions, acknowledgments, etc.) shall be omitted. A question and its answer may be contained in a single paragraph.

(e) Reproduction of exhibits. Exhibits designated for inclusion in the appendix may be contained in a separate volume, or volumes, suitably indexed. Four copies thereof shall be filed with the appendix and 1 copy shall be served on counsel for each party separately represented. The transcript of a proceeding before an administrative agency, board, commission or officer used in an action in the district court shall be regarded as an exhibit for the purpose of this subdivision.

(f) Hearing of appeals on the original record without the necessity of an appendix. A court of appeals may by rule applicable to all cases, or to classes of cases, or by order in specific cases, dispense with the requirement of an appendix and permit appeals to be heard on the original record, with such copies of the record or relevant parts thereof, as the court may require.

(As amended Mar. 30, 1970, eff. July 1, 1970; Mar. 10, 1986, eff. July 1, 1986; Apr. 30, 1991, eff. Dec. 1, 1991.)

## CIRCUIT RULE 30-1

### THE EXCERPTS OF RECORD

Appeals before the Court of Appeals shall be on the original record without requirement of the appendix prescribed by FRAP 30. Excerpts of record, in cases other than petitions for review or enforcement of agency orders, shall be filed as provided below. Cases involving petitions for review or enforcement of agency orders are governed by Circuit Rule 17-2.

30-1.1 Filing of the Excerpts of Record At the time the appellant's brief is filed, the appellant shall file 5 copies of excerpts of record bound separately from the briefs. The appellant shall serve 1 copy of the excerpts on each of the other parties.

#### 30-1.2 Required Contents of the Excerpts of Record

(a) In all appeals the excerpts of record shall include:

- (i) the notice of appeal;
- (ii) the trial court docket sheet;
- (iii) the judgment or interlocutory order appealed from;
- (iv) any opinion, findings of fact or conclusions of law relating to the judgment or order appealed from;
- (v) any other orders or rulings, including minute orders, sought to be reviewed;
- (vi) any jury instruction given or refused which presents an issue on appeal;
- (vii) except as provided in Circuit Rule 30-1.2(b)(ii), where an issue on appeal is based upon a challenge to the admission or exclusion of evidence, that specific portion of the reporter's transcript recording any discussion by court or counsel involving the evidence, offer of proof, ruling or order, and objections at issue;
- (viii) except as provided in Circuit Rule 30-1.2(b)(ii), where an issue on appeal is based upon a challenge to any other ruling, order, finding of fact, or conclusion of law, and that ruling, order, finding or conclusion was delivered orally, that specific portion of the reporter's transcript recording any discussion by court or counsel in which the assignment of error is alleged to rest;
- (ix) where an issue on appeal is based upon a challenge to the allowance or rejection of jury instructions, that specific portion of the reporter's transcript recording any discussion by court or counsel involving the instructions at issue, including the ruling or order, and objections;
- (x) where an issue on appeal is based on written exhibits (including affidavits), those specific portions of the exhibits necessary to resolve the issue; and
- (xi) any other specific portions of any documents in the record that are cited in appellant's briefs and necessary to the resolution of an issue on appeal.

(b) In addition to the items required by Circuit Rule 30-1.2(a), in all criminal appeals and motions for relief under 28 U. S. C. 2255 the excerpts of record shall also include:

- (i) the final indictment; and
- (ii) where an issue on appeal concerns matters raised at a suppression hearing, change of plea hearing or sentencing hearing, the entire reporter's transcript of that hearing.

Cross Reference: Cir. R. 30-1.7, Presentence Reports.

(c) In addition to the items required by Circuit Rule 30-1.2(a), in all civil appeals the excerpts of record shall also include:

- (i) the final pretrial order, or, if the final pretrial order does not set out the issues to be tried, the final complaint and answer, petition and response, or other pleadings setting out those issues,

and;

(ii) where the appeal is from the grant or denial of a motion, those specific portions of any affidavits, declarations, exhibits or similar attachments submitted in support of or in opposition to the motion that are essential to the resolution of an issue on appeal.

(d) In appeals from a district court decision reviewing agency actions, the excerpts of record shall include the items required by Circuit Rule 17-2.

Cross Reference: Circuit Rule 28-2.5, Reviewability and Standard of Review.

### 30-1.3 Items Not to Be Included in the Excerpts of Record

The excerpts of record shall not include briefs or other memoranda of law filed in the district court unless necessary to the resolution of an issue on appeal, and shall include only those pages necessary therefor.

Cross Reference: Circuit Rule 30-2, Sanctions.

### 30-1.4 Form of the Excerpts of Record

The documents which comprise the excerpts of record need not be certified as true copies, but if possible the district court's "filed" stamp should appear on each document. The documents in the excerpts should be arranged by file date in chronological order with the document with the earliest file date on top. The document with the earliest file date should appear under the first tab or should be paginated beginning with page 1. The trial court docket sheet should always be the last document in the excerpts. The 5 copies of the excerpts are to be reproduced on letter size white paper by any duplicating or copying process capable of producing a clear black image, and each copy must be securely bound at the top or on the left side and must have a tan cover styled as described in FRAP 32(a). The excerpts must be either paginated or the documents marked with tabs corresponding to the tab number, if any, of the documents in the clerk's record. The excerpts must begin with an index organized chronologically describing the documents, exhibits and portions of the reporter's transcript contained therein and the page or tab number where they may be found in the excerpts. The information on the front cover of the excerpts of record should be styled exactly as a brief except that the wording "Excerpts of Record" should be substituted for "Brief of Appellant." In those unusual cases in which the total number of pages in the excerpts exceeds 300 pages, the excerpts shall be filed in multiple volumes, with each volume containing 300 pages or fewer.

### 30-1.5 Appellee's Supplemental Excerpts of Record

If the appellee believes that the excerpts of record filed by the appellant exclude items which are required under this rule, or if argument in the answering brief requires review of portions of the reporter's transcript or documents not included by appellant in the excerpts, the appellee shall, at the time of the appellee's brief is filed, file supplemental excerpts of record, prepared pursuant to this rule, comprised of the omitted items. Appellee shall file 5 copies of the supplemental excerpts. The appellee shall serve 1 copy of the supplemental excerpts of record on each of the

other parties.

### 30-1.6 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 copies of the excerpts of record.

### 30-1.7 Presentence Reports

In all cases in which the presentence report is referenced in the brief, the party filing such brief must forward four (4) copies of the presentence report, under seal, to the Clerk of the Court of Appeals. This filing shall be accomplished by mailing the four copies of the presentence report in a sealed envelope which reflects the title and number of the cases and that four copies of the presentence report are enclosed. The copies of the presentence report shall accompany the brief and excerpts of record. The presentence report shall remain under seal but be provided by the Clerk to the panel hearing the case.

### CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 30-1

The purpose of the excerpts of record is to provide each member of the panel with those portions of the record necessary to reach a decision. In general, decisions will be rendered without review of parts of the record not contained in the excerpts and not specifically relied upon in the briefs of the parties. Therefore, parties should ensure that those parts of the record necessary to permit an informed analysis of their position are included in the excerpts. Nevertheless, in reaching its decision, the court may, but need not, rely on parts of the record not included by the parties in their excerpts.

### CIRCUIT RULE 30-2

#### SANCTIONS FOR FAILURE TO COMPLY WITH CIRCUIT RULE 30-1

If materials required to be included in the excerpts under these rules are omitted, or irrelevant materials are included, the court may take one or more of the following actions:

- (a) strike the excerpts and order that they be corrected and resubmitted;
- (b) order that the excerpts be supplemented;
- (c) if the court concludes that a party or attorney has vexatiously or unreasonably increased the cost of litigation by inclusion of irrelevant materials, deny that portion of the costs the court deems to be excessive; and/or
- (d) impose monetary sanctions.

Counsel will be provided notice and have an opportunity to respond before sanctions are imposed.

## CIRCUIT RULE 30-3

### PRISONER APPEALS WITHOUT REPRESENTATION BY COUNSEL

In cases involving appeals by prisoners not represented by counsel, the clerk of the district court shall forward to the prisoner and to the clerk of this Court, within 21 days after the date the notice of appeal is filed, copies of the documents to comprise the excerpts of record.

## FRAP 31

### FILING AND SERVICE OF BRIEFS

(a) Time for serving and filing briefs. The appellant shall serve and file a brief within 40 days after the date on which the record is filed. The appellee shall serve and file a brief within 30 days after service of the brief of the appellant. The appellant may serve and file a reply brief within 14 days after service of the brief of the appellee, but, except for good cause shown, a reply brief must be filed at least 3 days before argument. If a court of appeals is prepared to consider cases on the merits promptly after briefs are filed, and its practice is to do so, it may shorten the periods prescribed above for serving and filing briefs, either by rule for all cases or for classes of cases, or by order for specific cases.

(b) Number of copies to be filed and served. Twenty-five copies of each brief shall be filed with the clerk, unless the court by order in a particular case shall direct a lesser number, and 2 copies shall be served on counsel for each party separately represented. If a party is allowed to file typewritten ribbon and carbon copies of the brief, the original and 3 legible copies shall be filed with the clerk, and 1 copy shall be served on counsel for each party separately represented.

(c) Consequence of failure to file briefs. If an appellant fails to file a brief within the time provided by this rule, or within the time as extended, an appellee may move for dismissal of the appeal. If an appellee fails to file a brief, the appellee will not be heard at oral argument except by permission of the court.

(As amended Mar. 30, 1970, eff. July 1, 1970; Mar. 10, 1986, eff. July 1, 1986.)

## CIRCUIT RULE 31-1

### NUMBER OF BRIEFS

In lieu of the 25 copies required by FRAP 31(b), an original and 15 copies of each brief shall be filed. If a suggestion for hearing or rehearing en banc is granted, each party shall file 20 additional copies of its briefs. The appellant shall also file 20 additional copies of the excerpts of record.

Any party proceeding in forma pauperis and not represented by counsel, shall file only an original and 7 copies of briefs.

## CIRCUIT RULE 31-2

### TIME FOR SERVICE AND FILING

#### 31-2.1 Requirement of Timely Filing

(a) Parties shall observe the briefing schedule set forth in FRAP 31(a) unless a briefing schedule is established by an order of the Court of Appeals. Specific due dates set by Court order are not subject to the additional 3-day allowance for service of previous papers by mail set forth in FRAP 26(c).

(b) In cases controlled by FRAP 31(a), the appellant is responsible for determining the date on which the certificate of record is filed with the Court of Appeals and for computing the due date for the opening brief.

(c) In all cases, first class mail shall be deemed to be the most expeditious form of delivery by mail. (See FRAP 25(a).)

#### 31-2.2 Rule for Criminal Cases

In criminal cases, the briefing schedule will normally be set by the district court clerk. In such cases, the filing of the appellant's brief before the due date shall not advance the due date for the appellee's brief. If a briefing schedule is not set by the district court clerk, the parties shall follow the time schedule set forth in FRAP 31.

#### 31-2.3 Extensions of Time for Filing Briefs

(a) If good cause is shown, the clerk or a designated deputy may grant an oral request for a single extension of time of no more than 14 days to file an opening, answering or reply brief. Such extensions may be applied for and granted or denied by telephone. The grant or denial of the extension shall be entered on the court docket. Application for such an extension shall be conditioned upon prior notice to the opposing party. The grant of an extension of time under this rule will bar any further motion to extend the brief's due date unless such motion, which must be in writing, demonstrates extraordinary and compelling circumstances. The previous filing of a motion under Rule 31-2.3(b) precludes an application for an extension of time under this subsection.

(b) In all other cases, an extension of time may be granted only upon written motion supported by a showing of diligence and substantial need.

The motion shall be filed at least 7 days before the expiration of the time prescribed for filing the brief, and shall be accompanied by an affidavit stating:

- (1) when the brief is due;
- (2) when the brief was first due;

- (3) the length of the requested extension;
- (4) the reason an extension is necessary;
- (5) movant's representation that movant has exercised diligence and that the brief will be filed within the time requested; and
- (6) whether any other party separately represented objects to the request, or why the moving party has been unable to determine any such party's position.

A conclusory statement as to the press of business does not constitute a showing of diligence and substantial need. Any request exceeding 21 days must be supported by showing of extraordinary and compelling circumstances.

#### 31-2.4 Failure to File Briefs

If the appellant fails to file a brief within the time allowed by FRAP 31(a) or an extension thereof, the court will dismiss the appeal pursuant to FRAP 31(c). If appellee does not elect to file a brief, appellee shall notify the court by letter on or before the due date for the answering brief. Failure to file the brief timely or advise the court that no brief will be filed will result in the issuance of an order to show cause to counsel why sanctions should not be imposed.

Cross Reference: Circuit Rule 33-1, Civil Appeals Docketing Statement; Prebriefing Conference Program.